United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. BRAND ENERGY SOLUTIONS LLC, Respondent.	OSHRC Docket No. 09-1048

ON BRIEFS:

Robin Ackerman, Attorney; Heather Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

J. Albert Kroemer, Esq., James T. Phillips, Esq.; Cantey Hanger LLP, Dallas, TX
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

Brand Energy Solutions LLC was erecting a scaffold at a Shell Oil Company refinery in Deer Park, Texas, when a Brand employee was fatally injured in a 100-foot fall from an unfinished level of the scaffold. During an OSHA investigation that commenced the same day, the compliance officer observed various scaffold components scattered across a landing in a stair tower that was being erected to provide access to each level of the scaffold. As a result, the

Secretary issued Brand a citation that alleged a serious violation of a construction standard housekeeping provision, 29 C.F.R. § 1926.25(a), and proposed a penalty of $3,500.[1]

After a hearing, former Administrative Law Judge Stephen J. Simko, Jr. affirmed the housekeeping violation, rejecting Brand's contention that the cited construction standard does not apply. On review, Brand contends that the judge erred in concluding that the cited provision applies.[2] For the reasons that follow, we vacate Citation 1, Item 1.

DISCUSSION

I. Applicability of the Construction Standards

Brand first argues that its work on the project was maintenance, not construction, and therefore the construction standards do not apply here. An employer must comply with the construction standards if its employees are "engaged in construction work," an activity defined as "work for construction, alteration, and/or repair . . . ." 29 C.F.R. § 1910.12. The construction standards also apply to an activity that is an "integral and necessary part of construction." *Snyder Well Serv., Inc.*, 10 BNA OSHC 1371, 1373, 1982 CCH OSHD ¶ 25,943, p. 32,509 (No. 77-1334, 1982); *B.J. Hughes, Inc*., 10 BNA OSHC 1545, 1546-47, 1982 CCH OSHD ¶ 25,977, pp. 32,578-79 (No. 76-2165, 1982) (same); *Access Equip. Sys., Inc*., 18 BNA OSHC 1718, 1721 n.7, 1999 CCH OSHD ¶ 31,821, p. 46,776, n.7 (No. 95-1449, 1999) (employer engaged in "construction work" by having "employees erect, configure, dismantle, and repair the scaffolds" used for construction work).

The judge found that Brand was in the process of erecting a scaffold, which, in his view, necessarily constituted "construction work." On review, both parties depart from the judge's rationale. We find that the judge's reasoning was erroneous but, for the reasons discussed below, we conclude that he reached the correct result on this issue. Scaffold erection is not inherently construction; it can also be a general industry activity, as evidenced by various provisions of the

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[1] The citation included five other items that were later withdrawn by the Secretary. These items are not before us on review.

[2] Brand does not contest the judge's findings related to knowledge or exposure. *See Astra Pharm. Prods., Inc*., 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (requiring the Secretary to show by a preponderance of the evidence that: (1) the cited standard applies; (2) the employer failed to comply; (3) employees had access to the violative condition; and (4) the employer knew or could have known of the violative condition), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

general industry scaffold standard that address certain aspects of scaffold erection. *See, e.g.*, 29 C.F.R. §§ 1910.28(v) (specifying that the general industry scaffold standard includes the "construction . . . of scaffolds used in the maintenance of buildings and structures"); 1910.28(a)(1) ("[s]caffolds shall be furnished and erected in accordance with this standard . . ."); 1910.28(c)(6), (d)(12) (requiring certain scaffolds to be "erected by" competent and experienced personnel); 1910.28(f)(17), (h)(10) (addressing the installation and relocation of certain multi-point suspension scaffolds). *See also Pub. Utils. Maint., Inc. v. Sec'y of Labor*, 417 F. App'x 58, 61 (2d Cir. 2011) (unpublished) (noting that same activity could be construction or maintenance). Thus, the question before us is whether the project for which Brand was erecting this scaffold was a construction activity.

Shell hired Brand to erect a scaffold around its crude oil distillation column, which is a very large cylindrical tower. Shell's plan was to use the scaffold to facilitate the removal and replacement of the column's asbestos-containing insulation. When complete, the scaffold was to have a single stair tower, sixteen levels of work platforms surrounding the distillation column, and a decontamination bay. However, before the project began, a hurricane damaged the column. Shell then reduced the scope of the project to the repair and replacement of insulation damaged by the storm and the decontamination bay was eliminated from the scaffold's design.

Brand concedes on review that the work Shell initially expected to conduct from the scaffold—a complete asbestos abatement project—would have been construction, but argues that when Shell changed the project to address only the hurricane damage, it became maintenance because the work was not expected to alter the structure. Rather than directly challenge Brand's position that the work would not alter the distillation column's structure, the Secretary points out that whether a structure is altered during a work project is not necessarily determinative. Specifically, the Secretary notes that OSHA stated in several interpretation letters that evaluating whether an activity is construction or maintenance also involves consideration of the project's scale, complexity, and whether it was a routine activity. *See* Memorandum from James W. Stanley, Deputy Assistant Secretary of Labor, to Regional Administrators (Aug. 11, 1994) ("Stanley Memo"); Letter from Russell B. Swanson, Director, OSHA Directorate of Construction, to Charles E. Hill (Aug. 14, 2000) ("Hill Letter"); Letter from Russell B. Swanson, Director, OSHA Directorate of Construction, to Raymond V. Knobbs (Nov. 18, 2003) ("Knobbs

Letter"). According to the Secretary, consideration of all these factors supports finding that the project at issue here was construction.

We agree. The insulation repair work required access to the entire 220-foot tall structure, thus necessitating a sixteen-level scaffold encircling the vessel. Even after eleven Brand employees had been erecting the scaffold for about three weeks, the scaffold was only about halfway completed at the time of the inspection. *See Ryder Transp. Servs*, 24 BNA OSHC 2061, 2062, 2014 CCH OSHD ¶ 33,412, p. 57,383, n.3 (No. 10-0551, 2014) (electrical project's scale and complexity supported conclusion that work was construction); Knobbs Letter at 2. Moreover, the work to be done from the scaffold was not merely preventive—it involved repairing damage and installing new insulation to the exterior of the structure. *See Jimerson Under-Ground, Inc*., 21 BNA OSHC 1459, 1461, 2004-09 CCH OSHD ¶ 30,800, p. 52,465 (No. 04-0970, 2006) (laying new pipe was an alteration governed by the construction standard); *Foster-Wheeler Constructors, Inc*., 16 BNA OSHC 1344, 1346-48, 1993-95 CCH OSHD ¶ 30,183, pp. 41,523-25 (No. 89-287, 1993) (renovating a boiler constituted construction); *Pac. Gas & Elec. Co*., 2 BNA OSHC 1692, 1693, 1974-75 CCH OSHD ¶ 19,431, p. 23,191 (No. 2821, 1975) (replacing power lines and transformers was construction); Knobbs Letter at 2. *Compare Consumers Power Co*., 5 BNA 1423, 1425, 1977-78 CCH OSHD ¶ 21,786, p. 26,190 (No. 11107, 1977) (tree trimming to prevent interference with power lines was maintenance work). Nor was the work to be conducted from the scaffold routine, scheduled, or anticipated. *See* Stanley Memo at 2; Knobbs Letter at 3; Hill Letter at 3. *Compare Gulf States Utils., Co*., 12 BNA OSHC 1544, 1546, 1984-85 CCH OSHD ¶ 27,422, p. 35,524 (No. 82-867, 1985) (routine replacement of damaged parts not construction activity). Shell did not engage Brand in anticipation of a need for routine upkeep—rather, the hurricane forced Shell to change its plans and repair the hurricane damage. Accordingly, we find the Secretary has established that the construction standards apply.

II. Applicability of 29 C.F.R. § 1926.25(a)

Brand next raises two arguments challenging the judge's conclusion that the Secretary established the applicability of the cited housekeeping standard, which is in Subpart C—General Safety and Health Provisions, and applies to "work areas, passageways, and *stairs* . . . ." 29 C.F.R. § 1926.25(a) (emphasis added).[3] First, Brand argues that the judge erroneously considered the landing in the stair tower where the scaffold components at issue were located to be "stairs" as that term is used in the cited provision. Second, Brand argues that even if the cited housekeeping standard covers landings, the judge erred in rejecting its affirmative defense that a provision in Subpart L, the construction scaffold standard—29 C.F.R. § 1926.451(f)(13)[4]—is more specifically applicable and thus preempts the cited standard. *See* 29 C.F.R. § 1926.20(d)(1) ("[i]f a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process"); *Vicon Corp*., 10 BNA OSHC 1153, 1157, 1981 CCH OSHD ¶ 25,749, p. 32,159 (No. 78-2923, 1981) (claim that a general standard is preempted by a more specific standard is an affirmative defense), *aff'd,* 691 F.2d 503 (8th Cir. 1982) (Table). We conclude that Brand has established preemption and vacate this item.[5]

With regard to the cited provision, the Secretary states on review that he interprets the term "stairs" to cover not only the steps but also the "landings" connecting the flights of stairs. Indeed, stairs are "such steps collectively, esp. as forming a flight *or a series of flights*," which necessarily includes the landings between the flights. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1383 (1971) (emphasis added). In addition, as the Secretary points out, the purpose of the cited standard is to prevent trips and falls. Certainly, a trip or fall hazard is not

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[3] In its entirety, § 1926.25(a) states:

> During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

[4] This standard states that "[d]ebris shall not be allowed to accumulate on platforms." 29 C.F.R. § 1926.451(f)(13).

[5] Accordingly, we do not reach the issue of whether the scaffold components referenced in the citation constitute "debris" under either § 1926.25(a) or § 1926.451(f)(13).

limited to circumstances in which an employee encounters debris on a step; it also exists when an employee encounters debris on a landing while ascending the first step or leaving the last step. *Cf. Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2113, 2009-12 CCH OSHD ¶ 33,231, p. 56,065 (No. 07-1578, 2013) (construing inspection standard in light of its purpose). We therefore find that the Secretary's reading of the cited provision's scope "sensibly conforms to the purpose and wording of the regulation . . . ." *Superior Masonry Builders Inc*., 20 BNA OSHC 1182, 1184 n.2, 2002-04 CCH OSHD ¶ 32,667, p. 51,417, n.2 (No. 96-1043, 2003) (citing *Martin v. Occupational Safety & Health Review Comm'n* (*CF&I Steel Corp.*), 499 U.S. 144, 157-158 (1991)).

Nonetheless, we find that § 1926.451(f)(13) of the construction scaffold standard, which provides that "[d]ebris shall not be allowed to accumulate on platforms," is more specifically applicable than the cited provision of the construction housekeeping standard. The citation identifies the location of the cited condition as "Level 8 at the bottom of the stairs on the stair tower scaffold"—an area the Secretary describes in his brief as a "landing." The Secretary's reference fits squarely within Subpart L's definition of the same word—"[*l*]*anding* means a *platform* at the end of a flight of stairs." 29 C.F.R. § 1926.450(b) (emphasis added). Accordingly, as § 1926.451(f)(13) expressly addresses debris on *platforms*, on its face this provision applies specifically to the cited condition. While, as discussed above, we agree with the Secretary that the term "stairs" includes landings, the scaffold provision addresses the specific *part* of the stairs where the alleged hazard was located, and thus is more specifically applicable. *See* 29 C.F.R. § 1926.20(d)(1); *Cincinnati Gas & Elec. Co*., 21 BNA OSHC 1057, 1058, 2005-09 CCH OSHD ¶ 32,836, p. 52,771 (No. 01-0711, 2005) (where cited condition was coal dust explosion hazard, coal-handling combustible atmosphere provision in electrical standard preempted general housekeeping standard); *Manganas Painting Co*., 21 BNA OSHC 2043, 2059-61, 2005-09 CCH OSHD ¶ 32,945, pp. 53,812-15 (No. 95-0103, 2007) (consolidated) (finding fall protection standard more specifically applicable than general personal protective equipment standard), *rev'd in part on other grounds*, 540 F.3d 519 (6th Cir. 2008).

Finally, the Secretary argues that § 1926.451(f)(13) is entirely inapplicable here because it addresses debris on a "platform"—defined under the scaffold standard as a "work surface elevated above lower levels"—and points out that Brand claims no work was done from the

landing. 29 C.F.R. §§ 1926.451(f)(13); 1926.450(b). Whatever Brand's understanding may be regarding the scope of the term "work" in this context, we find that it is too narrow. The record shows that Brand's employees: (1) brought scaffold materials to the landing for later use; (2) were expected to go to the landing to retrieve those components later in the day; and (3) used that portion of the stair tower for access to other parts of the scaffold. Thus, the area where the alleged hazard was observed was indeed used for work. *See N. Berry Concrete Corp*., 13 BNA OSHC 2055, 2055-56, 1987-90 CCH ¶ 28,444, p. 37,643 (No. 86-163, 1989) (finding that concrete standard, which prohibits "work" above unprotected rebar, applies to employees in transit); *Salah & Pecci Constr. Co., Inc.*, 6 BNA OSHC 1688, 1688-89, 1978 CCH ¶ 22,807, p. 27,554 (No. 15769, 1978) (employee being lowered in an aerial lift is "working" within meaning of standard requiring fall protection "when working from an aerial lift"); *Capeway Roofing Sys., Inc*., 20 BNA OSHC 1331, 1344, 2002-04 CCH OSHD ¶ 32,695, p. 51,626 (No. 00-1986, 2003) (employees traversing area in question were engaged in "work" under fall protection standard for "roofing work"), *aff'd*, 391 F.3d 56 (5th Cir. 2004). Because the landing meets the scaffold standard's definition of a platform, § 1926.451(f)(13) clearly covers the cited condition.

We therefore find that on the facts of this case, § 1926.451(f)(13) is a more specifically applicable standard that preempts the application of § 1926.25(a).[6] Accordingly, we vacate Serious Citation 1, Item 1.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: April 27, 2015

[6] In a footnote to his brief on review, the Secretary notes that if the Commission finds that § 1926.451(f)(13) is more specifically applicable, "it may properly amend Item 1 to allege a violation" of that standard. At no time before has the Secretary mentioned amendment, nor has he moved—either separately, as required by Commission Rule 40, or in any other filing, including his review brief—to amend the citation. *See* 29 C.F.R. § 2200.40(a); *McWilliams Forge Co.*, 11 BNA OSHC 2128, 2131, 1984-85 CCH OSHD ¶ 26,979, p. 34,671 (No. 80-5868, 1984) (declaring that "it is the better practice to require parties to file motions in separate documents as is the practice in federal courts"). In addition, Brand contested applicability and raised the preemption defense in its Answer to the Complaint, pressed the arguments before the judge and the Commission and, apparently in response to the Secretary's brief before us, argues against an amendment. Nonetheless, the Secretary has made no "obvious attempt" to raise the issue of whether Brand's conduct also violated § 1926.451(f)(13) before the judge, and includes only a limited argument in his brief on review. Under these circumstances, we decline to amend the citation sua sponte at this late stage. *See Erickson Air-Crane, Inc.*, No. 07-0645, 2012 WL 762001, at *2, 2009-12 CCH OSHD ¶ 33,199, pp. 55,758-59 (OSHRC Mar. 2, 2012) (declining to amend, stating that a party's consent to amend "[will] be found only when the parties . . . 'squarely recognized' that they were trying an unpleaded issue," quoting *NORDAM Grp.*, 19 BNA OSHC 1413, 1414-15, 2001 CCH OSHD ¶ 32,365, p. 49,684 (No. 99-0954, 2001), *aff'd*, 37 F. App'x 959 (10th Cir. 2002)); *Pa. Steel Foundry & Mach. Co.*, 12 BNA OSHC 2017, 2029, 1986-87 CCH OSHD ¶ 27,671, p. 36,065, n.7 (No. 78-638, 1986) (declining to amend when "the parties tried only the general issue framed by the general standard").

MACDOUGALL, Commissioner, concurring:

I concur with my colleagues in vacating the judge's decision and in declining to amend the citation sua sponte at this late stage. I agree with their conclusion that the construction standards preempt the general industry standards as I find that the work in which Brand was engaged is construction work. I also agree that even if the cited standard is applicable, it is pre-empted by a more specifically applicable standard, 29 C.F.R. § 1926.451(f)(13).[1] However, I write separately to express my opinion on these issues and also because I find an additional basis to vacate—the Secretary has not shown that the cited standard was violated because he failed to show that the scaffold components in question were "debris" within the meaning of this standard.[2]

DISCUSSION

I. The Cited Construction Housekeeping Standard Is Inapplicable

We evaluate whether the Secretary has met his burden of proving that a standard applies by first looking to the language of the standard. *See Arcadian Corp.*, 17 BNA OSHC 1345, 1347 (No. 93-3270, 1995) ("[i]n a statutory construction case, the beginning point must be the language of the statute") (citations omitted), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). An agency's interpretation of its standards is entitled to deference when it is reasonable and consistent with the language of the standard.[3] *See CF & I Steel*, 499 U.S. at 147. Yet, it is fundamental that:

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[1] I do not join in my colleagues' discussion regarding the meaning of the term "stairs" because I conclude that it is unnecessary to reach this issue given that the cited standard covers "work areas." Thus, I find that the question of whether the cited location was included within the term "stairs" is not dispositive.

[2] The Secretary has the burden of proving: (1) the applicability of the cited standard; (2) the employer's noncompliance with the standard's terms; (3) employee access or exposure to the violative conditions; and (4) the employer's actual or constructive knowledge of the violation. *Ormet Corp.*, 14 BNA OSHC 2134, 2135, 1991-93 CCH OSHD ¶ 29,254, p. 39,199 (No. 85-0531, 1991).

[3] In *Martin v. OSHRC* (*CF & I Steel Corp.*), 499 U.S. 144, 158 (1991), the Supreme Court held that reviewing courts must defer to the Secretary's interpretation of his own regulations where that interpretation is reasonable, taking into account such factors as the consistency with which the interpretation has been applied, "the adequacy of notice to regulated parties," and "the quality of the Secretary's elaboration of pertinent policy considerations." 499 U.S. at 158-159. The Court further noted that "when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress." *Id.* at 157.

"[i]f a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process." 29 C.F.R. § 1910.5(c)(1); 29 C.F.R. § 1926.20(d).

The Secretary appears to interpret the term "platform" in the construction scaffold standard to exclude scaffold stair landings; thus, according to the Secretary, the construction scaffold's debris provision is inapplicable to the scaffold's stair tower at issue here. I find, for the reasons discussed below, that the Secretary's interpretation is unreasonable and not consistent with the language of the cited standard. Thus, I reject it and find that a provision in the construction scaffold standard—§ 1926.451(f)(13)—is more specifically applicable and therefore preempts the cited construction housekeeping standard.

A. The Secretary's Interpretation of the Term "Platform" Is Unreasonable

The construction standards contain a scaffold standard, § 1926.451, and paragraph (f)(13) of this standard provides that "[d]ebris shall not be allowed to accumulate on platforms." The Secretary asserts that the construction scaffold standard's debris provision is inapplicable here because the violative conditions occurred on the scaffold's *stair tower*, which the Secretary states is not covered by the construction scaffold standard's debris provision that addresses scaffold *platforms* only. Thus, according to the Secretary, the debris provision of the construction scaffold standard does not preempt the general housekeeping construction standard. I conclude that such an interpretation is unreasonable for several reasons.

"Platform" is a term defined as "a work surface elevated above lower levels." 29 C.F.R. § 1926.450(b). The Secretary contends that the construction scaffold standard's debris provision does not apply to the landings between flights of stairs, where the alleged debris was located. The Secretary apparently reasons that the landing of a stair tower is not a *work surface* because a stair tower is used for *accessing* dedicated construction levels, rather than the direct performance of construction work—in other words, a stair tower is not used for *work*. Thus, the Secretary essentially contends, the terms "platform" and "stair tower" are mutually exclusive, and the construction scaffold standard's debris provision does not apply to stair towers. However, in interpreting the construction scaffold standard, I do not believe the definition of "platform"

supports this conclusion, as I see no analytical basis to construe the terms "platform" and "stair tower" as mutually exclusive.[4]

On any given job site, it is possible for a single surface in a stair tower to serve two purposes: for accessing successive lengths of stairs and as a stage for performing construction work. The fact that a surface is used for access does not, as the Secretary presumes, preclude the possibility of other simultaneous uses. Indeed, the possibility of dual use is recognized in the preamble to the construction scaffold standard, which contemplates that the landing platform of a stair tower may be used as a work surface: "OSHA believes that employees on landing platforms must be adequately protected from fall hazards while on a landing *whether they are working from the landing or not*." *See* 61 Fed. Reg. 46,026, 46,056 (Aug. 30, 1996) (emphasis added). I conclude that surfaces in a stair tower can certainly be used for the performance of construction work; hence, a stair tower can contain platforms. This is particularly true where Brand's *work was the erection of the scaffold* (as opposed to once it is erected and work is conducted from the scaffold).[5] While the scaffold is being erected, work is conducted primarily on the platforms as it is erected level by level.

Even assuming *arguendo* that the surface here would be used strictly for access, I still conclude that such a surface would be a "work surface"; hence, it would still be a platform within the scope of the debris provision of the construction scaffold standard. Indeed, employee access to the construction area is a critical and integral part of the overall project. I see no reason

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[4] Even within the provisions addressing a stair tower, the construction scaffold standard discusses different types of platforms that are not specifically identified within § 1926.450(b) but can be reconciled with the debris provision's instruction that debris shall not be allowed to accumulate on platforms. For example, within the definitional provision of the construction scaffold standard, a "stair tower" is defined as a "tower comprised of scaffold components and which contains internal stairway units and rest *platforms*." 29 C.F.R. § 1926.450(b) (emphasis added). In describing access to a scaffold's stair tower, the construction scaffold standard states that "[a] landing *platform* at least 18 inches . . . wide by at least 18 inches . . . long shall be provided at each level." 29 C.F.R. § 1926.451(e)(4)(viii). I find that the language regarding what constitutes a "platform" under the construction scaffold standard is ambiguous; as such, the Secretary's interpretation is not entitled to deference if unreasonable. *See CF & I Steel*, 499 U.S. at 147. As discussed herein, I find his interpretation to be unreasonable.

[5] Once Brand erected the scaffold, the scaffold would be utilized to repair and replace torn insulation on the exterior of a distillation column, work which would be done from each of the scaffold's multiple levels.

to find that access areas are distinguishable from those surfaces used exclusively for construction work when the use of access areas contributes to the final *work* being performed. *Are Brand's employees not working during the times when they are traversing the stair tower?*[6] *See N. Berry Concrete Corp*., 13 BNA OSHC 2055, 2055-56, 1987-90 CCH ¶ 28,444, p. 37,643 (No. 86-163, 1989) (finding that concrete standard, which prohibits "work" above unprotected rebar, applies to employees in transit); *Salah & Pecci Constr. Co., Inc.*, 6 BNA OSHC 1688, 1688-89, 1978 CCH ¶ 22,807, p. 27,554 (No. 15769, 1978) (employee being lowered in an aerial lift is "working" within meaning of standard requiring fall protection "when working from an aerial lift"); *Capeway Roofing Sys., Inc*., 20 BNA OSHC 1331, 1344, 2002-04 CCH OSHD ¶ 32,695, p. 51,626 (No. 00-1986, 2003) (employees traversing area in question constituted "work" under fall protection standard for "roofing work"), *aff'd*, 391 F.3d 56 (5th Cir. 2004).

The Secretary has tacitly endorsed the same conclusion that I reach here, albeit in the general industry context. There, the Secretary has construed the term "platform" to include "[a]ny elevated surface designed or used primarily as a *walking or working surface*, and *any other elevated surfaces* upon which employees are required or allowed to *walk or work* . . . ." *See* OSHA Instruction STD 1-1.13 (emphasis added); *Unarco Commercial Prod.*, 16 BNA OSHC 1499, 1501, 1993-95 CCH OSHD ¶ 30,294, p. 41,731 (No. 89-1555, 1993) (Secretary contended that "various surfaces employees were forced to stand on" should be considered platforms). Indeed, the Secretary has adopted this broad interpretation notwithstanding the fact that the strict general industry definition of "platform" is limited to *work areas.* *See* 29 C.F.R. § 1910.21(a)(4) (defining the term "platform" in pertinent part as "[a] working space for persons, elevated above the surrounding floor or ground . . . ."). I do not see any basis to adopt a more narrow definition with regard to the construction scaffold standard. Thus, I find that the Secretary's interpretation of the term "platform" is unreasonable, and it should not be used to limit the application of the construction scaffold standard in these circumstances. *See CF & I Steel*, 499 U.S. at 147.

[6] Brand seems to view this differently, stating in its brief that "no part of the stair tower was a work level." I construe Brand's position here as a concession that the surface in question was not a dedicated construction surface as the scaffold was still under construction. However, I do not construe it as a concession regarding the scope of the term "platform" as a matter of law.

B. The Construction Scaffold Standard, As a Whole, Further Undermines the Reasonableness of the Secretary's Interpretation

The broader application of the construction scaffold standard as a whole further undermines the Secretary's narrow interpretation of the term "platform." *See Bunge Corp.*, 12 BNA OSHC 1785, 1790, 1986-87 CCH OSHD ¶ 27,565, p. 35,804 (No. 77-1622 1986) (consolidated) ("[T]he provisions of a standard should be interpreted in the context of the entire standard."). Indeed, "[i]t is a generally accepted precept of interpretation that . . . regulations are to be read as a whole, with each part or section . . . construed in connection with every other part or section." *Am. Fed. of Gov't Emps. v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) (internal quotations omitted). Two specific provisions in the construction scaffold standard are particularly instructive.

First, as previously stated, the construction scaffold standard expressly recognizes that stair towers can and *must* contain platforms, requiring that "[a] landing platform . . . shall be provided at each level [of a stair tower]." 29 C.F.R. § 1926.451(e)(4)(viii). Such a requirement explicitly undermines an attempt to distinguish stair towers and platforms as mutually exclusive. Second, the construction scaffold standard defines "walkway" as "a portion of a scaffold platform used only for access and not as a work level." 29 C.F.R. § 1926.450(b). That is to say that the definition of "walkway" acknowledges the existence of *platforms used for access. Id.* In so doing, the term "walkway" recognizes that a surface does not lose its identity as a *platform* merely because it is used to access dedicated construction areas. *Id.*

Both provisions, and the construction scaffold standard as a whole, undermine the Secretary's narrow interpretation of the term "platform" and dictate that the construction scaffold standard applies here. *See S.G. Loewendeck & Sons, Inc. v. Reich*, 70 F.3d 1291, 1294 (D.C. Cir. 1995) (Secretary's interpretation necessarily unreasonable "where an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation") (internal quotations omitted).

C. The Secretary's Narrow Interpretation Would Lead to Absurd Results

The Secretary's interpretation, if correct, would also lead to absurd results, and "[i]t is well established that a statute or . . . a standard must be construed so as to avoid an absurd result." *Unarco*, 16 BNA OSHC at 1502, 1993-95 CCH OSHD at p. 41,732. For instance, while the construction scaffold standard applies specifically to scaffolds (and is even titled "Subpart L

– Scaffolds"), the term "scaffold" is defined as a "temporary elevated *platform*." If the restrictive definition of the term "platform" advocated by the Secretary is correct, the definition of "scaffold" would mean that scaffolds and stair towers should be viewed as separate and distinct structures. Such a conclusion—that a stair tower should be viewed as separate and distinct from a *scaffold*—is unreasonable. Indeed, the diagram of a System Scaffold, which is contained in Appendix E of the construction scaffold standard, illustrates that the stair tower should be viewed as a *part of a scaffold*, rather than a separate and distinct structure.

Similarly, 29 C.F.R. § 1926.451(e)(6) creates minimum safe distances between scaffolds and overhead power lines. But again, the definition of "scaffold" plainly incorporates the term "platform," which the Secretary argues does not include those surfaces located within a stair tower. *See* 29 C.F.R. § 1926.450(b). Would the Secretary really suggest that stair towers are not subject to the minimum safe distances? Would the Secretary suggest that a stair tower erected adjacent to an overhead power line would not violate the construction scaffold standard as long as dedicated construction areas are kept further away? Such results seem absurd, illustrating the undeniable fact that the Secretary's narrow interpretation of the term "platform" is unreasonable.

I also note that the Secretary's interpretation is contrary to the goal of promoting employee safety and effectuating the intent of the OSH Act. *CF & I Steel*, 499 U.S. at 147 (concluding that the OSH Act "establishes a comprehensive regulatory scheme designed to assure so far as possible . . . safe and healthful working conditions for every working man and woman in the Nation") (internal quotations omitted). Indeed, the construction scaffold standard would be woefully insufficient to address the risk of accumulated debris if it were read to exclude all surfaces not used as dedicated construction areas.[7] If the debris provision of the construction scaffold standard was intended to apply only to *work surfaces*, the standard could

[7] Remarkably, the Secretary, in a case in which the Commission affirmed the judge's decision to vacate the citation, made this same observation about the interpretation of the term "platform" in prior litigation, noting that "to narrowly interpret the term platform would be to place the very worst of the conditions the standard was intended to correct outside the standard's scope." *Unarco*, 16 BNA OSHC at 1501, 1993-95 CCH OSHD at p. 41,731 (involving general industry standard).

have read: "[d]ebris shall not be allowed to accumulate on work surfaces." Such language was not employed.[8]

I conclude that the construction scaffold standard as a whole is clear that its debris provision is not rendered inapplicable merely because debris accumulates on a stair tower rather than a dedicated construction area. Brand was a scaffolding contractor charged with the task of constructing a scaffold. I do not find that the stair tower—a critical and integral part of the scaffold in this case—should be viewed in isolation from the remainder of the structure and reject the notion that the stair tower was outside the scope of the construction scaffold standard. *See Diamond Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 650 (5th Cir. 1976) ("[t]o strain the plain and natural meaning of words for the purpose of alleviating a perceived safety hazard is to delay the day when the occupational safety and health regulations will be written in clear and concise language so that employers will be better able to understand and observe them"). The text, purpose, and application of the construction scaffold standard dictate that § 1926.451(f)(13) is the applicable standard; for the reasons stated, I conclude that the Secretary erred by asserting a violation of the cited housekeeping standard.

In sum, I have little difficulty concluding that Brand's work should be covered by the construction scaffold standard and agree with Brand's contention that any citation addressing accumulated debris on the scaffold at issue is controlled by the debris provision in the construction scaffold standard, § 1926.451(f)(13). Additionally, I join with my colleagues and would not permit the Secretary to amend the citation to assert a violation of the construction

[8] Notably, if such language had been employed, it would have had the result of requiring employers to keep track of two different debris standards for different parts of the same scaffold system at the same jobsite. The same curious result would occur if the Commission adopted the Secretary's proposed view of the term "platform."

scaffold standard at this time, as any amendment at this stage would be prejudicial to Brand.[9] Hence, in concurring with my colleagues, I also would vacate Item 1 based on a lack of applicability.

II. The Secretary Failed to Show That the Scaffold Components at Issue Were "Debris" and That Brand Violated the Cited Housekeeping Standard

Even if the cited housekeeping standard was applicable, the Secretary failed to show that it was violated here.[10] That standard provides, in pertinent part: "[d]uring the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures." 29 C.F.R. § 1926.25(a). The Secretary asserts that Brand violated the construction housekeeping standard because the unused scaffold components lying on the stair tower were "debris" that should have been "kept clear from work areas, passageways, and stairs . . . ." I disagree. I find that the items asserted to be in violation of the standard do not meet the definition of "debris" under either a dictionary definition or under Commission precedent.[11]

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[9] In *McLean-Behm Steel Erectors, Inc. v. Occupational Safety and Health Review Comm'n*, 608 F.2d 580 (5th Cir. 1979), the court reasoned that:

> Elemental fairness proscribes depriving petitioner of its right to present defenses to the charge against it. Fed.R.Civ.P. 15(b) certainly would have permitted the administrative law judge to add an alternative charge . . . before the evidentiary hearing closed, but the Secretary forewent that timely opportunity to afford petitioner adequate notice. Because the record in this case does not reveal uncontrovertibly that petitioner could have prevailed in any defense to such a charge, we find prejudice requiring reversal.

608 F.2d at 582 (footnote omitted). I note, also, that the Secretary has not moved—either as required by Commission Rule 40 or within its brief—to amend the citation. *See* 29 C.F.R. § 2200.40(a).

[10] While the citation was to the debris provision of the construction general housekeeping standard, I find that the scaffold equipment at issue on review is not "debris" under either provision—29 C.F.R. § 1926.25(a) or § 1926.451(f)(13).

[11] Debris is defined as "scattered fragments, typically of something wrecked or destroyed." OXFORD AMERICAN DICTIONARY 436 (2005). *See also* WEBSTER NEW COLLEGIATE DICTIONARY 289 (1979) (debris defined as "the remains of something broken down or destroyed").

The Commission, in declining to accept a dictionary definition of the term, has previously addressed the question of what constitutes "debris" in *Gallo Mech. Contractors, Inc*., 9 BNA OSHC 1178, 1981 CCH OSHD ¶ 25,008 (No. 76-4371, 1980) and *Capform, Inc*., 16 BNA OSHC 2040, 1993-95 CCH OSHD ¶ 30,589 (No. 91-1613, 1994). Although *Gallo* and *Capform* are not models of clarity in this context, I conclude that these cases compel the conclusion here that the unused scaffold components are not debris.

I agree with Brand that these unused scaffold components were a necessary part of its erection work, and it was necessary for them to be kept at the location where they were in order for the work to proceed. Indeed, unlike the pieces of structural steel, small pieces of channel, one-by-fours, two-by-fours, and pipe in *Gallo* that were deemed "debris," the scaffold components at issue here were necessary for the continued construction of the scaffold tower. *See* 9 BNA OSHC at 1179, 1981 CCH OSHD at p. 30,899. As a consequence, I conclude that the unused scaffold components are akin to equipment as discussed in *Gallo*. 9 BNA OSHC at 1180, n. 3, 1981 CCH OSHD at p. 30,899, n. 3 ("[a prior Commission case] can also be read as including certain types of **equipment** within the items which must be kept clear of work areas and passageways under the standard. To the extent that [it] can be so read, we disapprove such an interpretation") (emphasis added).

Moreover, while *Gallo* acknowledges that objects may become debris when they are not kept in a proper organizational state, such as when they are unnecessarily scattered about on a work surface and create a trip and fall hazard, here the Secretary failed to present sufficient evidence that the state of organization was so deficient that the scaffold components were "debris." *See, e.g., Marinas of the Future, Inc.*, 6 BNA OSHC 1120, 1121-22, 1977-78 CCH ¶ 22,466, p. 27,011 (No. 13507, 1977) (interpreting 29 C.F.R. § 1910.22(a)(1) requirement that workplace be kept "clean and orderly" and finding no violation because "there is no evidence indicating that the work materials on the floor were in excess of those required to accomplish repairs" and thus "no convincing evidence that the work area was unreasonably filled with work materials"). As noted in *Gallo*, the state of organization is only pertinent when dealing with construction materials like structural steel, small pieces of channel, one-by-fours, two-by-fours, and pipe; it has no application when dealing with essential construction equipment or other items which are critical and integral to the performance of the task being conducted. 9 BNA OSHC at 1179, 1981 CCH OSHD at ¶ 30,899-900. Again, the various scaffold components—including

mud sills, vertical legs, ladders, horizontal ledgers, ladder brackets, toe boards, and scaffold planks—were specifically for Brand's use that day in the scaffold erection. Thus, they are more akin to equipment than to the structural steel, small pieces of channel, one-by-fours, two-by-fours and pipe in *Gallo*.[12] *Id.* Indeed, Brand's Safety Manager testified that the scaffold components were staged at the beginning of each shift for use that same day in the construction. At the end of the shift, any unused components were returned to the staging area.[13] In addition, as the levels of the scaffold were uniform, the components necessary for its erection did not change. Each lift of components by a crane and the use of a skid pan were designed to provide the shift's crew with exactly what was needed, with no leftover or excessive material.[14]

The Secretary's proposed application of the term "debris" would put construction employers, particularly those erecting a scaffold, in a perpetual state of organizing or bringing components up the scaffold in crippling piecemeal fashion, something *Gallo* recognized is neither what the housekeeping standard requires nor practical at a construction site. 9 BNA OSHC at 1180, 1981 CCH OSHD at p. 30,899 ("the nature of construction work would generally preclude keeping work areas and passageways entirely clear of equipment") (citations and footnotes omitted). The significant question in this case is: were the scaffold components critical and integral to the construction of the very next scaffold level and was it necessary to keep those components stored in the location where the violative conditions were cited? I conclude that the

[12] *Gallo* and its progeny do not clearly articulate the precise distinction between *materials* and *equipment*. *See Gallo*, 9 BNA OSHC at 1080, 1981 CCH OSHD at p. 30,899; *Capform*, 16 BNA OSHC at 2044, 1993-95 CCH OSHD at p. 42,356. Indeed, the distinction may amount to mere semantics in some circumstances. I find it unnecessary, however, to articulate a precise and comprehensive distinction here because I conclude that the scaffold components in question were far more akin to essential equipment than to the structural steel, small pieces of channel, one-by-fours, two-by-fours, and pipe identified in *Gallo*. 9 BNA OSHC at 1179, 1981 CCH OSHD at pp. 30,899-900.

[13] It is worth noting that on the day of the inspection, Brand did not get to the end of the shift when employees would return unused components to the staging area. Rather, the record shows that work stopped abruptly prior to the Secretary's inspection, and, but for the work stoppage, the components would have been removed prior to the end of the shift.

[14] The scaffold components expected to be used for the day were brought up onto the scaffold by utilizing a crane and a skid pan, which is a big, metal box that is loaded with materials, and then raised up and off-loaded. Once the components were off-loaded, they were staged on the platform and used to erect the next levels of the scaffold.

scaffold components meet this test as they were staged in the area in preparation for installation on the scaffold and, thus, were not "debris" within the meaning of the standard; at the very least, the Secretary failed to prove otherwise. Thus, even if the Secretary had cited the appropriate standard, I would vacate the citation.

III. Brand Was Not Provided with Adequate Notice of the Secretary's Interpretation

Nonetheless, if I were to conclude that the Secretary's interpretation of the cited standard was reasonable and that the Secretary established noncompliance, I conclude there is an additional basis to vacate the citation—Brand was not provided with adequate notice of the Secretary's interpretation that scaffold components intended to be used in construction that day may constitute "debris" within the meaning of the cited standard. An employer lacking fair notice of a standard cannot be found in violation of the OSH Act for failure to comply with that standard. *E.g., S.G. Loewendick & Sons Inc. v. Sec'y of Labor*, 70 F.3d 1291, 1297 (D.C. Cir. 1995) ("Congress and the courts require that agency action reflect clear, rational decision making that gives regulated members of the public adequate notice of their obligations"); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335-39 (6th Cir. 1978); *Cardinal Indus.*, 14 BNA OSHC 1008, 1011, 1987-89 CCH OSHD ¶ 28,510, p. 37,801 (No. 82-427, 1989). To the extent that the Secretary's choice of language does not effectuate what the Secretary may have intended, the remedy lies in further rulemaking by the Secretary rather than the adoption by this Commission of an interpretation that is not supported by the standard as promulgated. *See Diamond Roofing*, 528 F.2d at 650 (regulations cannot be construed to mean what an agency intended but did not adequately express).

CONCLUSION

For the reasons stated herein my separate opinion, I join in my colleagues' decision to vacate the item on review.

/s/
Heather L. MacDougall
Commissioner

Dated: April 27, 2015

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Brand Energy Solutions LLC, Respondent.	OSHRC Docket No. **09-1048**

Appearances:

Jennifer J. Johnson Esquire & Madeline Le, Esquire, Dallas, Texas
For Complainant

J. Albert Kroemer, Esquire & James T. Phillips, Esquire, Dallas, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Brand Energy Solutions LLC d/b/a Brand Scaffold Building, Inc., erects, dismantles, rents, and supplies scaffolds for commercial and industrial businesses. On December 18, 2008, Brand employee Cynthia Chavira fell to her death from a scaffold Brand was erecting at the Shell Deer Park Refinery in Deer Park, Texas. Occupational Safety and Health Administration (OSHA) compliance officer David Waters arrived at the worksite later that day and began an inspection. Based upon Waters's inspection, the Secretary issued a Citation to Brand on June 9, 2009.

The Citation consisted of six items alleging serious violations of the Occupational Safety and Health Act of 1970 (Act). Item 1 alleges the serious violation of 29 C. F. R. § 1926.25(a), for failing to keep debris clear from work areas, passageways, and stairs, in and around buildings or other structures. The Secretary proposed a penalty of $ 3,500.00 for Item 1. Items 2 through 6 alleged violations of various subsections of 29 C. F. R. § 1926.451, the standard that provides general requirements for scaffolds. The Secretary proposed penalties totaling$ 18,500.00 for Items 2 through 6. Brand timely contested the Citation.

The court held a hearing in this matter on January 20 and 21, 2010, in Houston, Texas. Brand admitted jurisdiction and coverage. Prior to the hearing, the Secretary withdrew Item 5 of the Citation. The hearing proceeded on the remaining five items. On April 2, 2010, the parties filed a joint notice of withdrawal of Items 2, 3, 4, 5, and 6 of the Citation. The court issued an order approving this partial settlement on April 21, 2010.

Only Item 1 remains at issue. The parties have filed post-hearing briefs addressing Item 1. Brand contends the Secretary cited the company under an inapplicable standard, and thus Item 1 should be dismissed. If the cited standard is applicable, Brand argues it did not violate the terms of the standard. Brand also contends that, if the court affirms Item 1, the court should reclassify the violation from serious to de minimis.

For the reasons discussed below, the court rejects Brand's arguments. The court affirms Item 1 as a serious violation, and assesses a penalty of $ 3,500.00.

Background

In 2008, Shell Oil Company hired Brand to erect a systems scaffold around a crude distillation column (a large circular tower) at its refinery in Deer Park, Texas. The original purpose of the scaffold was to provide a platform for employees to remove and replace asbestos-containing insulation. The original design of the scaffold included an area for an asbestos decontamination enclosure.

On September 13, 2008, Hurricane Ike made landfall near Galveston, Texas. Hurricane Ike is currently the third most destructive hurricane to make landfall in the United States, after Hurricanes Katrina and Andrew, and it wreaked substantial damage to the Deer Park Refinery. Following the storm, Shell downsized the scope of the project, eliminating the insulation replacement part of it. The scaffold was redesigned to eliminate the area that was to be used for asbestos decontamination. The scaffold would no longer need a Visqueen plastic covering to contain the asbestos. Brand reconfigured the scaffold's design, size, weight-bearing capacity, and wind-bearing capacity.

At completion, the scaffold was to be approximately 220 feet high. Brand built the scaffold in two parts. One part was built around the crude distillation column. The other part was a stair tower, located on the east side of the column. The stair tower was the only means of access to the tower.

On November 26, 2008, Brand began erecting a cup-lock systems scaffold around the column. Brand transported materials, scaffold components, and equipment to the worksite and placed these items in designated staging areas.

Brand assigned eleven employees to erect the scaffold. On December 18, 2008, the scaffold was halfway completed, and stood approximately 110 feet high. Brand employee Cynthia Chavira was working on an unfinished level of the platform, approximately 100 feet above the ground. She was wearing a full body harness with a double lanyard, but she was not tied off. At approximately 11:00 a.m., Chavira fell from the platform to her death.

OSHA assigned compliance officer David Waters to inspect the worksite. He arrived the day of Chavira's death and held an opening conference with Brand. He took photographs and interviewed Brand employees, as well as employees of other companies on the site. Waters returned twice to the site to take more photographs and measurements, and to conduct a closing conference. Brand shut down the scaffold site the day Chavira fell, and it remained closed throughout Waters's inspection.

Discussion

The Secretary has the burden of proving the violation by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of 29 C. F. R. § 1926.25(a)

The standard at 29 C. F. R. § 1926.25(a) provides:

> During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from the work areas, passageways, and stairs, in and around buildings or other structures.

In Citation No. 1, Item 1, the Secretary alleges:

29 C. F. R. § 1926.25(a): Debris was not kept cleared: work areas, passageways, stairs and around the buildings or other structures.

(a) Level 8 at the bottom of the stairs on the stair tower scaffold where scaffold components were stored.

(a) Applicability of the Cited Standard

(i) Construction Standard v. General Industry Standard

Brand contends the Secretary failed to establish the first element of proof, that 29 C. F. R. § 1926.25(a) applies to the cited conditions. Brand argues the Secretary should have cited the company under a general industry standard, not a construction standard.

The Secretary has two separate sets of standards addressing scaffolds, depending upon whether they are used for workers engaged in construction or maintenance. Scaffolds used for construction activities are governed by standards found in Subpart L of the construction standards, in Part 1926 of Title 29 of the Code of Federal Regulations. Scaffolds used for maintenance activities are governed by standards found in Subpart D of the general industry standards, in Part 1910 of Title 29 of the Code of Federal Regulations.

"Maintenance" is not defined in the Act. The standards at 29 C. F. R. §§ 1910.12(b) and 1926.32(g) define "construction work" as "work for construction, alteration, and/or repair, including painting and decorating." Brand concedes the project, as originally conceived, for which it was erecting the scaffold "would have undoubtedly been classified as 'construction' inasmuch as it was proposed that all or substantially all of the insulating materials on this particular tower which contain asbestos would be removed, the area decontaminated and the insulation replaced with non-asbestos containing insulation" (Brand's brief, pp. 5-6). Brand argues, however, that once the project was downscaled to merely repairing certain sections of torn insulation, the work fell under the classification of maintenance.

In support of its position, Brand cites a Standard Interpretation letter issued by OSHA on August 14, 2000, in which OSHA sought to clarify the differences between construction work and maintenance work. The Standard Interpretation letter states, in pertinent part:

> The following principles and examples apply in distinguishing between construction and maintenance:
> (A) It is the activity to be performed, not the company's standard industrial classification (SIC) code, that determines whether the construction standard applies;

> (B) "Maintenance" means keeping equipment or a structure in proper condition through routine, scheduled or anticipated measures without having to significantly alter the structure or equipment in the process. For equipment, this generally means keeping the equipment working properly by taking steps to prevent its failure or degradation.
> (C) Whether repairs are maintenance or construction depends on the extent of the repair and whether the equipment is upgraded in the process.

Both Brand and the Secretary mistakenly focus on the classification of the future activity for which the scaffold was being built. On December 18, 2008, no insulation replacement or repair was being done. The only activity underway was the construction of the scaffold. Only employees of Brand, a scaffold constructor, were allowed access to the scaffold while it was being constructed. Brand posted a tag at the bottom of the scaffold stairway:

DANGER
DO NOT
USE
SCAFFOLD

SCAFFOLD
UNDER
CONSTRUCTION

As Brand acknowledged with its tag, the erecting of a scaffold is construction work; it is building a completely new component by assembling materials for a specific project. It is not routine maintenance on a pre-existing structure. It is undisputed that the scaffold was only halfway completed on December 18, 2008. Brand had not released the scaffold to Shell for use in repairing the insulation. Brand's scaffold expert David Glabe testified, "[T]he fact is until the scaffold company does a final inspection on it . . . the scaffold is considered to be under construction" (Tr. 268).

The Secretary correctly cited Brand under the construction standards found in Part 1926.

(ii) The Housekeeping Debris Standard v. The Scaffold Debris Standard

Brand also argues that, even if the Secretary correctly cited it under the construction standards, a more specific construction standard exists and, therefore, the court should vacate Item 1.

The standard at 29 C. F. R. § 1910.5(c)(1) provides:

> If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.

Brand contends that because it was erecting a scaffold, the Secretary should have cited it using the specific debris provision found in Subpart L ("Scaffolds") of Part 1926. The standard Brand believes is more specific is 29 C. F. R. § 1926.451(f)(13), which provides:

> Debris shall not be allowed to accumulate on platforms.

Unlike the cited standard, the scaffold standard addressing debris is limited to platforms. "Platform" is defined at 29 C. F. R. § 1926.450(b) as "a work surface, elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated decks, and fabricated platforms."

The Secretary does not allege Brand allowed debris to accumulate on platforms. Item 1 of the Citation expressly addresses a non-platform area of the scaffold as the site of the violative condition: "Level 8 at the bottom of the stairs on the stair tower scaffold where scaffold components were stored." The cited standard requires debris be "kept cleared from the work areas, passageways, and *stairs*, in and around buildings or other structures."

The standard at 29 C. F. R. §1910.5(c)(1), stating that a more specific standard preempts a general standard, has a corollary at 29 C. F. R. § 1910.5(c)(2):

> On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in subpart B or subpart R of this part, to the extent that none of such particular standards applies.

Although Subpart L of the construction standards provides particular standards prescribed for scaffolds, none of those standards address the cited condition as specifically as the housekeeping standard does. The standard at 29 C. F. R. § 1926.25(a) applies according to its terms to the stairs on the stair tower scaffold constructed by Brand.

The Secretary has established 29 C. F. R. § 1926.25(a) applies to the conditions cited in Item 1 of the Citation.

(b) Compliance with the Terms of the Standard

Waters testified that when he conducted his inspection of the stair tower scaffold on December 18, 2008, he observed scaffold material scattered around the stairway, creating a tripping hazard. Waters took photographs of the area that corroborate his testimony. Exhibits C-6 and C-7 are copies of photographs of the area showing various scaffold parts strewn across the area employees used to access the upper levels of the scaffold. A water cooler and pieces of wood are also in the area. Mike Sharp, Brand's director of safety, and Gustavo Castillo, Brand's scaffolding expert, agreed Exhibits C-6 and C-7 depict scaffold parts at the bottom of the scaffold stairway.

Brand does not dispute that various scaffold components were at the bottom of the stairway on December 18, 2008. Brand argues, however, that the Secretary failed to prove it was in noncompliance with the cited standard because the scaffold components are not "debris" within the meaning of the standard. Brand contends the scaffold components shown in Exhibits C-6 and C-7 were either to be used that day in the construction of the scaffold, or removed to the staging area at the end of the day's shift. Brand cites *Webster's New Collegiate Dictionary* in defining "debris" as "the remains of something broken down or destroyed; ruins," or "an accumulation of rock" (Brand's brief, p. 12).

If this were a case of first impression, the court might be inclined to agree with Brand's interpretation of "debris." There is, however, case law that indicates otherwise. In *Gallo Mechanical Contractors, Inc.*, 9 BNA OSHC 1178 (No. 76-4371, 1980), the Review Commission reviewed the decision of an administrative law judge (ALJ) who had found a violation of 29 C. F. R. § 1926.25(a), but reclassified it from other than serious to de minimis. The ALJ determined that most of the matter cited as "debris" was not debris, but equipment and materials to be used by the employees. The small amount of matter that the ALJ concluded was "debris" amounted to a bit of trash he did not consider a tripping hazard.

The Commission found the ALJ had too narrowly defined "debris," and analyzed the standard in terms of the hazard it was designed to prevent:

> Section 1926.25(a) is concerned with housekeeping on construction worksites. It directs employers to keep lumber and debris cleared "from work areas, passageways, and stairs, in and around buildings and other structures." Hazards of tripping and falling, possibly resulting in sprains, fractures, and even concussions, can occur if

> matter is scattered about working and walking areas. . . . Accordingly, "debris" within the meaning of section 1926.25(a) includes material that is scattered about working or walking areas. Whether the material has been used in the past or can or will be used in the future is irrelevant.

Id. at 1180 (*citations omitted).*

The Commission went on to conclude that equipment, unlike materials (which the Commission listed in that case as wood, steel pieces, and pipes), cannot be considered "debris." The Commission found that materials did constitute a tripping hazard and modified the classification to other than serious.

When asked to reconsider its finding in *Gallo*, which the employer called "'clearly overbroad' and 'misguided,'" the Commission firmly upheld its earlier ruling:

> We find no basis for disturbing our decision in *Gallo.* There we considered the meaning of "debris" in light of the purpose of the standard (to prevent tripping accidents) and in relation to the only items specifically listed in the standard (form and scrap lumber with protruding nails). Capform's proposed meaning does not take into account this purpose, and Capform does not cite any precedent in support of its view. As for Capform's argument that to apply *Gallo*'s definition of "debris" would cripple construction contractors, the definition has been Commission precedent since 1980, and Capform presents no evidence that it has had that effect.

Capform Inc., 16 BNA OSHC 2040, 2044 (No. 91-1613, 1994).

Commission precedent on this issue is clear. The scaffold components scattered about the bottom of the stairway are materials. As such, they fall within the definition of "debris" as fashioned by the Commission. Exhibits C-6 and C-7 show the materials on the walking surface at the bottom of the stairway, creating numerous tripping hazards.

The Secretary has established Brand was in noncompliance with the terms of 29 C. F. R. § 1926.25(a).

(c) Employee Exposure

Eleven Brand employees had access to the scaffold the day of the accident. The stair tower was the only means of access the employees had to the upper level of the scaffold. They would have to pass through that level on their way to the highest level being built. The Secretary has established exposure to the tripping hazard for eleven employees.

(d) Employer Knowledge

The scaffold components at the bottom of the stairs were in plain view of Brand's eleven employees on site. Brand had two lead men working with its employees, as well as Edil Perez. Perez was Brand's foreman, lead carpenter, and designated competent person. Perez's knowledge that the scaffold components were scattered at the bottom of the stairway is imputed to Brand. *Dover Elevator Co., Inc*., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[W]here a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program").

The Secretary has established Brand knew of the violative condition. She has proven Brand violated 29 C. F. R. § 1926.25(a).

Classification of the Violation

The Secretary classified Item 1 as a serious violation. Under §17(k) of the Act, a violation is serious if it creates a substantial probability of death or serious physical harm. Brand argues that if the court finds it violated the cited standard, the court should reclassify the violation as de minimis. A violation is de minimis when there is technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Cleveland Consolidated, Inc.,* 13 BNA OSHC 1114 (No. 84-696, 1987).

Waters testified that employees tripping or falling over the scattered scaffold components could sustain injuries ranging from cuts and bruises to broken bones or death. An employee tripping over the components would likely suffer serious physical harm. In this instance, the tripping hazard does not bear a "negligible relationship to employee safety." The Secretary properly classified the violation as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity, generally, is the principal factor to be considered.

Brand is a large international organization, and employed at least 10,000 employees at the time of the inspection. The company had a history of OSHA citations. No evidence of bad faith was adduced.

The gravity of the violation is high. Employees were required to navigate through the scattered components, often while carrying materials or equipment. They were exposed to several tripping hazards each time they walked through the area. A penalty of $ 3,500.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

The court previously issued an order approving settlement of Items 2 through 6 of the Citation on April 21, 2010. Based upon the foregoing decision, it is ORDERED that:

Item 1 of the Citation, alleging a serious violation of 29 C. F. R. § 1926.25(a), is affirmed, and a penalty of $ 3,500.00 is assessed.

JUDGE STEPHEN J. SIMKO, JR.

Date: August 23, 2010