



The cited standard provides:

Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling support scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

The judge affirmed the item on the grounds that respondent's foreman was not a "competent person" to determine the feasibility and safety of providing fall protection. In its petition, respondent points out that neither the citation nor the complaint alleged that respondent did not have a competent person make the necessary feasibility determination. Rather, the allegations were limited to whether respondent failed to provide the requisite feasible fall protection and the item was generally tried on that issue. Respondent, while not denying that it did not provide fall protection, contends that the record established that fall protection was not feasible. In her response to respondent's petition, the Secretary agrees that the judge decided the item on a basis that was not litigated but reiterates her position that fall protection was feasible. The judge's decision is silent on this issue.

Accordingly, we remand the case to the judge to determine whether the Secretary established that respondent violated §1926.451(g)(2) by not providing feasible fall protection as alleged in Citation 2, Item 1.

This order is without prejudice to other issues raised by respondent's Petition for Discretionary Review, which may be resubmitted after the judge issues her decision on remand.

/s/  
W. Scott Railton  
Chairman

/s/  
James M. Stephens  
Commissioner

/s/  
Thomasina V. Rogers  
Commissioner

Dated: May 7, 2004

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

Secretary of Labor,

Complainant,

v.

Atlantic Heydt Corporation,

Respondent.

OSHRC Docket No. 02-1936

**Appearances:**

Jane Snell Brunner, Esq., Office of the Solicitor, U. S. Department of Labor, New York, New York  
For Complainant

Thomas J. Bianco, Esq., Kaufman, Schneider & Bianco, LLP, Jericho, New York  
For Respondent

Before: Administrative Law Judge Covette Rooney

**DECISION AND ORDER**

Atlantic Heydt Corporation (AHC) contests three citations issued by the Secretary on October 16, 2002. The Secretary issued the citations following an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Eric Reinhardt. AHC was constructing a hoist tower complex at the site where the Borgata Hotel and Casino complex was being built in Atlantic City, New Jersey.

Citation no. 1 alleges three serious violations of the Occupational Safety and Health Act of 1970 (Act). Item 1 alleges a violation of § 1926.251(a)(6) for failing to have a competent person inspect slings for damage or defects. Item 2 alleges a violation of § 1926.251(e)(8) for failing to remove torn and cut slings from service. Item 3 alleges a violation of § 1926.550(a)(1) for failure to comply with the manufacturer's specifications regarding the outriggers on a crane.

Citation no. 2 is a one-item citation alleging a willful violation of § 1926.501(b)(15) for failing to provide fall protection for employees on a walking/working surface 6 feet or more above lower levels. In the alternative, the Secretary alleges that AHC committed a willful violation of § 1926.451(g)(2) for failure to provide fall protection to employees erecting or dismantling supported scaffolds.

Citation no. 3 contains two items alleging repeated violations of the Act. Item 1 alleges a violation of § 1926.501(b)(1) for failing to require each employee on a walking/working surface to use fall protection. Item 2 alleges a violation of § 1926.501(b)(3) for failing to protect employees in a hoist area from falling 6 feet or more to lower levels.

A hearing was held in this matter on September 22, 23, 24, and December 8, 9, 10, and 11, 2003, in New York, New York. The parties have filed post-hearing briefs and reply briefs. AHC admits jurisdiction and coverage. AHC argues that the Secretary failed to establish a violation of any of the cited standards, and that the use of personal fall arrest systems was infeasible and would have resulted in a greater hazard. In the event that violations of any of the cited standards are found, AHC disputes the classifications and the proposed penalties for the affirmed items.

For the reasons set out below, items 1 and 3 of citation no. 1 are affirmed and item 2 is vacated. Item 1 of citation no. 2 is affirmed under the alternative cited standard, and the violation is classified as serious. Item 1 of citation no. 3 is vacated, and item 2 is affirmed.

### **Background**

On April 17, 2002, OSHA compliance officer Eric Reinhardt, accompanied by compliance officer Russ Wingate, began a general inspection of the Borgata Hotel and Casino under construction in Atlantic City, New Jersey (Tr. 22, 25). The Borgata was designed to be a 43 story building. At the time of Reinhardt's initial inspection, the Borgata was approximately 30 stories high (Tr. 22).

Reinhardt held an opening conference with Y. H. Tishman, the project manager for the site, and began a walkaround inspection. Reinhardt observed several employees at a height of approximately 300 feet, without apparent fall protection, working on the hoist tower complex adjacent to the Borgata. Reinhardt learned that the employees he observed on the hoist tower complex worked for AHC. He held an opening conference with AHC's foreman Julian Aleman, who told Reinhardt that AHC was using a safety monitoring system as a method of fall protection. Reinhardt told Aleman that a safety monitoring system could not be used with that type of construction (Tr. 36-27).

In 2001 AHC had been contracted to erect the hoist tower complex, a rectangular structure comprising six hoists. In high rise construction the upper floors of the new building are not accessible from interior stairways or elevators until near completion of the project. Contractors use exterior hoists to bring employees and material to the upper floors as the building progresses. In these hoist systems, hoist cars

ride along vertical steel masts from floor to floor. In this case, the hoist tower complex was approximately 3 feet away from the Borgata and was being constructed concurrently with the hotel (Tr. 25).

Four of the hoists were for personnel and two were for material. The side of the hoist tower complex facing the Borgata was connected to the Borgata by a series of ramps located on every building floor. The other three sides of the complex each contained two hoists. In the center of the structure was a platform where employees entered and exited the hoists and loaded and unloaded material (Tr. 35-39). AHC erected the hoist tower complex in stages, adding four or five levels after the Borgata had risen three floors above it. Each floor of the hoist tower complex was 6 feet, 6 inches, high while each floor of the Borgata was 8 feet, 9 inches high (Tr. 609, 811). AHC used spider ties every three floors to anchor the hoist tower to the Borgata (Tr. 669).

AHC constructed the hoist tower complex with two “four-pole” vertical structures, one at each end. AHC employees erected the four-pole structures and then added the middle portion that tied the two four-pole structures together (Tr. 63-66). The employees then “jumped” the hoist cars and the masts on which the hoist cars ride up and down. Employees fully decked the floor and installed gates on the hoist cars (Tr. 62, 67, 276, 283). AHC employees generally completed a jump of five levels in 6 to 10 days (Tr. 190, 224).

After discussing fall protection with foreman Aleman, Reinhardt also spoke by telephone with AHC Site Safety Director John Connelly and later met with him in person to discuss the use of fall protection (Tr. 27). Reinhardt was on the construction site on April 23, 2002, when he observed AHC employees using a boom hoist on a tractor trailer to lift bundles of plywood from the flatbed of the trailer. Reinhardt concluded that the slings were torn and damaged (Tr. 105-111). Reinhardt also determined that the outriggers on the boom hoist were not properly extended (Tr. 117-120). Reinhardt returned to the construction site on July 11, 2002, and observed several AHC employees working at heights of approximately 330 feet with no fall protection (Tr. 28).

Based upon Reinhardt’s inspection, the Secretary issued the three citations that gave rise to the present case.

#### **Citation No. 1**

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 § 1926.251(a)(6)**

The Secretary alleges that AHC committed a serious violation of § 1926.251(a)(6), which provides:

Each day before being used, the sling and all fastenings and attachments shall be inspected for damage or defects by a competent person designated by the employer. Additional inspections shall be performed during sling use, where service conditions warrant. Damaged or defective slings shall be immediately removed from service.

The citation alleges that, on April 23, 2002, "Liftex 20' by 4" nylon slings used to lift bundles of plywood were not inspected prior to use in which they had been torn or damaged to the point of exposing the red warning stitching." It is undisputed that the cited standard applies to slings being used by AHC at the time of Reinhardt's inspection.

Reinhardt testified that he observed AHC employees using an outrigger boom hoist (a crane) located on a tractor trailer to lift a bundle of plywood from the flatbed of a trailer onto the canopy roof of the hoist tower. Two slings were used to hoist the bundle of plywood, which weighed approximately 850 pounds. In good condition, the slings each were rated to hoist loads of up to 11,000 pounds (Tr. 238).

Reinhardt stated, "I could see that the strings [of the slings] were cut and threadbare" (Tr. 106). Exhibit C-5 comprises three photographs of the slings that bear out Reinhardt's testimony. Tears and worn areas are visible. Foreman Aleman was AHC's designated competent person on the site. He was on the trailer, assisting with the lift. Reinhardt asked Aleman if he had inspected the slings before attempting the lift. Aleman replied that he had not (Tr. 106).

AHC does not dispute the damaged condition of the slings, but argues that since the bundle of lumber weighed only 850 pounds and was double-slung with slings rated for a capacity of 11,000 pounds each, there was "only minimal risk" that one or both slings would break (Tr. 246). This argument is rejected. As Reinhardt explained, once the integrity of a sling's threads has been compromised, its lifting capacity cannot be calculated by looking at it. If a sling is damaged, it must be removed from service. The Secretary does not have to establish that the actual load exceeds the capacity of the damaged sling to prove

that a hazard has been created. The existence of the standard presumes that a hazard is present when the terms of the standard are not met. *Wright & Lopez*, 10 BNA OSHC 1108 (No. 76-256, 1981).

AHC also argues that the Secretary failed to prove that its employees were exposed to the hazard created by its failure to inspect the slings prior to use. Reinhardt testified that the hazard was that one or both slings could break, causing the load to fall suddenly. The load could fall on an employee standing underneath it, or the sudden movement of the boom resulting from the dropping of the load could cause the crane to tip over, crushing a nearby employee or employees (Tr. 115-116). Three employees were involved in hoisting the bundle of plywood. Aleman was on the trailer assisting with the rigging of the bundles. Matt Magenta was operating the crane. A third AHC employee was located on the canopy roof, unloading the plywood after it was hoisted (Tr. 239-240).

The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in the zone of danger. . . . The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.

*RGM Construction Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995) (citations omitted).

AHC argues that there was no exposure because Reinhardt admitted that he did not observe any AHC employees walk underneath the loads as they were lifted (Tr. 240). Aleman, however, was rigging the bundles on the flatbed trailer, and another AHC employee was removing the rigging on the canopy roof. If the slings failed at the beginning or the ending of the lift, these employees could be seriously injured. They would not have to be directly below the load to sustain injuries if the slings failed; 850 pounds of plywood sliding out of the slings would not fall in a neat pile. An area larger than the bundled load would be impacted if the plywood came loose from the slings. The Secretary has established that AHC's employees were exposed to the hazard of being crushed by the falling load of plywood.

Aleman was the AHC's foreman and the designated competent person on the site. Aleman himself was rigging the loads with the damaged slings. As a supervisory employee, his knowledge of the violation is imputed to AHC. See *Globe Contractors, Inc. v. Herman*, 132 F.3d 367, 373 (7<sup>th</sup> Cir. 1997) (foreman's

conduct as the competent person was properly imputed to the employer). The Secretary has established that AHC had actual knowledge of the use of the damaged slings.

The Secretary has proven that AHC committed a violation of § 1926.251(a)(6). She classified the violation as serious. In order to establish that a violation is “serious” under §17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

In the present case, the Secretary has shown that it was possible that the slings could fail while lifting the 850 pound bundles of plywood due to the visible cuts and tears in them. Both Aleman and the AHC employee on the canopy roof were in the zone of danger to be struck by the falling plywood. The violation is appropriately classified as serious.

**Item 2: Alleged Serious Violation of § 1926.251(e)(8)**

Section 1926.251(e)(8) provides, in pertinent part:

Synthetic web slings shall be immediately removed from service if any of the following conditions are present:

...  
(iii) Snags, punctures, tears or cuts[.]

This item refers to the same two slings that were at issue in item 1 above. It is undisputed that the slings were torn and cut, but were not removed from service (Exh. C-5).

The cited standard requires an employer to remove slings from service if they are damaged. Section 1926.251(a)(6), which was affirmed in item 1, requires a competent person to check the slings before use. The last sentence of the standard states: “Damaged or defective slings shall be immediately removed from service.” Compliance with § 1926.251(a)(6) requires (1) a daily inspection of the slings for damage or defects by a competent person and (2) immediate removal from service of any damaged or defective slings. Compliance with § 1926.251(e)(8) requires the immediate removal from service of any snagged, punctured, torn, or cut (in other words, damaged or defective) slings. Both standards require the removal of damaged or defective slings; compliance with § 1926.251(a)(6) necessarily assures compliance with § 1926.251(e)(8).

The hazards that the standards were designed to prevent are identical. Both standards seek to prevent loads rigged with defective slings from falling on employees. The Secretary recognizes the duplicative nature of the standards. In discussing the hazard created by the violation of § 1926.251(a)(6) under item 1 in her brief, the Secretary states, “For a thorough description of the hazard relating to the slings breaking, see the discussion of Citation 1 Item 2 *infra* (Tr. 115-116)” (Secretary’s brief, p. 62, footnote 91).

Violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well. *Flint Eng. & Const. Co.*, 15 BNA OSHC 2052, 2056-57 (No. 90-2873, 1997). Here, the abatement is the same for both standards: the removal of the slings from service.

Item 2 is found to be duplicative of item 1. Thus, item 2 is vacated.

**Item 3: Alleged Serious Violation of § 1926.550(a)(1)**

The Secretary alleges that AHC committed a serious violation of § 1926.550(a)(1), which provides:

The employer shall comply with the manufacturer’s specifications and limitations applicable to the operation of any and all cranes and derricks. Where manufacturer’s specifications are not available, the limitations assigned to the equipment shall be based on the determinations of a qualified engineer competent in this field and such determinations will be appropriately documented and recorded. Attachments used with cranes shall not exceed the capacity, rating, or scope recommended by the manufacturer.

The crane was a Palfinger Boom Hoist, Type PK32080, mounted on a Mack Truck. A crane’s outriggers extend horizontally, with rams attached to them that extend vertically to the ground. Reinhardt observed the crane in the morning and again in the afternoon on April 23 as AHC used it to hoist the bundles of plywood to the canopy roof. In the morning, Reinhardt noted that only one of the outriggers was fully extended. One was partially extended and the other two were not extended at all (Tr. 117-118, 129-130). In the afternoon, one of the outriggers was fully extended, two were partially extended, and one was not extended at all (Exh. C-6; Tr. 121-123, 251-252).

Cribbing (or dunnage) is supporting material that expands the surface area of the rams’ base plates to prevent the rams from being pushed directly into the surface on which the ram is positioned. In the morning, Reinhardt observed that the rams of the outriggers were extended, but there was no cribbing or dunnage beneath the rams’ base plates. All four of the rams were stuck in the soil (Tr. 118-119). By the

afternoon, AHC had placed boards underneath the rams, but one of them had snapped and the others were starting to bow (Tr. 120, 123-124).

Palfinger's manual for the crane states in pertinent part (Exh. C-7, pp.2-4):

3.2 Preparing for crane operation

...

3.2.2 Correct propping-up of vehicle

Crane operation is only permitted when it is properly supported.

...

Always keep an eye on the outriggers during extension!

The support plates sink in, what is to be done? Increase the propping area.

How?

By means of suitable bases such as steel plates which do not break under load.

The outrigger support of the crane is only designed to accommodate the load moment!

Take care not to lift the vehicle clear!

3.2.3 Extending the hydraulic outriggers

...

Before propping the vehicle, extend the outriggers to the full width, observing

-the yellow mark

-the danger area

Carry out movements one at a time and keep an eye on the outrigger rams.

AHC argues that the manual does not state that outriggers have to be used at all times when performing lifts with the crane, but that crane operation is only permitted "when it is properly supported." AHC contends that the Secretary has not shown that the crane was not properly supported without fully extended outriggers. Reinhardt contacted the manufacturer and received a load chart that permits the use of the crane with less than fully extended outriggers, but only if a load stability test is performed prior to the lift. AHC performed no such test (Exh. R-9: Tr. 254-256).

The Secretary has established that AHC failed to follow the manufacturer's specifications regarding the use of the outriggers. Reinhardt testified that the hazard created by AHC's failure to follow the manufacturer's specifications was that the crane could tip over, crushing foreman Aleman or crane operator Magenta (Tr. 124). As foreman, Aleman's knowledge that the crane with which he was working did not have all four of its outriggers fully extended is imputed to AHC.

The Secretary has established that AHC committed a serious violation of § 1926.550(a)(1). Item 3 is affirmed.

## **Citation No. 2**

### **Alleged Willful Violation of § 1926.501(b)(15)**

The Secretary alleges that AHC committed a willful violation of § 1926.501(b)(15), which provides:

Except as provided in § 1926.500(a)(2) or in § 1926.501(b)(1) through (b)(14), each employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system.

The citation alleges that on April 17, June 6, and July 11, 2002, employees “erecting a hoist tower complex approaching 330 feet above ground were not protected from falling.”

The first element the Secretary must establish is that the cited standard is applicable to the cited conditions. Section 1910.5(c) provides that “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.” General standards remain applicable where “they provide meaningful protection to employees beyond the protection afforded” by specific standards. *John Quinlan Enterprises*, 15 BNA OSHC 1780 (No. 91-2131, 1992).

#### **Was the hoist tower structure a scaffold?**

AHC argues that the hoist tower structure is a scaffold, and not a walking/working surface. AHC contends that one of the scaffolding standards is more applicable to the hoist tower complex, and thus the cited standard does not apply.

Section 1926.500(b) defines “walking/working surface” as:

[A]ny surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel, but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties.

Section 1926.45(b)(27) defines “scaffold” as:

[A]ny temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage) used for supporting employees or material, or both.

AHC contends that the hoist tower structure meets OSHA's definition of "scaffold" in every respect. The Secretary, vigorously and at length, disputes that the hoist tower structure is a scaffold. Her main argument in support of her position is: "Whether a structure is a scaffold is determined by its ultimate end use, not what happens during the erection process" (Secretary's brief, p. 15). The Secretary views the purpose of the hoist tower complex as being a means of materials and equipment transportation from the ground to the upper floors, and access to the Borgata.

In reviewing the language of the definition of "scaffold," it is difficult to see where the physical structure at issue in this case differs from the written description of a scaffold:

- (1) The hoist tower structure was temporary—it was dismantled after the completion of the Borgata;
- (2) It was elevated. The Secretary cited AHC's employees for working 330 feet in the air without fall protection;
- (3) It contained platforms which were supported by the supporting structure; and
- (4) The hoist tower structure was used for supporting employees and materials, both for AHC and for other employers on the site.

Despite the apparent fit of the hoist tower structure to the definition of scaffold, the Secretary argues that it is not a scaffold because she sees the structure primarily as a means "to get employees and materials from the ground to a floor of the building under construction (Tr. 172-173, 283)" (Secretary's brief, p. 15). The Secretary acknowledges that AHC's employees stood on the hoist tower complex while erecting it, but dismisses any significance to this activity.

OSHA area director Richard Mendelson was qualified as an expert in the scaffold standards. He testified for the Secretary. He acknowledged that the structure in question was a temporary elevated platform on which employees stood (Tr. 494-495), but argued that "[i]t never was a scaffold, the scaffold is defined by the end use" (Tr. 512). When asked where in the standard an employer could look to find direction regarding the end use of a structure, Mendelson responded, "Well, I don't know that it says that in the standard" (Tr. 512).

The Secretary and AHC disagree as to whether any work on the Borgata was actually performed by employees while standing on the hoist tower complex platforms. Mendelson testified that if it were determined that employees were performing work on the exterior of the Borgata while standing on the hoist tower structure, he would concede that the structure as a scaffold (Tr. 173, 523).

Dwayne Carter was the site safety manager for the Borgata project. He was called by the Secretary to testify (Tr. 282). During cross-examination, the following exchange took place (Tr. 289):

Q.: This structure, this four-pole structure, there were times that different trades stood on the structure and worked on the building exterior; isn't that true?

Carter: That's true.

Q.: Do you remember which trades they were?

Carter: They were multiple trades, every trade that was within the tower were there, mechanical trades suppliers.

The Secretary states, unconvincingly and without proof, that Carter's testimony that employees worked on the exterior of the building from the hoist tower platforms "must have been the result of a misunderstanding of the question or an erroneous transcription" (Secretary's brief, p. 16, footnote 28). The Secretary ignores Carter's later testimony, where he states that ironworkers "were installing the curtain work, glazing on the perimeter of the building" (Tr. 293). Carter's statement is corroborated by the another expert witness for the Secretary, Mohammad Ayub (qualified as an expert in structural engineering), who stated that ironworkers installed the curtain wall system while standing on the four-pole structure of the hoist tower (Tr. 691).

The definition of scaffold states that the platform be "used for supporting employees or material." It says nothing of being used for supporting employees while they perform work. This is an additional requirement, not found in the standard but imposed by the Secretary in this case. In his memorandum to the Secretary on the issue of whether the structure was a scaffold, Mendelson stated that he would not classify the hoist tower structure as a scaffold because its "end use" was not the support of employees or material, but as access to the building (Exh. C-10, p.2): "To the extent that the elevated platform supports employees or materials, such use is transient and incidental to the actual purpose of supporting the hoist and serving as a landing point." The definition of scaffold does not distinguish between "transient and incidental" support versus enduring and integral support. It only requires that the platform support employees and material, which the structure at issue did.

Despite her insistence on the transience and "end use" of the structure, the Secretary offers no case law, no letter of interpretation, and no directive supporting her position. The Secretary's declaration in this

case that the determination of whether a structure is a scaffold depends upon its “end use” is an attempt to make policy by fiat—an arbitrary decree with no basis in OSHA’s standards

In the present case, however, it is not necessary to determine whether a structure can be a scaffold if employees do not perform work from it. The record establishes that employees stood on the four-pole structure of the hoist tower complex while they performed work on the exterior of the Borgata. As noted above, Mendelson stated that under these circumstances, OSHA would consider the structure to be a scaffold.

Because there exists a particular scaffold standard that applies to the cited condition, the general fall protection standard cited by the Secretary is deemed inapplicable.

**Alternative Alleged Violation: § 1926.451(g)(2)**

In her complaint, the Secretary alleges in the alternative that AHC committed a willful violation of § 1926.451(g)(2), which provides:

Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

A crucial element of compliance with this standard is having a competent person determine the feasibility of providing fall protection. Section 1926.450(b) defines “competent person” as:

one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

AHC’s designated competent person on the site was its foreman, Julian Aleman (Tr. 178-179). Although several AHC employees attended competent person training and received certificates from the Scaffold Training Institute, there is no evidence that Aleman was among them (Exh. R-17; Tr. 638-639). Aleman’s testimony at the hearing demonstrates that he lacks basic knowledge regarding fall hazards and fall protection.

Aleman testified that the maximum allowable free fall distance is 35 feet. (Tr. 787). It is 6 feet.<sup>1</sup> He stated that the maximum allowable arrest force permissible on an employee wearing a full body harness is “[w]ith everything, I don’t know, maybe 500 pounds or so” (Tr. 786). It is 1,800 pounds.<sup>2</sup> When asked what deceleration distance is permissible on an employee in a fall (it is 3½ feet<sup>3</sup>), Aleman declined to give a specific answer; his response indicates a refusal to consider basic safety practices (Tr. 786-787): “You don’t want to fall. What do you, you don’t want to think about that fall, you know. You fall with a retractable either way it’s going to snap you, and you’re going to end up crippled. Because there’s certain, because it locks up, it’s going to stop you from falling. And as you’re falling anyway, you’re gaining, you know, speed and weight. So you know I wouldn’t, wouldn’t want to even think about something like that.”

Aleman, who would not want to even think about the permissible deceleration distance, was the employee designated by AHC as its competent person. His testimony shows he fails to grasp elementary safety principles. He is a foreman who oversees crews routinely working at heights of 300 feet or more, and he is untrained in the standards designed to protect them.

Aleman also demonstrated an inability to identify existing and predictable hazards. AHC performed a mockup in its New York yard to test the use of lanyards and retractables for fall protection. The company videotaped the mockup (Exh. J-3). Aleman identified the hazards in the mockup as tripping, employees crossing over each other, the pendulum effect, the retractable locking up so that the employee would have to constantly disconnect and reconnect it, and materials getting hung up in the lines (Tr. 782-783). Martin Lalonde was a witness for the Secretary. He was qualified as an expert in fall protection. Lalonde noted a number of obvious hazards that occurred during the mockup that Aleman failed to identify, including the use of a non-locking connector, excessive free fall, wrong positioning of a D-ring, and the wrong positioning of a chest strap (Tr. 868-879).

The Secretary has established that Aleman is not qualified to be a competent person within the meaning of § 1926.450(b). Because § 1926.451(g)(2) requires that a competent person determine the

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<sup>1</sup> § 1926.502(d)(16)(iii)

<sup>2</sup> § 1926.502(d)(16)(ii)

<sup>3</sup> § 1926.502(d)(16)(iv)

feasibility and safety of providing fall protection, AHC failed to comply with the terms of the cited alternative standard. AHC was in violation of § 1926.451(g)(2).

### **Willfulness**

The Secretary alleges that AHC's violation of this standard is willful. A willful violation is one committed:

with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. . . . A willful violation is differentiated by a heightened awareness—of the illegality of the conduct or conditions— and by a state of mind—conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard.

*Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987).

“An employer may defend against a showing of willfulness by producing evidence tending to show that it acted in good faith with respect to the requirements of the standard at issue.” *Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1920 (No. 96-0593, 1999). “The Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.” *Propellex Corp.*, 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999). A willful charge is not justified if an employer has made an objectively reasonable, good faith effort to comply with the standard or to eliminate a hazard even though the employer's efforts are not entirely effective or complete. *Keco Industries, Inc.*, 13 BNA OSHC 1161, 1169 (No. 81-263).

AHC has a written safety program. It retains the services of a John Connelly, a full-time site safety director, to implement and enforce its program (Tr. 634). AHC trains employees in safety at the time they are hired and then periodically throughout the year (Exhs. R-21 and R-22; Tr. 710). Several of its foremen had received competent person training (Exh. R-17). While there is no evidence that Aleman attended competent person training, the record does show that he is a member of Local 1536 Hoist Carpenter's Union, and that he has 18 years of experience in that field (Tr. 179).

Section 1926.451(g)(2) requires a competent person to determine the feasibility of using fall protection. Aleman considered himself to be a competent person. Aleman overestimated his capabilities and was unaware that he lacked the knowledge required to qualify him as a competent person. His belief,

while erroneous, does not support a finding that Aleman voluntarily disregarded the requirements of the Act, or that he was indifferent to employee safety. Nor did AHC act willfully in designating Aleman as a competent person. So designating an employee who is unqualified to act as a competent person is a violation of the standard, but it does not show a “heightened awareness” of the violation. The Secretary cannot rely on the mere existence of a violation to establish willfulness. *Hartford Roofing Co.*, 17 BNA OSHC 1361, 1363 (No. 92-3855, 1995). Based upon the record, it is determined that the Secretary failed to establish that AHC’s designation of Aleman as its competent person was so unreasonable that its state of mind was one of conscious disregard or plain indifference.

The hazard created by AHC’s violation of § 1926.451(g)(2) is that AHC did not accurately determine the feasibility of using fall protection, exposing employees to falls of approximately 330 feet. Such falls would result in death. The violation is serious.

### **Citation No. 3**

#### **Item 1: Alleged Repeated Violation of § 1926.501(b)(1)**

The Secretary alleges that AHC committed a repeated violation of § 1926.501(b)(1), which provides:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

The citation alleges that this violation occurred on the 33<sup>rd</sup> floor of the hoist tower complex, where employees were installing access gates at the edge of the platform without the use of fall protection.

As noted in the discussion of citation no. 2, the hoist tower complex is a scaffold within the meaning of § 1926.450(b). It is not a walking/working surface.

Section 1926.451(g)(1) addresses fall protection for employees working on scaffolds more than 10 feet above a lower level.<sup>4</sup> This more specific standard applies to the cited condition. Unlike citation no. 2,

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<sup>4</sup> Section 1926.451(g)(1) provides:

Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(I) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

the Secretary did not cite a scaffolding standard in the alternative to the walking/working surface standard. Section 1926.501(b)(1), as cited by the Secretary, is inapplicable to the cited condition. Item 1 of this citation is vacated.

**Item 2: Alleged Repeated Violation of § 1926.501(b)(3)**

Section 1926.501(b)(3) provides:

Each employee in a hoist area shall be protected from falling 6 feet (1.8 m) or more to lower levels by guardrail systems or personal fall arrest systems. If guardrail systems, [or chain, gate, or guardrail] or portions thereof, are removed to facilitate the hoisting operation (e.g., during landing of materials), and an employee must lean through the access opening or out over the edge of the access opening (to receive or guide equipment and materials, for example), that employee shall be protected from fall hazards by a personal fall arrest system.

The citation alleges that an “[e]mployee receiving material from a material hoist approximately 330' above ground w[as] not protected from falling, on or about 4/17/02.”

On April 17, Reinhardt observed an AHC employee standing on the hoist tower structure as he reached for a plank being hoisted by a winch. The material hoist was above the employee’s head. An employee on the ground tied a manila rope to the plank and then operated the winch to lift the plank to the employee standing in the hoist area. The exposed employee was standing on an unsecured 2x10 inch plank and was required to reach out in order to grab the plank being hoisted to him. The employee was not using any type of fall protection (Exh. C-1, p. 4; Tr. 45-46, 98-102, 684-685, 751).

AHC contends that the Secretary failed to establish that the area in which the AHC employee stood was a hoist area. AHC is correct in pointing out that there is no definition of “hoist area” in the Act. The plain meaning of the language used in the cited standard, however, indicates that a hoist area is an area to which loads are being lifted. The standard is designed to protect employees who are required to assist in landing the load, which is precisely the situation in the present case.

Reinhardt observed the AHC employee in question reaching out for a plank that was being hoisted to the level on which he stood. The employee was in a hoist area, and he was not protected by guardrails or by a personal fall arrest system, as required by the § 1926.501(b)(3). The employee was exposed to a fall of over 300 feet. The employee was working in plain view, such that AHC had knowledge of the violative conduct. The Secretary has established a violation of § 1926.501(b)(3).

### **Repeat Classification**

The Secretary alleges that this is a repeated violation. “A violation is repeated . . . if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.” *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Under *Potlatch*, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard.

The Secretary previously cited AHC for a violation of § 1926.501(b)(3) under item 2 of citation no. 1 issued on March 19, 2001. This citation was resolved by an approved settlement agreement, in which there was no reduction in the Secretary’s proposed penalty of \$2,500.00 for the violation (Exh. J-5, Exh. C-3; Tr. 102-103). A judge’s order approving a settlement agreement establishes a violation of the cited standard for the purposes of a repeated violation. *Stone Container Corp.*, 14 BNA OSHC 1757 (No. 88-310, 1990).

The Secretary has established that AHC committed a repeated violation of § 1926.501(b)(3).

### **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 is the principal factor to be considered.

AHC employed approximately 110 employees at the time of the inspection (Tr. 97). The Secretary had cited AHC for OSHA violations within the 3 years prior to the instant inspection (Tr. 96-97). AHC demonstrated good faith in having a written safety program and in hiring a full-time site safety director.

The gravity of the violations of § 1926.251(a)(6) and § 1926.550(a)(1) (items 1 and 3 of citation no. 1, respectively) is moderate. The load being lifted by the crane weighed approximately 850 pounds. This relatively light weight lessened the probability that the slings (which were double-slung around the load) would both break or that the crane would tip due to the outriggers not being fully extended. The Secretary proposed penalties of \$4,000.00 each for item 1 and item 3. It is determined that a penalty of \$ 2,500.00 is appropriate for each of these items.

The gravity of the violation of § 1926.451(g)(2) (item 1 of citation no. 2) is very high. By failing to designate a qualified competent person to determine the feasibility and safety of providing fall

protection for employees erecting the hoist tower structure, AHC failed to assure that its employees were provided with adequate fall protection. AHC's specialty is erecting hoist tower complexes. It requires its employees to work at extreme heights on a routine basis. Designating an inadequately trained employee as a competent person and allowing him to act as foreman over a crew of workers exposed those workers to serious fall hazards. The Secretary proposed a penalty (under the willful classification) of \$63,000.00. It is determined that an appropriate penalty is \$ 7,000.00 for this violation.

The gravity of the violation of § 1926.501(b)(1) (item 2 of citation no. 3) is also very high. AHC provided no fall protection to an employee perched on an unsecured 2x10 inch plank at a height of over 300 feet, working in a job that required him to reach out to hoisted loads. The Secretary proposed a penalty of \$ 8,000.00. It is determined that the proposed penalty 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**

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of citation no. 1, alleging a serious violation of § 1926.251(a)(6), is affirmed, and a penalty of \$ 2,500.00 is assessed;
2. Item 2 of citation no. 1 , alleging a serious violation of § 1926.251(e)(8), is vacated, and no penalty is assessed;
3. Item 3 of citation no. 1, alleging a serious violation of § 1926.550(a)(1), is affirmed, and a penalty of \$ 2,500.00 is assessed;
4. Item 1 of citation no. 2, alleging in the alternative a willful violation of § 1926.451(g)(2), is affirmed as serious, and a penalty of \$ 7,000.00 is assessed;
5. Item 1 of citation no. 3, alleging a repeated violation of § 1926.501(b)(1), is vacated and no penalty is assessed; and
6. Item 2 of citation no. 3, alleging a repeated violation of § 1926.501(b)(3), is affirmed, and a penalty of \$ 8,000.00 is assessed.

/s/ \_\_\_\_\_  
COVETTE ROONEY  
Judge

Date: April 5, 2004  
Washington, D.C.