

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant
v.
International Masonry, Inc.
Respondent.

OSHRC Docket No. **10-0148**

Appearances:

Patrick L. DePace, Esquire, Office of the Solicitor, Cleveland, Ohio
For Complainant

Timothy T. Tullis, Esquire and Eric B. Travers, Esquire, Kegler, Brown, Hill & Ritter, LPA, Columbus, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

International Masonry, Inc. (IMI) is a masonry contractor in Columbus, Ohio. On July 1, 2009, three IMI masons fell from a tubular welded frame scaffold, approximately 37 feet, on the east side of the IGS Energy headquarters building, under construction, in Dublin, Ohio. The masons were standing on a platform, supported by a modified outrigger corner bracket, when it collapsed. One mason died and another was seriously injured. As a result of an investigation by safety compliance officers with the Occupational Safety and Health Administration (OSHA), IMI received serious, willful, and other than serious citations on December 28, 2009. IMI timely contested the citations.

Serious Citation No. 1 alleges IMI violated 29 C.F.R. § 1910.178(l)(2) (iii) (item 1a) for failing to properly train employees to operate forklifts; 29 C.F.R. § 1910.178(l)(4)(iii) (item 1b) for failing to provide refresher forklift training; 29 C.F.R. § 1926.451(f)(4) (item 2) for installing a damaged corner bracket on the scaffold; 29 C.F.R. § 1926.451(g)(4)(i) (item 3) for installing the

top rail of the guardrail system at 30 inches; 29 C.F.R. § 1926.452(c)(5)(iii) (item 4) for utilizing scaffold brackets to support a hoist used to lift concrete headers; 29 C.F.R. § 1926.1051(a) (item 5a) for failing to provide a stairway or ladder for employees' access to the scaffold platform; and 29 C.F.R. § 1926.1053(b)(9) (item 5b) for failing to keep clear the area around the top and bottom of a ladder. The serious citation proposes total penalties of \$ 28,000.00.

Willful Citation No. 2 alleges IMI violated 29 C.F.R. § 1926.451(a)(6) (item 1) for modifying and using a side bracket contrary to the manufacturer's design; 29 C.F.R. § 1926.451(c)(1)(ii) (item 2a) for failing to secure the tubular welded frame scaffold; 29 C.F.R. § 1926.451(c)(1)(iii) (item 2b) for failing to use ties, guys, or braces, where outriggers applied eccentric loads to the scaffold. The willful citation proposes total penalties of \$ 112,000.00.

Other than serious Citation No. 3 alleges IMI violated 29 C.F.R. § 1904.29(b)(1) (item 1) for failing to complete the OSHA Form 300 Log or equivalent for calendar years 2008 and 2009. The other-than-serious citation proposes a penalty of \$ 800.00.

The hearing was held on October 3 thru 6, 2011, in Columbus, Ohio. The parties stipulated jurisdiction and coverage (Tr. 4). The Secretary withdrew Citation No. 1, items 1a and 1b (Tr. 5). By Amended Notice of Withdrawal dated December 20, 2011, the Secretary also withdrew Citation No. 1, item 3, and Citation No. 3, item 1. The parties filed post hearing briefs on April 23, 2012.

IMI denies the alleged violations, the willful classifications, and the proposed penalties. Also, IMI argues that the OSHA inspection was "a rush to cite" and that the three employees who fell were engaged in unpreventable employee misconduct (Tr. 33-34).¹

For the reasons discussed, Citation No. 1, items 2 and 5b, and Citation No. 2, items 2a and 2b are vacated. Citation No. 1, items 4 and 5a and Citation No. 2, item 1 are affirmed. Citation No. 1, item 5a is affirmed as other than serious and Citation No. 2, items 1 and 2a are affirmed as serious. A total penalty of \$ 4,000.00 is assessed.

The Accident

IMI is one of the largest masonry contractors for commercial projects in central Ohio. It is a family owned business started by Mr. John Casey and a former partner over thirty-six years ago.

¹Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

IMI is currently managed by Mr. Casey's three sons. The company's office is located in Columbus, Ohio. In 2009, the company employed approximately 70 employees. It currently employs 47 employees. IMI takes pride that many of its employees are related and the average length of employment is 17 years (Tr. 263, 265, 310-311, 572).

IMI's masonry work is generally performed from scaffolds which it purchased from scaffold manufacturers such as Waco. The scaffold components are stored at its yard in Columbus, Ohio. IMI employees deliver, erect, and dismantle the scaffolds for each project. The scaffold components include outrigger side brackets used to support additional planking off the main scaffold as well as a modified outrigger corner bracket used to support planking in the inside corner of a building (Tr. 312, 322).

A side bracket is a right triangular-shaped piece of angle iron. The vertical side, approximately 2 feet in length, has a hook and u-bracket (ears) at the ends to attach to the main scaffold. The horizontal side of the bracket, also 2 feet long, supports two 10-inch wood planks (platform). The third side approximately 34 inches long, provides support for the end of the horizontal side and transfers the weight of the platform and other loads to the main scaffold's vertical support (Exh. C-10; Tr. 190-191).

IMI constructed the corner bracket by welding together two outrigger side brackets at a 90 degree angle. Since 1977, IMI has used a "modified" outrigger corner bracket when working at the inside corner of a building and when the outrigger scaffold is turned.² The side bracket with the hook and u-bracket is placed against the main scaffold to support the weight of the platform and other loads. The other side bracket (without the hook and u-bracket), referred as the safety catch, is meant to prevent the planks from becoming unsecure and tipping. It does not directly support the weight of the platform and other loads. There are left and right modified corner brackets depending on the inside corner (Exh. C-18, Tr. 139, 213, 315, 531).

In 2009, Messer Construction contracted IMI to install brick and stone veneers on the new IGS Energy headquarters building in Dublin, Ohio. The project began in November 2008. IMI

²During the hearing, the modified corner bracket was also referred to as an "outrigger bracket," "corner outrigger," "modified outrigger bracket," and "modified bracket." Since the accident, IMI has ceased using the modified outrigger brackets (Tr. 146, 556).

began its veneer work on March 16, 2009. IMI's approximate 30 employees, masons and laborers, were supervised by the project supervisor (Exh. C-4; Tr. 61-62, 171, 222).

On July 1, 2009, IMI's welded frame scaffold was approximately 120 feet long and 45 feet high along the east side and in the northeast inside corner of the building.³ Waco had manufactured the scaffold components. The scaffold in the northeast corner (north tower) was one scaffold section long (7 feet long) and began at Column 5. It was connected at a 90 degree angle to the east scaffold. The north tower scaffold was incomplete and not secured to the building (Exhs. C-5, C-6, C-7; Tr. 72, 171, 173, 175).

The project supervisor assigned seven masons to install stone veneer on Columns (piers) 5.5 through 8.5 on the building's east side. Before starting work, the project supervisor had inspected the east side scaffold and placed numbers on the columns to assist the masons. He did not inspect the north tower scaffold at Column 5. A barricade was placed across the east side main scaffold's platform before Column 5. The masons worked on an outrigger platform which extended along the main scaffold to the north tower scaffold. The outrigger platform was not barricaded (Tr. 148-149, 151-152, 192).

After finishing the veneer work, three masons began installing flashing. The masons continued working from the outrigger platform. The flashing work took the masons to Column 5 at the north tower scaffold where IMI's modified corner bracket had been installed (Exh. C-9; Tr. 595).

At approximately 10:00 a.m., the platform supported by the modified corner bracket at Column 5 collapsed, causing the three masons to fall from the scaffold. The platform was approximately 37 feet above the first floor concrete slab. The masons were experienced and had worked for IMI more than 20 years. The project supervisor, who was working on the north side of the building, did not see the accident (Tr. 79, 91, 161, 300).

IMI's investigation concluded that the modified corner bracket was a factor in causing the accident. Three possibilities for the collapse were identified: (1) the corner bracket was improperly installed, (2) the corner bracket was damaged when used, or (3) the planks bounced causing the corner bracket to loosen (Tr. 332-333, 878-879). IMI denies the corner bracket was

³Although the scaffold has been identified as located on the northeast or west, the parties agree the alleged OSHA violations occurred on the east side of the IGS building (Tr. 518).

damaged when installed.

As a result of the accident, OSHA compliance officers initiated an investigation. An OSHA engineer concluded that the modified corner bracket collapsed because it was not correctly installed and the weight of the platform load was transferred against the u-bracket (ears) as opposed to the main scaffold, causing the load to slide off the scaffold's upright. He stated that the u-bracket was designed to keep the bracket from moving left or right but not to bear direct loads (Exh. C-23; Tr. 363, 369).

OSHA's investigation concluded that the modified bracket was bent and cracked and that it was not designed by a qualified person. OSHA also found that the north tower scaffold was not braced and tied to the building and that an improperly supported hoist at the other end of the east side scaffold was used to lift concrete headers (precast panels). Inside the building, on the sixth floor, the inspectors observed stacked wooden pallets used by employees to access the east side scaffold through the window opening (Exhs. C-12, C-13, C-15, C-16; Tr. 372, 374).

IMI received the OSHA citations at issue on December 28, 2009 and timely filed its notice of contest.

DISCUSSION

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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

IMI does not dispute the application of OSHA's scaffold standards to its project. The scaffold along the east side of the building was a tubular welded frame scaffold.

Reasonableness of OSHA Inspection

IMI alleges OSHA's issuance of the citations was "a blind rush to cite" because the compliance officers were "getting heat" from their supervisors due to the media coverage of the accident (Tr. 296-297, 735-736). As evidence, IMI points to the Secretary's withdrawal of Citation no. 1, items 1a and 1b at the hearing and Citation no. 1, item 3 and Citation no. 3, item 1 two months later. IMI claims there have been 59 prior OSHA inspections; none of which

identified a problem with the modified corner bracket. Also, OSHA's news release after the accident caused "great damage to IMI's reputation and financial stability." Since the accident, IMI has lost business and approximately one-third of its work force. During the informal conference which took approximately "two minutes", IMI claims OSHA acted in bad faith by "flatly" refusing to discuss any of the citations (IMI Post-Hearing Brief, pp. 10-12).

Section 8(a) of the Occupational Safety and Health Act (Act) provides that an OSHA inspection of an employer's worksite would be conducted in a reasonable manner, at reasonable times, and within reasonable limits. To establish the defense to the issuance of citations, an employer must present evidence of unreasonable conduct by OSHA in substantially failing to comply with the provisions of § 8(a), and such noncompliance substantially prejudiced the employer. *Gem Industrial, Inc.*, 17 BNA OSHC 1185 (No. 93-1122, 1995).

IMI's claim of unreasonable conduct by OSHA is rejected. The Secretary has broad prosecutorial discretion in deciding the prosecution of violations of the Act. *DeKalb Forge Co.*, 13 BNA OSHC 1146, 1153 (No. 83-299, 1987). The length of the inspection, the issuance or withdrawal of citations, and the refusal to settle citations at the informal conference are within her discretion and are not shown to have been motivated for harassment purposes nor have a harassing effect. While sympathetic to IMI's loss of reputation, financial stability, business and employees, OSHA is not responsible for the media coverage of a fatality and the effect of that coverage on an employer's business. It was a tragic accident with the death of one employee without an obvious cause. Also, it is noted the country has been in a severe depression, particularly in the construction industry.

Although IMI disagrees with the citations at issue and the fact that several of the alleged violations were later withdrawn or vacated as a result of the hearing, there is no showing that OSHA lacked reasonable justification for their issuance. The Secretary's withdrawal of citation items may reflect the evaluation of the available evidence and is not necessarily a showing of bad faith. Also, there is no showing that the modified bracket was the subject of any of the 59 prior OSHA inspections or that the compliance officers even saw the modified brackets on site. Such brackets are only used in inside corners.

The record lacks evidence of animus or prejudice. OSHA's inspection took almost six months and the citations were issued barely within the Act's six-month statute of limitations.

Clearly, it was not a “rush to cite.” Also, there is no showing IMI would not have otherwise received the same citations at issue.

SERIOUS CITATION NO. 1

Item 2 - Alleged Serious Violation of § 1926.451(f)(4)

The citation alleges that “On or about July 1, 2009, at the above addressed jobsite, on the northeast building face of the scaffold at approximately 37 feet above the 1st floor slab, employees were performing masonry operations from a modified outrigger bracket that was cracked and bent prior to erection, thus contributing to the subsequent collapse.”

Section 1926.451(f)(4) which applies to the use of scaffold components, provides:

Any part of a scaffold damaged or weakened such that its strength is less than that required by paragraph (a) of this section shall be immediately repaired or replaced, braced to meet those provisions, or removed from service until repaired.

The three masons were on the platform supported by the modified corner bracket when it collapsed on July 1, 2009. The bracket was found, after the accident, bent and cracked (Exh. C-18). The Secretary alleges the corner bracket was installed on the scaffold in the damaged condition. The OSHA engineer testified the damage to the bracket pre-existed the collapse based on observing rust and mortar powder inside the cracked metal (Tr. 372-373).⁴

The bracket was found bent and cracked after falling 37 feet onto concrete. The Secretary has alleged that it collapsed because of the inappropriate transfer of the platform load against the bracket’s hook and u-bracket (ears). Such load transfer could have contributed to damaging the bracket in the manner observed by the engineer. None of the witnesses testified the bracket was damaged prior to its installation on the scaffold.

The engineer’s opinion regarding the pre-existing condition of the bracket is given little weight. He even testified, “the U shaped/ear at bottom of the mod bracket was bent at some point in time, and in my opinion, it’s impossible to state to a reasonable degree of engineering certainty how much of the U shape was bent prior to the fall – I agree that 99% of the bend could have occurred during the fall” (Tr. 503). Also, because of the amount of time that passed before he was

⁴The Secretary’s second contention that “the modification of the bracket done by IMI rendered the bracket weakened to such a degree that it could not bear the intended load, even if there was no pre-existing damage” is rejected as not properly plead by the Secretary and beyond the scope of the citation. The citation alleges the cracked and bent condition of the modified bracket existed when installed on the scaffold. The issue regarding the design of the modified bracket is alleged in Citation 2, item 1 which is discussed later.

able to observe the bracket, its condition could have changed. The engineer first saw the damaged corner bracket on July 21, 2009 (three weeks after the accident) (Exh. C-23; Tr. 397-398). Also, it is noted that the corner bracket was the only component OSHA identified as damaged or bent in the extensive scaffold system along the building's east side.

The bracket, according to IMI's protocol, would have been inspected for damage numerous times before installation. It was inspected at the shop when loaded on the truck, at the job when unloaded from the truck, and on the scaffold when installed. The project supervisor also inspected the scaffold each morning before employees were permitted on the scaffold (Tr. 66, 148, 301, 334-335, 526). Moreover, the employee who erected the scaffold and the employee who delivered the components to the project, testified that the corner bracket at issue was in good condition when delivered and installed (Tr. 644, 674). Also, there was no reason to use a damaged component because other modified corner brackets were available for use at the project on July 1, 2009 (Tr. 302).

The record also fails to show the strength of the modified bracket, damaged or bent, was not "capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it." *See* § 1926.451(a). OSHA performed no strength test on the bracket because according to the engineer, it was a stability problem with the way the bracket was located. IMI tested the bracket by adding cinder blocks on a plank supported by the bracket without a failure (Tr. 392-393, 491, 740-741).

The alleged violation of §1926.451(f)(4) is not established.

Item 4 - Alleged Serious Violation of § 1926.452(c)(5)(iii)

The citation alleges that "On the Dublin, Ohio IGS site, the south end lower scaffold the employer used a chain hoist to lift concrete headers weighing up to 346 pounds. The chain hoist was supported on two outrigger brackets with a nylon sling supported by two scaffold planks. The concrete headers were being lifted to the upper section of the scaffolding, about 15 feet off the ground. These scaffold brackets were designed for supporting personnel and not materials."

Section 1926.452(c)(5)(iii) which applies to brackets used to support cantilevered loads, requires that the brackets:

Be used only to support personnel, unless the scaffold has been designed for other loads by a qualified engineer and built to withstand the tipping forces caused by those other loads being placed on the bracket-supported section of the scaffold.

The suspended chain hoist, observed during the OSHA inspection, was held by a nylon sling wrapped around two planks. The planks were supported by two outrigger side brackets. The IMI employees were using the hoist to lift concrete headers onto a scaffold platform, approximately 15 feet above the ground. Each header weighed 346 pounds. The hoist had been set up the day prior to the accident. The project supervisor was aware of the hoist but testified that he did not know it was being used (Exhs. C-12, C-13, C-14, C-30; Tr. 123-125, 210).

There is no dispute the side brackets were not used to support personnel. The use of the brackets to support the weight of the hoist and concrete headers is a violation of §1926.452(c)(5)(iii) unless the scaffold was designed for other loads by a qualified engineer. As an exception, the burden is on IMI to show the scaffold was designed by a qualified engineer “and built to withstand the tipping forces caused by the other loads.” *Kasper Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000), *aff’d* 268 F.3d 1123 (D.C. Cir. 2001).

The brackets at issue were manufactured by Waco. Waco, in its publication, instructs purchasers that brackets “are to be used as work platforms only and shall not be used for storage of materials or equipment” (Exh. C-3, p.15). IMI was using the brackets to support a hoist for lifting 346-pound concrete headers. The brackets were designed to support a work platform for personnel. The record fails to show that the brackets were designed to support loads lifted by a suspended hoist. There is no showing that a “qualified engineer” approved the bracket’s use in lifting suspended loads. There were no tests performed as to the tipping forces caused by suspending such loads from the brackets. Although each bracket was rated by the Waco for 800 pounds, the tipping forces caused by the suspended loads were not shown considered by a qualified engineer. Such suspended loads held by a hoist needed further analysis.

IMI’s project supervisor claims he did not see the hoist in use. However, he knew it was in place and should have known, with reasonable diligence, the employees were using the hoist to lift loads and the hoist was supported by two side brackets. The hoist was in plain view and subject to the project supervisor’s morning inspections of the scaffold (Tr. 691-692, 726, 773). The project supervisor’s knowledge is imputed to IMI. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (Nos. 86-360 and 86-469, 1992). Two employees were observed using the hoist and exposed to the unsafe condition.

IMI's violation of § 1926.452(c)(5)(iii) is established as serious.⁵ An employee could have been seriously injured if the brackets supporting the hoist and concrete header collapsed. IMI, through its project supervisor, should have known the hoist was used to lift concrete headers and not support personnel.

**Items 5a and 5b -
Alleged Serious Violations of §§ 1926.1051(a) and 1926.1053(b)(9)**

Item 5a alleges that “On the sixth level of the Dublin, Ohio IGS building where the employer set up an access to the scaffold employees had to step up onto three pallets, 15 inches high, then step up over a wire rope guardrail, 26 inches high above the pallets, then step out 15 inches then down nine inches onto a window ledge that was 31 ½ inches high from the floor to gain access to a portable ladder used to access/egress the tubular welded frame scaffold.”

Section 1926.1051(a) provides:

A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

Item 5b alleges that “On the fourth level of the building where the employer set up access to the tubular welded frame scaffold, employees were stepping over the top of a wire rope guardrail and stepping down onto a ladder to gain access/egress to the ladder on the scaffold.”

Section 1926.1053(b)(9) provides:

The area around the top and bottom of ladders shall be kept clear.

On the sixth floor of the IGS building, IMI employees used three stacked pallets, 15 inches high, to access a ledge (window sill), 16.5 inches above the pallets in order to reach a ladder outside which accessed the east scaffold platform below. The window ledge was 31.5 inches above the floor. The project supervisor knew employees were using the pallets to access the ledge (Exhs. C-15, C-16, C-17; Tr. 126, 777).

IMI's argument that there was no break in elevation greater than 19 inches is rejected. The height of the window ledge from the floor was 31.5 inches. The standard requires “a ladder or stairway” where there is a break in elevation of more than 19 inches. The stacked pallets do not

⁵ A violation is serious under § 17(k) of the Act, if there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation. 29 U.S.C. § 666(k).

meet the requirements of a ladder or stairway as described in 29 C.F.R. § 1926.1052 and § 1926.1053. The pallets do not provide a suitable platform because of the gaps between the slats (Exh. C-15).

IMI's violation of § 1926.1051(a) (item 5a) is established as other than serious. Although the stacked pallets do not meet the requirements of a ladder or stairway, the pallets were laid flat on the cement floor and provided a large surface for employees to stand while accessing the ledge. There was no showing of employees' injuries or that employees were exposed to possible serious injury or death.

With regard to item 5b, after accessing the window ledge on the sixth floor, employees were required to step over a wire rope (guardrail) that ran above the window ledge. The employees had to step over the wire to access the ladder to the scaffold platform outside (Exhs. C-15, C-16; Tr. 779). The wire rope was approximately 9 inches above the window ledge and functioned as the top guardrail.

The requirement of keeping clear the area around the top and bottom of the ladder as addressed by § 1926.1053(b)(9) was not shown to apply to part of a guardrail system. A guardrail is not comparable to construction debris and material which the standard attempts to prevent. As noted by IMI, OSHA Directive CPL 2-1.23 states "that the construction scaffolding standard does not prohibit climbing through guardrails as a means of access to the scaffold." The compliance officer conceded no violation (Tr. 782).

The violation of § 1926.1053(b)(9) (item 5b) is not established.

WILLFUL CITATION NO. 2

Item 1 - Alleged Willful Violation of § 1926.451(a)(6)

The citation alleges that "On or about July 1, 2009, at the above addressed jobsite, on the northeast building face of the scaffold at approximately 37 feet above the 1st floor slab, employees were performing masonry operations from a tubular welded frame scaffold that included an outrigger side bracket that was modified and used contrary to its original manufacturer design."

Section 1926.451(a)(6) provides:

Scaffolds shall be designed by a qualified person and shall be constructed and loaded in accordance with that design. Non-mandatory Appendix A to this subpart contains examples of criteria that will enable an employer to comply with paragraph (a) of this section.

The modified outrigger corner bracket was constructed by IMI consists of two side brackets welded together at a 90-degree angle. The bracket is only used in inside corners where the ends of the platform planks meet from two directions. The side brackets were purchased from Waco, a well-known scaffold manufacturer.

In IMI's design, one side bracket is intended to support the load (platform and personnel) and the other bracket, referred to as the "safety catch" is intended to prevent the platform from tipping off the scaffold. According to IMI, employees are trained to place the wood planks on the support bracket and not the safety catch bracket.

The modified bracket has been used by IMI for 35 years without incident. IMI's vice president testified that he "has no specific knowledge who designed this bracket (Tr. 498, 529). It is unknown who designed the modified corner bracket (Tr. 118, 343). According to IMI, other masonry contractors use similar modified corner brackets (Exh. R-8; Tr. 244-245).

There is no dispute the modified bracket is covered by the cited standard. The platform supported by the outriggers is a scaffold within the standard. *See* § 1926.450(b) *Definitions*. It is not known who designed the corner bracket for IMI or his qualifications. A "qualified person" is defined at 29 C.F.R. § 1926.450(b), *Definitions*, as;

One who, by possession of a recognized degree, certificate or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his/her ability to solve or resolve problems related to the subject matter, the work, or the project.

IMI argues that the standard does not prohibit modification of a scaffold component. OSHA agrees (Exh. R-1, p. 79; Tr. 785). Also, IMI contends that the intended use of the modified bracket did not change the designed function or use of the Waco side bracket. When the corner bracket is used as intended there is no weight placed against the ears. The safety catch is only necessary to prevent a plank from tipping. IMI claims the project supervisor based on his experience in erecting scaffolds, was a qualified scaffold person.

IMI's argument regarding the qualification of its project supervisor as a qualified person is immaterial. The project supervisor did not design the modified bracket. The issue is not the erection of the scaffold. The corner bracket was already in use when he was hired by IMI (Tr. 137-138). There is no showing that Waco or other manufacturers of the side bracket has

approved IMI's modified bracket (Tr. 118, 530). IMI agrees there were no engineering analysis performed on the modified bracket (Tr. 529).

The modified bracket used by IMI was not purchased in that modified condition from Waco (Tr. 118, 250, 529, 784, 865). Rather, the modified bracket was changed from the way it was purchased. The Secretary's experts testified that the modification by IMI changed the bracket in significant way (Exh. C-19; Tr. 363-364, 471). By welding two side brackets together and assigning different functions, IMI changed the nature of the side bracket. The corner bracket was not shown to have been designed by a qualified person and loaded in accordance with the design.

The purpose of IMI's corner bracket to prevent tipping planks is not necessary if IMI complied with the Secretary's standards which address the same concerns. Compliance with §196.451(b)(5)(i) and (ii) is intended to prevent planks from tipping by restricting the planks' size and overhang. The standard limits the overhang of the planks unless secured from movement and tipping (Tr. 470).

At the time of the accident, the corner bracket may not have been installed as intended with the weight of the platform directly on the safety catch. IMI's expert admitted that proper installation of the modified bracket was critical for it to function as intended (Tr. 918). If improperly installed, clearly the platform loads are directly placed on the safety catch bracket and the weight is transferred against the u-bracket (ears) and not to the main scaffold. The purpose of the u-bracket attachment is to keep the bracket from moving left or right and not to support loads (Exh. C-23; Tr. 410, 413). The safe use of IMI's corner bracket requires careful attention to its installation. Unlike IMI's corner bracket, manufacturers generally design a scaffold component so that it cannot be improperly installed (Tr. 383). The proper design of a component should minimize its misuse (Tr. 362).

The Secretary's expert, a licensed civil engineer with experience in the scaffold manufacture's industry, opined that the characteristics of the side bracket changed when the second bracket (safety catch) was welded to the support bracket.⁶ He testified that the design created a "fatal flaw" (Tr. 469, 475). If installed incorrectly with the platform sitting directly on

⁶Despite two state disciplinary actions for practicing engineering without a license, the court is not persuaded the expert's testimony lacks credibility and the actions have no effect on his opinions (Exhs. R-17, R-18; Tr. 485-496). The disciplines were the result of a misunderstanding and the fines paid.

the safety catch bracket or even if correctly installed and the platform tipped onto the bracket, the platform loads are transferred against the u-bracket and not the main scaffold. It fails to transfer the load to the main scaffold as intended by the manufacturer (Tr. 470-471). He testified that modifications of components are discouraged by the industry to ensure that the components perform as designed (Tr. 460-461). It is noted that scaffold manufacturers sell their own corner brackets for interior corners (Exh. C-26).

The scaffold in use by IMI was manufactured by Waco. The brochures produced by Waco provide warnings to customers about the proper installation of scaffold and components (Exhs. C-2, C-3). Any reasonable reading of the documents would caution very strongly against modifying the scaffold bracket. Waco warns purchasers to “NEVER USE EQUIPMENT FOR PURPOSES OR IN WAYS FOR WHICH IT WAS NOT INTENDED” (Exh. C-3, under “Safety Guidelines”). Under paragraph N, Waco states “ALL SCAFFOLDING ACCESSORIES shall be used and installed in accordance with the manufacturers’ recommended procedure. Accessories shall not be altered in the field. Scaffold, frames and their components of various manufacturers shall not be intermixed.” In paragraph M, Waco states that “ALL BRACKETS shall be seated correctly with side brackets parallel to the frames and end brackets at 90 degrees to the frames.” (See also, Exh. C-2, similar warning by the same manufacturer).

There is no showing who designed IMI’s modified corner bracket or if any engineering analysis was performed. A violation §1926.451(a)(6) is established.

**Items 2a and 2b -
Alleged Willful Violations of § 1926.451(c)(1)(ii) and § 1926.451(c)(1)(iii)**

Item 2a alleges that “On or about July 1, 2009, at the above addressed jobsite, on the northeast building face of the scaffold at approximately 37 feet above the 1st floor slab, employees were performing masonry operations from an unsecured tubular welded frame scaffold that was positioned at the northeast building face scaffold system, thereby exposing employees to the hazards associated with falls and scaffold collapse.”

Section 1926.451(c)(1)(ii) which applies to a “supported scaffold,”⁷ provides:

⁷There is no dispute the north tower scaffold was a supported scaffold with a height to base width ratio of more than four to one (4:1). A “supported scaffold” means “one or more platforms supported by outrigger beams, brackets, poles, legs, uprights, posts, frames, or similar rigid support.” §1926.450(b) *Definitions*.

Guys, ties, and braces shall be installed according to the scaffold manufacturer's recommendations or at the closest horizontal member to the 4:1 height and be repeated vertically at locations of horizontal members every 20 feet (6.1 m) or less thereafter for scaffolds 3 feet (0.91 m) wide or less, and every 26 feet (7.9 m) or less thereafter for scaffolds greater than 3 feet (0.91 m) wide. The top guy, tie or brace of completed scaffolds shall be placed no further than the 4:1 height from the top. Such guys, ties and braces shall be installed at each end of the scaffold and at horizontal intervals not to exceed 30 feet (9.1 m) (measured from one end [not both] towards the other).

Item 2b alleges that "On or about July 1, 2009, at the above addressed jobsite, on the northeast building face of the scaffold at approximately 37 feet above the 1ST floor slab, employees were performing masonry operations from a tubular welded frame scaffold that was positioned at the end of the northeast building face scaffold system, that did not have ties, guys, or braces where outriggers loaded with personnel and materials were applying an eccentric load to the scaffold, thereby exposing employees to the hazards associated with falls and scaffold collapse."

Section 1926.451(c)(1)(iii) provides:

Ties, guys, braces, or outriggers shall be used to prevent the tipping of supported scaffolds in all circumstances where an eccentric load, such as a cantilevered work platform, is applied or is transmitted to the scaffold.

There is no dispute the north tower scaffold was not braced and tied to restrain the scaffold from tripping or collapsing (Tr. 94-95). The north scaffold was approximately 5 feet in width, 7 feet in length, and 37 feet high (Tr. 843). The east side scaffold was properly braced and tied. The masons were working from a cantilevered platform supported by outriggers. The platform was attached to main east scaffold and the north tower scaffold. At the time of the accident, the three masons were working at Column 5, where the east side scaffold connected to the north tower scaffold (Exh. C-23; Tr. 371-372, 381, 424, 542). The modified corner bracket was located on the north tower scaffold (Exh. C-8; Tr. 535). To install the bracket, an employee had to stand on the north tower platform (Tr. 538).

There is also no dispute the north tower scaffold was not complete because Messer Construction had not released the area to IMI for work (Tr. 175). The three masons performing masonry work were not engaged in scaffold erection work. IMI safety program requires that "All scaffold frames will be adequately braced" (Exh. R-7). Waco warns users to ensure that the scaffold is properly tied. "Tie Scaffolds to Building. Scaffolding should be tied to the structure,

using push-pull ties, every 26 feet or less of rise, and every 30 feet or less of length” (Exh. C-2). The standards cited by Secretary were not complied with and the three masons were exposed to the lack of bracing and ties.

The record fails, however, to establish IMI’s knowledge that the three masons were working on the north tower scaffold and exposed to the lack of bracing and ties. There is no evidence that other employees were on the north scaffold except the employee engaged in erecting the scaffold. The three masons had been assigned a specific task (installing stone veneer) in different area to work (Columns 5.5 to 8 on the east scaffold) (Tr. 149-150). The masons were long-time trusted employees who had not been disciplined for past violations of company safety rules (Tr. 237, 324). The three masons were experienced and did not require constant supervision. According to one mason, they were only on the north scaffold for less than 5 minutes before the platform collapsed (Tr. 629).

At the time of the accident, the project supervisor was working on another side of the building, not in view of the north tower scaffold. He did not see and could not see the masons working on the north scaffold (Tr. 833). He did not see the masons before the accident (Tr. 90-91). There is no showing the project supervisor or any IMI employee saw the masons on the north tower scaffold. The project supervisor was not aware the north tower needed to be braced and tied because the employee erecting the scaffold had not released it as completed (Tr. 665, 673).

The masons were not assigned to work on the north tower scaffold (Tr. 149-150). They were instructed to install the stone veneer on specific columns on the east scaffold and no columns north of column 5.5 (Tr. 150). Without direction, the masons on their own decided to install flashing and work past column 5.5 (Tr. 625). The masons were on the north tower scaffold for no more than 5 minutes before the accident (Tr. 629).

There is no showing that IMI should have known the masons were working on the north tower scaffold. An employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative condition. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, Aug 17, 1992). An employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during the course of their scheduled work. *Automatic Sprinkler Corporation of America*, 8 BNA OSHC 1384, 1387 (No 76-5089, 1980).

The project supervisor's instruction only involved work on the east scaffold. There is no evidence he should have anticipated the masons would start any work involving the north tower scaffold. The supervisor inspected the east scaffold and made the work assignments to the masons in the morning prior to work based on where he anticipated them to work. The masons after completing their assigned work, voluntarily began the flashing work without informing the project supervisor or receiving a new assignment.

The Secretary's argument that the project supervisor failed to give a specific instruction is rejected. He gave a specific instruction – finish installing the stone veneer between column 5.5 and column 8. There was no reason for him to instruct the masons not to perform another task at column 5 because such conduct was not foreseeable (Tr. 595, 601, 606, 618-619). There is no showing that the supervisor should have reasonably anticipated the masons would engage in other work (installing flashing) which would take them to column 5, beyond where they were assigned.

The masons were only at column 5 on the north scaffold for a very brief period of time (5 minutes). No evidence that any IMI employee saw them or knew the masons were working on the north tower scaffold (Tr. 625). There was a barricade on the main scaffold to prevent or warn employees from going onto the north scaffold. However, there was no barricade on the outrigger scaffold. The record fails to show whether or not the masons knew the north tower was not complete.

The three masons were experienced masons with at least 20 years with IMI (Tr. 161, 162, 300). The three masons had not been previously disciplined for safety violations or failing to comply with instructions. IMI considered them safe workers. They were verbally disciplined as a result of their activities on July 1, 2009 (Tr. 343).

IMI has a written scaffold safety program and fall protection plan (Exhs. R-6, R-7). The safety program was prepared by a former OSHA area director and given to every IMI employee. The program requires that scaffolds must be tied. Test answer 6 provides that "Only employees who have received training and permission from IMI/SMC foreman may access a scaffold" (Exh. R-5). According to IMI, it has invested significant time and money on employees' safety training (Tr. 276-278).

The masons' decision to engage in a job not assigned and proceed to the north tower without permission was not foreseeable. Failure to discover a safety violation that occurs in five

minutes does not show inadequate monitoring. *Pipeline Distribution Contractors, Inc.*, 16 BNA OSHC 1293 (No. 91-3312, 1993, ALJ).

The record fails to establish IMI's knowledge of employees' exposure to the alleged violations of § 1926.451(c)(1)(ii) and § 1926.451(c)(1)(iii).

Willful Classification

The Secretary classified IMI's violation of § 1926.451(a)(6) as "willful" under § 17 of the Act. It is well settled that 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. *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). To find willfulness involves determining that the employer had a heightened awareness, rather than simple knowledge, of the violative conditions. *Williams Enterprises, Inc.* 13 BNA OSHC 1249, 1256-57 (No. 85-35, 1987).

The record fails to show that IMI's conduct demonstrated a heightened awareness the modified corner bracket was unsafe or contrary to OSHA standards. The compliance officer admitted that he had no evidence to support a willful violation (Exh. R-1; p. 102-103). A modification of a scaffold component is not necessarily an OSHA violation. According to IMI, the brackets were welded together by certified welders to increase the safety factor (Tr. 467-468, 848-849). IMI has used the modified corner brackets on a majority of its project for over 35 years without incident (Tr. 663). IMI's expert who tested the bracket considered it "well designed" (Tr. 901). He opined that the modification did not change the design of Waco side brackets, did not change how the Waco side brackets attached to the scaffold frame, did not change how the scaffold components fit together as part of the scaffold system, and did not change the load capacity of the side brackets (Tr. 910).

If installed properly and no load is placed on the safety catch, there is no showing of a strength or stability problem with the modified corner bracket (Exhs. C-18, ALJ-2). The intended use of the bracket neither changed the design function or use of the bracket (Tr. 851-852, 910). When used as intended, the safety catch carries no load and no load is applied against the ears. IMI trained its employees on the proper use and loading the modified bracket.

There have been many OSHA inspections (59) and the modified corner bracket's use was never questioned by OSHA and not the subject of an OSHA citation. IMI was familiar that other

masonry contractors used similar modified corner brackets (Tr. 139, 284-285, 286). IMI also engaged a former OSHA area director to prepare its safety program and conduct safety audits which included visual inspections of all scaffold components. He raised no concern about the corner bracket (Tr. 268-269, 293).

The record fails to show IMI's intentional disregard or plain indifference to employee safety. The willful classification of § 1926.451(a)(6) is not established.

Penalty Consideration

The Review Commission is the final arbiter of penalties in contested cases. In determining an appropriate penalty, the Commission is required, pursuant to § 17(j) of the Act, 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 in considering a reasonable penalty.

IMI is entitled to credit for size because it employed approximately 70 employees in 2009. IMI is also entitled to good faith credit based its generally good safety program and use of the former OSHA Area Director as a consultant. Most employees have been employed with IMI for more than 17 years and many employees are related. IMI is not entitled to credit for history because it has received OSHA citations within the preceding three years.

A penalty of \$1,000.00 is reasonable for violation of § 1926.452(c)(5)(iii) (citation no. 1, item 4). The improperly supported hoist exposed at least two employees if it collapsed because of the use without analysis by a qualified engineer.

No penalty is proposed for other than serious violation of § 1926.1051(a) (citation no. 1, item 5a). The stacked pallets provided a large flat platform for employees to use to access the window sill. There was no showing of serious injury.

A penalty of \$ 3,000.00 is reasonable for violation § 1926.451(a)(6) (citation no. 2, item 1). IMI failed to identify who designed the modified bracket or show any engineering analysis showing stability and capability to sustain the anticipated loads if the platform tipped which the bracket was designed to prevent.

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 serious Citation:

1. Citation No. 1, Items 1a and 1b, alleged serious violations of § 1910.178(l)(2)(iii) and § 1910.178(l)(4)(iii), are withdrawn by the Secretary.
2. Citation No. 1, Item 2, alleged serious violation of § 1926.451(f)(4), is vacated and no penalty is assessed.
3. Citation No. 1, Item 3, alleged serious violation of § 1926.451(g)(4)(i), is withdrawn by the Secretary.
4. Citation No. 1, Item 4, alleged serious violation of § 1926.452(c)(5)(iii), is affirmed and a penalty of \$ 1,000,00 is assessed.
5. Citation No. 1, Item 5a, alleged serious violation of § 1926.1051(a), is affirmed as other than serious and no penalty is assessed.
6. Citation No. 1, Item 5b, alleged serious violation of § 1926.1053(b)(9), is vacated.
7. Citation No. 2, Item 1, alleged willful violation of § 1926.451(a)(6), is affirmed as serious and a penalty of \$ 3,000.00 is assessed.
8. Citation No. 2, Items 2a and 2b, alleged willful violations of § 1926.451(c)(1)(ii) and § 1926.451(c)(1)(iii), are vacated and no penalty assessed.
9. Citation No. 3, Item 1, alleged other than serious violation of § 1904.29(b)(1), is withdrawn by the Secretary.

Date: July 2, 2012

/s/ Ken S. Welsch
KEN S. WELSCH
Administrative Law Judge