

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,
Complainant,
v.
MANGANAS PAINTING CO.,
Respondent.

OSHRC Docket Nos. 93-1612 &
93-3362

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

This case involves allegations by the Secretary of Labor that Manganas Painting Company (“MPC”) committed fall protection violations while preparing to repaint the Jeremiah Morrow Bridge. The bridge, approximately 249 feet high, is a dual-span interstate highway bridge across the Little Miami River near Cincinnati, Ohio. Each span of the bridge consists of a concrete road deck resting on a steel-beam trusswork. Steven Medlock, a compliance officer employed by the Occupational Safety and Health Administration (“OSHA”) of the Department of Labor, inspected the working conditions at MPC’s bridge repainting project. He found that MPC had installed some fall protection in the form of safety cables, safety nets and scaffolds on the bridge trusswork, but he also found by interviewing MPC employees and on-site managers that the sandblasting work MPC had

already done on the trusswork had involved certain fall hazards.¹ Thereafter, OSHA issued citations to MPC alleging that it committed a serious violation of a guardrails standard and repeated violations of a personal protective equipment standard.

Administrative Law Judge Michael Schoenfeld heard the case and found that MPC had violated the standards as alleged. However, the judge affirmed the violations as serious and assessed smaller penalties than the Secretary proposed. On review, the Secretary urges us to classify the personal protective equipment violations as repeated. She also argues that the judge erred in reducing the proposed penalties. MPC argues that the judge erred in finding any violations. For the following reasons, we affirm the judge in affirming the violations involved here and we affirm the penalty assessed by the judge for the guardrails violation, but we find that a repeated classification and higher penalties are warranted for the personal protective equipment violations.

The Guardrails Violation (Citation 1, Item 1)

The Secretary alleges that 29 C.F.R. § 1926.451(a)(4)² required MPC to install guardrails on a painter's pick, a temporary working and walking surface approximately 20 inches wide and 18 feet long. Alvin Stillwell, one of MPC's experienced sandblaster-painters, had been using the pick to gain access to certain exterior beams he was required to sandblast. He used the pick as a temporary walkway from the permanent railed catwalk inside the trusswork to a temporary cable MPC had strung on the outside of the trusswork. Timothy McCully, an MPC foreman, sometimes helped Stillwell position the pick as he

¹MPC employees were not engaged in any work activity when Medlock was there.

²29 C.F.R. § 1926.451(a)(4), the guardrails requirement for scaffolds in general that was in effect at the time of the inspection in this case, reads as follows: "Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor, except needle beam scaffolds and floats (see paragraphs (p) and (w) of this section). Scaffolds 4 to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails on all open sides and ends of the platform."

progressed from one trusswork bay to another. There is no dispute that McCully knew the pick lacked guardrails, and that there were no safety nets under the pick.³ MPC witnesses testified that Stillwell could have tied off to a safety cable running perpendicular to the pick at head height approximately midway between the catwalk and the outer edge of the trusswork. However, Stillwell told Medlock that he crossed the pick without tying off. His walking distance across the pick was approximately 8 feet.⁴

³The judge's decision erroneously states that safety nets were in place by the time of the inspection. MPC had not installed nets where Stillwell worked. "The nets were ordered," Stillwell testified, "and when they arrived, [MPC] would hang them, but in the meantime, we would do our job[.]" Stillwell testified that it would take three to three and a half months to "have this bridge totally rigged" with safety nets.

⁴The judge found from McCully's testimony that the distance was 8 feet. Medlock measured 12 feet, 9 inches from the catwalk rail to the perimeter cable. Stillwell testified that the distance was only "a matter of three steps."

The only issue directed for review concerning the merits of the violation⁵ is whether the cited scaffold standard that required guardrails on “platforms” applied to a pick. However, consistent with the definition of a platform as a “working space for persons, elevated above the surrounding floor or ground,” 29 C.F.R. § 1926.502(e), and the definition of a scaffold as a “temporary elevated platform and its supporting structure used for supporting workmen,” 29 C.F.R. § 1926.452(b)(27), the Commission has previously found that frequently moved painter’s picks used as temporary elevated surfaces for access to work

⁵To establish a violation, the Secretary must show that the cited standard applied, that the employer failed to comply with it, that one or more employees were exposed or had access to the hazard, and that the employer knew of it. *E.g.*, *Kulka Constr. Mgmt. Corp.*, 15 BNA OSHC 1870, 1873, 1991-93 CCH OSHD ¶ 29,829, p.40,687 (No. 88-1167, 1992). The only issue in MPC’s cross-petition for discretionary review and in the Commission’s briefing order was whether the cited standard applied. MPC’s review brief, however, raised three more issues that the Secretary responded to in her reply brief. Although the Commission may decline to address issues not directed for review, *see Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 and.4, 1991-93 CCH OSHD ¶ 29,617, p. 40,097 n.4 (No. 86-360, 1992), we have reviewed the entire record in this case and affirm the judge’s findings as to each element of the violation. Thus, although MPC argues that the Secretary failed to establish employee exposure, we reject the argument because, as the judge found, Stillwell’s testimony that he crossed the pick without tying off is not refuted by McCully’s testimony to the contrary; McCully was not present every time Stillwell crossed the pick. MPC argues that the Secretary failed to establish knowledge, but as the judge found, McCully had constructive knowledge that Stillwell did not always tie off because the only available lifeline was in “an awkward and less than completely useful location” perpendicular to the pick and approximately 4 feet from each end. Moreover, the judge found that Stillwell walked along the pick without fall protection “on more occasions than not.” In view of the difficulty with the lifeline, the frequency of Stillwell’s use of the pick, and McCully’s knowledge of these conditions, reasonable diligence would include the further step of monitoring to see that Stillwell tied off. This is readily distinguishable from applying a per se rule that a safety policy is inadequate unless employees are being constantly monitored for safety violations, which the Second Circuit rejected in *New York State Elec. & Gas Corp*, 88 F.3d 98 (2d Cir. 1996). MPC argues that it established an affirmative defense of infeasibility, but the defense has not been established because MPC did not effectively implement the alternative means of protection, a safety belt. *See, e.g., Mosser Constr.*, 15 BNA OSHC 1408, 1416, 1991-93 CCH OSHD ¶ 29,546, p. 39,907 (No. 89-1027, 1991) (elements of infeasibility defense).

are scaffolds and has applied the cited standard, § 1926.451(a)(4), to them. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1389-90, 1993-95 CCH OSHD ¶ 30,909, pp. 43,032-33 (No. 92-262, 1995). We therefore conclude that § 1926.451(a)(4) applied to MPC's pick used for access to work,⁶ and we affirm the judge in finding a serious violation.

In assessing a penalty, we consider the four penalty factors in section 17(j) of the Act, 29 U.S.C. § 666(j), which are the size of the company, its good faith, the gravity of the violation, and the company's history of violation. The gravity of this violation was high. Stillwell faced a high probability of serious injury or death because he could have fallen as much as 200 feet. MPC was a small employer with no prior fatalities, and it had a program of disciplinary measures for failure to obey safety rules, but it had prior citations for deficiencies in fall protection. Based on these facts, we find that a penalty of \$1,000 is appropriate for this item.⁷

⁶MPC argues that the pick was a "catenary" scaffold, *i.e.*, a kind of suspension scaffold that consists of a platform secured to two parallel horizontal cables. *See* 29 C.F.R. § 1926.450(b) (1996) (revised scaffold standard defining "[c]atenary scaffold"). We agree with the judge, however, that MPC's pick was not a catenary scaffold because one end rested on a permanent catwalk, not a horizontal cable. Moreover, the standard cited here was a general standard that applied to all scaffolds, such as catenary scaffolds, that were not addressed by a particular standard. While the cited general standard did not specifically address catenary scaffolds, it did not exempt them. MPC points to OSHA's new standard on scaffolds that only requires safety belts for fall protection on catenary scaffolds. *See* 29 C.F.R. § 1926.451(g)(1) (1996) (personal fall arrest system required for catenary scaffolds). We note first that the revised standard was not yet in effect when the citations here issued. In addition, under the cited standard, MPC was not required to install guardrails if they were infeasible and MPC implemented safety belts instead as an alternative means of fall protection. *See, e.g., Mosser*, 15 BNA OSHC at 1416, 1991-93 CCH OSHD at p. 39,907 (affirmative defense of infeasibility of compliance). As we found earlier, however, MPC did not effectively implement safety belts at this location and thus would not have been in compliance under the new standard even if it did apply.

⁷In citation 2, item 1, instance g, the Secretary alleged that MPC violated 29 C.F.R. § 1926.105(a) by failing to require Stillwell to use a tied-off safety belt while securing the same pick at issue here to the temporary cable on the outside of the bridge trusswork.

(continued...)

Improper Use of Safety Belts (Citation 2, Item 1, Instances a, b, c)

The fall protection used by MPC's painter-sandblasters while sandblasting or stringing cables for safety nets consisted of clipping their lanyard hooks onto the lower edge or flange of large oblong holes in the beams of the trusswork. The lanyard hooks were snap hooks with a "keeper" that was intended to snap shut on an "anchor device." The Secretary cited MPC for violating 29 C.F.R. § 1926.105(a)⁸ because, as the compliance officer claimed, clipping the snap hooks onto the flanges could cause the hooks to "roll out" and become disengaged because the keepers were not in contact with the anchor devices.

We agree with the judge that this method does not provide adequate fall protection to employees and that MPC failed to comply with the standard by using it. *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1384 (D.C. Cir. 1985). The judge relied on witness demonstrations during the hearing⁹ to find that the method was "only partially effective in that the hook was secure only when the employee leaned or shifted his weight in such a

⁷(...continued)

However, the same abatement would alleviate the fall hazards involved in both citation items. Accordingly, we exercise our discretion to assess a single penalty of \$1,000 for citation 1, item 1, and citation 2, item 2, instance g. *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981).

⁸Section 1926.105(a) states: "Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical." The Secretary also argues on review that MPC violated 29 C.F.R. § 1926.28(a), which she cited in the alternative. This standard requires personal protective equipment "where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards." However, the judge only found a violation of § 1926.105(a) and did not address § 1926.28(a). We will confine our analysis to § 1926.105(a) because we agree that it was violated.

⁹The Secretary asked certain painters and MPC employees including Stillwell, McCully, William Miller and Alan Trevino, to demonstrate the clipping-off method on a demonstrative prop consisting of a board cut by Mr. Medlock to have a hole in it with the dimensions he had measured in the trusswork beams at the site.

manner as to produce tension on the lanyard.” Testimony provides further support for the judge’s finding. Nicholas Manganas conceded that an employee would not “have weight on his hook when he was climbing” from one porthole to another. Stillwell testified that he sometimes moved the hook down to the porthole where he was standing before he climbed out of the porthole to move down to the next one. Medlock testified that the hook could come loose because, among other possibilities, the employee could kick the hook out as he climbed out. McCully testified that the way the hook stays in place is that the employee keeps it “firm . . . like a balance.” The judge therefore found that this method was “only partially effective in that the hook was secure only when the employee leaned or shifted his weight in such a manner as to produce tension on the lanyard.” The judge also found that the Secretary’s lifelines would have “provided a higher degree of fall protection.” These findings based on courtroom observation and witness testimony must be given considerable weight. *Cf. Hamilton Fixture*, 16 BNA OSHC 1073, 1080, 1993-95 CCH OSHD ¶ 30,034, pp. 41,175-76 (No. 88-1720, 1993) (deference to credibility findings that rest on matters peculiarly observable by judge), *aff’d without published opinion*, 28 F.3d 1213 (6th Cir. 1994).

Having found that MPC was not in compliance, we turn to the question of whether the Secretary established a violation. When the Secretary cites § 1926.105(a) to require a device other than safety nets,¹⁰ she has the burden of (1) proving where and how the device could have been used and (2) overcoming the employer’s evidence that use of the device was impractical, including industry custom and practice. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1189-90, 1993-95 CCH OSHD ¶ 30,059, pp. 41,338-39 (No. 89-2883, 1993).

¹⁰The Secretary erroneously relies on *GEM Indus, Inc.*, 17 BNA OSHC 1861, 1863, 1995-97 CCH OSHD ¶ 31,197, p. 43,688 (No. 93-1122, 1996), *aff’d without published opinion*, 149 F.3d 1183 (6th Cir. 1998), where the prima facie case is different because the citation involved a lack of safety nets for work being performed without any fall protection.

Compliance officer Medlock testified where and how snap hook lanyards could have been used here. He stated that vertical lifelines could have been anchored to the upper trusswork beams above employee work locations or anchored on the bridge deck and dropped over the sides to employee work locations. Medlock saw employees of Ahern & Associates, MPC's subcontractor, tied off to vertical lifelines, and a photograph in evidence shows Ahern's employees tied off to vertical lifelines anchored above their work location.

Nicholas Manganas, MPC's president, and Andrew Manganas, vice-president and project superintendent, testified that lifelines anchored on the bridge deck and dropped over the sides would have had to be angled toward the trusswork and that angled lifelines could have pulled the employees off the trusswork, then swung them back into it, possibly injuring and paralyzing them. However, MPC did not present any evidence to rebut the Secretary's evidence regarding the possibility of anchoring lifelines to the upper trusswork beams.

Nor is the Secretary's case rebutted by the industry custom and practice evidence in this case. There is evidence that the practice of clipping the snap hooks of lanyards to holes in steel beams was a traditional industry practice. The record as a whole establishes, however, that clipping the snap hooks onto lifelines has also become industry practice, as demonstrated by subcontractor Ahern's use of them and MPC's plans to use them. We therefore find that the Secretary overcame MPC's industry practice evidence and established the practicality of vertical lifelines for the snap hook lanyards.¹¹

¹¹MPC argues that it complied with the standard because the lanyards provided fall protection for a "substantial portion of the workday" even without the keeper properly engaged all the time. We note that "the issue of whether employees were protected for a substantial portion of the workday is only relevant were the employees are temporarily unable to tie off because of 'unexpected or unusual circumstances' and the Secretary claims that the employer should have used alternative fall protection in addition to the safety belts." *Armstrong Steel Erectors, Inc.*, 18 BNA OSHC 1630, 1632, 1999 CCH OSHD ¶ 31,758, p. 46,422 (No. 97-250, 1999) (citations omitted). As the Commission found in *Armstrong*, "those circumstances clearly were not present here. . . . [Rather, the Secretary has established] that safety belts were practical for 100 percent of the workday." *Id.*

Accordingly, we find that the Secretary established that the device could have been used and that it was practical. Accordingly, we affirm the alleged violations of § 1926.105(a).¹²

Classification of the § 1926.105(a) Violations as Repeated

Under *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979), a violation is repeated¹³ if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. The Secretary can make a prima facie case of substantial similarity by showing that “the prior and present violations are for failure to comply with the same standard.” *Amerisig Southeast, Inc.*, 17 BNA OSHC 1659, 1660-61, 1995-97 CCH OSHD ¶ 31,081, p. 43,364 (No. 93-1429, 1996), *aff’d without published opinion*, 117 F.3d 1433 (11th Cir. 1997); *see also Secretary of Labor v. D.M. Sabia Co.*, 90 F.3d 854 (3d Cir. 1996).¹⁴ Here, a prima facie case of substantial similarity was established by the evidence

¹²MPC’s claim that § 1926.105(a) is unenforceably vague when used to penalize its method for using the snap hook lanyards fails to take into account that § 1926.105(a) has long been held to provide clear notice of a duty to provide protection that eliminates the fall hazard to the extent possible. *See Corbesco, Inc. v. Secretary*, 926 F.2d 422, 428 (5th Cir. 1991) (notice from case precedent that roof where employees are working does not constitute temporary floor for fall protection from edge of roof); *Willson III*, 773 F.2d at 1384 (employer cannot simply choose device without regard to whether it provides adequate fall protection). We also reject MPC’s claim that the Secretary’s new fall protection standard addressing snap hook disengagement problems proves that § 1926.105(a) does not address how snap hook lanyards must be used. Because the Secretary promulgated her standard after the inspection in this case and because it does not purport to interpret § 1926.105(a) in any way, it is irrelevant to MPC’s case. The inquiry here is whether MPC’s method of hooking eliminated the hazard as § 1926.105(a) requires.

¹³The judge erroneously determined that the Secretary did not argue for a repeated classification in her posthearing brief, and concluded that she had abandoned the allegation.

¹⁴In *Sabia*, which issued shortly after Judge Schoenfeld issued his decision in this case, the Third Circuit, one of the circuits to which this case is appealable, disavowed its
(continued...)

of a prior final order against MPC for a § 1926.105(a) violation on a bridge-painting job. MPC argues that it rebutted the Secretary's prima facie case. MPC describes the prior violation as "employees tying off to cables under the picks instead of securing to safety lines installed above their heads" and argues that it therefore was not substantially similar to the violations that the Secretary characterizes as repeated. We disagree. All the violations in both cases concerned failure to tie off to safety lines located above the employees' work locations and presented nearly identical fall hazards. *Amerisig*, 17 BNA OSHC at 1661, 1995-97 CCH OSHD at p.43,364 (substantial similarity based on substantially similar hazards). We therefore affirm the Secretary's repeated classification for citation 2, item 1, instances a, b and c, which are the violations of § 1926.105(a) involving the improper use of snap hook lanyards.

The Secretary proposed a penalty of \$15,000 for citation 2, item 1, instances a, b, c, d, e, f and g. The Secretary asks us to assess this amount on review. However, instances d, e and f were vacated by the judge and are not on review, and we have combined instance g with item 1 of citation 1, for penalty purposes. The remaining instances a, b and c present a high probability of serious injury or death because the employees could have fallen approximately 200 feet. As we have noted, MPC was a small employer with no prior fatalities, and MPC had purchased new fall protection equipment for this job and had repeatedly instructed the employees to tie off.¹⁵ However, MPC had prior citations for failure to tie off, failed to instruct employees to tie off completely through the holes, and failed to install a sufficient number of vertical lifelines before sandblasting work began. In these

¹⁴(...continued)

prior view that a repeated violation requires "proof of flaunting" and instead adopted the Secretary's interpretation set forth in *Potlatch*.

¹⁵Specifically, MPC had purchased new scaffolds, safety nets, safety belts, lanyards, and safety cables or lifelines and had instructed the employees to tie off at all times or suffer discipline, *i.e.*, a verbal warning, written reprimand, termination of employment.

circumstances and considering the section 17(j) factors, we assess a penalty of \$9,000 for citation 2, item 1, instances a, b and c.

Order

We affirm item 1 of citation 1. We combine instance g of item 1 of citation 2 with item 1 of citation 1 for penalty purposes and assess \$1,000 for both violations. We affirm instances a, b and c of item 1 of citation 2 as repeated violations and assess \$9,000.

/s/
Thomasina V. Rogers
Chairman

/s/
Stuart E. Weisberg
Commissioner

Dated: September 27, 2000

VISSCHER, Commissioner, concurring in part, dissenting in part:

I agree with the majority that the Manganas Painting Company (“MPC”) violated 29 C.F.R. § 1926.105(a) by allowing its employees to clip their lanyard hooks onto the lower edge of the holes of the beams of the trusswork. The judge found that clipping the lanyard hooks in this way did not provide a secure connection for the lanyard because the hooks could become loose when the tension on the lanyard was reduced. Thus the means of fall protection being used did not provide adequate protection for MPC’s employees. *RGM Constr. Co.*, 17 BNA OSHC 1229, 1232, 1993-95 CCH OSHD ¶ 30,754, p. 42,727 (No. 91-2107, 1995). I also agree with the majority’s determination that these violations (Citation 2, Item 1, Instances a, b, and c) are properly classified as repeat violations.

MPC was also cited for failing to have guardrails on a painter’s pick which was being used as a type of scaffold suspended between a fixed catwalk and a cable strung along the outside of the trusswork (Citation 1, Item 1), and for an employee to walk across the painter’s pick to secure the end of the pick to the cable without tying off (Citation 2, Item 1, instance g). I disagree with my colleagues that the Secretary has established these violations.

MPC raised two arguments with regard to Citation 1, Item 1: the inapplicability of the standard,¹ and the infeasibility of compliance.¹ The majority appears to accept MPC’s argument that putting guardrails on the painter’s pick was infeasible. However, they indicate that MPC failed to establish the defense of infeasibility because it did not show that it provided alternative protection. The alternative protection that the majority finds was required was that MPC employees walking or working on the painter’s pick use safety belts for fall protection. As the very same violative conduct, and the very same abatement requirement, is alleged in Citation 2, Item 1, instance g, I would vacate Citation 2, Item 1,

¹In my view, MPC’s argument that this was a “catenary scaffold” and that the language of 29 C.F.R. § 1926.452 that was in effect at the time of this inspection did not apply to such scaffolds has considerable merit. However, the question of the application of the standard cited here to such scaffolds would have no bearing on future cases since application of the scaffold standard to catenary scaffolds has now been addressed in the revised scaffold standard [see 29 C.F.R. § 1926.451(g)(I)], and, in any case, I would vacate for the reasons discussed.

instance g as duplicative. *See Capform, Inc.*, 13 BNA OSHC 2219, 2224, 1987-90 CCH OSHD ¶ 28,503, p. 37,778 (No. 84-0556, 1989), *aff'd without published opinion*, 901 F.2d 1112 (5th Cir. 1990)(Commission vacated a violation of the trenching standard as duplicative of one it had affirmed, since both citations addressed the same hazard and required the same abatement). *Cf. Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1118, 1986-87 CCH OSHD ¶ 27,829, p. 36,430 (No. 84-696, 1987)(two citation items involving substantially the same violative conduct held to be single violation and single penalty assessed); *Alpha Poster Service, Inc.*, 4 BNA OSHC 1883, 1884, 1976-77 CCH OSHD ¶ 21,354, p. 25,644 (No. 7869, 1976)(two items involving substantially the same violative conduct merged into single violation).²

As for Citation 1, Item 1, this alleged violation was based on the statement of MPC employee Stillwell, who, when asked by the compliance officer how he accessed the painter's pick, stated that he walked across it without tying off. In reviewing the evidence, the judge thought it most likely "that Stillwell used his lanyard at times and not at others." Furthermore, the judge found no evidence that MPC had actual knowledge that Stillwell sometimes walked across the painter's pick without tying off. The majority has adopted the judge's finding that MPC nonetheless had constructive knowledge of Stillwell's actions. This is based on the failure of supervisor McCulley to consistently observe Stillwell, and from the fact that, in the judge's opinion, the horizontal lifeline to which Stillwell could have tied off was in "an awkward and less than completely useful" location. But, as the courts have said, an employer may not be required to provide constant supervision, and the Secretary may not rely on lack of constant supervision to establish an employer's constructive knowledge of a

²I would further note that the Second Circuit Court of Appeals has disallowed safety belts as an alternative means of means of protection under guardrail standards. *See Spancrete Northeast, Inc. v. OSHRC*, 905 F.2d 589, 593-94 (2d Cir. 1990)(as safety belt violations must be separately cited under personal protective equipment standard, safety belts may not be treated by Secretary as an "equivalent" alternative to guardrails where guardrails are infeasible).

violation. *See, e.g., New York State Electric & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 109 (2nd Cir. 1996). On the question of whether it was unduly difficult for Stillwell to reach the lifeline, the judge based his conclusion at least in part on his opinion that the company should have suspended lifelines from the outer edge of the bridge surface. In the judge's opinion, Stillwell could have tied to such lifelines while he was securing the outer edge of the painter's pick to the cable. But as MPC pointed out, lifelines suspended that far from the end of the pick would actually tend to pull the employee off the end of the pick. The exhibits show various features to which Stillwell might have tied off while walking across the painter's pick or while working to secure the pick to the cable. In any event, Stillwell himself did not say that tying off was unduly difficult, and the record indicates that there were occasions when Stillwell did in fact tie off when walking across the pick. As a result, I do not find that the Secretary established that MPC had either actual or constructive knowledge that Stillwell did not always tie off when walking or working on the painter's pick. I would therefore vacate instance g of Item 1, Citation 2.

/s/ _____
Gary L. Visscher
Commissioner

Date: September 27, 2000

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

MANGANAS PAINTING COMPANY,
INC.,

Respondent.

DOCKET NOS. 93-1612 AND 93-3362

Appearances: Patrick M. Zohn
Office of the Solicitor
U. S. Department of Labor
For Complainant

Roger L. Sabo
Schottenstein, Zox & Dun
Columbus, Ohio
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Respondent's worksite was inspected by a Compliance Officer of the Occupational Safety and Health Administration, Manganas Painting Company, Inc., ("Respondent") several times. This

case arises out of inspections conducted in April and September of 1993. As a result of the April inspection two citations, one alleging three serious and one alleging a repeat violation were issued to Respondent. Civil penalties in the amount of \$22,500 were proposed by OSHA. (Docket No. 93-1612). As a result of the September 1993 inspection one citation, one alleging a serious violation was issued to Respondent. A civil penalty in the amount of \$3,000 were proposed Respondent timely contested both citations. (Docket No. 93-3362) Following the filing of complaints and answers the cases were consolidated for purposes of hearing and decisions. and pursuant to a notice of hearing, the case came on to be heard in Columbus, Ohio. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in Industrial Painting. It is undisputed that at the time of this inspection Respondent was sandblasting and repainting a highway bridge. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.³ Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Setting

Respondent, an industrial painting company, was engaged by the Ohio Department of Transportation (“ODOT”) as a result of competitive bidding, to re-paint (including blasting to remove old paint and repainting) a highway bridge known as the Jeremiah Morrow Bridge (“The Bridge”). The company had performed similar work in the past but this project was the largest ever undertaken by Respondent. The bridge is actually a pair of parallel bridges spanning a gorge which included the Little Miami River. The bridge provide the river crossings for Interstate Highway 71. The structure is two spans each a concrete road bed 36 feet wide supported by steel structure framework below. The steel framework had an overall width of 24 feet.

³ Title 29 U.S.C. § 652(5).

Respondent's overall plan was to install (rig) steel cables which would then be used to support safety nets below the steel framework and canvas "containments."⁴ Respondent began actual work on the bridge in March of 1993. (Tr. 528). The first cable installed was a safety line directly underneath the roadbed ("deck"). A permanently installed catwalk ran the entire length of the bridge centered underneath the deck. From this catwalk, Respondent's employees, primarily experienced bridge painters, obtained access to their specific work areas amongst the steel framework.

Docket No. 93-1612

Citation 1, Item 1 - 29 C.F.R. § 1926.451(a)
Guardrails and toeboards on platforms.

It is alleged in the citation as amended that;

an employee was working from a pick scaffold without standard guardrails and/or adequately secured lanyard/safety in that, the lanyard hook was just clipped to a column flange exposing the employee to a potential [fall] in excess of 200'.

The standard cited, § 1926.451(a)(4), provides;

Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor, except needle beam scaffolds and floats (see paragraphs (p) and (w) of this section). Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

An employee of Respondent, Alvin Stillwell, who worked on the bridge testified that he had been performing blasting on the diagonal steel members (the "45s") on the outer-most structural steel work below the roadbed. In order to reach the outer-most steel structures he walked on the surface of a collapsible or extendable "scaffold pick" ("pick"). The pick was set up by carrying it to the proper location along a permanent catwalk located underneath and running along the entire length of the middle of the bridge. The pick was then extended out through the permanent handrail of the catwalk so that its outside end rested on a cable running horizontally along the outside of the bridge.

⁴ A containment is a tent-like temporary structure suspended underneath the roadbed which would totally enclose an area of the steel framework. The purpose was to provide an environmental barrier against the atmospheric distribution of the airborne materials generated by the blasting and painting taking place inside.

The pick would then be tied off to the catwalk handrail. A foreman, Tim McCulley, would occasionally assist Stillwell up to this point in placing and setting up the pick. (Tr, 30-31.) The outer end of the pick which was resting on top of the cable was then tied down to the cable. To get from the catwalk to the outer end of the pick in order to tie it down or to access his work area, Stillwell climbed over the handrail of the permanent catwalk and walked along the surface of the pick, a distance he described as “a matter of three steps.” (Tr, 32.) A Manganas foreman estimated the same distance to be 8 feet. (Tr. 537) There were no guardrails or toeboards on the picks nor was there a safety net below. Stillwell stated that he did not make use of or tie-off the lanyard attached to the safety belt he was wearing when he walked along the pick. (Tr. 31). The areas involved were more than 10' above the ground or surface of the water below. (Tr. 49-50.)

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

Respondent argues that the cited standard does not apply. Its argument is rejected. Respondent, in its post-hearing brief (p. 19) acknowledges that the Commission, in *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385 (No. 92-0262, 1995) reviewed the applicability of the standard at 29 C.F.R. § 1926.451(a)(4). It is clear from that decision that the standard applies to the picks in this case in that an examination of the characteristics of the surface of the picks as used in this case fit within the parameters of 29 C.F.R. § 1926.502(c) which defines “platform” as “a working space for persons, elevated above the surrounding floor or ground.” Stillwell was required to walk along the surface of the picks in order to reach his job station and did so as an integral and necessary part of accomplishing the tasks assigned to him as his job responsibilities. In walking upon the surface of the pick from the permanent catwalk to the location of his job assignment, Mr. Stillwell was “working.” The surface of the pick was thus a working space within the meaning of the cited standard. The fact that proposed rulemaking mentions and perhaps defines catenary scaffolding in a certain manner does not afford relief to Respondent. First, the picks in this case do not fall under

the proposed definition of catenary scaffolding because only one end of each pick as used by Manganas was secured to a rope or cable. The other end was secured to the handrail of the catwalk which is a permanent structural member. Second, Respondent has not specifically shown, as did the employer in *Baker Concrete Construction Co.*, 17 BNA OSHC 1236 (No. 93-0606, 1995), that it was aware of and in fact relied on “OSHA pronouncements”, *Id.* at 1238. I thus find the cited standard to be applicable.

Respondent is silent as to the existence of the condition and employee exposure except to suggest that Stillwell used his safety belt and lanyard while on the picks. Respondent also appears to make an argument which goes to its state of knowledge of the violative condition.

There is no dispute that McCulley, one of Respondent’s foremen, knew that the picks lacked guardrails and that he occasionally assisted Stillwell in moving and placing the picks into position. McCulley’s testimony is not, however, crystal clear as to his observations of Stillwell’s use or non-use of safety belts. At one point McCulley seems to say that he never saw Stillwell walk along a pick. (Tr. 521, Lines 21-25). A bit later he responded in the affirmative when asked if he “would watch him (Stillwell) walk the scaffold pick out and then tie off into the 45-degree (steel member) and start sandblasting.” (Tr. 522, Lines 7-16). He finally agreed that he had not seen Stillwell walk a pick without tying off his safety lanyard (apparently to a cable which had been installed overhead). (Tr. 524, Lines 1-16; Tr. 525, Lines 18-25 to Tr. 526, Lines 1-3). Such testimony does not absolutely contradict Stillwell’s statements that he walked picks without using the safety lanyard unless Stillwell’s statement is viewed as claiming that he never tied off his safety belt when walking along a pick. For the following reasons, it is more reasonable to infer that Stillwell used his safety lanyard at times and not at others.

There is no evidence that McCulley was present every time Stillwell walked across a pick. On the other hand, there is evidence which raises the reasonable inference that McCulley frequently or even routinely left the area after helping Stillwell locate, extend and secure the end of the pick to the catwalk guardrail. (Tr. 31, Lines 1-8). Also, the cable to which Stillwell would have had tie off in order to walk across the pick from the catwalk to the exterior steel works was in an awkward and less than completely useful location in that it was one-half way across the plank and ran perpendicular to the pick (Tr. 538-541). Thus, in order for Stillwell to secure his lanyard to the only safety line nearby before getting on to the pick from the catwalk he would have had to reach up and out 4’.

Moreover, after doing so, he could not slide the hook across the safety line because the line ran parallel to the length of the bridge, which was perpendicular to the length of the pick. In addition, if the consistent use of safety belts was as high a concern to McCulley as he has claimed, it would be reasonable to expect that after helping Stillwell move, place and secure a pick that he would have made it a point to remain in the area long enough to watch Stillwell walk the length of the pick, secure the outer end and start his work. I thus find that it is more likely than not that Stillwell walked along the picks from the catwalk to the outer steel without tying off his safety belt on more occasions than not.

Finally, in a case where the employer argued that its employees working on picks without any guardrails always tied off their safety belts the Commission stated that even if it were so factually, “safety belts are not ‘equivalent protection’ when the standard requires guardrails.” *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1389 (No. 92-0262, 1995)(Citations omitted.). Thus, even if there were safety lines in place to which Stillwell could have and did tie off (See, Tr. 535, Lines 4-23), a violation of the cited standard would have to be found due to the lack of guardrails. Based on the above, I find that Respondent failed to comply with terms of the standard, an employee was exposed to the hazard created by the non-compliance, and that Respondent knew or, with the exercise of reasonable diligence, could have known of the condition. The Secretary has thus made out a *prime facie* case.

Respondent maintains that “guardrails on the scaffold was infeasible.” (R. Brief, p. 20). It points to testimony by McCulley, that there were locations where the picks were used at which “[g]uardrails wouldn’t be feasible.” (Tr. 516). Referring to two photographs (Ex. C-19 & 20), he pointed out locations on the outer most steel structures where there was not enough room between the diagonal (45s) and vertical (90s) to fit a pick with guardrails or where, if a pick with guardrails were used, the employee would not have enough room to “be able to work, or move, because you wouldn’t have access to his work.” (Tr. 517). I conclude that this evidence is not sufficient to demonstrate infeasibility.

The Commission, in *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1219 (No 88-821, 1991) ("*Seibel*") reviewed the history of the infeasibility defense including *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553, 1986), *rev'd in part, sub nom, Secretary v. Dun-Par Engineered Form Co.*, 843 F.2d 1135 (8th Cir. 1988), ("*Dun-Par I*") and *Dun-Par*

Engineered Form Co., 12 BNA OSHC 1962 (No. 82-0928, 1986) ("*Dun-Par II*"). In order to prevail on this defense, a Respondent must demonstrate that 1) compliance with the standard's requirements would "not be practical or reasonable in the circumstances." *Dun-Par II*, supra, 12 BNA OSHC at p. 1966, and 2) "that an alternative protective measure was used or that there was no feasible alternative measure." *Seibel*, supra, 15 BNA OSHC at 1228. The Commission said in *Dun-Par II*, 12 BNA OSHC at p.1996, that infeasibility includes "considerations of reasonableness, common sense, and practicality." Moreover, where an employer cannot fully comply with the literal requirements of a standard, it must nevertheless comply to the extent that compliance is feasible. *Bratton Furniture Manufacturing Co.*, 11 BNA OSHC 1433, 1434 (No. 81-799-S, 1983).

The evidence of record does not show that the use of picks with guardrails would have been infeasible, difficult or even problematic at all locations throughout the bridge where picks were needed or actually used. McCully's testimony, at most, was to the effect that using picks with guardrails in some locations on the bridge would have presented problems. Respondent used no picks with guardrails at all. The configuration of the members which composed the outer-most steel structure, a series of 45 degree and 90 degree columns between essentially horizontal beams, created angular "corners" resulting in constricted spaces only where a 45 degree column was joined to a 90 degree column or a horizontal member. Even if the use of picks with guardrails was found to be infeasible in this particular type of location (which was the only type of area identified by McCulley), there is nothing on this record to indicate that picks with guardrails could not have been used elsewhere and still provided access for the employees to their work areas. On this basis, I find that Respondent has not shown that the use of picks with guardrails would have been impossible or that their use would have precluded performance of the work required. Respondent has thus not demonstrated the infeasibility of using picks with guardrails under the circumstances of this case. Moreover, the record supports an affirmative finding that the use of picks with guardrails was feasible. An examination of the same photographs referred to by McCulley (Ex. C-19 and -20) as well as sketches (C-7) and drawings of the bridge (C-9) reasonably shows areas between the 45s and 90s with a sufficient amount of room to accommodate the end of a guardrail equipped pick. I so find. On this evidence, I find that the use of picks with guardrails in these areas was feasible.

Having found that the Secretary demonstrated the applicability of the standard, the existence of a violative condition, and the employer's knowledge of the condition and also having found that compliance with the cited standard was feasible, the alleged violation is affirmed.

The violation is alleged to be serious, that is, if the employee were subjected to the hazard created by the violation, the result would likely be serious physical harm or death. Act, § 17(k), 29 U.S.C. 666(j). Here, given the possibility of a fall of 10' to 200' to the ground or surface below, the violation is plainly serious within the meaning of the Act.

The Secretary has proposed a penalty of \$3000 (amended citation). The Commission has often held that in determining appropriate penalties for violations "due consideration" must be given to the four criteria under section 17(j) of the Act, 29 U.S.C. 666(j). Those factors include; the size of the employer's business, gravity of the violation, good faith and prior history. While the Commission has noted that the gravity of the violation is generally "the primary element in the penalty assessment," it also recognizes that the factors "are not necessarily accorded equal weight." An administrative law judge is required "to state an adequate factual basis for his assessment of a penalty...." *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). The facts in this case are that Respondent provided no guardrails on any of its picks. There was, however, low employee exposure shown on this record. There is evidence before me only to the effect that one employee, Stillwell, used such picks without his safety belt anchored. The degree of Stillwell's exposure was limited to "a matter of three steps." The frequency of such exposure, when Stillwell secured the outer end of a newly placed pick, went from the catwalk to his working area, or when he returned from his work area appears to be several times per working day. Finally, while a fall of 10' might or might not cause a death, a fall of '200 almost assuredly would. In balance, considering the above as well as the size of Respondent and its cluttered history of prior violations of a very similar nature, a penalty of \$1,000 is found to be appropriate.

Accordingly, based on the above, Citation No. 1, Item 1 is AFFIRMED as a serious violation. A penalty of \$1,000 is assessed.

Citation 1, Item 3 - 29 C.F.R. 1926.1052(c)
Stairway without handrail.

Item 3 of Citation No. 1 alleges that;

[a]long the south end of the I-71 Bridge employees were observed gaining access to an office/break trailer by using a 4 step 45" high set of stairs which was not protected by stair railings on each open side.

The condition described allegedly violates the standard at 29 C.F.R. § 1926.1052(c)(1) which provides;

c) *Stairrails and handrails.* The following requirements apply to all stairways as indicated:

(1) Stairways having four or more risers or rising more than 30 inches(76 cm), whichever is less, shall be equipped with:

(i) At least one handrail; and (ii) One stairrail system along each unprotected side or edge.

The Secretary relies in the testimony of CO Medlock as to his observations of the condition and use of a job-constructed wooden stairway at the entrance to a job-site trailer Respondent used as an office and brake area. The stairs were lacking a mid-rail on one side and had no railing at all on the other (Tr. 168-169; Ex. G-24). Medlock testified that he observed Respondent's employees using the stairs. (Tr. 169). On cross examination Medlock conceded that he did not know how long the trailer had been at the project at the time of his inspection. (Tr. 332). The Secretary maintains that the existence of references to the standard and its requirements for handrails in Respondent's written safety program demonstrates that Respondent knew of the requirements.

The employee who constructed the stairs, Bill Miller, testified that the stairs were not completed at the time of the inspection because he did not have enough lumber on hand to complete the task. (Tr. 434-436) Respondent's vice-president, Andy Manganas, claimed that if the Secretary's photograph (Ex. G-24) had included a greater area, it would have shown Miller in the process of cutting lumber as part of his building the stairs at the time of the inspection.

Respondent maintains that no violation existed because the stairs were under construction at the time of the inspection. (R. Brief, p. 26). It also argues that as an employee climbed the stairs he "would naturally hold on to the handrail with his left hand and reach up toward the door and push [pull] it (open) to the right." (*Id.*) Since the handrail that was missing was on the right side of the stairs, the door to the trailer which opened to the right, would have afforded some fall protection to

any employee entering or leaving the trailer, argues Respondent. Respondent's arguments are rejected.

While it is logical to conclude that a full and complete set of railings could not exist while a stairway such as this was actually under construction, there is no evidence on this record that such is the case here. Respondent claims that construction of the stairs was underway at the time of the inspection. Since it does not challenge the existence of the non-complying condition at the time of the inspection, the burden of going forward with evidence to explain why the non-complying condition should not be found to be a violation falls upon Respondent. Here, Respondent's explanation falls short of persuasive. Miller's testimony was that he started and then stopped building the stairway. He said that he did not have enough wood of sufficient width. (Tr. 436). Most importantly, Miller did not remember how long the trailer stairs remained in the partially completed condition depicted in Ex. G-24. (Tr. 437). He appears to begin to say that he "just never got--" around to completing the stairs. (Tr. 437, lines 20-12).

Where a respondent makes the claim that a lack of guardrails on a scaffold existed only during the erection or dismantling of a scaffold, it has the burden of showing that actual erection or dismantling was underway. *See, R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070, 1071-1072 (Nos. 91-1873 & 91-2027, 1959.) (Whether an employer is actually in the process of abatement (compliance) is to be viewed in terms of the reasonableness of the circumstances.) The same logic is applicable to the construction of a temporary wooden stairway which is found by an OSHA inspection to be in non-compliance on the day of the inspection. Thus, even if I were to conclude that as a matter of law a short hiatus in the construction of the stairs which was required in order to re-supply the carpenter with the appropriate sized lumber is included within a reasonable time allowed for the "construction" of the stairs, such is not the evidence here. There is no showing that completion of the stair railings proceeded with due diligence. Miller's testimony does not establish that the needed lumber was supplied within a reasonable time, or at any time for that matter. He made no statement as to how long the non-complying condition existed or when the work on the stairway started again. Thus, I find that the stairway was not under construction at the time of the inspection.

Respondent does not challenge the Secretary's claim that employees were exposed and that Respondent knew or should have known of the violative condition. Accordingly, I conclude that Respondent violated the cited standard in the manner alleged.

Respondent challenges the classification of the violation as serious, saying that the CO "was never able to explain how such a violation...could lead to an injury of a serious nature." (R. Brief, p. 26). Medlock did state that in his opinion a fall of 4½' could result in a "simple fracture." (Tr. 172). The Commission has held serious violations to have been demonstrated under circumstances where the hazard was a fall of ten to fifteen feet. *Brown-McKee, Inc.*, 8 BNA OSHC 1247 (No. 76-982, 1980). A fall of 4½' is, however, quite different. There is no reason to find, on this record, that the worst case example the CO could conjure up, "a simple fracture", was the likely or even probable result of a fall off the uppermost step. A possible result is not a likely or probable result. A possible result thus does not support a finding of serious. I conclude that the violation was other-than-serious.

The history, size and good faith of Respondent are considered, More importantly, however, given the scope of the violative condition, particularly the existence of a handrail on one side and the position of the trailer door when open, on the other, as well as the absence of any evidence as to frequency or duration of employee exposure (the burden of which is upon the Secretary), I find that a penalty of \$100 is appropriate for the violation.

Accordingly, based on the above, Citation 1, Item 3 is AFFIRMED as an other-than-serious violation. A penalty of \$ 100 is assessed.

Citation 2, Item 1 - 29 C.F.R. § 1926.105(a)
Fall Protection

I Fall Protection Generally

The standard cited, 29 C.F.R. § 1926.105(a), states that;

safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

Item 1 of Citation 2 alleges seven instances (a through g) which describe varying conditions or actions allegedly violative of the cited standard. All of the instances took place in the absence of safety nets.⁵ Briefly stated, instances a, b and c describe situations in which employees used safety belts and lanyards but did so in a manner which the Secretary maintains was “inadequate.”⁶ Instances d, e, f and g describe somewhat different circumstances -- those in which the employees did not use their safety belts and lanyards at all.⁷

⁵ By the time of the inspection safety nets were in place. (Tr. 282).

⁶ Instance a refers to a particular employee “shot blasting in a stationary position on a 45 degree beam” while his “safety belts lanyard hook was just clipped to the flange....” Instance b describes “[a]n employee...in a stationary post setting pick cables on 90 degree columns” while his “safety belts lanyard hook was just clipped to the flange....” Instance c portrays “[a]n employee in a stationary position...securing sna[t]ch blocks for pick cables on 90 degree columns...and the safety belts lanyard hook was clipped to the flange.”

⁷ Instance d describes “an employee walking across the lower beam to gain access to next work location without fall protection devices or systems being utilized.” The next instance, e, refers to “employees setting 5/8" cable for safety nets were cooning and walking lower beams without fall protection systems or devices being utilized....” Similarly, instance f mentions “employees setting pick and safety cables were cooning beams without fall protection devices or systems being utilized....” Finally, instance g describes “an employee...working from an unprotected scaffold pick to secure picks to cable without fall
(continued...) ”

In general, to prove a violation of a standard under § 5(a)(2) of the Act, 29 U.S.C. § 654a(2), the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, supra.; *Dun-Par Engineered Form Co.*, supra.

“[T]he cited standard (29 C.F.R. § 1926.105(a)) requires the use of one of the enumerated methods of fall protection.” *RMG Construction Co.*, 17 BNA OSHC 1229, 1232 (No. 91-2107, 1995). The Commission has held that the Secretary establishes a *prima facie* case of non-compliance with 29 C.F.R. § 1926.105(a) by showing that Respondent’s employees were subject to falls of twenty-five feet or more;

and that none of the other safety devices listed in the standard were practical -- meaning that they are either not in use or are in use but not practical because they do not protect against the cited fall hazard for a substantial portion of the workday.

American Bridge/Laschon, J.V., 16 BNA OSHC 1867 (No. 91-0663, 1994), *aff’d*, *American Bridge/Laschon, A Joint Venture v. Secretary of Labor*, 70 F.3d 131 (D.C.Cir. 1995) (“*American Bridge*”). Thus, showing that none of the devices listed in the standard were in use where employees could fall over twenty-five feet constitutes a *prima facie* showing of a violation. *John H. Quinlan d/b/a Quinlan Enterprises*, 17 BNA OSHC 1194, 1195 (No. 92-0576, 1995) (“*Quinlan*”). Where, however, some form of fall protection was in use, the Commission will examine the evidence about the fall protection actually adopted by the employer to determine whether the employees were adequately protected. *American Bridge*, supra. Once a *prima facie* case is made under this standard, a Respondent may raise one of the affirmative defenses recognized by the Commission.

There is no challenge by Respondent to the applicability of the standard. Respondent was engaged in construction and the potential fall distance was greater than twenty-five feet. I thus find that the standard is applicable.

Respondent complains that the Secretary relies on hearsay in that the Compliance Officer personally observed none of these alleged violations but rather reached the conclusion that they had

⁷(...continued)
protection devices or systems being utilized.”

occurred based solely upon his questioning employees and reviewing audio tapes of the interviews (Tr 351-352). While attacking the credibility and expertise of the Compliance Officer, Respondent's arguments present no persuasive reason to find unreliable the Compliance Officer's depiction of his conversations with and tapes of employee interviews. Such statements are not only admissible as statements made to the Compliance Officer by employees relating to their employment, but may be relied upon by the Commission as the basis of finding a violation of the Act. The evidentiary weight and reliability of the statements as depicted by the Compliance Officer are enhanced because they corroborate one another due to their concordance. More importantly, their content, as described by the Compliance Officer, is essentially consistent with the testimony given by the same employees at the hearing.

Determining whether there was non-compliance with the terms of the standard as alleged in the several instances in this case, requires two separate analyses because there are two types of violations alleged, those where the employees were allegedly totally unprotected and those where there was employee protection but of a type which was not considered by the Secretary to be adequate.

IA Instances a, b and c - Alleged violations and infeasibility

The violations alleged in instances a, b and c rest upon the theory that in the absence of safety nets, where another method of fall protection is actually used, that method must be "practical" -- meaning that the method of fall protection which was actually used must have provided adequate protection.

Respondent in this case was in the very process of installing safety nets. I thus find that the use of safety nets during the installation of safety nets would have been technologically infeasible. Thus, the question here narrows down to whether the method of protection used (safety lanyards tied off by clipping on to the flange of beams or the edges of portholes) adequately protected the employees against the cited fall hazard. Precisely what constitutes an adequate means of protection is the chestnut of this matter.

In this case, the Secretary argues that;

If the Court believes that the method of clipping into the portholes and flanges does not constitute adequate fall protection then the Secretary

should prevail. If the opposite is concluded, then the Secretary will lose.

The Secretary's statement of the issue is not quiet accurate. The question which must be answered to resolve instances a, b and c, is whether the evidence of record demonstrates that the method of clipping off safety belt lanyards into the portholes and flanges is "adequate" fall protection and if not, whether any other method of fall protection (short of safety nets) which would have provided greater protection to the employees was feasible.

For the reasons which follow, I find as fact that the evidence on this record as a whole, as it pertains to instances a, b and c, demonstrates that clipping off to a flange or porthole edge, the method relied upon by Respondent for fall protection for its employees, was less than adequate because the method used left gaps in employee protection and because another method of fall protection which would have provided a higher degree of fall protection to employees was feasible.

First, as observed first hand by the Administrative Law Judge as a result of several demonstrations during the hearing, clipping off to a flange or the edge of a porthole as was done by Respondent's employees on the job, was only partially effective in that the hook was secure only when the employee leaned or shifted his weight in such a manner as to produce tension on the lanyard which, in turn, held the clip in place. It was apparent upon observation of the demonstrations that with every shift in weight or leaning, loosening, sliding or moving the clip to another location, fall protection lapsed. There were lapses in fall protection even when the employee was in a relatively stationary working position such as on a 45 degree beam and not in the process of moving from one work location to another. (See, Tr. 638). Such observations coincide with logic. It is reasonable to infer that a person who is not moving from place to place (sliding along a beam, climbing up or down a 45 degree beam) but remains in a relatively stationary work position would, in order to accomplish his tasks, have to shift his weight, reach and pull and, in general, change positions. In doing so, a safety device which is dependent upon the worker continuously leaning back to keeping his weight and tension on the lanyard in order to keep the clip in place cannot be providing full protection at all times.

Second, the testimony of a number of employees acknowledged that there were times when they did, or could have but did not, obtain full fall protection by passing their lanyards completely around the beam they were working on or passing the lanyard completely through a porthole, around the beam and clipping off back to the lanyard itself or to the safety belt. (Tr. 186, 190-191, 279, 363-

364, 457-458, 605-605) There were, however, some times or conditions under which the employee could not tie off back to his own lanyard or safety belt. (Tr. 442, 605-606).

Third, the evidence is unequivocal that lifelines hung vertically from above could have been used by those employees working in a relatively stationary position and those who are the subject of instances a, b and c.⁸ At least one photograph in evidence (Ex. G-12) shows employees of a sub-contractor working from a scaffold in or near the areas where the identified employees of Respondent referred to by instances a, b and c worked. The contractor's employees were protected by safety belts with their lanyards tied off to vertical lifelines anchored somewhere above their work location. (Tr. 182, 209; Ex. G-12). Had such vertical lifelines been installed earlier, Respondent's employees could have had secure places to which they could have tied off. Moreover, the evidence that employees of another contractor were protected in this manner is an ample basis for rejection of the contentions of both Andy and Nick Manganas that vertical safety lines dropped over the sides of the bridge from the roadway above could not be used. (Tr. 564-566, 646-647). The lifelines shown to be in use by the contractor's employees were either dropped over the side of the bridge or anchored elsewhere above the working areas. If the former, the Manganas' opinions and reasoning must be incorrect or, if the later, there was a better method of employee protection not used by Respondent.

Under these circumstances, I find that the clipping off of safety belt lanyards to flanges or porthole edges is not "adequate."⁹ I conclude that Respondent was in violation of the standard as alleged in instances a, b and c.

IB Instances d, e, f and g - Alleged violations and infeasibility.

⁸ Respondent eventually installed horizontal cables along the outside of the outer most columns of structural steel as part of its rigging plan. (Tr. 493-494).

⁹ The Compliance Officer's testimony and attempt to rely on ANSI standards or OSHA standards published after the inspection in this case is misplaced. Such pronouncements are irrelevant to the conditions as they existed at the time of the alleged violations.

Instances d, e and f allege violations regarding activities identified in the citation as “walking” or “cooning” (or both) on various beams while not being protected by any fall protection. Instance g describes an employee “working from an unprotected scaffold pick” without any fall protection.¹⁰ It is undisputed that safety nets were not yet in place. It is also undisputed on this record that at least on some occasions, employees would move about the beams (and in one case, a scaffold) from location to location, whether walking, climbing or cooning, while not tied off. (Tr. 48-49, 430, 440, 463, 606-607, 614). Based on this evidence, I find that the employees of Respondent identified in citation 2, item 1, instances d, e, f and g were subject to fall hazards of 25 feet or more under conditions in which no fall protection at all was in use. This is sufficient to conclude that the Secretary has made out a *prime facie* case of violations in instances d,e, f and g. *American Bridge, Supra., Quinlan, Supra.*

Respondent raises the affirmative defense that compliance with the standard was infeasible.

In order to prevail on this defense, a Respondent must demonstrate that: 1) compliance with the standard's requirements would "not be practical or reasonable in the circumstances." *Dun-Par II, supra, 12 BNA OSHC at p. 1966*, and 2) "that an alternative protective measure was used or that there was no feasible alternative measure." *Seibel, supra, 15 BNA OSHC at 1228. See also, Kunz Construction Co., 15 BNA OSHC 1331, 1333 (No. 90-2369-S, 1991) (ALJ)*. Infeasibility, said the Commission, in *Dun-Par II, 12 BNA OSHC at p. 1996*, includes "considerations of reasonableness, common sense, and practicality." *Id.* Moreover, where an employer cannot fully comply with the literal requirements of a standard, it must nevertheless comply to the extent that compliance is feasible. *Bratton Furniture Manufacturing Co., 11 BNA OSHC 1433, 1434 (No. 81-799-S, 1983)*. Most recently, the Commission articulated the defense as follows:

In order to establish the affirmative defense of infeasibility, an employer must prove that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work

¹⁰ Instance g is not duplicative of Citation No. 1, item 1 because the Commission has held that “safety belts are not ‘equivalent protection’ when the standard requires guardrails.” *Armstrong Steel Erectors, Inc., 17 BNA OSHC 1385, 1389 (No. 92-0262, 1995)*(Citations omitted.).

operations would have been technologically or economically infeasible after its implementation and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection.

Armstrong Steel Erectors, Inc., 17 BNA 1385, 1387 (No. 92-0262, 1995).

The record does not support a finding that there was a feasible way to provide fall protection for the employees portrayed in instances d, e and f. In regard to a suggested abatement method for instance d, the Compliance Officer spoke of “retractables, life lines from above, the nets or a static line along that area.” (Tr. 193). He identified “beam strap(s)” “cross arm strap(s)” and “static line(s)” as methods to abate in instances e and f (Tr. 196).

Logic, the photographs in evidence and reasonable inferences arising from the record as a whole warrant rejecting such testimony. At some point in time in the complex process of rigging a bridge for painting as was being done at the time of the alleged violations, the first outside horizontal cable must be installed. In order to do so employees had to be on the lowermost horizontal beam on the outer steel structural works. In instances d and e the employees were moving horizontally along the lower beam (cord) from upright (90 degree) column to column as part of installing the first line running horizontally along the outside of the structural steel framework which would become a line supporting the safety nets which were installed later. In instance f, the employees were setting the first safety line itself and preparing for the setting of the outside horizontal lines which would eventually support the ends of the picks. Thus, the Compliance Officer’s reference to “nets” or a “static line” which could be used makes no sense. In installing the first line safety line itself or the first horizontal lines to support picks and from which nets would eventually be hung there are, perforce, neither pre-existing other static lines nor earlier - installed nets for protection. Using “beam straps or cross arm straps” amounts to the same tautology. At some time, some employee must put in the first protective system. Unless it can be demonstrated that the safety line itself can be installed without any employee exposure to the hazard it is designed to protect against, there will be some employee exposure to that hazard. I thus find that while in the process of installing the first safety lines, employees who were cooning beams could not have feasibly been afforded more effective fall protection.

Lifelines hung vertically every six lateral feet which were secured somewhere above the work location were found to be feasible in relation to employees on the outer structural steel framework

performing stationary job duties at a later time. Indeed, such lines were put in later by Respondent. (Tr. 493-494). Installation of a sufficient number of vertical lifelines was, however, not feasible here. With lanyard lengths of no more than 6 feet, a separate vertical line would have to be dropped every three lateral feet or less to enable an employee moving horizontally along a beam to clip off, move a bit further, yet still be able to change his clip from one vertical line to the next before proceeding further. Hanging a vertical lifeline every three lateral feet is found to be unreasonable. I thus find that it was infeasible for Respondent to comply with the cited standard insofar as it is sought to be applied in instances d, e and f.

Instances d, e and f are accordingly VACATED.

I find that it was not infeasible to comply with the standard in a manner so as to provide fall protection for the employee as described in instance g. The employee referred to is Mr. Stillwell. As discussed in detail in regard to Citation No. 1, Item 1, supra., Mr. Stillwell walked across the pick from the catwalk to the far outside end of the pick which was resting on a cable running horizontally along the outside of the bridge. He then secured the end of the scaffold to the cable. Had Respondent installed the vertical lifelines at intervals along the outside of the bridge as discussed in regard to instances a, b and c, Stillwell would have had a stable and secure place to which he could tie off his lanyard once he arrived at the outside end of the scaffold and in a rather stationary position, secure the pick's end to the cable on which it rested. It is noted that even if Stillwell had tied off to the very horizontal line on which the pick rested he would have had greater fall protection than not having tied off at all. This is so even though tying off to a horizontal cable below one's work station may not itself, be in compliance with OSHA requirements. Finally, the fact that securing the pick to the cable might not have taken very much time is no defense. Stillwell could have been afforded fall protection during that time and was not. Thus, compliance with the standard, under the circumstances depicted in instance g was not infeasible.

II Greater Hazard Defense

Respondent's does little more than merely mention the greater hazard defense (apparently as to all instances) in its post-hearing brief. (Resp. brief, p. 21). Respondent recognizes that the defense places upon an employer the burden of showing by a preponderance of the evidence that (1) the hazards of compliance are greater than the hazards of non compliance, (2) alternative means of

protection are unavailable, and (3) a variance was unavailable or inappropriate. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020 (No. 86-521, 1991). Yet, it presents an argument only as to the variance aspect. It merely states that “[c]learly a greater hazard existed as to any other available means to protect employees, or to perform the work safely.” (Brief, p. 22). Respondent’s failure to identify evidence or present any argument furthering its mere statement of an affirmative defense constitutes, for all practical purposes an abandonment of the defense or, at least, a failure to carry its burden. The argument is rejected.

III Employee Misconduct Defense

Respondent maintains that “[a]ny violations were due to employee misconduct.” (Brief. p. 24).

The record is clear that Respondent’s employees were fully aware that they were supposed to wear and to tie off their safety belt lanyards “wherever possible.” Several admitted that there were times when they (and other) employees did not do so because they forgot or were simply in too much of a rush to do so. Several employees as well as supervisory personnel testified that Respondent had an established and known policy that violators of safety requirements would be warned orally, then in writing and then could be disciplined or fired. Indeed, there is some indication that after the inspection in this case, an employee was fired, at least in part, due to his unsafe work practices.

The Commission has long recognized an affirmative defense of unpreventable employee misconduct. It has consistently held that in order to prevail on this affirmative defense an employer must show by a preponderance of the evidence that; (1) it established work rules designed to prevent the violative conditions from occurring; (2) the work rules were adequately communicated to its employees; and (3) it took steps to discover violations of those rules; and (4) it has effectively enforced the rules when violations were discovered. *Jensen Construction Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979).

Respondent’s asserted employee misconduct defense fails in this case. First, it is irrelevant as to instances d, e and f, vacated on other grounds. Second, as to instances a, b and c there simply was no employee misconduct. In clipping off to the flanges and porthole openings, the employees were using their safety belts and lanyards as they had been instructed to by Respondent. Their actions were fully known, approved and supported by Respondent’s supervisory and management personnel.

Similarly, as to instance a, for all of the reasons discussed in regard to Citation No. 1, Item 1, foreman McCully knew or should have known that Stillwell, when he reached the outer end of the scaffold pick, worked to secure the pick without tying off.

IV Violations, Classifications and Penalties

Based on the above, I concluded that instances a, b, c and g of Item 1, Citation No. 2 are violations of the cited standard.

Given the most likely consequences of falling the distances involved, I conclude that the violations are serious violations under section 17(j) of the Act, 29 U.S.C. § 666(j). *Brown-McKee, Inc.*, 8 BNA OSHC 1247 (No. 76-982, 1980); *P.P.G. Industries, Inc.*, 6 BNA OSHC 1050 (No. 15426, 1977).

Citation No.2, Item 1 alleges a repeat violation. I conclude that it is not. The Secretary, in his post-hearing brief, points to no facts and makes no argument supporting the repeated classification of the alleged violation. It is his burden to do so as the proponent of the classification which carries with it significantly higher possible civil penalties. (Act, § 17(a), 29 U.S.C. § 666(a). Complainant has thus abandoned the allegation. Moreover, what little relevant evidence of record exists as to the nature of prior violations of 29 C.F.R. § 1926.105(a) by Respondent would be insufficient to find any substantial similarity of past and present violations or flaunting of the requirements of the Act which might be necessary for concluding that the instant violations are repeated. *Potlach Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979); *Austin Road Co.*, 8 BNA OSHC 1916, 1918 (No. 77-2752, 1980).

The Secretary proposed a penalty of \$15,000 for this alleged violation. Neither party sought to argue that any particular amount of penalty would be appropriate. Having concluded that four of the seven initially cited “instances” were violations of the Act and that none were repeated as alleged, the penalty proposed by the Secretary is excessive. The considerable fall distances involved with the concomitant results indicates a relatively high degree of gravity. On the other hand, Respondent’s good faith is not challenged. It has a written safety program, conducts safety training and prior to starting work on this, its largest contract, it invested in and supplied much new equipment. While Respondent has a history of prior violations, it also has a history, according to Nick Manganas, of having never had a fatality. It is a family run company seasonally employing up to thirty-five individuals. Under these circumstances, I find that a penalty of \$1000 is appropriate for the serious

violation of the Act occasioned by Respondent's failure to comply with the standard at 29 C.F.R. § 1926.105(a) found above.

Accordingly, Citation 2, Item 1, Instances a, b, c and g are AFFIRMED as a serious but not repeat violation. A civil penalty of \$1,000 is assessed. Citation 2, Item 1, Instances d, e and f are VACATED.

Docket No. 93-3362

Citation 1 Item 1- 29 C.F.R. 1926.602(c)(1)(iv)
Unauthorized personnel allowed to ride on forklift.

This citation alleges that during the course of the inspection in September of 1993, "unauthorized employees were observed riding an Ingersoll Rand forklift and no safe place to ride was provided."

The standard allegedly violated, 29 C.F.R. § 1926.602(c)(1)(iv), requires that industrial trucks used meet the requirements of American National Standards Institute (ANSI) standard B56.1-1969, Safety Standards for Powered Industrial Trucks. Section 603 C of the ANSI standard provides:

C. Unauthorized personnel shall not be permitted to ride on powered industrial trucks. A safe place to ride shall be provided where riding of trucks is authorized.

Compliance Officer Medlock testified that he observed the forklift in operation on several occasions during which there was, in addition to the operator, another employee riding the equipment. On one of those occasions, Mr. Andy Manganas was operating the lift. (Tr. 217, 229, 230). The Compliance Officer maintains that he brought it to the attention of Andy Manganas who responded by ordering the employee off the equipment, reprimanding him and telling him specifically that he (the employee) had previously been instructed not to ride the forklift. (Tr. 229). Observation and a photograph establish that there is only one cushioned seat on the lift. (Ex. C-25). In addition, he testified that there was a warning sticker on the cab to the effect that riders were not permitted. (Tr. 221, 222, 225; Ex. C-25c).

Respondent argues that the standard is not applicable because the OSHA standard "did not contemplate, nor require, what had to be done by employees insofar as safety of operation of the truck." (Resp. Brei, p. 28) Respondent relies on subsequent revisions of the standard made by

OSHA which added more specific requirements regarding personnel protection. Respondent also notes that “the standard is not an outright prohibition against riding on lift trucks.” (Brief, p. 29). Respondent concedes that employees rode on the forklift. It maintains, however, that employees were authorized to do so and that there were “safe places” for them to ride. Andy Manganas’ description of his conversation at the site with the Compliance Officer differs from that of the Compliance Officer. According to Mr. Manganas, the conversation he had with the Compliance Officer was limited to a statement by the officer to the effect that he saw people riding on the forklift fender. He denies making any further statement (*e.g.* that employees, other than the operator were instructed not to ride the fork lift.) Respondent also points to testimony by Andy Manganas that there “was a bar to hold on to” on each of the fenders and that Mr. Manganas opined that someone could sit on the top of the fender on either side of the lift and ride safely. (Tr. 571-572).

As with other alleged violations of § 5(a)(2) of the Act, Complainant must show by a preponderance of the evidence that the standard is applicable, that there was a non-complying condition, that employees were exposed to the hazard which arose from the non-complying condition and that Respondent knew or reasonably should have known of the violative condition. *Astra Pharmaceutical Products, Inc.*, *Supra*.

Respondent’s claim that the standard is not applicable is rejected. Where the wording of a standard is clear, as it is here, there is neither need nor reason to look to later OSHA amendments to “interpret” it. Moreover, even if a standard is amended after the inspection and issuance of a citation in a particular case, the mere fact that it was later amended, is not, by itself, necessarily evidence of what OSHA intended in the original standard.

The controlling issue here is whether the condition as it concededly existed failed to comply with the requirements of the standard. More specifically, when the employees rode on the fork lift were they provided a safe place to ride? I find that they were not.

It is not the province of an administrative law judge to decide an alleged violation on his or her own notion of what would or would not have been safe. It is a matter of the weight of the evidence of record. Yet, an administrative law judge cannot ignore common knowledge or rational inferences arising from the evidence on the record. Nor can or should the judge ignore what is plainly evident in a photograph in evidence. In this case there was testimony by Andy Manganas that he thought the practice of allowing employees to ride the fenders of the forklift was a safe practice. The

Compliance Officer sought to present evidence which was rejected because it could not be shown to be applicable to the year, make and model of the fork lift in question. Nor was the proffered evidence claimed to be applicable to fork lifts in general. That evidentiary ruling is again affirmed. The photograph of the fork lift (Ex. C-25) does not reveal a platform, seat or handrails of any kind on the fender. Despite Andy Manganas' claim that employees sat there, it appears from the photograph that there was no such place established or demarcated by the manufacturer. The manufacturer installed one seat for an operator and no others. In addition, there is unrefuted evidence that employees were observed to ride as passengers while standing on the step area of the fork lift. (Tr. 217). Mr. Manganas did not claim that the step (as opposed to the fender) was a safe place to ride. Finally, there is no dispute that a "No Riders" sticker or decal was on the fork lift. Although equivocal whether the intent in putting the decal on the fork lift was to allow no riders at all or only those authorized, the presence of the decal nonetheless is consistent with either. Based on this evidence, I find that other than the driver's seat, there was no safe place to ride on the fork lift. Thus, Respondent's permitting employees to do so constitutes non-compliance with the requirements of the cited standard.

Employee exposure and Respondent's knowledge of the condition is clear and unrebutted. Accordingly, I find that Respondent violated the cited standard as alleged in Citation 1, Item 1, as alleged.¹¹

In order to be classified as serious under § 17(k) of the Act, supra., it must be established by the evidence as a whole that there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from an accident rather than the likelihood of the accident occurring which is considered in determining whether a violation is serious. In this case, neither party presents any argument (other than summary proposed findings) regarding either the classification of the alleged violation or the amount of penalty that might be appropriate.

There is opinion testimony from the Compliance Officer that if an employee riding on the fender or step fell off he could suffer broken bones or a concussion, or even death resulting from the

¹¹ Other affirmative defenses raised by Respondent in its answer were not carried forward with supporting evidence in the hearing nor are they argued in Respondent's post-hearing brief. They are deemed to have been abandoned.

fall or being run over by the fork lift. (Tr. 231) I find that there is little likelihood of a serious injury. The fall distances are just a few feet. While the lift is moving, it is doing so slowly. Employees on the site generally wore hardhats¹² significantly reducing, if not eliminating the Compliance Officer's concern as to concussions. In sum, the likelihood of a serious injury or death occurring as a result of a fall from the fork lift under the circumstances of this case is low. The likelihood of a serious injury occurring, even if the hazard comes to fruition, is so low that it cannot support finding a serious violation. Accordingly, I find that the violation was other than serious.

The penalty factors are not discussed by the parties in their briefs. While proposed to be \$3,000 in the initial citation and notification of proposed penalty, given all of the factors as discussed previously, I find that a penalty of \$500 is appropriate.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).
2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

DOCKET NO. 93-1612

¹² Since the Compliance Officer stated that the only violation he found on this inspection was the one which was cited, it is reasonable to infer that Respondent was in compliance with all other applicable standards at that time.

3. Respondent was in serious violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1926.451(a)(4). A penalty of \$1,000 is appropriate therefor.

4. Respondent was in non-serious violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1926.1052(c)(1). A penalty of \$100 is appropriate therefor.

5. Respondent was in serious but not repeated violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1926.105(a). A penalty of \$ 2,500 is appropriate therefor.

DOCKET NO. 93-3362

6. Respondent was in non-serious violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1926.602(c)(1)(vi). A penalty of \$ 500 is appropriate therefor.

ORDER

Docket No. 93-1612

1. Citation No. 1, Item 1 is AFFIRMED. A civil penalty of \$1,000 is assessed therefor.
2. Citation No. 1, Item 2 is VACATED pursuant to Complainant's withdrawal.
3. Citation No. 1, Item 3 is AFFIRMED as an other than serious violation of the Act.

A civil penalty of \$100 is assessed.

4. Citation No. 2, Item 1, instances a, b, c and g are AFFIRMED as a serious but not repeated violation of the Act. An aggregate penalty of \$2,500 is assessed.

Docket No. 93- 3362.

5. Citation No. 1, Item 1 is affirmed as an other than serious violation of the Act.
A. civil penalty of \$500 is assessed.

Michael H. Schoenfeld
Judge, OSHRC

Dated: JUL 23 1996
Washington, D.C.