UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Masonry Arts, Inc., Respondent.	OSHRC Docket No. **07-1923**

Appearances:

Angela F. Donaldson, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Andrew N. Gross, General Counsel, H B Training &Consulting, LLC, Suwanee, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Masonry Arts, Inc. (MAI) performs brick and masonry work on commercial and residential projects in Alabama and Florida. On July 16, 2007, MAI was working on a new high school gymnasium in Pensacola, Florida, when the project was inspected by the Occupational Safety and Health Administration (OSHA). As a result of the inspection, MAI received serious and repeat citations on October 24, 2007. MAI timely contested the citations.

The serious citation alleges MAI violated 29 C.F.R. § 1926.25(a) (item 1) by failing to keep work areas clean; 29 C.F.R. § 1926.451(b)(1)(i) (item 2) by failing to fully plank a scaffold platform; 29 C.F.R. § 1926.451(e)(1) (item 3) by failing to have a ladder or other safe means of access to a scaffold platform; 29 C.F.R. § 1926.501(b)(1) (item 4) by failing to have an adequate guardrail system along the open side of a balcony; and, 29 C.F.R. § 1926.1052(c)(1) (item 5) by failing to equip stairways with a stair rail system. The serious citation proposes total penalties of $7,800.00.

The repeat citation alleges MAI violated 29 C.F.R. § 1926.451(g)(1) (item 1) by failing to have a guardrail system on a scaffold platform. The repeat citation proposes a penalty of $20,000.00. MAI has received prior citations on May 18, 2005 and July 29, 2005, for violations of 29 C.F.R. § 1926.451(g)(1) at two work sites in Birmingham, Alabama. The prior citations were resolved informally and have become final orders.

A hearing in this matter was held on March 19 and 20, 2008, in Pensacola, Florida. The parties stipulated jurisdiction and coverage (Tr. 6). The parties filed post hearing briefs.

MAI denies the alleged violations and claims the scaffold platform was being dismantled. With regard to failing to keep work areas clean, the lack of stair rails in stairways, and the inadequate guardrails along the balcony, MAI argues the general contractor A.E. New was responsible for utilizing and maintaining and MAI's employees were not exposed.

For the reasons discussed, serious citation no. 1, item 2 (lack of full planking), item 3 (lack of safe access), and repeat citation no. 2, item 1 (lack of fall protection) are affirmed and a total penalty of $12,500.00 is assessed. The remaining items are vacated.

Background

MAI performs brick and masonry work for commercial and residential construction projects in Alabama and Florida. Its principal office is in Birmingham, Alabama. MAI employs approximately 250 employees including 60 employees at a satellite office in Pensacola, Florida (Tr. 55, Vol. III-4, 15).

In October 2006, MAI contracted with general contractor, A. E. New, to perform block and brick veneer work for a new basketball gymnasium at Pensacola High School. The new gymnasium is approximately 200 feet long, 200 feet wide, and 24 feet high. Foreman Michael Holobaugh was MAI's supervisor and competent person for the project. His assistant was Lucas Knight. MAI's work on the project was completed by December 2007 (Tr. 26, 54, 159-160, 221, 224, Vol. III-17).

Based on a complaint regarding A. E. New and the scaffolds on the project, compliance officer Diane Cuyler initiated an OSHA inspection on July 16, 2007. Cuyler arrived at the project a little before noon. The contractors present were A. E. New, MAI, and Comfort Systems, a heating/air conditioning contractor (Tr. 22, 25, 30, 91, 121-122, 125).

Before entering the work site, Cuyler observed two MAI employees on a scaffold platform who were assigned to perform block repair work. The scaffold platform was part of a larger scaffold

system along the northeast wall. The inside block work had been completed and MAI was moving the scaffold outside to install the brick veneer (Exhs. C-1, C-2; [1] Tr. 23, 169, 287-288).

When Cuyler entered the project, she met with a representative of A. E. New who radioed foreman Holobaugh regarding OSHA's presents on the site. By the time she began to walk the project, all MAI employees except Holobaugh and Knight, were sent home because of the heavy rains over the weekend and the expected wet conditions (Tr. 202-203, 287). Cuyler described the weather as sunny, but she was told more rain was expected (Tr. 30). Cuyler, accompanied by A. E. New's superintendent and foreman Holobaugh, inspected the project (Exh. R-6; Tr. 25-26, 29, 100, 208, 284).

Cuyler continued her inspection the next day, July 17. The scaffolding inside the gymnasium had been dismantled inside the gymnasium and handrails installed in the three stairways. On July 18, Cuyler held a closing conference with representatives of A. E. New, MAI, and Comfort Systems (Tr. 30, 92-93, 102, 130).

As a result of the OSHA inspection, MAI received the serious and repeat citations at issue. Similar citations were also issued to A. E. New and Comfort Systems (Tr. 91-92).

Discussion

The Alleged Violations

> 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).

The parties do not dispute the application of the construction standards at 29 C.F.R. Part 1926 to the construction of a new gymnasium. The scaffold on the gymnasium balcony was owned and erected by MAI. The scaffolds along the northeast wall was owned by the general contractor

[1]Cuyler's photographs reflects eastern time. Pensacola is on central time which are the times referred to in this decision (Tr. 32).

A. E. New but erected and used by MAI to perform its block work (Tr. 122, 161-162, 222). Each scaffold jack is 6 feet high and 5 feet wide (Tr. 236).

Cuyler identified the two MAI employees observed on the scaffold platform before entering the project as Freddie Scott and Willie Lindsay (Tr. 33). MAI claims the two employees were Scott and Willie Lee (Tr. 185). Scott is a brick mason. Lindsay and Lee are laborers (Tr. 164, 168, 219).

Based on the interview statements of Lindsay and Holobaugh dated July 17, 2007, the court concludes that Scott and Lindsay were the employees on the scaffold platform (Exhs, C-21, C-22). MAI's time sheet, prepared by Holobaugh on July 16, show Scott and Lindsay performing the same grout work. Lee is shown doing brick face work (Exh. R-6). Holobaugh's and Lindsay's inconsistent testimony at the hearing is not given weight.

Serious Citation No. 1

Item 1 - Alleged Violation of §1926.25(a)

The citation alleges excessive broken blocks, soda bottles and mortar piles were not kept clear from work areas. Section 1926.25(a) provides:

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

During the first day of the inspection, Cuyler observed debris at the base of the scaffold along an outside wall and near a wooden stairway to access the gymnasium. She considered the debris a tripping hazard. Cuyler asked that it be cleared, not considering it a violation because the weekend wind and rain may have caused the debris problem. However, when she returned on July 17, the debris was still present. The debris consisted of soda cans, lumber with protruding nails, cross-braces, broken blocks, and mortar piles. Cuyler saw employees on the scaffold and using the stairway. The debris was not removed until July 18 (Exhs. C-14, C-15; Tr. 45-47, 49-51, 114, 128-130).

A. E. New, as general contractor, was primarily responsible for keeping work areas clear. Cuyler agreed A.E. New was "in charge of" the clean up. She also deemed it the responsibility of each contractor to keep its work area's clear (Tr. 115).

MAI agrees the project was messy with debris caused by other contractors. Holobaugh identified most of the debris as caused by A. E. New and other contractors. He testified the main problem was the overfilled dumpsters maintained by A. E. New. He told Cuyler that MAI attempted to keep clean its work areas. He had the debris gathered in temporary piles, until the dumpsters were available (Tr. 88, 117). The only time debris piled up was when the dumpsters were overfilled (Tr. 212-214, Vol. III 25-29).

The record fails to establish MAI's violation. Cuyler could not identify the employees observed near the debris as employed by MAI. MAI's employees were not shown to use the stairs or be exposed to the debris near the stairs. According to Holobaugh, the stairs accessed the mechanical room which was not used by MAI employees. The employees on the scaffolds were not seen passing through the debris at the base to access the work platforms. From the photographs, the debris at the scaffold's base does not appear to hinder access. Holobaugh testified the debris was put into small piles under the scaffold and cleared at the end of the work day. MAI used "dump trash pan that generally stayed in the areas" to keep the areas reasonably clean. MAI's employees were instructed not to work under the scaffold and not use the steps.

Also, it is noted Cuyler agreed the weekend wind and rains likely caused a lot of the debris (Tr. 114-115). She allowed the contractors another day to clear the debris. MAI's employees, however, were sent home at noon because of expected more bad weather. She returned the next day at 9:30 a.m., not giving MAI sufficient time to clear the work area.

Item 2 - Alleged Violation of §1926.451(b)(1)(i)

The citation alleges a scaffold platform was not fully planked. Section 1926.451(b)(1)(i) provides:

> Each platform with (e.g. scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example to fit around uprights when side brackets are used to extend the width of the platform).

Before entering the project, Cuyler photographed two MAI employees at 11:54 a.m., on a scaffold platform along the northeast wall who were assigned to perform block repair work (Exh. C-1; Tr. 23). The platform was 12 ½ feet above ground. When Cuyler inspected the scaffold

at 12:22 p.m., she observed an approximate 5-inch gap, which ran the length of the platform between the second and third planks. The employees were no longer on the platform; they had been sent home at noon (Exhs. C-9, C-10; Tr. 42-44, 56-57, 61, 132-134, 170-171).

MAI's argument that the scaffold was being dismantled is rejected. Section 1926.451(b)(1)(ii), *Exception to paragraph (b)(1)*,[2] provides that if the employees are performing scaffold dismantling, "only the planking that the employer establishes is necessary to provide safe working conditions is required."

Although the scaffold on the northeast wall was to be dismantled, the two employees on the scaffold platform at issue were performing block repair work. There is no showing they were engaged in dismantling the platform (Tr. 167-168). The plain wording of the exception limits its application to employees actually engaged in dismantling activities and not to employees performing regular work activities such as block repair on scaffold to be dismantled.

MAI's argument the gap in the platform was proper because of outriggers is also rejected. An outrigger secures the scaffold to the block wall. Section 1926.451(b)(1)(i) and (ii) permits that if the employer can demonstrate that a wider space than 1 inch is necessary, than the "remaining open space between the platform and the uprights shall not exceed 9 ½ inches (24.1 cm)." MAI failed to demonstrate that a 5-inch gap, the length of the platform was necessary for attaching the outriggers. As shown in the photographs, there are no outriggers on the platform and no evidence outriggers had been removed. Holobaugh conceded the gap could have been closed by moving the planks over (Tr. 180).

With regard to employees' exposure, there is no showing the condition of the platform had changed between the time Cuyler photographed the two employees at 11:54 a.m. and when she observed the 5-inch gap at 12:22 p.m. The photograph showing the two employees working on the platform was taken less than 30 minutes before the photograph showing the gap. The same gap is apparent in a photograph taken 11 minutes earlier and only 17 minutes after seeing the two employees (Exh. C-7). At 12:10 p.m., when Holobaugh was placing red tape on a nearby section of the balcony, there are still no detectable alterations to the scaffold platform or materials on it

[2]Exceptions are to be narrowly construed and the party seeking the benefit of an exception has the burden to show its compliance. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1389 (No. 92-262, 1995).

(Exh. C-6). By the time Cuyler inspected the platform at 12:22 p.m., only the bridge erected from the platform to the concrete balcony was removed. Knight testified that he removed the bridge after the employees completed the block repair work. He said nothing about removing anything from the platform (Tr. 297). The employees were sent home at noon; only six minutes after Cuyler's first photograph (Exh. R-6). MAI's time sheet for the day does not identify any employees engaged in dismantling activities. Only Holobaugh and Knight remained on the site until 4:30 p.m. (Tr. 207-208). Employees' exposure is established based on observing the employees on the platform at 11:54 a.m.

MAI's knowledge of the 5-inch gap in the platform is established through Holobaugh. Holobaugh brought the materials to the northeast wall scaffold for Scott and Lindsay to "to build that bridge over to the areas that they were working off of" and he "watched them put most of that material up" before leaving the area (Tr. 172-173, 228). His presence on the site, his involvement in instructing the employees, his providing of the materials for the decking, and his knowledge about the bridge is sufficient to establish MAI knowledge of the lack of full planking of the scaffold platform. As a supervisor, Holobaugh's knowledge is imputed to MAI. *Dover Elevator Co*., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). His testimony that the platform was fully planked because he "watched them and work with them to get that decked out," is inconsistent with his earlier statement (Tr. 189). In his signed interview, Holobaugh stated he left the employees to deck the scaffold and only came back after they had completed the patch work. He did not observe the removal of any planks (Exh. C-21; Tr. 176, 178).

The lack of full planking is properly classified as a serious violation. In order to establish a violation is "serious" under § 17(k) of the Occupational Safety and Health Act (Act), the Secretary must show 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 of the violation. Showing the likelihood of an accident is not required. *Spancrete Northeast, Inc.,* 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Holobaugh should have been aware of the 5-inch gap in the scaffold platform because he assisted the employees in erecting the platform and was present on the site. Although an employee could not fall through the gap, serious physical harm could occur if an employee stepped into the opening or he tripped on the platform, 12 ½ feet above the ground.

Item 3 - Alleged Violation of §1926.451(e)(1)

The citation alleges the scaffold platform did not have a ladder or other safe means of access. Section 1926.451(e)(1) provides:

> When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, shall be used. Crossbraces shall not be used as a means of access.

To access the scaffold platform used by the two MAI employees to perform the block repair work, Cuyler did not observe a ladder or other means of access except a bridge erected between the platform and the second floor balcony. Lindsay stated in his written interview that they accessed the platform by climbing the scaffold rungs (Exh. C-22; Tr. 66). MAI concedes there was no ladder (Exhs. C-1, C-6, C-9; Tr. 60, 64, 169).

Holobaugh testified the employees were expected to use a temporary bridge erected between the scaffold platform and the balcony. Holobaugh instructed and assisted the employees in erecting the bridge. He placed the boards and material on the balcony for the employees to use. He watched them place most of the material before he was called outside. He returned later and inspected the scaffold while the employees were working (Tr. 168-169, 172-173, 185-186).

The bridge lacked guardrails or handrails and was closer to the balcony edge than to the wall on the opposite side (Tr. 152-153, 296). Section 1926.451(e)(5), *Ramps and Walkways*, requires an elevated walkway to have a guardrail system that complies with subpart M, *Fall Protection*. Without a guardrail system, the employees' use of a bridge did not provide a safe means of access as required by § 1926.451(e)(1).

The lack of a safe means of scaffold access was properly classified as serious. Holobaugh was aware the bridge lacked a guardrail system and the scaffold did not have a ladder for access. An employee's fall from the bridge to the ground was 12 ½ feet which could cause serious injury or possibly death.

Item 4 - Alleged Violation of §1926.501(b)(1)

The citation alleges the balcony did not have a guardrail system, exposing employees to a fall hazard of 12 ½ feet. Section 1926.501(b)(1) provides:

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

On the second level balcony, approximately 12 ½ feet above the ground, MAI had erected scaffold for block work on the wall. Along the balcony's open side, there is no dispute the guardrail system was inadequate. It was missing guardrails in one section and lacked top rails across the balcony. Cuyler observed employees including Holobaugh on the balcony. When observed, Holobaugh was placing caution tape around the area of the scaffold. The parties agree A. E. New was responsible for maintaining the guardrail system on the balcony (Exhs. C-4, C-5, C-6, C-8, R-2; Tr. 39-41, 43, 57, 222).

Holobaugh was aware MAI's employees accessed the balcony to perform work on the scaffold and to access the platform on the northeast wall. He claimed he had to replace the caution tape regularly because other contractors would remove it. He also said he repeatedly advised A.E. New about the inadequate guardrail system. According to Holobaugh, MAI had its own handrail system that ran through its scaffold because he could not depend on A. E. New (Tr. 69, 208-210, 225-226).

The record fails to show the employees observed on the balcony during the inspection were employed by MAI except Holobaugh and that MAI's employees were exposed to the inadequate guardrail system. Cuyler did not ascertain the employees' names or their employer (Tr. 118-119, 140). Also, she failed to establish exposure based on where the employees were in relation to the balcony's open side. She did not know the size of the balcony.

When she observed Holobaugh, he was placing caution tape around its scaffold to keep MAI's employees away from the balcony's edge. A supervisor such as Holobaugh is expected to take reasonable steps to warn its employees of hazards which an employer is unable itself to correct. It was A. E. New's responsibility for maintaining the guardrails on the balcony (Tr. 98-99, 137-138). Placing caution tape and advising A. E. New of the inadequate guardrails are considered such reasonable steps.

On the second day of the inspection, Cuyler observed an employee sweeping water off the balcony and two other employees replacing missing guardrails.[3] She assumed the employee sweeping water was employed by MAI based on her conversation with Holobaugh and A. E. New's superintendent (Tr. 72, 117).

MAI denies the employee was employed by MAI. There is no evidence the employee was employed by MAI. Also, in the photograph, the employee is in the doorway facing the open side and there is no evidence how close the employee came to the balcony's open side.

A violation is not established. A. E. New was responsible for installing and maintaining the guardrail system on the balcony. Cuyler was unable to identify the employees except for Holobaugh on the balcony as employees of MAI. Holobaugh's placement of caution tape shows MAI's reasonable attempt to protect the safety of its employees working on the scaffold.

Item 5 - Alleged Violation of §1926.1052(c)(1)

The citation alleges four stairways were not equipped with at least one handrail and stairrail system. Section 1926.1052(c)(1) provides:

> 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.
> NOTE: When the top edge of a stairrail system also serves as a handrail, paragraph (c)(7) of this section applies.

To access the second floor of the gymnasium, four concrete stairways were erected. One stairway was not finished and not used (Tr. 76, 119-120). On the first day of the inspection, the other completed stairways lacked handrails and stairrail systems (Exhs. C-11, C-12; Tr. 44). When Cuyler returned on July 17, handrails and stairrails had been installed (Exhs. C-13, C-16, C-17; Tr. 45, 74). Cuyler cited the three employers including MAI for the lack of stairrail. There is no dispute the stariways had more then four risers.

Cuyler observed employees using the three stairways. Although she did observe MAI employees using the stairways, MAI concedes its employees used them daily to access the scaffold

[3] Although she considered the employees replacing the guardrails as exposed, she did not consider it a violation because they were correcting an unsafe condition (Exh. R-3; Tr. 139-140).

on the balcony (Tr. 87-89, 183-184, 256). Cuyler classified the violation as serious because of the risk of falling (Tr. 75).

The parties agree the responsibility for installing and maintaining the handrails and stairrails rested with A. E. New (Tr. 143-144). According to MAI, its general superintendent Robert Ritter had sent numerous e-mails to A. E. New requesting the installation of the stairrail.

MAI's violation is not established.[4] It is well settled the Commission requires "each employer to take reasonable steps to protect its employees against known hazards which the employer can reasonably be expected to detect." *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1189 (No. 12775, 1975). An employer cannot close its eyes to hazards to which its employees are exposed because it cannot itself abate a violative condition. An employer is expected to take realistic abatement measures, even though these measures may fall short of literal compliance.

The record in this case shows MAI took reasonable steps under the circumstances to protect its employees over an unsafe condition it did not create or have responsibility to abate. It notified A. E. New of the unsafe conditions and requested abatement. Prior to the inspection, it had employees use a ladder to access the second floor. It had employees to be careful. No other measures MAI should have taken.

Repeat Citation No. 2

Item 1 - Alleged Violation of §1926.451(g)(1)

The citation alleges employees performing block repair work from a scaffold platform were exposed to a fall hazard of 12 ½ feet because the platform did not have a guardrail system. Section 1926.451(g)(1) provides:

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

[4] MAI's assertion of unpreventable employee misconduct for the alleged violation of §1926.1052(c)(1) is not discussed because no violation is found.

It is undisputed that a guardrail or other means of fall protection was not present on the scaffold platform when Cuyler took her first photograph at 11:54 a.m. Two MAI employees were working approximately 12 ½ feet above ground (Exh. C-1; Tr. 61, 187).

MAI argues the scaffold along the northeast wall including the scaffold platform at issue was being dismantled. MAI claims the block repair work was completed by the time the photograph was taken by Cuyler and the two employees had begun dismantling the scaffold (Tr. 290-291). In the photograph, one employee is standing facing the block wall and the other employee is sitting down. By the next morning, July 17, the scaffolding had been removed (Exh. R-1; Tr. 102). After the employees left the project at noon, Holobaugh and Knight completed the dismantling process. Also, MAI claims that when Holobaugh instructed the crew in erecting the platform, the platform had proper fall protection consisting 16-foot walk boards used as a guardrail.

Although most of the work on the northeast wall was completed as of July 16, Holobaugh was aware that some work involving repairing some blocks remaining. Holobaugh's testimony that a guardrail was present when he inspected the platform and someone must have taken it away by 11:54 a.m., is inconsistent and contradicted other testimony. Holobaugh provided conflicting testimony on whether he watched and assisted in the installation of the scaffold platform or whether he brought the materials and left before the materials were installed (Tr. 172-173, 189). It is noted Knight testified the employees brought the materials to erect the platform down from the above scaffold sections.

Holobaugh's version is also implausible. It is unreasonable to assume the employees removed the guardrail during the block repair work. There is no showing the guardrail interfered with the repair work. According to the time records, only Holobaugh and Knight worked pass noon. Knight testified he removed the bridge and later in the afternoon he and Holobaugh dismantle the scaffolding. The reasonable inference is that the scaffold platform at 11:54 a.m. lacked guardrails and this condition existed from the time the two employees began their work on the scaffold.

The lack of fall protection on a scaffold platform while the remaining scaffolding was being dismantled show also Holobaugh's failure to ensure the employees' safety on the platform was not affected by the dismantling. The block repair work performed by the two employees was not part of the dismantling process. Even if two employees were engaged dismantling, MAI failed to show

by competent person that fall protection was not feasible or would create a greater hazard. See § 1926.451(g)(2).

MAI's violation of §1926.451(g)(1) is properly classified as repeat. A violation is repeated under § 17(a) of the Act if, at the time of the alleged repeated violation, there is a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Substantial similarity is shown, *prima facie*, if both violations are of the same standard. *Monitor Constr. Co*., 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

In this case, MAI has received two prior citations on May 18, 2005 and July 29, 2005 for violations of § 1926.451(g)(1) at two worksites in Birmingham, Alabama. The citations were informally resolved without change to the violations of § 1926.451(g)(1). The citations have become final orders (Exhs. C-18, C-19). It is noted the citation issued July 29, 2005 was also classified as a repeat violation of 1926.451(g)(1). A review of the citations shows similar fall hazard conditions as in this case.

Penalty Consideration

In determining an appropriate penalty, the Commission considers the size of the employer's business, history of the employer's previous violations, the employer's good faith, and the gravity of the cited violation. Gravity of the violation is the principal factor.

MAI is not entitled to credit for size and history. MAI employs 250 employees. It has received prior serious citations within the proceeding three years. MAI is entitled to credit for good faith because it maintains a written safety program including a safety manual, safety training and monitoring (Exh. R-5, R-7, R-8). Cuyler agreed MAI has a good safety program that was adequately communicated to its employees (Tr. 54). MAI provides safety training to its employees including the OSHA 10 hour course, operator certifications, and training for competent person, fall protection, and scaffolding.

A penalty of $1,000.00 is reasonable for MAI's serious violation of § 1926.451(b)(1)(i). MAI's two employees on a scaffold platform were exposed to the 5-inch gap in the planking. The time sheet show the employees were working for five hours. The two employees were exposed to a tripping hazard from a scaffold platform 12 ½ feet above the ground.

A penalty of $1,500.00 is reasonable for MAI's serious violation of § 1926.451(e)(1). The two employees on the scaffold platform did not have a safe means to access the platform. There was

no ladder and the bridge installed from the balcony did not have guardrails. The platform was 12 ½ feet above the ground.

A penalty of $10,000.00 is reasonable for MAI's repeat violation of § 1926.451(g)(1). The scaffold platform lacked guardrails or other fall protection. The two employees were exposed to a fall hazard of 12 ½ feet. MAI has received two previous citations since 2005 for violations of § 1926.451(g)(1).

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:

Serious Citation No. 1

1. Item 1, serious violation of § 1926.25(a), is vacated and no penalty assessed;
2. Item 2, serious violation of § 1926.451(b)(1)(i), is affirmed and a penalty of $1,000.00 is assessed;
3. Item 3, serious violation of § 1926.451(e)(1), is affirmed and a penalty of $1,500.00 is assessed;
4. Item 4, serious violation of § 1926.501(b)(1), is vacated and no penalty assessed;
5. Item 5, serious violation of § 1926.1052(c)(1), is vacated and no penalty assessed; and

Repeat Citation No. 2

6. Item 1, repeat violation of §1926.451(g)(1), is affirmed and a penalty of $10,000.00 is assessed.

/s/
KEN S. WELSCH
Judge

Date: August 19, 2008