Secretary of Labor,

Complainant,

v.

Anderson Masonry, Inc.,

Respondent.

OSHRC Docket No. 02-2193

Appearances:

Andrea Christensen Luby, Esq., Office of the Solicitor, U. S. Department of Labor, Kansas City, Missouri
For Complainant

Scott A. Harrison and Zachary Anderson, Anderson Masonry, Inc., Bigfork, Montana
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Anderson Masonry, Inc. (AMI), was erecting scaffolds for its exterior brick masonry work on the American Bank building in Whitefish, Montana, on October 24, 2002, when the worksite was inspected by the Occupational Safety and Health Administration (OSHA). As a result of OSHA's inspection, AMI received serious and "other" than serious citations on November 13, 2002. AMI timely contested the citations.

Serious citation no. 1 alleges that AMI violated 29 C.F.R. § 1926.451(e)(9)(i) (item 1) for failing to provide a safe means of access for the employees erecting scaffolds; 29 C.F.R. § 1926.451(g)(2) (item 2) for failing to provide fall protection for employees erecting scaffolds; and 29 C.F.R. § 1926.452(c)(4) (item 3) for failing to lock together vertically the end frames or panels of scaffolds by pins or equivalent means. The serious citation proposes total penalties of $5,950.

The "other" than serious citation no. 2 alleges that AMI violated 29 C.F.R. § 1926.1052(c)(1) (item 1) for failing to equip stairways having four or more risers with handrails and stairrails along each unprotected side or edge; and 29 C.F.R. § 1926.1052(b)(1) (item 2) for failing to prohibit foot traffic where the treads or landings of pan stairs were to be filled in with concrete or other material at a later date. No penalties are proposed for the "other" than serious citation.

The case was designated for EZ trial proceedings pursuant to 29 C.F.R. § 2200.200, *et. seq.* The hearing was held in Kalispell, Montana, on March 10 and 11, 2003. AMI was represented *pro*

se by its safety director and project manager. The parties stipulated jurisdiction and coverage (Exh. J-1; Tr. A-6[1]). The parties filed post-hearing statements of position.

AMI denies the violations. AMI asserts that it complied with the standards and the procedures designated by its competent person in erecting scaffolds. AMI argues that its competent person determined that the erecting procedures provided maximum feasible fall protection and that personal fall arrest systems were infeasible and would pose a greater hazard. AMI also contends that a failure to provide safe means of access does not include employees climbing on cross bracing, which is covered by another standard.

For the reasons discussed, serious violations of § 1926.451(e)(9)(i) (item 1) and § 1926.452(c)(4) (item 3) are affirmed and total penalty of $3,000 is assessed. The remaining violations cited are vacated.

The Inspection

AMI is a masonry contractor. Its principal place of business is in Bigfork, Montana. AMI employs approximately 80 employees in Montana and 11 employees at an office in Spokane, Washington (Exh. J-1).

In March 2002 Schlauch-Bottcher Construction (SBC), a general contractor, initiated construction work for an American Bank building in Whitefish, Montana (Exh. C-1; Tr. A-16). AMI contracted to perform the exterior brick work. AMI's brick work began in September 2002 and was almost completed by March 2003 (Tr. A-20; B-224).

AMI used approximately 8 employees on the bank project, including masons and helpers (Exh. J-1). Mike Stodtbeck was the AMI's job foreman and competent person on the project (Tr. B-203, 223). Strodtbeck's duties included on-site supervision, including safety checks (Tr. A-103; B-35, 207-208, 226). Strodtbeck has been employed by AMI since 1987 and a foreman for 7 years (Tr. B-223-224).

The day prior to OSHA's inspection, AMI employees Christopher McMichael and Jeffrey Eberle, who assisted the brick masons, used an interior stairway on the north side of the building to access the third level of AMI's scaffold on the south side (Tr. A-74-75, 116-117). Also, brick mason

[1]Reference to transcript volume and page number. "A" refers to hearing date March 10, 2003. "B" refers to hearing date March 11, 2003.

Robert Brockman testified that he used an interior stairway because his access off the scaffold was blocked by a forklift (Tr. B-37). The two interior stairways did not have handrails or stairrails, and the pan stairs were not completely filled with material (Exh. C-2; Tr. B-104).

On the morning of October 24, 2002 (date of OSHA's inspection), employees McMichael and Eberle,[2] began erecting scaffold along the west side of the building (Exh. C-2; Tr. A-95; B-15). The job was assigned by foreman Strodtbeck (Tr. A-72, 102; B-203). The scaffold was tubular welded frame scaffold for masons (Tr. A-46, 83; B-106). The scaffold was approximately 70 feet long and at the time of OSHA's inspection was 2 frames high, approximately 12 feet, 8 inches above the ground (Tr. B-6, 16). The scaffold was eventually to reach 4 frames high (Tr. B-16).

When OSHA arrived on site, employees McMichael and Eberle were laying 4 x 8 feet sheets of plywood over three, 2 x 10 inch planks. The plywood sheets were used to deck the second level of the scaffold before installing the uprights and cross bracing for the third level (Exhs. J-1, C-2; Tr. B-16, 87-88, 117, 155). The plywood sheets were lifted to the employees on the second level by a forklift (Tr. B-6, 88, 101). While erecting the scaffold and placing the plywood, the employees were not tied off or protected from falls by any fall protection (Tr. A-72, 103; B-86, 203). To access the scaffold, the employees climbed the cross bracing or end frames (Tr. A-52, 73, 109-110).

After observing the employees laying the plywood deck, OSHA safety compliance officers Trina Mailloux and Christopher Dickey initiated an inspection of the worksite at approximately 1:00 p.m. on October 24, 2002 (Tr. A-33, 41; B-148, 156). The inspection was made pursuant to an OSHA local emphasis program (Tr. A-34). In addition to the lack of fall protection, CO Mailloux observed the employees climb down the cross bracing of the scaffold from the second level to the first level and then use the end frames (Tr. A-52). When she inspected the scaffold, Mailloux saw that most of the frames were not locked together by pins or equivalent means (Tr. A-57). She made the same observation on AMI's scaffolds on the east and south sides of the building (Tr. A-56-58). As a result of the inspection, the serious and "other" than serious citations were issued to AMI.

Discussion

[2]Eberle had worked for AMI for approximately 4 months as a laborer (Tr. A-70, 89). McMichael, also a competent person, was the hod carrier, who tended the masons and erected scaffolding. McMichael had worked for AMI approximately 1 year (Tr. A-101; B-19-20).

The Secretary has the burden of proving a violation.

> 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).

AMI does not dispute that scaffold standards at § 1926.451 and § 1926.452 and the stairway standards at § 1926.1052 were applicable to the bank building worksite. AMI employees' exposure to the conditions also is uncontested. Further, the record is uncontradicted that there was no ladder for the scaffold on the west side; the employees were not using fall protection while erecting the scaffold; AMI's scaffolds did not have locking pins to prevent uplifts; the building interior stairways did not have handrails or stairrails; and the pan stairs were not filled completely with material.

Alleged Violations

Serious Citation No. 1

Item 1 - Alleged Violation of § 1926.451(e)(9)(i)

The citation alleges that employees were exposed to a fall in excess of 12 feet because AMI failed to provide safe means of access to employees erecting scaffolds. Section 1926.451(e)(9)(i) provides:

> The employer shall provide safe means of access for each employee erecting or dismantling a scaffold where the provision of safe access is feasible and does not create a greater hazard. The employer shall have a competent person determine whether it is feasible or would pose a greater hazard to provide, and have employees use a safe means of access. This determination shall be based on site conditions and the type of scaffold being erected or dismantled.

There is no dispute that two employees were erecting the scaffold when laying plywood sheets to complete the deck on the second level. The scaffolding along the west side was approximately 70 feet long, and the employees were in excess of 12 feet above the ground.

The record in this case also establishes that when the employees were asked by the job foreman to exit the scaffold, the two employees climbed down the cross bracing to the first level and

then the end frame to the ground (Exh. R-1; Tr. A-52, 73, 88, 109-110; B-118-119). The 2x10 planks extended approximately 6 to 12 inches past the end frame at two points, which made it difficult to climb down the end frame (Tr. A-109-110; B-222-223). There was no ladder for the scaffold on the west side (Exh. C-2; Tr. B-81).

Employee Eberle testified that he would "usually climb up the scaffolding itself or use the X-braces to get up" (Tr. A-73). No one had told him not to climb the cross-bracing prior to OSHA's inspection (Tr. A-74). Employee McMichael testified that he used the cross bracing because the extended planks prevented him from using the end frame. He had to climb around the planks to access the second level (Tr. A-109, 115). However, he did not believe the extended planking hindered his use of the end frame (Tr. B-13). McMichael said that usually a ladder is tied to the scaffold. Otherwise, he used a window or the end frames (Tr. A-110, 114; B-25).

CO Mailloux observed that the extension of the planks obstructed the use of the end frames to access the scaffold (Tr. B-82-83). Regardless, according to Strodtbeck, Safeway, the manufacturer of the scaffold, did not recommend the use of the end frames as a means of access (Tr. B-205-206).

Despite the manufacturer's recommendation and the obstruction caused by the planks extending beyond the end frame, foreman Strodtbeck thought that the employees could use the end frames for access (Tr. B-204-205). However, Strodtbeck also testified that ladders are used "whenever we're erecting scaffolding" (Tr. B-207). It is undisputed that there was no ladder for the scaffold on the west side (Tr. B-147).

AMI does not dispute that employees should not climb on the cross bracing. In fact, both employees testified that after climbing down the cross bracing, foreman Strodtbeck told them that they should not use the cross bracing (Tr. A-73, 111; B-25).

AMI does not assert unpreventable employee misconduct nor does the record support such an affirmative defense. There is no showing of an AMI work rule or AMI enforcement of such a rule. During his four months with AMI, no one told Eberle not to use the cross bracing (Tr. A-74). The employees were not disciplined for using the cross bracing (Tr. A-113).

AMI argues that the cited standard does not apply because climbing on the cross bracing is covered by another standard (Tr. A-111). This argument is rejected. Safe means of access during erection or dismantling of scaffold includes a prohibition against climbing on the cross bracing. *See*

§ 1926.451(e)(9)(iv).[3] In this case, the hazard addressed by the citation is broader than using the cross bracing. The unsafe condition cited involves the lack of any safe means of access provided to the employees. There was no ladder on the west side, and the record shows that the end frames were obstructed by the extension of planks used to support the plywood deck.

Also, although the standards permit the use of end frames, it requires that the horizontal members be parallel and no more than 22 inches apart. *See* § 1926.541(e)(9)(iii).[4] The record in this case does not establish that the end frames, even if there was no obstruction caused by the planks, met the standard's requirements for a safe means of access. The end frames on the west side of the building were not shown to be equivalent to a ladder. Further, the manufacturer of the scaffold does not recommend the use of the end frames (Tr. B-205-206).

Additionally, the record fails to show that AMI's competent person Strodtbeck made a determination regarding the safe means of access as required by the standard. It was not established that he considered the obstruction to using the end frames caused by the extension of the planks. Also, he made no determination that a portable ladder was infeasible or posed a greater hazard to the employees erecting the scaffold or while laying the plywood decking for the second level. In *Brand Scaffold Rental and Erection, Inc.*, 19 BNA OSHC 1741, 1743 (No. 00-1668, 2001)(ALJ), cited by AMI (AMI Brief, p. 1), the judge found that a competent person made a determination that a ladder was infeasible and would pose a greater hazard. In this case, it was not shown that Strodtbeck made any determination prior to OSHA's inspection regarding safe access.

With regard to AMI's knowledge of the condition, foreman Strodtbeck was present when the two employees climbed down the cross bracing. He also repeatedly inspected the scaffold's progress on the west side. He should have known that no ladder was present and the end frames were obstructed by the extension of the planks (Tr. B-207-208, 222). Strodtbeck agreed that the planks

---

[3]Section 1926.451(e)(9)(iv) provides that "[c]ross braces on tubular welded scaffolds shall not be used as a means of access or egress".

[4]Section 1926.541(e)(9)(iii) provides :

> When erecting or dismantling tubular welded frame scaffolds, (end) frames, with horizontal members that are parallel, level and are not more than 22 inches apart vertically may be used as climbing devices for access, provided they are erected in a manner that creates a usable ladder and provides good hand hold and foot space.

extended into the employees' climbing space at two points (Tr. B-223). The lack of a safe means of access was in plain view.

As foreman, Strodtbeck's knowledge of the unsafe conditions on site are imputed to AMI. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (when a supervisory employee has actual or constructive knowledge of the violative condition, knowledge is imputed to the employer). Strodtbeck should have known of the lack of a safe means of access based on his on-site supervision of the project (Tr. A-103; B-35-36, 207-208, 225, 226).

A violation of § 1926.451(e)(9)(i) is established.

Item 2 - Alleged Violation of § 1926.451(g)(2)

The citation alleges that AMI failed to provide fall protection for employees exposed to a fall in excess of 12 feet to the ground while erecting scaffold. Section 1926.451(g)(2) provides:

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

While erecting scaffold, AMI claims that it does not require its employees to tie off because of the lack of anchorage points and the potential tripping and entanglement hazards (Exhs. J-1, C-5; Tr. B-204, 207).[5] Employee Eberle testified that he has never worn fall protection while erecting scaffold during his approximate 4 months with AMI (Tr. A-71-72). Similarly, McMichael has never used fall protection during scaffold erection (Tr. B-13, 22, 24). In fact, it appears that no one at AMI has used fall protection while erecting or dismantling scaffolds since 1996 (Tr. B-49, 54).

As required by the standard, the record in this case shows, however, that AMI's competent person on site made a determination regarding the feasibility of providing fall protection to employees erecting the scaffold on the west side of the building. Job foreman Strodtbeck, the designated competent person, testified that he determined that fall protection was not feasible and

[5]AMI's argument that employees' fall exposure was minimized because uprights, cross bracing, and guardrails are immediately installed after the decking is irrelevant. Although the process may take less than 45 minutes (Tr. B-16, 18, 38-39), the Commission has considered even brief exposures to a hazard as sufficient to establish exposure. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2074 (No. 87-1359, 1991).

would pose a greater hazard to employees. He stated that the employees could not utilize fall protection, including personal fall arrest because (1) fall protection in his experience has never been provided during the erection and dismantling of scaffolds; (2) he did not consider the 2 x 6 inch wood roof frame of the building as adequate anchorage for fall protection; and (3) the use of lanyards and lifelines posed tripping and entanglement hazards to employees[6] (Tr. B-203-204, 206, 209, 211, 234). Strodtbeck testified that AMI had fall protection equipment on site and used it during other phases of the masonry work (Tr. B-215, 217-218). AMI owns portable roof anchors, lifelines, lanyards, and harnesses (Tr. B-209, 220). Strodtbeck stated that "[f]all protection was being used at the bank building project. It was sporadic when we went on the roof a few times" (Tr. B-224). Also, there were guardrails on the scaffold after erection.

The Secretary does not dispute that Strodtbeck is qualified as a competent person. *See* § 1926.450(b).[7] The Secretary, however, doubts that Strodtbeck actually made a site-specific analysis regarding the scaffold being erected on the west side because of AMI's practice of never providing fall protection. The Secretary asserts that it is a matter of AMI policy not to utilize fall protection as opposed to a site-specific determination. Despite the Secretary's doubts, the failure to use fall protection in the past does not mean that a site-specific determination was not made at the bank building project. Strodtbeck's testimony that he made a determination is uncontroverted.

The record, therefore, shows that AMI has made a *prima facie* showing of compliance with § 1926.451(g)(2). As required by the standard, AMI's competent person made a determination that fall protection was not feasible and was not safe for employees erecting the scaffold on the west side of the building.

---

[6]AMI also argues that Strodtbeck determined that the scaffolding was too far away from the building for fall protection (AMI Brief, p. 2). However, the record is unclear as to whether this was a concern other than for vertical lifelines (Tr. B-204). Regardless, it was not further explored by the parties and it was not shown why it prevented the use of fall protection.

[7]Section 1926.451(b) defines "competent person" to mean:

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

The Secretary challenges Stodtbeck's determination as without foundation. The Secretary relies on the testimony of OSHA director of compliance assistance Raymond Nellor. Nellor opined that horizontal lifelines could have been extended between safe anchor points on the corners of the roof. The building was made of 2x6 inch wood frame construction (Tr. B-188, 194-195). Nellor recommended using a Safe-T-Strap horizontal lifeline connected to the building by a Rough-It anchor (Exh. C-13; Tr. B-195). From the horizontal lifeline, the employees could attach vertical lifelines and their lanyards (Exhs. C-8, C-9; Tr. B-194-195). CO Mailloux and Nellor testified that they have observed such fall protection systems provided by other employers, including masonry contractors engaged in erecting or dismantling scaffolds (Tr. B-90, 93-94, 191).

The wording of § 1926.451(g)(2) contemplates that the determination is site-specific. Otherwise, there would be no purpose in requiring a determination by a competent person and mandating that fall protection be provided during scaffold erection activities unless it is infeasible or poses a greater hazard. However, as long as a reasonable determination is made by a competent person, an employer complies with the requirements of the standard. To permit the Secretary to second guess the determination, unless it is shown to be unreasonable, is contrary to the intent and meaning of this performance-based standard. The Secretary, unlike the other fall protection standards for scaffolds, leaves the determination during scaffold erection and dismantling to the competent person. Fall protection is required for all other work activities on a scaffold without regard to a competent person's determination. *See* § 1926.451(g)(1).

It is noted that § 1926.451(g)(2) does not identify factors or criteria to be used by the competent person in making the determination. In the safe access standard at § 1926.451(e)(9)(i), the competent person's determination "shall be based on site conditions and the type of scaffold being erected or dismantled." The fall protection standard, on the other hand, states that fall protection is required during the erection of scaffolding unless it is infeasible or poses a greater hazard which determination is made by the competent person.

With regard to the reasonableness of Strodtbeck's determination not to provide fall protection during scaffold erection on the west side of the building, his reliance on company policy and past practice is irrelevant, except as historical perspective and experience. The standard presumes that fall protection will be provided unless determined to be infeasible or a greater hazard. Instead of

policy and past experience, in order for his determination to have meaning, it must be based on the conditions and circumstances of each project.

Similarly, Strodtbeck's concerns regarding possible tripping and entanglement hazards from the use of lanyards and lifelines also appears to be without merit (Tr. B-204). Such hazards can be resolved through planning, the use of retractables, and overhead lifelines. Strodtbeck conceded that the use of retractable lanyards and connecting the lanyard to an overhead lifeline prevented any potential tripping hazard (Tr. B-209-211). With the lanyard typically attached in the middle of an employee's back, the lanyard would not drag on the ground (Tr. B-192-193). Also, through pre-planning of work procedures, if one employee remained on the north side of the scaffold and the other employee stayed on the south side, their lifelines would not get entangled (Tr. B-212-213). Pre-planning would allow employees to avoid entangling the lines and prevent tripping hazards (Tr. B-192-193). Also, on a mason's scaffold similar to the one at the bank building, employees could get around uprights or other employees by walking on a planked outrigger between the scaffold platform and the building (Exh. C-6; Tr. B-95, 98, 191-192). CO Mailloux testified that she has observed scaffolds erected by other employers safely using these methods (Tr. B-99).

Strodtbeck's determination regarding the inadequacy of anchor points for horizontal and vertical lifelines was not shown to be unreasonable. Competent person Strodtbeck testified that, in his opinion, there were no adequate anchor points on the corners of the building to attach fall protection. He had no idea whether the 2 x 6 inch wood frame structure was able to withstand the required 5,000 pounds per employee attached (Tr. B-206, 218; *also see* § 1926.502(d)(15) as incorporated by § 1926.451(g)(3)).

Although it is likely that such wood frame may provide adequate anchorage support, the record in this case fails to show that Strodtbeck's determination was unreasonable. OSHA manager Nellor, who had not visited the bank project, agreed that he did not know if 2 x 6 inch wood frame was strong enough to support a fall arrest system. He testified that the determination "would be made by the competent person" (Tr. B-193). CO Mailloux offered no opinion regarding the adequacy of anchorage points.

Strodtbeck made the determination. He testified that he "did not feel that the existing building provided adequate anchorage point. I would just be guessing" and "judging from where we

could hook off and all the anchorage was on the top of the roof, I thought, no – I didn't think it was adequate enough" (Tr. B-234). Strodtbeck said that he would need an engineer (Tr. B-206).

SBC job superintendent Gary Witt's testimony is given little weight regarding the adequacy of the anchorage points. Witt testified that he would have permitted AMI to nail or screw in portable anchors to the wood frame of the building (Tr. B-17). He described that on the day of OSHA's inspection, the entire perimeter was framed and sheeted in ½-inch plywood. The roof was flat with a parapet wall (Tr. A-16, 21). However, Witt did not testify or show any knowledge regarding the adequacy of the wooden frame to support anchorage for fall protection with the capacity to hold 5,000 pounds for each employee attached. Also, it is noted that in his experience, Witt did not consider it standard practice for masonry contractors to use fall protection while erecting scaffolding (Tr. A-25).

A violation of § 1926.451(g)(2) is not established.

Item 3 - Alleged Violation of § 1926.452(c)(4)

The citation alleges that scaffolds on the south, east, and west side of the building were not equipped with pins to lock together vertically the end frames or panels of scaffolds. Section 1926.452(c)(4) provides:

> Where uplift can occur which would displace scaffold end frames or panels, the frames or panels shall be locked together vertically by pins or equivalent means.

AMI does not dispute that the scaffolds in the south, east, and west sides of the bank building did not, for the most part, have locking pins which prevented the upper frame from lifting off the lower frame (Exh. C-3; Tr. A-191; B-31, 101, 128). AMI stipulates employee exposure and its knowledge regarding the lack of locking pins on the scaffold on the west side of the building (Exh. J-1). The scaffold on the west side was being erected and, at the time of the OSHA inspection, was two frames high and approximately 70 feet long. The two employees were laying the deck on top of the second level before attaching the uprights and cross bracing for the third level (Exh. C-2; Tr. A-39, 46). Instead of locking pins, CO Mailloux observed that the bottom frames were tack

welded to the connector pins[8] which join the upper frame with the bottom frame. The tack welding prevented loss of the connector pins (Tr. A-67; B-152-153). The parties agree that such tack welding did not prevent the upper frame from being lifted off the lower frame (Tr. B-152).

On the south side and east side of the building, CO Mailloux observed some locking pins and tack welding on the bottom frames. However, for the most part, the locking pins were lacking from the upper frames (Tr. A-56-57; B-154-155). The scaffolds on the south side or east side were at least 3 frames high (Tr. A-75, 116).

Locking pins are required by the standard "where uplift can occur which could displace scaffold end frames or panels." AMI claims that its competent person determined that the scaffold was not subjected to possible uplifts; however, the testimony of competent person Strodtbeck fails to reflect that he made any determinations regarding uplift potential of the scaffolds. He was not asked about the lack of locking pins.

The potential for uplift occurring is based on the forklift's repeated lifting scaffold components to the two employees standing on the second level of the scaffold on the west side (Exh. C-2). On the east and south side scaffolds, the forklift had placed the "mud buddy" and pallets of brick (Tr. A-119; B-31, 102). Because of the continuous lifting of materials to the scaffolds, CO Mailloux, who has prior forklift experience,[9] opined that the forklift could accidentally collapse the scaffolding by lifting the upper scaffold frame off the lower scaffold frame (Tr. B-31, 101, 167, 170). A collapse of the scaffold could occur if the top frame was lifted more than 3 ½ inches above the lower frame (Tr. A-59; B-142, 170-171). Eberle testified that the forks of the forklift came "right above" the scaffold decking (Tr. A-76-77). If an operator made a slight misjudgment regarding the height of the scaffold, the forks could come up beneath the scaffold frame and lift it up. CO

[8]Connector pins are approximately 2 inches in diameter and 8 inches long with a band around the center. The connector pins fit inside the frame tubing. On the ends the connector pins have holes which are to match holes in the frame tubing through which the locking pins are placed to prevent the upper and lower frames from separating (Exh. C-3; Tr. A-54; B-171-172).

[9]CO Mailloux operated a forklift for four years prior to her job with OSHA. In fact, she testified that she operated a Gradall forklift similar to the Gradall forklift at the bank building project (Tr. B-107).

Mailloux explained that accidents commonly occur with forklifts due to operator error (Tr. B-161-162).[10]

AMI had received an earlier citation for failing to provide pins for scaffolds. In accordance with a stipulation by the parties, the citation, however, was withdrawn by the Secretary (Tr. B-237-239). Although AMI may read some agreement by OSHA in the withdrawal of the citation, it has long been recognized that the Secretary has broad discretion in settling citations and the reasons for withdrawing a citation may involve the lack of evidence or other considerations as opposed to an agreement of compliance. *Erie Coke Corp.*, 15 BNA OSHC 1561, 1568-1570 (No. 88-611, 1992). The withdrawal of a citation does not protect an employer against a future citation. *Trinity Marine Nashville, Inc.*, 19 BNA OSHC 1015, 1019 (No. 98-0144, 2000), *rev'd. on other grounds*, 275 F.3d 423 (5th Cir. 2001).

A violation of § 1926.452(c)(4) is established.

Serious Classification for Citation No. 1

OSHA classified the violations of § 1926.451(e)(9)(i) (item 1) and § 1926.452(c)(4) (item 3) as serious. A violation is serious under § 17(k) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 666(k), if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

The lack of a safe means of access and locking pins on scaffolds were properly classified as serious. Two employees were working on the scaffold's second level, in excess of 12 feet above the ground, without a ladder or other safe means to access the scaffold. Because of the lack of safe access, the employees were observed using the cross bracing. Also, a forklift was continuously observed lifting plywood sheets up to the employees on the scaffold. The scaffold did not have

[10]AMI's reliance on the decision in *Pyramid Masonry Constructors, Inc.*, 16 BNA OSHC 2103 (No. 93-1972, 1994) is misplaced. An unreviewed ALJ decision is not binding. Also, the judge found that an uplift could not occur because the scaffold was double braced on the inside and outside, attached to the building, and other facts relevant to that case. These elements were not shown in this case.

locking pins to prevent it from uplift if struck by the forklift. Thus, there was a potential for the scaffold to collapse.

Other than Serious Citation No. 2
Items 1 and 2 - Alleged Violations of § 1926.1052(c)(1) and § 1926.1052(b)(1)

The citation alleges that AMI employees were exposed to a fall or tripping hazard because interior stairways were not equipped with a handrail or stairrail system along each unprotected side or edge. Also, it is alleged that AMI failed to prohibit foot traffic on the pan stairs which were to be filled in with concrete or other material at a later date.

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.

Section 1926.1052(b)(1) provides:

> Except during stairway construction, foot traffic is prohibited on stairways with pan stairs where the treads and/or landings are to be filled in with concrete or other material at a later date, unless the stairs are temporarily fitted with wood or other solid material at least to the top edge of each pan. Such temporary treads and landings shall be replaced when worn below the level of the top edge of the pan.

There is no dispute that the interior stairways in the north and south portions of the building did not have handrails and stairrails, exposing employees to a possible fall hazard of approximately 14 feet (Exhs. C-1, C-2; Tr. A-60, 64-65; B-104). Also, it is not disputed that the stair pans were not completely filled (Exh. C-2; Tr. A-60). The 2-inch pans were filled with approximately 1 inch of material (Tr. A-61, 104). The record shows that employees Brockman, Eberle, and McMichael had used the stairways prior to the OSHA inspection to access the erected scaffolds on the south side (Tr. A-63-64, 74-75, 116-118; B-37, 47).

Because AMI lacked knowledge of the conditions, the alleged violations are not established. The general contractor, not AMI, was responsible for installing the handrails and stairrails on the stairways. The general contractor was also responsible for placing and filling the stair pans (Tr. B-

156). There is no showing that AMI, through its job foreman, knew or should have known with the exercise reasonable diligence that the stairways lacked handrails, stairrails, and the pans were not filled.

The record fails to show that the foreman knew the employees were using the stairways inside the building to access the scaffolds. There were already ladders for accessing the scaffolds on the east and south sides of the building. The use of the interior stairways was not necessary (Tr. B-146-147). Employee Brockman acknowledged that there was a ladder for the scaffold but he used the stairway because access to the ladder was blocked temporarily by a forklift (Tr. B-37, 48). He only used the stairway once (Tr. B-48). Other than the day prior to OSHA's inspection, there is no showing Eberle and McMichael had previously used the interior stairways. According to employee Eberle, foreman Strodtbeck did not instruct him to use the stairways or that the stairways could not be used (Tr. A-86). He testified that he used the stairway because it was easier to reach the top of the scaffold on east side to stack bricks (Tr. A-93). He did not have to use the stairway.

Also, the record fails to show that job foreman Strodtbeck was ever inside the building or that AMI's work required him to be inside the building. AMI's brick work was on the exterior of the building. The stairways were inside the building. Also, the lack of handrails, stairrails, or filled stair pans was not shown to be readily visible inside or outside of the building.

Strodtbeck was the AMI's job foreman and competent person for the bank building project (Tr. B-223). He supervised the employees and was responsible for recognizing unsafe conditions (Tr. B-36). Throughout the day, Strodtbeck traveled between the AMI's work areas outside the east, west, and south sides of the building (Tr. B-208). Strodtbeck's job was not shown to require him to be inside the building or use the interior stairways. He was not shown to have been aware or should have been aware that AMI employees on occasion used the interior stairways.

The reasonable diligence obligations of an employer to establish constructive knowledge includes adequate supervision of employees, implementation of training programs, work rules designed to ensure that employees perform their work safely, and the ability to anticipate hazards to which employees may be exposed and to take measures to prevent the occurrence of unsafe conditions. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-707, 2001), *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2181 (Nos. 00-1268, 00-1637, 2003). There is no showing that

AMI failed to exercise reasonable diligence regarding its job at the bank building project. Violations of § 1926.1052(c)(1) and § 1926.1052(b)(1) are not established.

Penalty Consideration

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

AMI is a medium size employer with approximately 91 employees (Exh. J-1). There is no evidence that AMI has received OSHA citations within the preceding three years (Tr. B-85). AMI is entitled to credit for good faith. AMI utilizes a competent person to make determinations regarding the scaffold erection. AMI has safety meetings and participated in a forklift certification training program while on the bank building project. AMI had fall protection equipment on site which is used to perform some jobs (Tr. B-215, 218). The general contractor's job superintendent considered AMI a very safe company (Tr. A-26-27; B-230).

A penalty of $1,000 is reasonable for violation of § 1926.451(e)(9)(i) (citation no. 1, item 1). Two employees were observed climbing down the cross bracing. There was no ladder or other safe means of access. The end frame was obstructed by planks which extended approximately 12 inches beyond the end frame. The competent person failed to make a determination regarding the use of a ladder during scaffold erection.

A penalty of $2,000 is reasonable for violation of § 1926.452(c)(4) (citation no. 1, item 3). AMI's scaffolds throughout the project did not have locking pins. The tack welding did not prevent the upper scaffold frame from lifting off the lower frame. Forklifts were continuously placing material or masonry products on the scaffold. The forklift could have caused an uplift of the scaffold and a possible collapse.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation no. 1, item 1, serious violation of § 1926.451(e)(9)(i), is affirmed and a penalty of $1,000 is assessed.

2. Citation no. 1, item 2, serious violation of § 1926.451(g)(2), is vacated and no penalty is assessed.

3. Citation no. 1, item 3, serious violation of § 1926.452(c)(4), is affirmed and a penalty of $2,000 is assessed.

4. Citation no. 2, item 1, other than serious violation of § 1926.1052(c)(1), is vacated and no penalty is assessed.

4. Citation no. 2, item 2, other than serious violation of § 1926.1052(b)(1), is vacated and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: April 16, 2003