United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. SALCO Construction, Inc., Respondent.	OSHRC Docket No. **05-1145**

Appearances:

Lindsay Wofford, Esq., U. S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Robert N. Aguiluz, CSP, The Barnes Law Firm, P.C., Dallas, Texas
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

SALCO Construction Inc. (SALCO) was erecting the steel for a new Verizon Wireless retail store in Baton Rouge, Louisiana, when the project was inspected by the Occupational Safety and Health Administration (OSHA) on April 29, 2005. As a result of OSHA's inspection, SALCO received serious and repeat citations on June 14, 2005. SALCO timely contested the citations.

The serious citation alleges SALCO violated 29 C.F.R. § 1926.760(a)(1) for failing to ensure an employee exposed to a fall hazard of more than 15 feet was protected by fall protection. The serious citation proposes a penalty of $3,000.00.

The repeat citation alleges SALCO violated 29 C.F.R. § 1926.451(c)(2)(v), (Item 1) for failing to secure a platform occupied by two employees to the forks on a Gradall Telehandler; and 29 C.F.R. § 1926.451(g)(1) (Item 2) for failing to protect two employees on the platform from a fall hazard of more than 10 feet. Each alleged repeat violation proposes a penalty of $1,200.00.

The hearing was held in Baton Rouge, Louisiana, on January 12, 2006. Jurisdiction and coverage are stipulated (Tr. 6). The parties filed post hearing briefs.

SALCO denies the alleged violations. SALCO asserts the employee on the steel beam was a connector and fall protection was not required. With regard to the two employees on the platform supported by the forks on the Gradall Telehandler, SALCO argues the scaffold standards in § 1926.451 do not apply and are preempted by the steel erection standards at § 1926.750. Also, SALCO claims the Gradall Telehandler and the platform are not covered by the cited standards.

For the reasons discussed, the alleged violations of § 1926.760(a)(1) and § 1926.451(c)(2)(v) are affirmed. The alleged violation of § 1926.451(g)(1) is vacated.

Background

SALCO, a construction company, is in the business of steel erection. It employs 50 employees (Tr. 62, 114). SALCO contracted to erect the steel for a new single story Verizon Wireless store in Baton Rouge, Louisiana (Exh. C-8).

On April 29, 2005, four SALCO employees were on site; leadman Raub, equipment operator Merrill Myers, and two employees, Roche and Bodreaux (Tr. 113-114). Merrill Myers operated the Gradall Telehandler by JLG Industries (Exh. R-1). The forks attached to the Gradall Telehandler were used to support an elevated platform for employees to work. The platform had guardrails on three sides. The side facing the eaves of the building under construction was open without guardrails (Exhs. C-2, C-3; Tr. 25-26, 28). To hold the platform, the forks slid into two pieces of channel iron underneath the platform (Exh. C-4).

OSHA compliance officer Raymond Loupe, after finishing lunch across the street from the project, observed two employees on an elevated platform and one employee on a steel beam. Leadman Raub and employee Roche were standing on the platform installing flashing to the eaves of the building (Tr. 30, 114). According to the building's blueprints, the eaves was at a height of 15 feet, ¾ inches (Tr. 36, 94). Only Roche was wearing a safety harness but it was not attached (Tr. 27, 114). CO Loupe estimated the platform was approximately 13 feet above the ground (Tr. 58, 120). Also, CO Loupe testified he saw the wheels on the Gradall move with the Raub and Roche still on the elevated platform (Tr. 24-25, 26-27, 29-30, 60).

In addition to the employees on the platform, CO Loupe observed employee Bodreaux standing and sitting on a steel beam in the interior of the building while bolting in purlins[1] (Exh. C-1; Tr. 30, 35). Bodreaux was not utilizing any fall protection (Tr. 35). From the eaves which was at a height of 15 feet, ¾ inches, according to the blueprints, the steel beams went to a height of 22 feet (Tr. 36). CO Loupe estimated Bodreaux was approximately 18 feet above the concrete floor (Tr. 41).

Based on CO Loupe's inspection and observations, the serious and repeat citations were issued to SALCO.

Discussion

In order to establish a violation of an Occupational Safety or Health Standard, the Secretary has the burden of proving:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

For the most part, this case does not involve factual disputes as to CO Loupe's observations. Also, SALCO does not dispute its knowledge of the conditions and the employees' exposure to the cited conditions, if violations are found.

SALCO's primary dispute involves the application of the standards cited and the repeat classification. Also, SALCO challenges Loupe's estimate of the height of the platform and whether the platform was moved with employees on it.

Serious Citation No. 1 - Alleged Violation of 29 C.F.R. § 1926.760(a)(1)

The citation alleges SALCO failed to ensure an employee on a steel beam exposed to a fall hazard of more than 15 feet was protected by fall protection. Section 1926.760(a)(1) provides:

[1]A "purlin" is a "Z" or "C" shaped member formed from sheet steel spanning between primary framing and supporting roof material. See 29 C.F.R. § 1926.751, *Definitions*.

> Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge, more than 15 feet (4.6m) above a lower level shall be protected from fall hazards by guardrails systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

It is undisputed the employee on the steel beam was performing steel erection. Bodreaux was bolting purlins to the steel beam (Exh. C-1; Tr. 30, 35). Bolting in purlins is a steel erection activity. 29 CFR § 1926.751(b)(1). There is no dispute the steel erection standards at Subpart R, 29 C.F.R. § 1926.750, apply.

There is also no dispute Bodreaux was not utilizing any fall protection (Exh. C-1; Tr. 35). According to the blueprints of the building, the height of the eaves was 15 feet, ¾ inches. The steel beam on which Bodreaux was higher (Tr. 36). Based on his observation, CO Loupe estimated Bodreaux was approximately 18 feet above the concrete floor (Tr. 41).

SALCO's knowledge of Bodreaux's lack of fall protection is established through Raub, the leadman. As leadman, Raub was given supervisory responsibility over the worksite. Bodreaux was in plain view on the steel beam and in relative proximity to Raub who was on the platform at the eaves. *Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1097 (No. 88-1720, 1993) (the supervisor could have seen what the compliance officer did see). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). Raub's knowledge is imputed to SALCO.

Under § 1926.760(a)(1), two exceptions to the 15-feet fall protection requirement are; (1) the employee is a connector, or (2) the employee is working in a controlled decking zone (CDZ). 29 C.F.R. § 1926.760(a)(3). There is no dispute the area where Bodreaux was working was not a CDZ.

The Connector Exception

SALCO argues Bodreaux in bolting in the purlins was working as a connector. SALCO contends the connector exception applies and pursuant to § 1926.760(a)(3), Bodreaux was not required to tie off below 30 feet. According to SALCO, the purlins had been individually positioned with a forklift. SALCO agrees it had completed the initial connections and Bodreaux was in the process of making subsequent connections (Resp. Brief, p. 17).

A "connector" is defined as "an employee who, working with hoisting equipment, is placing and connecting structural members and/or components." 29 C.F.R. § 1926.751. Section 1926.760(b)(3) requires protecting connectors from fall hazards in the same manner as §1926.760(a)(1) only when the connector is working above 30 feet or two stories above a lower level, whichever is less.

SALCO argues connecting for the purpose of applying the exception does not just include the time when the employee is actually making the connection or when the hoisting equipment is in place. It also includes moving on the steel to and from initial and subsequent connection points.

SALCO's argument is rejected. The definition of a connector is specific. By definition, the connecting work must be done in conjunction with hoisting equipment. There is no evidence in this case Bodreaux was working with any hoisting equipment.

As set forth in the Federal Register, 66 Fed. Reg. 5196, 5203 (January 18, 2001), the drafters state:

> The definition is very specific; connecting is distinguished from other steel erection activities by the elements in the definition. For example, spreading and securing bar joists by hand would not be considered connecting, since that work is not done "with hoisting equipment." Therefore, an employee is a "connector" only when working with "hoisting equipment." This includes placing components as they are received from hoisting equipment, and then connecting those components while hoisting equipment is overhead.

OSHA's CPL 2-1.34, "*Inspection Policy and Procedures for OSHA's Steel Erection Standards for Construction*," and an OSHA Interpretation letter dated April 5, 2005, "*Evaluation if moving point-to-point on concrete wall to make initial connections of structural steel is "connecting" work; landing loads on systems-engineered metal building*," are consistent in that the work is done in conjunction with hoisting equipment (Exh. C-14, Interpretation letter attached to Secretary's Brief). In the question and answer section of OSHA's CPL 2-1.34 p. 4-11 (Exh. C-14), OSHA states:

> *Question 34*: If workers are on a one story building that is 20' tall(top of steel) and the joists require horizontal bridging, is fall protection required for employees installing this bridging?
>
> *Answer:* Normally, yes. Fall protection by use of a guardrail system, safety net system, personal fall arrest system, positioning device system or fall restraint system is required by § 1926.760(a)(1) to be provided at heights more than 15 feet above a lower level. The requirements in § 1926.760(a)(1) apply irrespective of whether the building is single or multi-story. The connector exception will not normally apply in situations like this. Horizontal bridging is not erection bridging. These workers typically will not be working with hoisting equipment when installing horizontal bridging. So employees installing horizontal bridging at a height of 20 feet, on a single story building, working without hoisting equipment, would be required to have fall protection in accordance with § 1926.760(a)(1).

In this case, the purlins had been laid out prior to the OSHA inspection and Bodreaux was simply placing additional bolts (Resp. Pre-Hearing, p. 5). Bodreaux at the time of the citation was not acting as a connector as defined by OSHA and should have been utilizing fall protection since he was at a height in excess of 15 feet.[2]

SALCO's Infeasibility Defense

Although SALCO asserted infeasibility as an affirmative defense in its answer and prehearing exchange, SALCO did not address the defense in its post hearing brief. The alleged defense is therefore deemed abandoned because of SALCO's failure to brief the issue. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

[2]Even if Bodreaux was acting as a connector, §1926.760(b)(3) requires connectors to wear fall arrest or restraint equipment at heights of 15 - 30 feet and be able to tie off or be provided another means of fall protection. Based on the record, there is no showing Bodreaux was utilizing any fall protection equipment or had been provided another means of fall protection.

Even if not abandoned, the record fails to support an infeasibility defense.[3] CO Loupe testified fall protection could have been provided from equipment currently available on the market (Tr. 37). He specifically identified the use of a beamer which is spring-loaded device that slides along the steel beam (Tr. 37). The beamer fits around the beam and has a D-ring where a lanyard attaches. Loupe also discussed the use of a wire sling, mesh sling, ladder, scissor lift or manlift (Tr. 39-40). The photograph shows Bodreaux stationary and sitting on the steel beam (Exh. C-1).

SALCO failed to offer evidence showing Bodreaux could not have utilized fall protection when bolting in the purlins. There was no showing SALCO considered different fall arrest systems available on the market or made a determination prior to initiating work that such systems were infeasible. SALCO's reliance on an OSHA safety and health bulletin (SHIB 09-22-03) entitled "*Compatibility of Personal Fall Protection Systems Components*" is misplaced (Exh. R-2). The SHIB merely warns employers to check the compatibility of the components of fall arrest systems before the arrest system is utilized. The SHIB does not instruct employers not to require fall arrest systems. Also, SALCO did not show how the conditions described in the bulletin were analogous to the Verizon store worksite or how it was impossible for SALCO to avoid an accident similar to the one discussed in the bulletin.

It is noted SALCO has only objected to fall arrest systems. The fall protection standard, however, allows the employer to utilize a guardrail system, safety net system, positioning device system or fall restraint system which were not discussed by SALCO.

The Serious Classification

The violation of § 1926.760(a)(1) is classified as serious. A violation is serious under section 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. The issue is not whether an accident is likely to occur; but rather,

[3]As an affirmative defense, SALCO has the burden of proof. To establish infeasibility, an employer must show: (1) the means of compliance prescribed by the standard would have been infeasible under the circumstances in that either (a) its implementation would have been technologically or economically infeasible or (b) necessary work 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. *Beaver Plant Operations, Inc.*, 18 BNA OSHC 1972, 1977 (No. 97-0152, 1999).

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).

It is undisputed Raub was the designated leadman on the project. Raub was present on the project and was aware Bodreaux was on the steel beam without utilizing fall protection. As a supervisor, Raub's knowledge is imputed to SALCO. *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

The record is also undisputed that Bodreaux was subject to a fall hazard of approximately 18 feet to the cement floor below. If such a fall occurred, it is clear the employee would have been seriously injured.

SALCO's serious violation of § 1926.760(a)(1) is established.

Repeat Citation No. 2[4]

Application of Subpart R, Steel Erection Standards - § 1926.760(a)

As a preliminary matter, the parties dispute the application of the scaffold standards at Subpart L, § 1926.450 *et seq.* to the elevated platform holding the two employees engaged in steel erection. OSHA cited SALCO under the scaffold standards for failing to secure the platform to the forks and for the lack of fall protection.

The parties agree the employees on the platform were engaged in steel erection activities. The employees were installing flashing (Tr. 94). *See* 29 C.F.R. §1926.750(b). CO Loupe testified he observed no violations of the steel erection standards regarding the elevated platform (Tr. 96).

SALCO argues the steel erection standards in Subpart R, § 1926.760(a) *et seq.*, preempt the applicability of the scaffolding standards in Subpart L, § 1926.450 *et seq*. when the employees are engaged in steel erection. SALCO maintains it is necessary that Subpart R specifically provide for the incorporation of other standards such as the scaffold standards to be applicable. In support its position, SALCO refers to the scope section of the steel erection standards which states "...the requirements of this Subpart apply to employers engaged in steel erection unless otherwise specified." 29 C.F.R. § 1926.750(a). The scaffold standards requirements are not specifically incorporated into steel erection standards.

[4]SALCO's argument that items 1 and 2 of citation 2 address the same hazard and therefore only one citation should have been issued is rejected. Although both citation items refer to a 13 foot fall hazard, the violative conditions differ. Item 1 deals with inadequate securing of the platform. Item 2 involves the lack of fall protection for the employees on the platform. The abatement of one item does not abate the other item.

SALCO's preemption argument is also based on a statement by the drafters of the new steel erection standards when they stated "[t]his revision [of the steel erection standards] clarifies that steel erection is covered *exclusively* by Subpart R" (emphasis added). 66 Fed. Reg. 5196, 5200 (January 18, 2001). SALCO argues Subpart R was meant to be exclusive and comprehensive for all conditions related to steel erection. In its notice announcing the intent to revise the steel erection standards, OSHA also stated "[t]he comments received to date have convinced the Agency to develop a separate proposed rule [that] will provide comprehensive coverage for protection in steel erection." 53 Fed. Reg. 2048, 2053 (January 26, 1988). The compliance directive for Subpart R states steel erection is "always" covered by Subpart R (Exh. C-14 - CPL 2-1.34, p. 2-1; Tr. 94).

SALCO's interpretation as to the exclusivity of Subpart R is rejected. A review of current Review Commission decisions shows SALCO's exclusivity argument has not been addressed since the new steel erection standard became effective on January 18, 2002. 66 Fed Reg 37137 (July 17, 2001). However, earlier Review Commission decisions rejected the exclusivity of Subpart R. See e.g. *Peterson Brothers Steel Erection Co.*, 16 BNA OSHC 1196, 1198 (No. 90-2304, 1993) (Commission reaffirms position that Subpart R does not provide exclusive fall protection requirements for employees engaged in steel erection). The Review Commission rejected arguments the fall protection requirements of Subpart R were exclusive because they were not comprehensive and were only intended to cover interior falls on multi-tiered buildings. According to SALCO, the revision of Subpart R remedied these shortcomings.

Unlike SALCO's interpretation, the application of the fall protection requirements of Subpart L involving scaffolds is only excluded if specifically listed as excluded in the steel erection standards. This was not done by OSHA. The exclusivity sentence by the drafters relied upon by SALCO must be read in context. The paragraph states:

> In addition to revisions to Subpart R, Steel Erection, this rulemaking makes necessary revisions to Subpart M of this Part, Fall Protection, for the purposes of consistency. Currently § 1926.500(a)(2)(iii) states: "Requirements relating to fall protection for employees performing steel erection work are provided in § 1926.105 and in Subpart R of this part." This final rule revises the language of § 1926.500(a)(2)(iii) to read: "Fall protection requirements for employee performing steel erection work (except for towers and tanks) are provided in Subpart R of this part." This revision [of the steel erection standards] clarifies that steel erection is covered exclusively by Subpart R." 66 Fed. Reg. 5196, 5200 (January 18, 2001).

This paragraph shows the drafters were interested in making changes in the fall protection provisions of Subpart M, 29 C.F.R. § 1926.500 *et seq.*, for consistency purposes. Subpart M is the general fall protection requirements applicable to all construction activities. There were no revisions to the scaffold standards under Subpart L.

Subpart R and Subpart L are vertical standards. Subpart L incorporates the scaffold standards which govern the equipment and activities involved in scaffolds utilized during construction. The scaffold standards address the hazards to employees working on a scaffold platform. Subpart R, the steel erection standards, govern steel erection activities. The steel erection standards are silent as to the use of scaffolds and the protection provided to employees utilizing scaffolds during steel erection. Because the scaffold standards directly confront the creation of the hazard, working on an elevated scaffold platform, and resolves the hazard, requiring the scaffold platform to be securely attached to the forks and fall protection to be provided to employees on the scaffold at heights above 10 feet, the scaffold standards more specifically apply to the unsafe conditions cited. *John Quinlan t/a Quinlan Enterprise*, 15 BNA OSHC 1780, 1781 (No. 91-2131, 1992) ("when more than one provision governs a particular hazard, the more specifically applicable provision prevails").

The Secretary discusses the applicability of standards in 29 C.F.R. § 1910.5(c)(2) which states, in part:

> ....any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in Subpart B or Subpart R of this part, to the extent that none of such particular standards applies. To illustrate, the general standard regarding noise exposure in § 1910.95 applies to employments and places of employment in pulp, paper, and paperboard mills covered by § 1910.261.

There is no showing OSHA intended scaffolds to be governed by the revised steel erection standards or that Subpart L is subsumed within Subpart R. While Subpart R contains specific provisions related to the use of personal fall arrest systems and safety net systems, there are no provisions specific to scaffolds. There is simply no language either within the steel erection standards or the Federal Register, which shows any intention to abrogate the application of the scaffold standard.

Subpart L governs the use of all scaffolds in the construction industry, while Subpart R fails to mention scaffolds. SALCO's attempt to use of the terms "walking/working surface" to show that a steel erection standard, § 1926.760(a)(1), covers scaffolds is misplaced. While the steel erection standards fail to define "walking/working surface," they do define "unprotected sides or edges" and give examples such as a floor, roof, ramp, and runway. They do not include scaffolds in the definition. 29 C.F.R. § 1926.751. Also, it is noted the same definition of "unprotected sides or edges" is found in Subpart M, 29 C.F.R. § 1926.500(b).

In revising Subpart R, the drafters attempted to make its provisions consistent with Subpart M where possible. The scaffold requirements for fall protection are specifically exempted from Subpart M application. 29 C.F.R. § 1926.500(a)(2)(i); 66 Fed. Reg. 5196, 5247 (January 18, 2001). A comparison to structure and terminology of Subpart L and R to the general fall protection standards found in Subpart M demonstrates that Subpart L is more specifically applicable to employees working from a scaffold.

This conclusion is supported by a review of the drafters' intent in adopting fall protection standards for steel erection. The drafters noted "[s]teel erection differs from general construction in three major respects - the narrowness of the working surface, its location above, rather than below the rest of the structure, and a minimum distance of approximately 15 feet to the next level." 66 Fed. Reg. 5196, 5243 (January 18, 2001). These unique elements do not exist when an employee is working on a scaffold platform as in this case. The drafters only discuss fall protection systems for an employee physically working on the structure, not from a platform supported by a forklift. 66 Fed. Reg. 5196, 5243-5247 (January 18, 2001). The drafters in discussing the 15-foot height requirement stated:

> While some general contractors and large industrial steel erectors may be providing fall protection below 15 feet, the data are unclear with respect to how much of a need there may be for requiring fall protection in steel erection at those lower heights. Also, many situations in steel erection do not permit connecting fall protection below 15 feet. In addition, steel erection work that is done between 6 and 15 feet is often performed from ladders, scaffolds, or personnel work platforms (63 FR 43479). Therefore, OSHA has decided not to require conventional fall protection in steel erection below 15 feet. 66 Fed. Reg. 5196, 5245.

SALCO's argument of preemption leads to unsafe results. In essence, contractors would have no obligation to securely attach a scaffold to a forklift and provide fall protection to employees 10 feet above the ground on the scaffold. Under SALCO's interpretation none of the requirements in Subpart L would be applicable to scaffolds used by employees engaged in steel erection while on scaffolds including proper bracing and planking.

There is no language, either within the standards or within the Federal Register, which signifies any intention to abrogate the application of the scaffold standards. Indeed, Subpart R does not address the use of scaffolds. The scaffold standards are not preempted by the steel erections standards.

Item 1 - Alleged Violation of 29 C.F.R. § 1926.451(c)(2)(v)

The citation alleges SALCO failed to securely attach the platform to the Gradall Telehandler's fork attachment (Item 1). Section 1926.451(c)(2)(v) provides that:

> Fork-lifts shall not be used to support scaffold platforms unless the entire platform is attached to the fork and the fork-lift is not moved horizontally while the platform is occupied.

There is no dispute the Gradall Telehandler on site was used to elevate a platform which held two employees installing flashing at the eaves (Exhs. C-2, C-3).[5] CO Loupe estimated the height of the platform above the ground was 13 feet (Tr. 58-59). To hold the platform, the forks attached to the Gradall's boom slid into two pieces of channel iron underneath the platform (Exhs. C-4, C-5; Tr. 45). Although the channel iron prevented the platform from falling off to either side or toward the Gradall, the platform was not secured to the forks so that it could slide off the front (Tr. 44, 46, 113). There was no chain or sling securing the platform to the frame and there were no pins securely attaching the platform to the forks (Tr. 45-46). Given the forks are not stationary, operator error or mechanical failure could result in the forks rotating downwards, causing an unsecured platform to tumble to the ground (Tr. 46, 113). Moreover, the operator could inadvertently catch the platform on an object such as the eaves of the building and reverse the Gradall causing the platform to slide off the forks (Tr. 46).

[5]A warning sign on the Gradall Telehandler stated "Do not lift Personnel" (Exh. C-6; Tr. 87). It is noted §1926.451(c)(2)(iv) requires the forklift to be specifically designed by the manufacturer to support a scaffold platform for employees. OSHA did not SALCO for a violation of §1926.451(c)(2)(iv).

CO Loupe also testified he saw the wheels of the Gradall move with the employees on the platform (Tr. 25, 46, 61). Loupe said he witnessed the Gradall reverse and reposition into another location when he first arrived on worksite prior to opening the inspection (Tr. 24-25, 61). Equipment Operator Myers' testimony that he never moved the Gradall with employees on the platform is considered less credible (Tr. 130). Additionally, as noted by the Secretary, the manufacturer's manual shows that the boom can telescope outwards and move vertically, up and down. There is no indication the boom can move horizontally, sideways to the cab (Exh. R-1). Therefore, to work along the eaves, the Gradall Telehandler must be repositioned to move the platform.

The Gradall Telehandler Operated as a Forklift

OSHA refers to the Gradall Telehandler as a forklift. SALCO argues the Gradall Telehandler and attached personnel work platform are regulated by 29 C.F.R. § 1926.453 as an aerial lift and not a forklift under § 1926.451. SALCO maintains although the Gradall Telehandler has a fork attachment, it is more accurately classified as an extensible boom platform, particularly when used to position personnel on a work platform. Extensible boom platforms are regulated under § 1926.453 for construction and § 1910.67 for general industry. Although SALCO contends the vehicle itself never actually moved with personnel on the platform and that only the boom moved, § 1926.453(b)(viii) allows the extensible boom lift truck itself to be moved with personnel on the platform so long as the boom is not elevated in the working position or if it meets certain criteria under § 1926.453.

Section 1926.453 provides "aerial lifts include the following types of vehicle-mounted aerial devices used to elevate personnel to job-sites above ground: (i) Extensible boom platforms..." An extensible boom platform is defined by OSHA at § 1910.67 as "an aerial device (except ladders) with a telescopic or extensible boom. Telescopic derricks with personnel platforms attachments shall be considered to be extensible boom platforms when used with a personnel platform."

With the fork attachment, the Gradall Telehandler functioned more as a forklift in supporting the platform. The forks were used to hold the separate platform. The platform was not an integral or permanent part of the fork attachment. It is noted JLG, the manufacturer of the Gradall Telehandler, advises purchasers that OSHA requires all rough terrain forklift operators to be trained according 29 C.F.R. § 1910.178(l). It is noted the manufacturer does sell a personnel work platform

as an attachment for the Gradall. However, SALCO was using the fork attachment and not the personnel work attachment. Also, throughout the testimony of equipment operator Myers, SALCO's counsel and Myers referred to the Gradall Telehandler as a forklift (Tr. 130).

Scaffold Platform

SALCO contends the platform was not a scaffold platform within the meaning of the standard. SALCO argues the term "scaffold platform" indicates a particular type of platform. As noted by SALCO, the standard does not use the word platform alone but rather uses it in conjunction with scaffold. Not all work platforms are scaffold platforms. SALCO claims its platform is not a scaffold platform.

SALCO's argument misconstrues the clear meaning of "a scaffold platform." A scaffold is defined as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." 29 C.F.R. § 1926.450(b). A platform is defined as a "work surface elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated planks, fabricated decks, and fabricated platforms." 29 C.F.R. § 1926.450(b). Clearly, a scaffold platform refers to the work surface on the scaffold. The platform is a component of a scaffold system.

According to an OSHA Interpretation letter dated November 27, 2001 entitled "*Applicable Standards to Lifting Personnel on a Platform Supported by a Rough-Terrain Forklift,*" OSHA makes clear the platform supported by a forklift is a scaffold within the meaning of the scaffold standards (Exh. C-7; Tr. 42-44; 61 Fed. Reg. 46043 (August 30, 1996). Also, see *Armstrong Steel Erectors*, 17 BNA OSHC 1385, 1389 (No. 92-262, 1995), (whether a working surface is considered a scaffold platform is dependent on the temporary versus permanent nature of the structure).

Repeat Classification

The citation classifies SALCO's violation of §1926.451(c)(2)(v)(Item 1) as a repeat violation. Under § 17(a) of the Act, a violation is a repeat violation if, at the time of the violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary establishes substantial similarity in several ways including showing the violations are of the same standard or if different standards,

by showing similar hazards and means of abatement. *Monitor Construction Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

There is no dispute that in July 2004, OSHA cited SALCO for a serious violation of §1926.451(c)(2)(v) as a result of an inspection conducted by OSHA inspector John Watkins on May 6, 2004 (Exhs. C-12; Tr. 49, 61, 125-126). SALCO did not contest the citation and paid the assessed penalty (Tr. 127). The citation became a final order by operation of law on August 10, 2004 (Tr. 127). The standard cited in the previous citation is the same standard at issue in this case.

SALCO argues the violation is not properly classified as repeat. The fall hazard alleged in the prior citation is 22 feet which exceeds the 15-feet trigger for steel erection. But, the fall hazard in this case at issue is only 13 feet. Although the hazards are the same, SALCO argues the results of a fall from the respective distances do not have the same effect. In promulgating Subpart R and deciding on a 15-feet trigger height, SALCO claims OSHA could not establish there was a significant risk of serious injury or death between 6 and 15 feet. But, such risk is present at heights between 15 and 25 feet.

SALCO's reliance on the 15-feet trigger height under the steel erection standards is misplaced. The standard cited involves a scaffold standard which has a 10-feet trigger height. The injuries likely to be suffered from a fall from either height are serious (Tr. 48, 127).

The violation of § 1926.451(c)(2)(v) is properly classified as repeat.

Item 2 - Alleged Violation of 29 C.F.R. § 1926.451(g)(1)

The citation alleges SALCO failed to equip employees on a scaffold platform installing flashing and exposed to a fall of 13 feet with a fall arrest system. Section 1926.451(g)(1) provides that:

> 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.

There is no dispute two employees on the platform supported by the Gradall Telehandler were not utilizing fall protection (Exhs. C-2, C-3). Roche was wearing a safety harness but it was not

attached (Tr. 27, 114). Leadman Raub and employee Roche were installing flashing on an outside of the eaves (Tr. 30, 114). The platform had suitable guardrails only on three sides (Tr. 26). There was no guardrail along the front of the platform; the side facing the eaves (Tr. 28). According to the building blueprints, the eaves was 15 feet, 3/4 inch (Tr. 36, 50, 94). CO Loupe estimated the height of the platform was approximately 13 feet because the top of the eaves was at the employees' waists (Exhs. C-2, C-3; Tr. 58-59, 120).

SALCO argues the height of the platform was less than 10 feet because the citation states the wall bracing was at the height of 12 feet (Tr. 68). SALCO states the platform was therefore at least 3 feet below that level or less than 9 feet above the ground. During his inspection, Loupe took no measurements (Tr. 69). He testified the 12-foot figure was the bottom of the wall brace and speculated the platform was positioned so the employees "could install the bottom portion and the top portion of the brace" (Tr. 68). Loupe determined the 13-foot fall distance because "they had put the platform halfway between the bottom and the top of the wall bracing" (Tr. 120).

SALCO's argument the platform was at a height of less than 10 feet is rejected and contrary to the record. The blueprints shown to CO Loupe identified the height of the eaves as 15 feet 3/4 inches (Tr. 36, 117). The blueprints identified the height of the steel structure; not the finished building (Tr. 74). The photographs taken by Loupe show the flashing being bolted to the eaves was somewhere at or below the waist levels of the employees (Exhs. C-2, C-3). Loupe consistently testified the height of the platform where the employees were installing flashing was approximately 13 feet (Tr. 58-59, 120). The operative facts alleged in the citation and Loupe's testimony are consistent. Considering the height of the eaves and the photographs, CO Loupe's estimate of a 13-foot fall hazard is credible (Tr. 60).

However, it is noted when the platform was placed next to the eaves, the record does not show an exposure to a fall hazard. The platform had suitable guardrails on three sides, the unprotected side was guarded by the eaves (Exhs. C-2, C-3). The Secretary argues the platform was not abutted to the eave during repositioning and SALCO cannot claim the building itself protected the employees from a fall to the ground below (Tr. 60).

Subpart L does not require all sides of a platform have guardrails in order to protect employees. Section 1926.451(b)(3) only requires a guardrail system or personal fall arrest system to protect

employees from falling if the platform is greater than 14 inches from a horizontal or vertical surface. CO Loupe did not know the distance between the platform and the eaves and agreed the eaves along the otherwise open end could constitute protection from falls (Tr. 115). The side of a platform is only defined by Subpart L as an open end if the space between the platform and a horizontal or a vertical surface is greater than 14 inches. Based on the photographs, Loupe's failure to take measurements and his inability to know the distance between the platform and the eaves, the Secretary did not meet her burden to establish an open end. Also, the record is silent as to how the employees were elevated to the eaves. Therefore, the court is unable to ascertain whether the employees were exposed to a fall hazard.

The alleged violation of § 1926.451(g)(1) is not established.

Penalty Determination

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

SALCO is a medium size employer with less than 50 employees (Tr. 65). SALCO is not entitled to credit for history because it received serious citations in the proceeding three years. Also, no credit is given for good faith because SALCO made no showing of a safety program or safety training.

A penalty of $2,000.00 is reasonable for a serious violation of § 1926.760(a)(1). One employee was exposed to a fall hazard in excess of 15 feet to a cement floor without fall protection.

A penalty of $1,000.00 is reasonable for a repeat violation of § 1926.451(c)(2)(v). Two employees including the leadman were on a platform supported by forks. The platform was not adequately secured to the forks to prevent it from falling off.

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:

1. Citation No. 1, Item 1, alleged serious violation of 29 C.F.R. § 1926.760(a)(1), is affirmed and a penalty of $2,000.00 is assessed.

2. Citation No. 2, Item 1, alleged repeat violation of 29 C.F.R. § 1926.451(c)(2)(v), is affirmed and a penalty of $1,000.00 is assessed.

3. Citation No. 2, Item 2, alleged repeat violation of 29 C.F.R. § 1926.451(g)(1), is vacated and no penalty is assessed.

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

Date: April 24, 2006