United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

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| SECRETARY OF LABOR<br>Complainant,<br>v.<br>MANGANAS PAINTING CO., INC.<br>Respondent. | OSHRC DOCKET NO. 95-0103 & 95-0104 |

## ***DECISION AND ORDER ON REMAND***

This matter is before me as a result of the Commission's remand order dated April 14, 2009. The first issue to determine is whether Manganas Painting Co. ("Manganas"), violated 29 C.F.R. 1926.451(a)(4) by allowing employees to work on "painter's pick scaffolds" that did not have guardrails. The second issue to determine is whether, if Manganas did violate the standard, the violation was willful. I find that Manganas willfully violated the cited standard.

### ***Procedural Background***

The decision of the Administrative Law Judge ("Judge") in this matter was issued on June 14, 1996. In that decision, the Judge vacated Items 13a, 13b and 13c of Willful Citation 2 in Docket No. 95-0103.[1] *See* Judge's Decision, pp. 42-43. The Judge found that the items were duplicative of other citation items and that the Secretary had not shown that the painter's pick scaffolds were "platforms" under the cited standard. The Commission issued its decision in this matter on April 25, 2007. That decision upheld the vacating of the items, although for different reasons than the Judge gave. The Secretary appealed, and the Sixth Circuit Court of Appeals reversed the Commission and

[1]The same Judge heard both cases in this matter, that is, Nos. 95-0103 and 95-0104, and the cases were consolidated for disposition purposes. The Commission issued a decision in these cases in 2007. *Manganas Painting Co.*, 21 BNA OSHC 2043 (Nos. 95-0103 & 95-0104, 2007). The Secretary appealed the Commission's decision, solely as to the items noted above. The Sixth Circuit reversed the Commission and remanded the consolidated cases. *Chao v. OSHRC*, 540 F.3d 519 (6th Cir. 2008). As noted, the Commission issued its remand order on April 14, 2009.

remanded this matter "for further proceedings regarding the merits of the citations at issue." *Chao v. OSHRC*, 540 F.3d 519, 521 (6th Cir. 2008). The Commission's April 14, 2009 remand order noted that the court, in reversing the Commission, had left standing that part of the Judge's decision in which he vacated the three items for duplicativeness and applicability of the cited standard. The Commission set aside that part of the Judge's decision relating to Items 13a, 13b and 13c and remanded the matter to the Chief Judge. The Chief Judge then assigned this matter to me.

After being assigned this matter, I issued an order on September 11, 2009, directing the Secretary to advise me of her position regarding the three citation items.[2] On October 21, 2009, the Secretary filed her response to my order. The Secretary's response sets out in detail the reasons why she believes the Judge erred in his decision and why the items at issue should now be affirmed. I agree with the Secretary's reasons and adopt them as my own, as follows.

***Factual Background***

In the early 1990's, Manganas contracted with the Ohio Department of Transportation ("ODOT") to remove lead-based paint from the Jeremiah Morrow Bridge in Lebanon, Ohio. That bridge has two parallel spans, one running north and the other south. In 1993, while Manganas was working on the northbound bridge, OSHA inspected the site and issued several citations to Manganas. One alleged that Manganas had violated 29 C.F.R. 1926.451(a)(4) because it had not installed guardrails on platforms that were located more than 10 feet above the ground level. Manganas contested the citation, which was affirmed by the Commission. *Manganas Painting Co.*, 19 BNA OSHC 1102 (Nos. 93-1612 & 93-3362, 2000), *aff'd*, 273 F.3d 1131 (D.C. Cir. 2001).

In 1994, while Manganas was working on the southbound bridge, OSHA again inspected the work site and again issued citations. One of these alleged three new violations of 29 C.F.R. 1926.451(a)(4), as set out in Items 13a, 13b and 13c. In particular, the OSHA compliance officers who inspected the site saw employees in June and July 1994 working from unguarded painters' pick scaffolds ("picks") and using the picks, by walking or crawling on them, to access other areas. The

[2]Manganas's former counsel moved to withdraw as counsel, and the motion was granted on August 9, 2009. My September 11, 2009 order was thus sent to the last known addresses for Manganas and its president by certified mail. The envelopes containing the orders sent to those addresses came back to my office with the notation "return to sender, refused, unable to forward" on them. This decision will also be sent to those same addresses by certified mail.

employees who used the unguarded picks were not utilizing any personal fall protection and were exposed to falls of 30 to 140 feet. (Tr. 1231-34, 1238-40, 1243, 1376, 1423-28, 1437-38, 1589). As set out above, the Judge vacated these three items, finding that they were duplicative of other citation items issued to Manganas and that the Secretary had not demonstrated that the picks were platforms covered by the standard.

***Discussion***

The intent of the cited standard is to prevent employees from falling from scaffolds. The standard provides in relevant part as follows:[3]

> (a) *General Requirements*. (1) Scaffolds shall be erected in accordance with the requirements of this section....(4) Guardrails and toe boards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor....

The Judge's decision, issued in 1996, was that the Secretary did not show that the picks were platforms under the standard. As the Secretary points out, the Commission addressed in 1995 the issue of what constitutes a scaffold. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1389 (No. 92-262, 1995), *aff'd on other grounds*, 72 F.3d 919 (D.C. Cir. 1996). In *Armstrong*, the Commission noted that "whether a surface constitutes a scaffold is a question of fact to be answered by comparing the definition of a scaffold to the characteristics of the surface in question." 17 BNA OSHC at 1389. The word "scaffold," for purposes of this case and in *Armstrong*, was defined in 29 C.F.R. 1926.451(b)(27) as "[a]ny temporary elevated platform and its supporting structure used for supporting workmen or materials, or both." The Commission held that the painters' picks in *Armstrong*, which employees used as surfaces from which to weld angle irons as cross-braces on a bridge, were "platforms" under the standard because they "clearly were working spaces for persons, elevated above the surrounding floor or ground." The Commission also held that the picks were temporary, because they were moved frequently during the job and would be removed from the work site when the steel erection was completed. 17 BNA OSHC at 1389.

I agree with the Secretary that, following *Armstrong*, the picks in this case were platforms as defined in the standard. The picks were elevated above the ground and were moved frequently,

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[3]The Secretary revised the scaffolding standards on August 30, 1996. *See* 29 C.F.R. Part 1926, Subpart L. *See also* 61 Fed. Reg. 46,026 (Aug. 30, 1996).

and employees used them both for painting and for accessing other areas of the bridge. (Tr. 1231-34, 1238-40, 1243, 1376, 1423-28, 1437-38, 1589). The cited standard therefore applied to the picks Manganas employees used at the site.

I also agree with the Secretary that Manganas knew that the picks were scaffolds requiring guardrails. Its safety and health program stated that "scaffolding includes all temporary elevated or suspended platforms and its supporting members used for supporting workmen, materials or both." (Exh. C-68, p. 26, ¶ 24.1). The program required guardrails, mid-rails, and toe boards on all sides and ends of scaffolds or work platforms over 6 feet above the ground. (Exh. C-68, p. 27, ¶ a). The ODOT contract also required guardrails on scaffolds that inspectors used on the site. (Exh. C-73, pp. 62-63). In addition, Manganas was cited in 1993 for violating the same standard. (Exh. C-72).

The Judge's decision also found that the citation items at issue were duplicative of other items issued to Manganas because Items 13a, 13b and 13c could have been abated by requiring employees to use their safety belts. As the Secretary points out, this finding is not consistent with Commission precedent. The Commission has held that violations are duplicative only where they require the same abatement conduct. *J.A. Jones*, 15 BNA OSHC 2201, 2207 (No. 87-2059, 1993) (citations omitted). The Commission has also held that safety belts are not "equivalent protection" when the standard requires guardrails. *Armstrong Steel Erectors*, 17 BNA OSHC 1385, 1389 (No. 92-262, 1995) (citations omitted). The Secretary notes that the other items the Judge referenced, that is, Items 1 through 5 and 11 of Willful Citation 2, involved employees not tying off as required. Those violations did not involve scaffolds and could not have been abated by installing guardrails. In Items 13a, 13b and 13c, abating the hazard required installing guardrails. I agree with the Secretary that Items 13a, 13b and 13c were separate and distinct violations from those cited in Items 1 through 5 and 11. They were not, therefore, duplicative.

The above discussion plainly shows that Manganas violated 29 C.F.R. 1926.451(a)(4). It also shows that Manganas knew that it was required to have guardrails on the picks, in view of its own safety program, its contract with ODOT, and the 1993 OSHA inspection and citations. As the Secretary indicates, even in the absence of guardrails, Manganas could have ensured that employees utilized personal fall protection to prevent falls. Manganas did not do so, and the Judge's decision

establishes that employees routinely did not use fall protection and that one foreman was observed violating the fall protection rules "repeatedly." *See* Judge's Decision, pp. 32-33.

To demonstrate a violation was willful, the Secretary must show that the employer committed the violation "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." A willful violation is "differentiated by a heightened awareness – of the illegality of the conduct or conditions – and by a state of mind – conscious disregard or plain indifference." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). I find that Manganas had a heightened awareness of the violations at issue, in light of its own safety program, its contract with ODOT, and the 1993 OSHA inspection and citations. The fact that the failure to use fall protection was widespread, and that a supervisor violated the fall protection rules repeatedly, is also evidence of Manganas's plain indifference to employee safety. Items 13a, 13b and 13c are AFFIRMED as willful violations. A total penalty of $70,000.00 for these items has been proposed. I find that penalty appropriate, and it is assessed.

## ***FINDINGS OF FACT AND CONCLUSIONS OF LAW***

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

## ***ORDER***

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Items 13a, 13b and 13c of Willful Citation 2 in Docket No. 95-0103 are AFFIRMED as willful violations. The total proposed penalty of $70,000.00 for these items is assessed.

/s/
G. Marvin Bober
Administrative Law Judge

Date: November 16, 2009
Washington, D.C.