SECRETARY OF LABOR, Complainant, v. SUPERIOR RIGGING & ERECTING CO., Respondent.	:	Docket No. 96-0126

DECISION

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

BY THE COMMISSION:

This case arises out of a fatal accident on June 15, 1995, when a foreman employed by Respondent, Superior Rigging & Erecting Company ("Superior"), fell down an elevator shaft while welding elevator sill angles on the fifteenth floor of a 24-story office building Superior was constructing in Montgomery, Alabama. The Secretary of Labor ("Secretary") issued a citation alleging that Superior had committed a number of serious violations and one repeated violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The judge affirmed two items of the citation alleging serious violations. He rejected Superior's argument that the cited standards were stayed because the work involved steel erection. He granted the Secretary's motion during the hearing to amend the repeated citation, and he affirmed the repeated citation as amended. For the reasons that follow, we conclude that the judge properly ruled that the installation of sill angles is not steel erection work within the coverage of the stay. We thus affirm item 2 of the serious citation in the absence of any argument by Superior regarding the merits of that item. We remand item 3 for further proceedings as discussed below. While we conclude that the judge properly found that the amendment the Secretary requested to the citation for repeated violation was not prejudicial to Superior, we remand that citation for reconsideration as set forth below.

FACTS

The elevator sill angles which Superior was installing are 4-by-4 metal brackets. These are placed at the edge of an elevator shaft to fill the space between the floor and the area which will eventually be occupied by the elevator door. They serve as a guide for positioning the elevator doors at the edge of the floor. It is undisputed that sill angles are installed after the structural steel is in place and the concrete has been poured for the floors and walls. Sill angles are either bolted or welded to 6- by 6-inch metal plates which have been embedded in the concrete. At the time in question here, the structural steel assembly of the building had been largely completed, and the cement floors and columns were in place.[1]

In most instances, sill angles could only be installed by employees working from within the elevator shaft itself. Accordingly, Superior's employees placed plywood on the steel beams that ran through the elevator shaft to form a work platform inside the shaft. The general contractor for the project had installed wire rope cables alongside the elevator shafts at the edge of the floor. It instructed Superior that its employees on the work platform inside the shaft were expected to tie off to these cables and that it would be safe for them to do so.[2] These same cables were also intended to provide a physical barrier to a fall through an elevator shaft opening for any employees working or passing by on the floor on the *inboard* side of the cable. The record indicates that it is common in the industry for a wire rope to be used in this fashion as both a guardrail and as a lifeline.

In addition to the horizontal cables, the elevator subcontractor had installed vertical lifelines for use by its employees in installing the elevators and associated components. The Secretary's compliance officer, David Gilreath, observed one instance in which an employee

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[1]In May 1995, the month before the accident, Superior was still engaged in connecting steel beams at the roof level. It is not entirely clear when that work was completed, and indeed the record does not directly show that there was no structural steel erection work remaining at the time of the violations. The record is clear, however, that in the elevator shaft areas where the violations in question were alleged to have occurred, floors and walls were largely complete and no structural steel assembly was taking place.

[2]The parties concede that the deceased employee, Lendon Whitlow, was required to tie off to the cable and was not wearing a safety belt at the time he fell.

of Superior was tied off to this vertical lifeline. The lifeline was secured to a beam on the floor above without any padding to protect the lifeline from being cut or damaged by the edges of the beam.

STAY OF SUBPART M

The parties do not dispute that Superior's system of fall protection in which its employees used safety belts to tie off is intended to be a "personal fall arrest system" ("PFAS") within the meaning of the standard cited here, 29 C.F.R. § 1926.502. On these facts, the Secretary issued a citation alleging that Superior failed to comply with two provisions of section 1926.502(d), which sets forth specifications for a PFAS. Item 2 alleged that the vertical lifeline was not protected, contrary to the requirements of section 1926.502(d)(11), and item 3 alleged that Superior had failed to comply with section 1926.502(d)(23) because it allowed its employees to secure their PFAS to "cable guardrails."[3] Superior contended before the judge and argues before us on review that it had not failed to comply with section 1926.502 because the Secretary had stayed the application of that standard to steel erection work.

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[3]The cited standard provides as follows:

> **§ Section 502 Fall protection systems criteria and practices**
> . . . .
> (d) *Personal fall arrest systems*. Personal fall arrest systems and their use shall comply with the provisions set forth below.
> . . . .
> (11) Lifelines shall be protected against being cut or abraded.
> . . . .
> (23) Personal fall arrest systems shall not be attached to guardrail systems, nor shall they be attached to hoists except as specified in other subparts of this part.

Section 1926.500(b) defines a PFAS as "a system used to arrest an employee in a fall from a working level." A "guardrail system" in turn is defined as "a barrier erected to prevent employees from falling to lower levels."

The circumstances of this stay may be briefly summarized. The standards set forth at 29 C.F.R. §§ 1926.500-.503 comprise Subpart M of Part 1926. This subpart, which is entitled "Fall Protection," is one of several subparts which prescribes fall protection requirements for construction worksites. As a result of circumstances not relevant to the issues before us, the Secretary on January 26, 1995, decided to stay the application of Subpart M as to steel erection work until August 6, 1995 in order to reopen the rulemaking record for comments regarding the appropriate fall protection measures for employees engaged in non-building steel erection. Thereafter, on August 2, 1995, the Secretary formally amended Subpart M to conform to the stay, that is, she amended Subpart M to provide specifically that it did not cover steel erection activities. The Secretary further announced a definition for the term "steel erection activities"; she stated that her enforcement policy would conform to a memorandum OSHA had issued to its field offices on July 10, 1995:

> The memorandum provides that the term "steel erection activities" means the movement and erection of skeleton steel members (structural steel) in or on buildings or non-building structures. It includes the initial connecting of steel, employees moving point-to-point, installing metal floor or roof decking, welding, bolting and similar activities.
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> The memorandum further provides that steel erection does not include the erection of steel members such as lintels, stairs, railings, curtainwalls, windows, architectural metalwork, column covers, catwalks, and *similar non-skeletal* items or the placement of reinforcing rods in concrete structures.

60 Fed. Reg. 39,254 (emphasis added).

Superior presented opinion testimony from a number of witnesses, including its own president, managers for the general contractor, and a safety consultant for its insurance company, to the effect that the industry considers installation of sill angles to be steel erection work because it involves the connection of metal components to the building. However, none of these witnesses disputed that sill angles are not structural steel supporting members for the building or disputed that they are set in place after the concrete floors are poured. One of Superior's witnesses, the construction manager for the general contractor, conceded that the sill angles provide no structural support. This witness further stated that sill angles are integral to the building only because they are a necessary part of the elevator

assembly and that if a building is not equipped with elevators, sill angles would not be required.

In concluding that Subpart M had not been stayed with regard to the work activities involved in the installation of the sill angles, Judge Welsch relied on the July 10, 1995 enforcement memorandum set forth in the August 1995 rulemaking, quoted above. He found that sill angles are not skeleton steel members which provide structural support for the building and concluded that they are within the category of steel members which are excluded from steel erection work under the terms of the memorandum. Superior argues that the judge erred in disregarding its testimony of persons knowledgeable about steel erection that installation of sill angles is regarded as a type of steel erection work. We affirm the judge's decision.

Neither the rulemaking associated with Subpart M nor Subpart R, which applies to certain steel erection activities,[4] defines the term "steel erection." Where the language of the standard itself is not explicit on a matter in issue, we look to extrinsic evidence, starting with the legislative history of the standard, to determine its meaning. *Nooter Constr. Co.*, 16 BNA OSHC 1572, 1574, 1993-95 CCH OSHD ¶ 30,345, pp. 41,837-38 (No. 91-237, 1994). As the Secretary correctly observes, the preamble to a standard is the most authoritative evidence of the meaning of the standard. *Tops Markets, Inc.*, 17 BNA OSHC 1935, 1936 (No. 94-2527, 1997), *aff'd without published opinion*, 132 F.3d 1482 (D.C. Cir. 1997); *American Sterilizer Co.*, 15 BNA OSHC 1476, 1478, 1991-93 CCH OSHD ¶ 29,575, p. 40,016 (No. 86-1179, 1992). The Secretary's statement adopting the enforcement memorandum is part of a preamble to a final rule—in this instance, the preamble to the final rule amending Subpart M to incorporate the terms of the stay. As such, it is an authoritative expression of the Secretary's intent in enacting the stay.

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[4]Subpart R governs the erection of steel-framed buildings and contains a number of safety requirements, of which fall protection is only one portion. *See* 60 Fed. Reg. 5132 (1995).

The enforcement memorandum clearly provides that placement of non-structural steel components does not constitute steel erection activity for purposes of the stay.[5] Accordingly, the judge did not err by failing to rely on Superior's opinion testimony regarding the industry understanding of what constitutes steel erection work. *See Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1117, 1986-87 CCH OSHD ¶ 27,829, pp. 36,428-29 (No. 84-696, 1987) (citing *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094, 1103-05 (5th Cir. 1980)) (industry custom and practice is not relevant where the language of a standard, as defined by its legislative history, is clear and unambiguous). Since it is undisputed that sill angles are not structural components of the building and since the record establishes that sill angles are installed only after the structural steel assembly is completed and permanent floors have been poured, the judge properly determined that installation of sill angles is not structural steel work within the scope of the Secretary's stay.

MERITS OF THE ALLEGED SERIOUS VIOLATIONS

Other than its contention that application of the standard had been stayed, Superior does not dispute the merits of item 2, alleging that the vertical lifeline was not protected against damage. Accordingly, we affirm item 2 of the serious citation. The Secretary proposed and the judge assessed $7000, the maximum penalty, based on his finding that the violation was of high gravity. Since the employer does not dispute this penalty amount, we affirm the penalty imposed by the judge.

As previously indicated, the Secretary alleged in item 3 of the citation for serious violation that Superior failed to comply with 29 C.F.R. § 1926.502(d)(23) because it attached a PFAS to a guardrail system. Superior argued that "the horizontal cable served as an acceptable anchorage -- or secure point of attachment" for a PFAS in addition to a guardrail

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[5]Superior contends that the enforcement directive is inconclusive on the issue of the scope of the stay because sill angles are not expressly included in the list of activities considered to be non-structural steel work. Superior concedes, however, that the directive is not intended to be an exhaustive enumeration of every work operation but rather sets forth illustrations or examples of the kinds of activities that are or are not covered by the term "steel erection."

since it complied with other requirements for a PFAS in 29 C.F.R. § 1926.502(d). As a result, the parties adduced evidence relating to the strength and adequacy of the anchorages and other components of the PFAS under paragraphs (d)(15) and (d)(16) of section 1926.502.[6] These paragraphs set forth requirements for the amount of weight and force the various components of a PFAS must be able to withstand as well as requirements for testing the strength of the PFAS and ensuring that a qualified individual reviews the design and installation of the PFAS. They provide as follows:

> **§ 1926.502 Fall protection systems criteria and practices**
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> . . . .
>
> (d) *Personal fall arrest systems*
>
> . . . .
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> (15) Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached, or shall be designed, installed, and used as follows:
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> (i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and
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> (ii) under the supervision of a qualified person.
>
> (16) Personal fall arrest systems, when stopping a fall, shall:

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[6]According to the definition of a PFAS in section 1926.500(b), a PFAS "consists of an anchorage, connectors, a body belt or body harness and may include a lanyard, deceleration device, lifeline, or suitable combinations of these." One of the components of the PFAS, the anchorage, is defined at section 1926.500(b) as "a secure point of attachment for lifelines, lanyards or deceleration devices." Lifelines and lanyards are defined as follows:

> *Lanyard* means a flexible line of rope, wire rope, or strap which generally has a connector at each end for connecting the body belt or body harness to a deceleration device, lifeline, or anchorage.
>
> . . . .
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> *Lifeline* means a component consisting of a flexible line for connection to an anchorage at one end to hang vertically (vertical lifeline), or for connection to anchorages at both ends to stretch horizontally (horizontal lifeline) and which serves as a means of connecting other components of a personal fall arrest system to the anchorage.

> (i) limit maximum arresting force on an employee to 900 pounds (4 kN) when used with a body belt;
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> (ii) limit maximum arresting force on an employee to 1,800 pounds (8 kN) when used with a body harness;
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> (iii) be rigged such that an employee can neither free fall more than 6 feet (1.8 m), nor contact any lower level;
>
> (iv) bring an employee to a complete stop and limit maximum deceleration distance an employee travels to 3.5 feet (1.07 m); and,
>
> (v) have sufficient strength to withstand twice the potential impact energy of an employee free falling a distance of 6 feet (1.8 m), or the free fall distance permitted by the system, whichever is less.
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> NOTE: If the personal fall arrest system meets the criteria and protocols contained in Appendix C to subpart M, and if the system is being used by an employee having a combined person and tool weight of less than 310 pounds (140 kg), the system will be considered to be in compliance with the provisions of paragraph (d)(16) of this section. If the system is used by an employee having a combined tool and body weight of 310 pounds (140 kg) or more, then the employer must appropriately modify the criteria and protocols of the Appendix to provide proper protection for such heavier weights, or the system will not be deemed to be in compliance with the requirements of paragraph (d)(16) of this section.

Although they impose a number of requirements, Judge Welsch focused only on the provisions at 1926.502(d)(15)(i) and (ii) requiring that anchorages used as part of a PFAS have a safety factor of at least two and be designed, installed, and used "under the supervision of a qualified person." The judge concluded that "the perimeter cable guardrail system" to which Superior's employees were instructed to tie off was not "designed and installed and used under the supervision of a qualified person as part of a complete personal fall arrest system which maintains a safety factor of at least two."

However, section 1926.502(d)(15) sets forth requirements for the design, installation, and use of *anchorages* to which the other components of the PFAS are attached. It mandates that anchorages "shall be . . . capable of supporting at least 5000 pounds . . . per employee attached, *or* shall be designed, installed, and used as follows . . . ." (Emphasis added). Under the plain language of the standard, maintenance of a specified safety factor and design, installation, and use under the supervision of a "qualified person" are requirements which

must be met *only if* the anchorages used for attachment of the PFAS components are incapable of supporting at least 5000 pounds per person. Judge Welsch made no findings as to how much force the anchorages could withstand, and therefore he did not determine whether Superior is even required to comply with the safety factor and qualified person provisions.

Although the Commission is empowered to make factual findings *de novo*, *Franklin R. Lacy*, 9 BNA OSHC 1253, 1254, 1981 CCH OSHD ¶ 25,171, p. 31,073 (No. 3701, 1981), we decline to do so in the circumstances of this case. As we have said, the parties litigated a number of factual issues relating to the various specifications and requirements set forth in section 1926.502(d)(15) and (16) in addition to the "qualified person" and safety factor requirements. The judge made no findings on these other matters although they were raised and argued before him.[7] The Commission's usual practice is to allow judges to make factual findings in the first instance. *Anthony Crane Rental, Inc.*, 17 BNA OSHC 1597, 1995-97 CCH OSHD ¶ 31,015 (No. 91-556, 1996), and cases cited therein. Not only would a full resolution of all the issues raised by the parties in this case require that a large number of factual findings be made, but at least some of the factual matters to be addressed involve drawing inferences from somewhat ambiguous testimony and determining the weight to be assigned certain testimony or other evidence. *Compare Kulka Constr. Management Corp.*, 15 BNA OSHC 1870, 1874, 1991-93 CCH OSHD ¶ 29,829, p. 40,687 (No. 88-1167, 1992) (Commission on review makes a very limited number of findings on matters not addressed by the judge based on obvious and unmistakable photographic evidence and evidence which is uncontroverted) *with Wiley Organics, Inc.*, 17 BNA OSHC 1587, 1594, 1995-97 CCH

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[7]The judge asserted that it was the Secretary's contention that the "perimeter guardrail system" was not implemented under the supervision of a qualified person. Although the judge also concluded that Superior had not complied with the safety factor requirement of section 1926.502(d)(15)(i), his decision suggests that the *only* issue the Secretary raised before him was whether Superior had satisfied the qualified person criterion of section 1926.502(d)(15)(ii). In fact, in her trial brief the Secretary argued all elements of both paragraphs 1926.502(d)(15) and (16) before the judge.

OSHD ¶ 31,035, p. 43,277 (No. 91-3275, 1996), *aff'd without published opinion*, 124 F.3d 201 (6th Cir. 1997) (province of the judge to resolve factual issues and weigh conflicting testimony). *See Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1228 & n.15, 1991-93 CCH OSHD ¶ 29,442, p. 39,685 & n.15 (No. 88-821, 1991) (general discussion of policy considerations inherent in structure under which the administrative law judge makes initial factual findings subject to review by the Commission under the preponderance of the evidence standard).

In addition to the fact-finding required for a full resolution of all of the contentions of the parties regarding the requirements and specifications for a PFAS as set forth in the provisions of section 1926.502(d), there is a potentially more fundamental issue which remains to be resolved as to the appropriate means of fall protection for Superior's employees in the circumstances here. That issue arises from the alleged repeated violation, to which we now turn.

ALLEGED REPEATED VIOLATION

The citation for repeated violation alleges that Superior failed to comply with section 1926.501(b)(1)[8] because the employees installing sill angles from the platform in the elevator shaft were not protected by one of the three alternative means of fall protection permitted by the standard, either a guardrail, safety net, or PFAS. The violation was alleged to be repeated based on a prior uncontested citation for Superior's failure to have guardrails on a manually propelled mobile scaffold at a construction project for the Atlanta, Georgia airport. That prior citation alleged a violation of Subpart L of Part 1926, the Secretary's standards for scaffolds,

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[8]The standard imposes a general requirement that employees be protected against the hazard of a fall from working surfaces as follows:

> **§ 1926.501 Duty to have fall protection.**
>
> . . . .
>
> (b)(1) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

29 C.F.R. § 1926.451(e)(10), which required guardrails on all open sides and ends of manually propelled mobile scaffolds. During the hearing in the case now before us, the Secretary moved to amend to allege in the alternative a violation of section 1926.451(a)(4), which required guardrails on scaffolds in general.[9] The Secretary's position in support of the amendment was that the platform from which employees were installing sill angles inside the elevator shaft met the definition of a scaffold.

The judge granted the motion over Superior's objection but afforded Superior the opportunity to adduce additional evidence for the purpose of curing any prejudice resulting from the amendment.[10] Superior declined to request that the record be reopened. The judge

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[9]At the time this case arose, the scaffold standards provided as follows:

> **§ 1926.451 Scaffolding.**
>
> (a) *General requirements.*
> . . . .
> (4) Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor . . . .Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.
> . . . .
> (e) *Manually propelled mobile scaffolds.*
> . . . .
> (10) Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection, approximately 42 inches high, with a midrail . . . and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

On August 30, 1996, the Secretary substantially revised the scaffold standards set forth in Subpart L, including the fall protection requirements for scaffolds contained in section 1926.451. 61 Fed. Reg. 46,026, 46,104. Although this amendment postdates the violations alleged in this case, it is nevertheless relevant for the reasons discussed *infra*.

[10]The Commission has consistently held that the judge may in his discretion allow prejudice
(continued...)

concluded that the area from which Superior's employees were performing work in the elevator shafts was a scaffold covered by section 1926.451 rather than a "walking/working surface" under section 1926.501. He affirmed the citation item insofar as it alleged a violation of section 1926.451 and found it repeated on the ground that both the violation in question here and the prior citation item were substantially similar since both involved falls from scaffolds.[11] Superior contends that the judge erred in allowing the Secretary to amend to allege a charge under section 1926.451(a)(4) and in finding the violation to be repeated in nature.

Propriety of the Amendment

In the situation presented here, where an amendment is sought during the course of the hearing, the issue is whether the amendment would be prejudicial under the second part of Fed. R. Civ. P. 15(b), which provides:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

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[10](...continued)
to be cured by granting a reasonable continuance. *Bland Constr. Co.*, 15 BNA OSHC 1031, 1041, 1991-93 CCH OSHD ¶ 29,325, p. 39,401 (No. 87-992, 1991), and cases cited therein.

[11]In order for a repeated violation to exist, the evidence must show that at the time the violation is alleged to have existed there was a Commission final order against the employer for a "substantially similar" violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). Under the rule set forth in *Potlatch*, a prima facie showing of substantial similarity is presumed to exist where the present and prior violations are of the same standard, and the burden then shifts to the employer to rebut that showing. Where the present and prior violations are of different standards, the Secretary must present evidence to establish substantial similarity.

Caterpillar, Inc., 17 BNA OSHC 1584, 1586 n.4, 1995-97 CCH OSHD ¶ 31,016, p. 43,234 n.4 (No. 93-2230, 1996); *Morrison-Knudson Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1112-13, 1993-95 CCH OSHD ¶ 30,048, pp. 41,269-70 (No. 88-572, 1993). Superior contends that the amendment to add section 1926.451(a)(4) to the original allegation of section 1926.501(b)(1) was prejudicial because it was prepared to defend by showing that employees on the scaffold platform tied off to the cable for fall protection whereas the amendment forced it to litigate an independent and separate allegation that these employees were not protected by guardrails. The Secretary, on the other hand, argues that Superior was not prejudiced because the amendment to a guardrail standard from one requiring either guardrails or personal protective equipment does not add any new issues to the case. *See A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1997, 1993-95 CCH OSHD ¶ 30,554, p. 42,272 (No. 92-1022, 1994) and cases cited therein (amendments generally permissible where they do not alter the essential factual allegations of the citation but merely add an alternative legal theory).

As the Secretary acknowledges in her brief before us, the Commission has held that the Secretary cannot properly amend from a standard requiring only guardrails to one requiring guardrails *and* other forms of fall protection, because to do so would inject new issues into the case. *E.g.*, *Roanoke Iron & Bridge Works, Inc.*, 5 BNA OSHC 1391, 1393, 1978 CCH OSHD ¶ 22,522, p. 27,174 (No. 10411, 1977), *aff'd without published opnion*, 588 F.2d 1351 (4th Cir. 1978); *Roof Engg. Co.*, 4 BNA OSHC 1942, 1976-77 CCH OSHD ¶ 21,416 (No. 6972, 1977). *See Spancrete Northeast, Inc. v. OSHRC*, 905 F.2d 589 (2d Cir. 1990) (judge erred in holding employer in violation for failure to require safety belts where the citation alleged only a violation of a standard requiring guardrails). However, the Secretary argues that an amendment from a standard requiring that the employer select one of several permissible means of fall protection to one requiring a single specific means of fall protection is inherently non-prejudicial. We disagree.

The proposition the Secretary advances assumes that the employer *is not using any means of fall protection*. In such a situation, a citation alleging a violation of a standard which requires that the employer use one of several alternative means of fall protection would put the employer on notice that it must be prepared to litigate issues relating to all the permissible means of fall protection. It logically follows that the employer would not be prejudiced by an amendment to a more restrictive standard which permits only one of those means of protection. But where, as here, the employer has instituted one of the means of fall protection permitted under the standard originally cited and is prepared to defend on that basis, that same amendment *would* interject new issues because it would require the employer to litigate a means of fall protection different from the one it had been using and on which its case was predicated. As the Commission stated in *Morrison-Knudson Co./Yonkers Contracting Co.*, 16 BNA OSHC at 1113, 1993-95 CCH OSHD at p. 41,270 "to determine whether a party has suffered prejudice, it is proper to look at whether . . . it could have offered any additional evidence if the case were retried" (quoting *Con-Agra Flour Milling Co.*, 15 BNA OSHC 1817, 1822, 1991-93 CCH OSHD ¶ 29,808, p. 40,592 (No. 88-2572, 1992)).

When Superior raised its objections at the hearing, it objected to the amendment *solely* on the grounds that it was not prepared to try the issue of whether the platform in the elevator shaft was subject to the scaffold standards, which at the time in question defined a scaffold as "any temporary elevated platform and its supporting structure used for supporting workmen or materials, or both." Section 1926.452(b)(27). Superior did not specifically object on the basis of the differences in the substantive fall protection requirements of the two standards. At the time in question, however, the only means of fall protection permitted by the scaffold standard was guardrails, which as noted differs from the means of fall protection permitted under section 1926.501 as set forth in the Secretary's citation. Nonetheless, while this change in the substance of the allegation against Superior would be prejudicial under Fed. R. Civ. P. 15, the judge offered Superior a continuance to cure any prejudice. We

therefore conclude that the judge did not err in granting the Secretary's motion to amend after Superior declined the opportunity for a continuance.

Appropriate Fall Protection in the Circumstances Presented Here

While we find no *procedural* reason to deny an amendment of the charge to allege that the platform was a scaffold requiring guardrails, the Secretary's motion to amend does create an inconsistency with item 3 of the serious citation, in which the parties have litigated issues concerning the use of personal fall arrest equipment. If it is the Secretary's position—as item 3 of the serious citation indicates—that the employees on the scaffold platform would have adequate fall protection if the PFAS had been rigged, secured, and tested in the manner required by section 1926.502(d), then to require the installation of guardrails as an additional means of fall protection would be contrary to the terms of section 1926.501(b)(1), which clearly provides that guardrails and a PFAS are alternative and equivalent means of fall protection. As a general proposition, an employer cannot be required to implement multiple methods of protecting employees from a single hazard if those means are duplicative, and the additional abatement measures would not further enhance employee safety. *See H.S. Holtze Construction Co. v. Marshall*, 627 F.2d 149 (8th Cir. 1980). Conversely, if the Secretary is of the view—as the amended allegation of repeated violation suggests—that guardrails are required because the scaffold standards are more specifically applicable to the platform from which Superior's employees were working than the general fall protection requirements set forth in Subpart M, then the means of protection set forth in the specific scaffold standard take precedence over the requirements of the general standard, and Superior cannot be cited for a violation of the general standard. *McNally Constr. & Tunneling Co.*, 16 BNA OSHC 1879, 1993-95 CCH OSHD ¶ 30,506 (No. 90-2337, 1994), *aff'd per curiam*, 71 F.3d 208 (6th Cir. 1995); *Yazoo Mfg. Co.*, 12 BNA OSHC 1112, 1118, 1984-85 CCH OSHD ¶ 27,141, p. 35,018 (No. 81-2141, 1984).[12]

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[12]We also note that on August 30, 1996, subsequent to the accident and inspection at issue (continued...)

Accordingly, we remand for reconsideration that portion of the judge's decision finding that Superior committed a repeated violation by failing to comply with section 1926.451(a)(4). We instruct the judge to determine, based on further argument of the parties if necessary, which standard is applicable in the circumstances here—the general fall protection standards which would permit use of a PFAS, or the then-existing standards for scaffolds, which require guardrails. In view of this disposition, we do not at this time address the issue of whether there exists a violation that is substantially similar to the prior violation of section 1926.451. If the judge determines that a PFAS satisfies Superior's obligation to

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[12](...continued)
here, the Secretary promulgated a final rule revising the scaffold standard to which she seeks to amend here. 61 Fed. Reg. 46,026 (1996). This revision is based on rulemaking which the Secretary conducted simultaneously with her revision of the general fall protection standards in Subpart M. In the preamble to her proposed revisions of the scaffold standards, the Secretary expressed her general objective to harmonize the fall protection requirements among the various subparts:

> The proposed revisions are intended to correct problems related to the existing standards. More specifically, the existing standards regulate, in detail, the specific methods to be used to reduce employee exposure to the hazards of slipping or falling while working on scaffolds. The proposed revisions would continue to address employee exposure, but would do so using performance criteria, where possible, rather than specifications standards. This approach is another step in OSHA's plan to review its safety standards and to revise them as necessary to provide safer working conditions without imposing unnecessarily burdensome requirements.

51 Fed. Reg. 42,680 (1986). To this end, the Secretary proposed to eliminate the general scaffold protection provision requiring guardrails, section 1926.451(a)(4), the paragraph to which she seeks to amend in this case, in favor of a requirement allowing the employer a choice between a guardrail and a PFAS. As the Secretary stated, "[w]hereas the existing rules are specific requirements to have guardrails only or safety belts only, the proposal would require that all employees on platforms more than 10 feet above lower levels be protected by a choice of . . . guardrails or body belt/harness systems, with certain exceptions discussed below." *Id*. In adopting the final rule amending Subpart L, the Secretary reiterated her intention "to allow employers as much flexibility in compliance as is consistent with employee protection." 61 Fed. Reg. at 46,026.

provide protection against the fall hazard to which its employees were exposed, then we direct that he set aside his ruling granting the Secretary's motion to amend the citation for repeated violation and that he decide the original pre-amendment repeated allegation under section 1926.501(b)(1). In such event, the judge is also to make the necessary further factual findings with respect to the parties' allegations in item 3 of citation no. 1 regarding the adequacy of the design, installation, and testing of a PFAS. If the judge determines that Superior's employees should have been protected by guardrails, then we direct that item 3 of citation no. 1 be vacated. The judge may in his discretion conduct further evidentiary proceedings or request further briefs from the parties if he concludes that such proceedings would be helpful on any of the matters covered by this order.

CONCLUSION

In conclusion, we affirm Judge Welsch's holding that the standards prescribed in Subpart M were not stayed as to the work operations in which Superior's employees were engaged. We conclude that the judge properly affirmed item 2 of citation no. 1 alleging serious violations. We remand for reconsideration citation no. 1, item 3 and repeated citation no. 2.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

/s/
Stuart E. Weisberg
Commissioner

Dated: April 5, 2000

Secretary of Labor, Complainant, v. Superior Rigging & Erecting Co., Respondent.	OSHRC Docket No. **96-0126**

Appearances:

Kathleen G. Henderson, Esquire
U. S. Department of Labor
Office of the Solicitor
Birmingham, Alabama
For Complainant

David E. Jones, Esquire
Ogletree, Deakins, Nash, Smoak & Stewart
Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Superior Rigging and Erecting Co. contests two citations issued by the Secretary on December 14, 1995. The Secretary issued the citations as a result of Occupational Safety and Health Administration (OSHA) compliance officer David Gilreath's investigation of an employee fatality at a construction site where Superior was working on June 15, 1995.

Citation No. 1 alleges serious violations of the following construction standards of the Occupational Safety and Health Act of 1970 (Act):

Item 1: 29 C.F.R. § 1926.20(b)(2), which requires frequent and regular inspections of the job site by competent persons.

Item 2: 29 C.F.R. § 1926.502(d)(11), which requires lifelines to be protected from cuts and abrasions.

Item 3: 29 C.F.R. § 1926.502(d)(23), which requires that personal fall arrest systems not be attached to guardrails.

Item 4a: 29 C.F.R. § 1926.503(a)(2)(i), which requires employees to be trained in the nature of fall hazards in the work area.

Item 4b: 29 C.F.R. § 1926.503(a)(2)(ii), which requires employees to be trained in the maintenance of the fall protection system to be used.

Item 4c: 29 C.F.R. § 1926.503(a)(2)(iii), which requires employees to be trained in the use and operation of personal fall arrest systems and guardrail systems.

Item 4d: 29 C.F.R. § 1926.503(a)(2)(viii), which requires employees to be trained in the standards contained in subpart M of the construction standards.

Item 5: 29 C.F.R. § 1926.1060(a), which requires employees to be trained in the hazards associated with the use of ladders in elevator shafts.

Citation No. 2, item 1, alleges a repeat violation of 29 C.F.R. § 1926.501(b)(1) (amended at the hearing from "§ 1926.502(b)(1)," as it appeared in the citation (Tr. 272)), which requires employees on a working/walking surface with an unprotected side more than 6 feet above the lower level to be provided with some form of fall protection. During the hearing, the Secretary moved to allege in the alternative a violation of § 1926.451(a)(4), which requires guardrails to be installed on all open sides of platforms more than 10 feet above the ground or floor. The Secretary's motion was granted (Tr. 273).

Background

In early 1995, Superior began work as a subcontractor at the RSA Tower, a 24-story building under construction at 201 Monroe Street in Montgomery, Alabama (Tr. 372, 581-582). Superior was originally hired as a subcontractor by Industrial Manufacturing Incorporated to perform steel erection work on the upper floors of the RSA Tower. The general contractor Huber, Hunt & Nichols (HHN) subsequently hired Superior to install approximately 180 sill angles in the passenger and freight elevator shafts under construction (Tr. 138-139, 331). Sill angles span the opening of an elevator door and provide continuity between the elevator floor and the story floor (Exh. C-18, Tr. 83, 553-554).

Superior began installing the sill angles in April 1995 (Tr. 553). On June 15, 1995, Superior employee Lendon Whitlow fell 15 stories to his death in the east passenger elevator shaft (Tr. 697). Whitlow fell as he assisted Freddie Payne, another Superior employee, in moving some boards from the sixteenth to the fifteenth floor (Tr. 1184-1188).

Citation No. 1

Item 1: Alleged Serious Violation of § 1926.20(b)(2)

The Secretary alleges that Superior committed a serious violation of § 1926.20(b)(2), which requires that employers initiate and maintain programs that:

> shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

The citation alleges that Superior's employees "were exposed to fall hazards, in that the employer did not do regular inspections of the job site to insure fall protection was adequate to protect employees, that fall protection was installed correctly and that the fall protection was inspected before each use." The Secretary contends that no one, competent person or not, conducted inspections of fall protection at the site. Superior argues that Herschel Lynch, Superior's general foreman and superintendent on the RSA Tower project, and Lendon Whitlow, a foreman, were both competent persons and made frequent and regular inspections of the fall protection at the site.

The Secretary has the burden of proving this 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 (No. 90-1747, 1994).

Superior does not dispute the application of § 1926.20(b)(2) to the cited conditions. If Superior violated the terms of the standards by failing to inspect its fall protection, its employees had access to the violative conditions and Superior knew of the existence of the violative conditions. The only issue is whether Superior conducted the safety inspections.

Section 1926.32(f) defines a competent person as:

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

Superior established that both Lynch and Whitlow were competent persons within the meaning of the standard. Both Lynch and Whitlow were capable of identifying existing and predictable hazard in their working conditions which were hazardous or dangerous to employees.

Pamela D. Painter is a senior safety consultant with the Argonaut Insurance Company (Tr. 468). Before attaining that position, she had worked for J. A. Jones Construction Company for 13 years, first as a field safety inspector and then as the southeastern safety coordinator (Tr. 469). Painter has worked with Lynch on a number of projects since the mid 1980s (Tr. 469, 479). Her contact with Lynch led her to conclude that Lynch "is very experienced and very capable of" identifying unsafe work practices (Tr. 480-481). Painter described one of the projects that she and Lynch worked on, the Atlanta Apparel Mart, as "an enormously challenging project that we were very successful with" (Tr. 482-483). Painter observed that Lynch had the authority to take corrective action regarding unsafe conditions (Tr. 483, 486-487). Superior sent Lynch to a seminar on OSHA's fall protection standards (subpart M) and paid for the training (Tr. 543). Benny Tumbleston, president of Superior, testified that Lynch had the authority to correct unsafe conditions that he identified at the site (Tr. 72-73).

Painter also worked with Lendon Whitlow on the Atlanta Apparel Mart project, and she testified that Whitlow was capable of identifying unsafe conditions: "[I]n the area of steel erection, Lendon was particularly cautious about fall protection and was very good at ensuring that his employees utilized fall protection" (Tr. 489). Gregory Fussell, Superior's vice-president and safety director, testified that Whitlow had the authority to rectify any unsafe conditions that he observed while he worked as a foreman for Superior (Tr. 1529).

Superior also established that Lynch made frequent and regular inspections at the RSA Tower job site. Lynch testified that he made visual inspections when Superior employees were performing sill angle installation work in the elevator shafts (Tr. 690). Whitlow, who did most of the hands-on supervising of the installation of the sill angles, died at the work site. The record does not establish whether he conducted frequent or regular inspectors of the work site.

The Secretary attempts to establish that Superior violated § 1926.20(b)(2) primarily by pointing out other alleged violations. The Secretary's position is that, had Superior's competent persons conducted frequent and regular inspections, the other alleged violations would not have existed.

Such an argument is insufficient to sustain a violation of § 1926.20(b)(2). Some positive evidence is required to show that no inspections were made. The mere existence of safety violations does not establish a § 1926.20(b)(2) violation. The compliance officer, David Gilreath, was asked at the hearing, "[D]id you find one shred of evidence that anybody, any management person from the respondent, even conducted one inspection while the employees were working inside the elevator shaft?" Gilreath responded, "No, I did not" (Tr. 1310). This exchange does not tell us how assiduously Gilreath looked for evidence that inspections were conducted. Gilreath did not testify as to whether he asked anyone he interviewed about the frequency and regularity of inspections.

The Secretary has failed to establish that Superior violated § 1926.20(b)(2). Item 1 is vacated.

Item 2: Alleged Serious Violation of § 1926.502(d)(11)

The Secretary alleges a serious violation of § 1926.502(d)(11), which provides:

> Lifelines shall be protected against being cut or abraded.

Superior contends that § 1926.502(d)(11) (as well as the subpart M standards cited in items 3, 4a, 4b, 4c, 4d and item 1 of Citation No. 2) is inapplicable to the cited conditions. On January 26, 1995, the Secretary stayed the application of subpart M to steel erection activities from February 6, 1995, through August 6, 1995 (Exh. R-2), Federal Register, Vol. 60, p. 5132). On August 2, 1995, the Secretary announced that he was extending the stay (Exh. R-3, Federal Register Vol. 60, p. 39254).

Superior began installing sill angles in April 1995 (Tr. 553). Superior contends that its installation of sill angles constitutes steel erection, thus the subpart M standards did not apply to it at the time of the accident.

The August 6, 1995, Federal Register announcement states that, until subpart M is revised, OSHA's "enforcement policy on fall protection during steel erection is the policy outlined in Deputy Assistant Secretary Stanley's July 10, 1995, memorandum to the Office of Field Programs, 'Fall Protection in Steel Erection'" (Exh. R-3). That memorandum provides that the term "steel erection activities" means (Exh. R-3):

> the movement and erection of skeleton steel members (structural steel) in or on buildings or non-building structures. It includes the initial connecting of steel, employees moving point-to-point, installing metal floor or decking, welding, bolting and similar activities.

> . . . [s]teel erection does not include the erection of steel members such as lintels, stairs, railings, curtain walls, windows, architectural metal work, column covers, catwalks, and similar non-skeletal items or the placement of reinforcing rods in concrete structures.

The January 26, 1995, Federal Register announcement states that subpart M "will become effective for all construction activity other than steel erection on February 6, 1995" (Exh. R-2). The issue is whether the installation of sill angles is classified as a steel erection activity. The record establishes that sill angle installation is not a steel erection activity, and thus is covered by subpart M at the time of the accident.

Sill angles are lengths of steel angle installed at a right angle to steel separator beams along the inside edge of elevator shafts (Tr. 83, 553). The outside doors of the elevators -- those visible to a person standing in an elevator lobby -- rest on, and slide open and close along, door stops that are installed upon sill angles (Tr. 553). As such, sill angles are not skeleton steel members. Sill angles do not provide structural support for the building. Sill angles are more akin to the steel members, like architectural metalwork and column covers, which are not classified as steel erection. The standards contained in Subpart M apply to Superior's installation of sill angles.

The Secretary alleges that Superior employee Brian Stokes, on either June or July 21, 1995, was exposed to a fall because his lanyard was attached to a vertical lifeline that was at risk for being cut or abraded (Tr. 1238-1239). On either June or July 21, 1995, compliance officer Gilreath took a picture of a rope double-wrapped around an I-beam. There was no padding to protect the rope from cuts or abrasions (Exh. C-20; #1; Tr. 1238). Gilreath called Lynch to the floor where the rope was attached. Lynch told Gilreath that he and another Superior employee had installed the lifeline (Tr. 1240). Gilreath had previously encountered Superior welder Brian Stokes one floor below, tied off to the lifeline (Exh. C-26; Tr. 1232).

Superior argues that it did not install the lifeline, that Brian Stokes was not a Superior employee at the time the photograph was taken, and that Gilreath "staged" the photograph to make it appear that a violation existed where one did not. All of these arguments are without merit.

At the hearing, Lynch claimed that Superior did not use vertical lifelines on the RSA project. Gilreath's testimony that Lynch admitted to him that he had installed the rope depicted in Exhibit C-20 is deemed more credible. Superior contends that a visual examination of the location of the rope in relation to the elevator shaft in Exhibit C-20 compared to the location of the rope in Exhibit C-26 established that the photographs do not show the same rope. This contention is speculative and inconclusive.

Superior also contends that Stokes was not in its employ on July 21, 1995, which Superior claims is the date that Gilreath took Exhibit C-26. This ignores the following exchange from the hearing (Tr. 1239):

> Gilreath: To the best of my recollection, it was July 21st.
>
> Q.: Could it have been June 21st.
>
> Gilreath: It's a possibility it could be.

Superior's time records establish that Brian Stokes was on its payroll the week of June 21, 1995 (Exh. R-29).

Finally, Superior argues that somehow Gilreath staged the photograph of Stokes. How this could have been accomplished without Stokes's knowledge is not explained. Stokes admitted that Exhibit C-26 was a photograph of him (Tr. 1119, 1122). Since he is looking directly into the camera and is aware that he is being photographed, the possibility of staging is farfetched. Stokes denied any staging.

The Secretary has established that Superior violated § 1926.502(d)(11) by failing to protect its lifeline from cuts and abrasions. The hazard created by failing to install padding is that the rope could have become abraded at the eight points where the rope made contact with the edges of the I-beam (Tr. 1240-1241). If the rope failed, any employee tied off to it was exposed to a fall down the elevator shaft. The violation was serious.

Item 3: Alleged Serious Violation of § 1926.502(d)(23)

The Secretary alleges a serious violation of § 1926.502(d)(23), which provides:

> Personal fall arrest systems shall not be attached to guardrail systems, nor shall they be attached to hoists except as specified in other subparts of this part.

The citation alleges, "Employees were allowed to attach personal fall arrest equipment to cable guardrails." It is undisputed that Superior's employees tied off their lanyards to the cable guardrails located at the elevator shafts when they were installing the sill angles.

Section 1926.502(d)(23) contains an exception to its prohibition against tying off to guardrails: "except as specified in other subparts of this part." Section 1926.502(d)(15) sets forth the characteristics of acceptable fall arrest anchorages:

> Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2kN) per employee attached, or shall be designed, installed, and used as follows:

> (1) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and
> (ii) under the supervision of a qualified person.

Section 1926.500(b) defines "anchorage" as "a secure point of attachment for lifelines, lanyards or deceleration devices." In the note to § 1926.502(d)(16) which lists performance criteria for fall arrest systems, the standard specifies that if a fall arrest system meets the criteria set forth at Appendix C to subpart M, and the employee using the system has a combined body and tool weight of less than 310 pounds, then the fall arrest system will be considered to be in compliance with § 1926.502(d)(16). Appendix C at § II (h)(ii) recognizes:

> that there will be [at times] a need to devise an anchor point from existing structures. Examples of what might be appropriate anchor points are . . . guardrails or railings if they have been designed for use as an anchor point . . . . A qualified person shall be used to evaluate the suitable [sic] of these "make shift" anchorages with a focus on proper strength.

Superior argues that it fits within the exception specified in § 1926.502(d)(23) because the perimeter cable installed around the elevator shaft at the RSA Tower met the criteria set forth in other subparts of § 1926.502. The Secretary argues that the perimeter guardrail system was not "designed, installed, and used . . . under the supervision of a qualified person."

Lynch testified that he allowed Superior employees to tie off to the perimeter cable because he was told by representatives of HHN that it met OSHA regulations. The representatives of HHN specifically named by Lynch were Monte Thurmond, Doug Underwood, and Doc Foster. Lynch stated he did not attempt to confirm whether the guardrail met OSHA standards because, "It's not my obligation to do the test" (Tr. 611). Monte Thurmond was the construction manager for HHN (Tr. 376). John Douglas "Doug" Underwood, field superintendent for HHN, confirmed that he had told Lynch that it was safe to tie off to the cable system (Tr. 1454). Superior has the burden of proving that the guardrail met the criteria.

> A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception. *Armstrong Steel Erect., Inc.*, 17 BNA OSHC 1385, 1389, 1995 CCH OSHD ¶ 30,909, p. 43,031 (No. 92-262, 1995), *Article II Gun Shop*, 16 BNA OSHC 2035, 1994 CCH OSHC ¶ 30,563, p. 42,302 (No. 91-2146, 1994) (Consolidated).

C. J. Hughes Construction, Inc., 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996).

The issue is whether the perimeter cable was designed, installed and used under the supervision of a qualified person. If HHN installed the perimeter cable and did it correctly, then

there was no violation of § 1926.502(d)(23). Underwood testified that Mannus "Doc" Foster, HHN's carpenter foreman, had primary responsibility for installation of the anchors and all of the components that were part of the safety cable system (Tr. 1432).

Foster supervised the installation of the lug bolts and the eye bolts and the cable (Tr. 1477). Superior adduced no evidence that Foster was a qualified person within the meaning of § 1926.502(d)(15). Prior to working for HHN, Foster worked for Brassfield and Gorrie as a form carpenter (Tr. 1471-1472). Before that, Foster owned a tree service and he did construction work for Ray Sumlin Contractors (Tr. 1473).

Furthermore, Foster did not design the cable guardrail "as part of a complete personal fall arrest system which maintains a safety factor of at least two." Foster testified that, "The system wasn't my system. It was the project manager's system. They worked that all out ahead of time with Huber, Hunt's safety people" (Tr. 1480). Underwood purchased the various components of the cable system, but he did not oversee its design or installation (Tr. 1420). Foster stated that he believed that cable system met the strength criteria set out in the standard "[j]ust from reports from Hilti and the cable and the companies of the strengths of the components" (Tr. 1480). Although HHN conducted tests for concrete strength, no test was done prior to the June 15, 1995, accident to determine whether the cable system as installed met the criteria set out in § 1926.502(d)(15).

Superior has failed to establish that the perimeter cable guardrail system that it instructed its employees to tie off to was designed, installed, and used under the supervision of a qualified person as part of a complete personal fall arrest system which maintains a safety factor of at least two. Superior failed to carry its burden of proof that it fit within the exception contained in § 1926.502(d)(23). Since it is undisputed that Superior's employees tied off to the guardrail system, the Secretary has established a serious violation of § 1926.502(d)(23).

Items 4a through 4d: Alleged Serious Violations of §§ 1926.503(a)(2)(i),(ii), (iii), and (viii)

The Secretary alleges that Superior committed serious violations of four sections of the § 1926.503 training standard. The cited sections provide:

> The employer shall assure that each employee has been trained, as necessary, by a competent person qualified in the following areas:

(Item 4a) (i) The nature of fall hazards in the work area;

(Item 4b) (ii) The correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used;

(Item 4c) (iii) The use and operation of guardrail systems, personal fall arrest systems, safety net systems, warning line systems, safety monitoring systems, controlled access zones, and other protection to be used;

. . .

(Item 4d) (viii) The standards contained in this subpart.

The Secretary may not assume a lack of training solely because another standard has been violated. The record establishes that Superior provided general safety training to its employees.

Lynch conducted weekly mandatory toolbox safety meetings with Superior's employees at the RSA Tower (Tr. 808-809). Fall protection was discussed at every safety meeting (Exh. R-20). Employees attending the meetings signed off on a copy of the meeting's minutes (Tr. 1038-1039). Superior provided a copy of its safety handbook to each employee at the time he was hired (Exh. E-1).

Item 4a:

The citation alleges that Superior violated § 1926.503(a)(2)(i) because its "[e]mployees were allowed to work at elevated levels in the elevator shaft(s) without an appropriate fall protection system in place and were allowed to use cable guardrails as attachment points for lanyards."

The safety handbook contains the following instructions relating to fall protection:

7. When there is a possibility of falling, safety belts must be worn when guardrails or nets are not approved.

(Exh. R.1, p.6).

7. Use your safety belt when working in elevator locations over six feet above ground or platform.

(Exh. R-1, p. 13).

18. When working on a suspended scaffold you must at all times be wearing a safety belt attached to a lifeline which is independent of the scaffold suspension.

(Exh. R-1, p. 17).

While it is true that Superior violated § 1926.503(d)(23) by allowing its employees to tie off to the guardrail system, this does not establish that Superior failed to train its employees in the nature of fall hazards. The record establishes that Superior did provide training regarding fall hazards (Exhs. R-1, R-20). Item 4a is vacated.

Item 4b:

The citation alleges that Superior's "[e]mployees were not trained in the procedures necessary to maintain fall protection systems."

Section 1926.503(a)(2) provides that each employee be trained "as necessary" by a competent person. Brian Stokes testified that he never received any training regarding the guardrails (Tr. 1122). However, Stokes's assignment did not entail "erecting, maintaining, disassembly , and inspecting" the cable guardrail system. He was assigned to weld sill angles (Tr. 1118). Had Stokes been assigned to erect or disassemble the guardrail system, then his training in the correct procedures for doing so would be necessary. Given Stokes's assignment, it was not necessary for him to be trained in the maintenance of the guardrail system. Item 4b is vacated.

Item 4c:

The citation alleges that Superior's "[e]mployees were not trained in the proper use and operation of personal fall arrest systems and guardrail systems."

Item 4c essentially rehashes the allegations made in items 4a and 4b. The record establishes that Superior did instruct its employees in the use and operation of guardrail systems and personal fall arrest systems, as necessary. Item 4c is vacated.

Item 4d:

The citation alleges that Superior's "[e]mployees were not trained in 1926 Subpart M, 'Safety Standard for Fall Protection in the Construction Industry.'"

The record establishes that Superior trained its employees in the standards of Subpart M "as necessary" to their work. The standard does not require that the employees memorize every individual section of every standard contained in Subpart M, only that employees be trained in those standards relevant to their work. Item 4d is vacated.

Item 5: Alleged Serious Violation of § 1926.1060(a)

The Secretary alleges a serious violation of § 1926.1060(a), which provides:

> The employer shall provide a training program for each employee using ladders and stairways, as necessary. The program shall enable each employee to recognize hazards related to ladders and stairways, and shall train each employee in the procedures to be followed to minimize these hazards.

In the citation, the Secretary charged Superior with the failure to train employees in the hazards associated with using ladders in elevator shafts.

Ladder safety was the topic of the toolbox safety meeting on Monday, June 12, 1995. Lynch conducted the meeting and it was attended by Whitlow, Freddie Payne, Stokes, and Brian Bullard

(Exh. R-20). The meeting addressed the inspection of ladders and the angle at which to set up ladders, among other things.

In addition, Superior's safety handbook, which is provided to each employee, contains 18 rules relating to the safe use of ladders and scaffolding (Exh. R-1, pp. 15-17). Payne, a Superior employee assigned to install sill angles, testified that he received training from Superior in ladder safety (Tr. 1074-1076).

The Secretary has failed to establish that Superior did not train its employees in the safe use of ladders. Item 5 is vacated.

Citation No. 2

Item 1: Alleged Repeat Violation of § 1926.501(b)(1)

The Secretary alleges a repeat violation of § 1926.501(b)(1), which provides:

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

In the alternative, the Secretary alleges a violation of § 1926.451(a)(4), which provides:

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

The citation alleges that "[o]n June 15, 1995, employees were exposed to fall hazards in the east elevator shaft on the 15th and 16th floors when installing sill angles."

The Secretary initially cited Superior for a repeat violation of § 1926.502(b)(1), then amended the item at the hearing to allege a violation of § 1926.501(b)(1), citing a clerical error (Tr. 272). At the same time, the Secretary moved to amend the item to allege in the alternative a violation of § 1926.451(a)(4) (Tr. 261-273). The Secretary's motion was granted over Superior's objection (Tr. 273).

In its posthearing brief, Superior moves for a reconsideration of the ruling to allow the amendment in the alternative, and urges the undersigned to deny the Secretary's motion to amend.

Superior's motion for reconsideration is denied. Superior's claims of prejudice are without merit. The undersigned left the record open to take additional witnesses at the conclusion of the hearing if Superior deemed it necessary to its case (Tr. 273). Superior did not avail itself of this

opportunity. Also, the hearing lasted six days, extending over a two-week period, which was sufficient time for Superior to prepare rebuttal evidence.

Walking/Working Surface or Scaffold?

The determination of which of the alternative standards is applicable to the cited condition depends upon whether the surface at issue is considered a "walking/working surface" or a "scaffold." If it is a walking/working surface, then § 1926.501(b)(1) applies. If it is a scaffold, § 1926.451(a)(4) applies.

During the installation of the sill angles, some of Superior's employees discovered that they could not position themselves from the floor and comfortably reach under the sill to weld the bottom part of the sill angle to the embed. Because of this difficulty, Superior installed a plywood platform inside the elevator shaft, and set up a ladder from which the employees could more comfortably weld (Tr. 721-722). The platform was constructed by laying two 4x4s across two I-beams in the elevator shaft, and then setting a 4x8 foot sheet of plywood across the top of the 4x4s. A ladder would then be positioned using the plywood sheet as a base (Exh. C-22; Tr. 938).

Section 1926.452(b)(27) defines "scaffold" as:

> Any temporary elevated platform and its supporting structure used for supporting workmen or materials, or both.

Section 1926.500(b) defines "walking/working surface" as:

> [A]ny surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties.

All of the surfaces listed in § 1926.500(b) as "walking/working surfaces" have in common the fact that they are pre-existing surfaces used because they are convenient to the location where the work is to be done. That is not the case here. Superior constructed the surface specifically to enable its employees to reach their work.

The sheet of plywood does, however, meet the definition of § 1926.452(b)(27). The Commission has held 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." *Armstrong Steel Erectors, Inc.*,17 BNA OSHC 1385, 1389 (No. 92-262, 1995). The sheet of plywood was temporary (it was moved from floor to floor as the sill angles were installed), it was elevated (it was used in the elevator shaft, whose floor was in the basement of the RSA Tower), and

it was a platform used for supporting workmen while they welded the sill angles. Therefore, the sheet of plywood was a scaffold and § 1926.451(a)(4) applies to the cited condition.

§ 1926.451(a)(4)

Section 1926.451(a)(4) requires that scaffolds more than 10 feet above the ground or floor have guardrails erected on all open sides and ends. It is undisputed that the sheet of plywood that Superior used as its platform was elevated more than 10 feet above the basement floor, and that it was not guarded on any side, three of which were open. The Secretary has established a violation of § 1926.451(a)(4).

Was the Violation Repeated?

On September 23, 1993, Superior received a citation alleging in item 5 a serious violation of § 1926.451(e)(10) for failing to install guardrails on all open sides and ends on a manually propelled mobile scaffold. Section 1926.451(e)(10) provides in pertinent part:

> (e) *Manually propelled mobile scaffolds.*
> . . .
> (10) Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), approximately 42 inches high, with a midrail, of 1x6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

Superior did not contest the citation and it because a final order of the Commission (Exh. C-2).

A violation is properly characterized as repeated if at the time of the alleged violation there was a Commission final order against the same employer for a substantially similar violation. *See Potlatch Corp.,* 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Because the present cited standard and the previously cited standard are different, the Secretary has the burden of proving that they are substantially similar. The principal factor to be considered in establishing substantial similarity between the present and prior violations is the similarity of the hazards. *See Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990).

Superior argues that the hazards in each case are different because the 1993 citation against Superior involved a 15-foot fall to the floor, while in the instant case, the employee was tied off so that he would fall only 6 feet - the length of his lanyard. Superior is incorrect in its analysis of the issue. The hazard in each case is falling off a scaffold. "That the possible fall distances may have

varied somewhat is not significant." *Id.* The Secretary has established that Superior committed a repeated violation of § 1926.451(a)(4).

Penalty Determination

Under § 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration"' to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Superior employed more than 100 employees (Tr. 1305). No evidence of bad faith was adduced. Superior had a history of previous violations.

Item 2 of Citation No. 1 is a serious violation of § 1926.502(d)(11) for failure to protect vertical lifelines against cuts and abrasions. Its gravity is high. Superior employee Brian Stokes was welding at the edge of the elevator shaft on the floor below where the vertical lifeline was attached. A penalty of $7,000.00 is assessed.

Item 2 of Citation No. 1 is a serious violation of § 1926.502(d)(23) for allowing employees to tie off to the guardrail. The gravity is high. Employees were exposed to falling down the elevator shaft. A penalty of $7,000.00 is assessed.

Item 1 of Citation No. 2 is a repeat violation of § 1926.451(a)(4) for failure to erect guardrails on all open sides and ends of a scaffold. The gravity is high. Employees were exposed to falling down the elevator shafts. A penalty of $70,000.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

Serious Citation No. 1

1. Item 1 violation of § 1926.20(b)(2), is vacated and no penalty is assessed.
2. Item 2 violation of § 1926. 502(d)(11), is affirmed and a penalty of $7,000.00 is assessed.
3. Item 3 violation of § 1926.502(d)(23, is affirmed and a penalty of $7,000.00 is assessed.

4. Items 4a-4d, violations of §§ 1926.503(a)(2)(i), 1926.503(a)(2)(ii), 1926.503(a)(2)(iii), and 1926.503(a)(2)(viii), are vacated and no penalty is assessed.

5. Item 5 violation of § 1926.1060(a) is vacated and no penalty is assessed.

Repeat Citation No. 2

1. Item 1, in the alternative violation of § 1926.451(a)(4), is affirmed and a penalty of $70,000.00 is assessed.

KEN S. WELSCH
Judge

Date: February 16, 1998