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SECRETARY OF LABOR
Complainant,
v.
METRIC CONSTRUCTORS
Respondent.

OSHRC DOCKET
NO. 92-3322

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 30, 1993. The decision of the Judge will become a final order of the Commission on January 31, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before January 19, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 30, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3322

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. METRIC CONSTRUCTORS, INC., Respondent.	OSHRC Docket No. 92-3322

APPEARANCES:

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U. S. Department of Labor
Atlanta, Georgia
For Complainant

J. Larry Stine, Esquire
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For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

Metric Constructors, Inc. (Metric), contested nine alleged serious violations of the scaffolding and trenching requirements and four "other" alleged violations for the lack of a hazardous communication program, failure to conspicuously locate fire extinguishers, lack of valve protection caps for two acetylene and oxygen compressed gas cylinders, and lack of safe access from a trench. The Secretary seeks to hold Metric, the general contractor, liable for the violations. The conditions were created by employees of subcontractors, not

employees of Metric. The Secretary contends that Metric did not act in a reasonable and responsible manner to prevent the violations.

GENERAL FACTS

Metric is a large construction company which employed approximately 200 persons at the site at the time of the inspection (Tr. 316, 419). It was the general contractor for construction of a Federal prison on land owned by the United States Department of Justice, Bureau of Prisons (BOP) in Estill, South Carolina. The project involved the construction of 29 buildings totaling approximately 470,000 square feet and extending over 200 acres (Tr. 315). At the peak of the project, it employed approximately 520 personnel. The employees included those hired by Metric and those hired by subcontractors. Between January and May of 1992, Metric was using the services of subcontractors for mechanical, electrical, masonry, security, sprinklers, roofing and structural work.

Metric's contract with the BOP required it to comply with all OSHA standards and to make sure that its subcontractors complied with OSHA requirements (Exh. C-25). The contract provided, in pertinent part:

> SAFETY AND HEALTH
>
> Contractors shall be required to comply with the regulations issued by the Secretary of Labor . . . entitled "Safety and Health Regulations for Construction" (29 C.F.R. Part 1926).
>
> * * *
>
> The contractor [Metric] shall be responsible for its subcontractors' compliance with this clause.
>
> * * *
>
> Contractor Responsibility: The Contractor shall assume full responsibility and liability for compliance with all applicable regulations pertaining to the health and safety of personnel during the execution of work . . . .

The citations emanate from a general schedule inspection commenced on April 14, 1992, by Compliance Officer John Madden (Tr. 12). The project, a BOP prison, had been under construction for approximately a year (Tr. 12-13). Madden arrived at the site on

April 14, 1992, met with representatives of BOP and Metric, and spent the remainder of the day examining paperwork. He began the actual walk-around on April 14 but terminated it due to unusually low activity (Tr. 79-80; 88-91). He returned in May accompanied with Compliance Officer Luis Ramirez and completed the inspection. BOP construction inspector Phillip Knight and Metric superintendent Ty Dyar participated in the walk-around. Metric's regional safety supervisor Brian Peterson and project manager Michael Adams also participated (Tr. 80-81).

Eight masonry subcontractors were at the site. They employed 150 to 200 persons (Exh. R-13; Tr. 334-336). A number of these masonry subcontractors were small disadvantaged firms who had difficulty in providing the safety equipment as required by their contract (Exhs. R-12, R-13; Tr. 334-336). Metric purchased and provided safety equipment for the masonry subcontractors without charge despite the subcontractors' own contractual obligation to do so. Metric purchased items such as scaffolding, planking, adjustable jacks and baseplates (Tr. 336-337). Metric also provided safety training to the employees of the subcontractors.

BURDEN OF PROOF

Multi-employer construction sites involve a prime or general contractor and various subcontractors. In multi-employer situations, two or more employers may be cited for the same offense. The determination is primarily related to control and exposure. In most instances, the prime contractor has control but has no exposed employees.

In order to establish a violation of a standard, the Secretary must show that the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. *Ormet Corp.*, 14 BNA OSHC 2134, 2135, 1991 CCH OSHD ¶ 29,254, p. 39,199 (No. 85-531, 1991). The Secretary submits Metric failed to exercise reasonable diligence in satisfying OSHA standards. Metric was responsible for safety at the site and should have been reasonably expected to detect the violations. It does not dispute this responsibility but contends that it did not know and should not have been expected to know of the violations.

Metric concedes that it was responsible for compliance with OSHA standards, including employees of subcontractors (Tr. 366, 422-423). The Secretary cites Metric's contractual obligation to assume safety liability (Exh. C-25). He states that the Commission has recognized that where "an employer is in control of an area and responsible for its maintenance, the Secretary need only show that 'a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer *or those of other employers engaged in a common undertaking*'." (Emphasis added) *Pace Construction Corp.*, 13 BNA OSHC 1282, 1987 CCH OSHD ¶ 27,889 (No. 86-517, 1987), *aff'd per curiam*, 840 F.2d 24 (11th Cir. 1988). The Secretary believes his burden has been satisfied.

RESPONSIBILITIES OF GENERAL CONTRACTOR

The position taken by the Secretary has the effect of holding a general contractor liable for violative acts of employees' subcontractors regardless of (1) whether the general contractor knew or could have reasonably known of the violative conditions, (2) whether the general contractor could have reasonably prevented or detected the violation, or (3) whether the general contractor took reasonable steps to prevent or detect the violation. The conditions were created by employees of subcontractors. They were exposed to the conditions. The Secretary submits that Metric knew or could reasonably have known of the violative conditions.

Metric counters that the Secretary's argument of strict liability is misplaced. It submits that it could not have been expected to prevent or abate by reason of its supervisory capacity. It states that where the general contractor takes necessary steps to assure compliance, it should not be held liable for violations by a subcontractor's employees of an OSHA standard. On this basis, Metric argues that it must be found to have complied with the Act. The parties are in agreement that the violations were committed by employees of the subcontractors and that Metric employees were not exposed to the hazards. Metric concedes that it was responsible for compliance with OSHA standards, but submits that it

took the necessary steps to assure compliance and should not be held accountable for the violations.

Quoting from *Grossman Steel and Aluminum Corporation*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976), the Secretary accuses Metric of attempting to escape liability by shifting culpability to the subcontractors. *Grossman, supra*, holds the general contractor liable only for violations that "it could reasonably have been expected to prevent or abate by reason of its supervisory capacity."

While the Commission has held that the general contractor is responsible for violations it controls by virtue of its supervisory authority over the site (which was present in this case) regardless of whether its own employees are exposed, it has disdained adoption of the principle that the Act imposes strict liability. The court in *National Realty Co., Inc. v. OSHRC*, 489 F.2d 1257 at p. 1265-66 (D.C. Cir. 1973), spoke early on this point with respect to section 5(a)(1) and made it clear that Congress required only elimination of preventable hazards. It concluded:

> On the other hand, Congress quite clearly did not intend the general duty clause to impose strict liability. The duty was to be an achievable one. Congress' language is consonant with its intent only where the "recognized" hazard in question *can be* totally eliminated from a workplace. A hazard consisting of conduct by employees, such as equipment riding, cannot, however, be totally eliminated. A demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime. This seeming dilemma is, however, soluble within the literal structure of the general duty clause. Congress intended to require elimination only of preventable hazards.

The goal of section 5(a)(1) is directed toward achieving preventable hazards. The standards, for the most part, require or suggest a method of compliance. Metric advocates making a determination based on the reasonableness of actions taken by the general contractor. Each case must be decided on its particular facts.

SCAFFOLDING - GENERAL FACTS

This project involved the construction of 29 buildings and was located on 200 acres. Eight masonry subcontractors were working at the site. Metric had two employees, Robert

Brooks and Robert Harmon, conducting periodic safety inspections of the jobsite (Tr. 324, 332, 413-416). They reported their findings to the project manager, Mike Adams, who would inform the area superintendent. If they discovered an imminent danger situation, they were authorized to stop the work, and did so on numerous occasions (Tr. 416). Brian Peterson, regional safety manager, conducted a monthly inspection. The area superintendents and the project superintendent supposedly conducted daily inspections of the jobsite.

Metric contends that the job of inspecting the scaffolding was complicated by the method of laying blocks and the limited equipment the subcontractors possessed. The majority of the walls were laid in seven layers (Tr. 338, 450). Metric crews would grout the wall, which could take up to a week or more (Tr. 339). In the meantime, the masonry subcontractors would be required to work on another wall. They would "cannibalize" the inactive scaffold or they would move the scaffold (Tr. 339, 451). While Metric managers did not assume that subcontractors' employees were working on a particular scaffold (Tr. 451), they had to know which scaffold was being used by which subcontractor.

Prior to the inspection and on more than one occasion, Metric had removed employees from the scaffolds (Tr. 332, 387). Metric's representative had difficulty with two crews of Reliable and Lanier and instructed them regarding safe practices on scaffolding (Tr. 388). Where Metric believed a scaffold was unsafe, the subcontractor would be instructed to dismantle it. Fred Allmand, an area superintendent for Metric, ordered Cherokee Masonry to remove the scaffold on the loading dock at the CU building. Metric was cited for the condition of the scaffold while it was partially dismantled, even though it had taken some action. Metric was cited because the condition was not corrected. Eventually, two subcontractors were ordered off the job (Exhs. R-12, R-13).

The masonry subcontractors were "fully responsible for all OSHA-approved scaffolding, including safety rails, walkboards, toeboards, and ladders" (Schedule A of Exhs. R-12, R-13; Tr. 334-335). The masonry subcontractors were deficient in their need for safety equipment. Metric provided them with the necessary equipment--scaffolding planking, adjustable jacks, baseplates, and mud sills (Tr. 336-337).

Metric conducted numerous meetings on safety training for the subcontractors and their employees. Mike Adams and Ty Dyar held weekly subcontractor meetings with the

subcontractors on the job, and safety was discussed each week. On December 7, 1991, scaffolding was discussed because the project would require heavy use of scaffolds. On January 28, 1992, scaffolding was the safety topic of the subcontractors' meeting and again on February 4 and March 24, 1992 (Tr. 325-326). Metric also conducted weekly safety training for its employees and the employees of subcontractors who did not conduct their own safety training. All employees were required to attend weekly safety training sessions.

THE MULTI-EMPLOYER DEFENSE

Multi-employer worksites are common in the construction industry, and most of the cases involving the liability of employers on multi-employer worksites involve construction work. In early cases, the Commission held that each employer was responsible for the safety of its own employees and no others. An employer who created a hazardous condition was not responsible for the exposure of employees of another employer to the hazard. Employers were, however, liable for the exposure of their own employees to hazardous conditions even if they did not create or control those conditions. Reviewing courts rejected the idea that liability under section 5(a)(2) should be based solely on the employment relationship.

In light of the reversals by reviewing courts, a more enlightened Commission reconsidered its early decisions and adopted rules for apportioning liability on multi-employer construction sites that conformed, in most respects, to the decisions of the circuit court in *Underhill Construction Corp.*, 573 F.2d 1032 (2d Cir. 1975), and *Anning-Johnson Co.*, 516 F.2d 1081 (7th Cir. 1975). The Commission held that the general contractor had primary responsibility for the safety of its employees and would generally be held responsible for violations to which its employees were exposed, even if another employer were contractually responsible for providing the necessary protection. The Commission created a two-pronged affirmative defense by which an employer could avoid liability. An employer that did not create or control a violation could avoid liability by proving either that it took whatever steps were reasonable under the circumstances to protect its employees against the hazard or that it lacked the expertise to recognize the condition as hazardous. The Commission applied these rules to serious and "other" than

serious violations, rejecting the distinction between these classes of violations drawn by the Seventh Circuit in *Anning-Johnson Co. v. OSHRC, supra.*

The Commission adopted the holding of *Brennan v. OSHRC (Underhill Construction Corp.), supra*, that an employer who creates or controls a hazard is liable even if its own employees are not exposed. *Grossman Steel & Aluminum Corp., supra*, note 65 at 1188; *Anning-Johnson Co., supra,* n. 65 at 1199. The Commission also held that a general contractor on a construction site is responsible for violations it controls by virtue of its supervisory authority over the site.

The Commission made clear its position regarding responsibility for safety on a multi-employer worksite. *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶ 20,691, p. 24,791 (No. 12775, 1976). *Anning-Johnson Co., supra*, at p. 24,784, echoed that principle:

> [T]ypically a general contractor on a multiple employer project possesses sufficient control over the entire worksite to give rise to a duty under section 5(a)(2) of the Act either to comply fully with the standards or to take the necessary steps to assure compliance.

Reviewing courts approved the Commission's approach.

The rule adopted by the Commission is not a panacea but is predicated on the principle that is a fair way to determine liability. As stated in *Grossman Steel & Aluminum Corp., supra*, "the general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors . . . it is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected." *Id.* at 1188. It would be grossly unfair to hold an employer liable for employee action which may be a deviation from the normal. Metric possessed supervisory control over the site. The judge must consider all factors. If a condition is created or controlled by an employer, the decision hinges primarily upon whether that employer has the ability and authority to abate the hazard for "it would be unduly burdensome to require particular crafts to correct violations for which they have no expertise . . . ." *Id.*

The Secretary cites several cases in which employees of subcontractors were exposed and liability was attributed to the general contractor. A common construction site involving several employers presents a dilemma to the Secretary. His job is to ensure that the law is fulfilled and that the working conditions are safe and healthful. He has scarce resources and must allocate the resources frugally. It would be advantageous to hold the general contractor liable for any violation discovered. The Secretary is aware that the general contractor, having supervisory control at the site, has within its discretion the right to take action against a subcontractor who fails to comply with the standards. It would be easier for enforcement of the Act if the general contractor could not absolve itself of the liability. The Secretary would be able to achieve compliance with the Act without trying to determine what subcontractor is at fault. This is not the approach set forth by the Commission in *Anning-Johnson,* supra. Those cases present a sound approach to a multi-employer construction site. There is no basis for change.

The general contractor has, in essence, been deemed liable by the Commission but is afforded an opportunity to absolve itself of culpability by affirmatively pleading and proving a defense. The standard imposed by the Commission is a reasonable one. It will not hold a general contractor liable for violations which it could not be reasonably expected to detect or prevent. In *Knutson Construction Co.*, 4 BNA OSHC 1759, 1976-77 CCH OSHD ¶ 21,185 (No. 765, 1976), *aff'd*, 566 F.2d 596 (8th Cir. 1977), it was believed to be manifestly unfair to place liability upon a general contractor when it had no knowledge of the violation. Metric has the burden to show that it had no control over the abatement or prevention of the conditions.

The Secretary raises some preliminary questions. It argues that Metric assumed liability through the contract with the subcontractors, which provides that Metric will assume all liabilities of the subcontractors. This is reflected in the contract, which exists between Metric and its subcontractors. OSHA was not a party to the contract and is not bound by its terms. The Act does not allow an employer to contract his liability to another employer.

Such agreements are not binding on OSHA. It would be impossible to obtain enforcement of the Act if an employee were allowed to contract his liability to someone else.

The Secretary argues that Metric was actually the employer of the employees of the subcontractors. This position presents no dilemma. The evidence fails to justify it. There is no evidence to support "piercing the corporate veil" of any subcontractor. The fact that employees of subcontractors might attend safety meetings given by the general contractor does not make such persons employees of the general contractor (Tr. 25). There is no basis to challenge the fact that the subcontractors were independent contractors. There is nothing to indicate that employees of subcontractors were subject to control by Metric (Tr. 26-27) other than a general control which is assumed where a subcontractor works under the general contractor. It has to be satisfied with the subcontractor's work.

Metric's primary position connotes a belief that the site represented a safe workplace and that it had done everything reasonable within its power to make it a safe place. Whether the conduct of the general contractor is reasonable must be determined from the individual facts of each case. The general contractor should contemplate what the word "reasonable" implies. Metric claims it had no knowledge of the violations. This may be true, but an employer cannot ignore its worksite and then plead ignorance of knowledge of the conditions. If Metric had used reasonable diligence, it would have discovered the violations. The violations existed in open territory and should have been observed by the inspectors.

While Metric maintained an inspection program, it is noted that each of the employees assigned to conduct inspections also had other duties to perform. There is no indication as to the amount of time expended on safety matters. The number of hours and the quality of time devoted to safety have an added importance when the site is large. The violations were too numerous to assume that the site was adequately inspected. In the absence of the work records of the inspectors, it is impossible to ascertain if Metric employed sufficient personnel to adequately inspect the worksite. In view of numerous violations, it must be determined that the duties performed by these gentlemen permitted little time for safety matters.

Metric has failed to establish that its conduct was reasonable. The merits of each allegation must be decided on the facts.

Metric had five people conducting some type of inspection. Robert Brooks and Robert Harmon conducted periodic safety inspections. A monthly inspection was made by the regional safety manager whenever he visited the site. The area superintendent and project superintendent conducted daily inspections (Tr. 332, 384-385, 412-413, 415). All the violations were in plain view (Tr. 35), and on some scaffolds employees were actually working. Metric personnel conducting the inspections either observed or should have observed the violations. All of the scaffolds were erected by subcontractors. Metric agrees that it possessed the power and authority to correct the conditions.

THE SERIOUS ALLEGATIONS

Item 1 - Alleged Violation of § 1926.451(a)(2)

The first item pertains to seven alleged violations of § 1926.451(a)(2), which states:

> The footing or anchorage for scaffolds shall be sound, rigid and capable of carrying the maximum intended load without settling or displacement. Unstable objects such as barrels, boxes, loose bricks, or concrete blocks, shall not be used to support scaffolds or planks.

Sub-item (a) involved a tubular welded frame scaffold at the loading dock at the southeast end of the CU building. Two scaffold legs overhanging the dock deck were atop a structure constructed of concrete blocks and boards thrown across a small ditch (Exh. C-1; Tr. 14). Madden's observation is supported by the photographs. Sam Hamilton who, at the time of the inspection worked for Reliable Masonry, a subcontractor of Metric, testified that the photographs accurately represent the basing of the scaffold when in use (Tr. 260-265). Metric construction superintendent Fred Allmand, who supervised the area including this building, testified that employees worked on an outrigger[1] which was connected to, and part of, the scaffold (Tr. 488-496). The basing affected both the platform and the outrigger. Phillip Knight, BOP's construction inspector who inspected the site daily, observed the

[1] In fact, he originally stated that he assumed employees did work on the platform shown in the photographs (Tr. 489) but later stated they only worked on the outrigger (Tr. 490-491).

scaffold in this condition for at least a month. He saw an employee working on it in this condition (Tr. 194-196, 198, 225, 228-229). He was there specifically to inspect the masonry work and had to use the scaffold. Metric did not dispute this fact.

Metric made much of the fact that Phillip Knight did not know for which subcontractor the employee worked (Tr. 225-228). His lack of knowledge on this issue is neither relevant nor surprising because BOP's contract was with Metric. Metric project manager Michael Adams stated that even though Kirlin subcontracted its digging work, Metric considered it to be Kirlin's work because its contract was with Kirlin (Tr. 359). Phillip Knight stated that the employee was probably a structural steel employee (Tr. 227), and Metric stated that it had structural steel subcontractors at the site (Tr. 317). Employees were exposed to the risk of the unstable basing.

The standard requires that the footing to all scaffolds "be sound, rigid, and capable of carrying the intended load without settling or displacement." The standard specifies that concrete blocks are unstable objects and are not to be used. A scaffold at the loading dock at the south end of the CU building had two legs hanging over the dock that were supported by a plank laid across concrete blocks (Exh. C-1; Tr. 14). The photograph shows a scaffold that is supported by a board which in turn is supported by concrete blocks. Employees were exposed to the conditions.

Metric contends that the scaffold had been directed for dismantling several days before OSHA came on the site. Fred Allmand, area superintendent for Metric who was responsible for supervision of the CU building, testified that the bottom portion of the scaffold had no crossbracing, that it was unsafe, and that he was told to take it down (Tr. 488-489). This is in contrast to the testimony of Madden who stated he observed employees using the scaffold. The testimony of Sam Hamilton and Philip Knight support Madden's testimony. Allmand stated that he assumed that employees used the scaffold before he told them to get off (Tr. 489). Knight indicated that he inspected the site daily for BOP and that the site was in the same condition before Madden arrived on the scene (Tr. 197). He believed that conditions had existed for at least a month before Madden's arrival. The credibility determination is resolved in favor of Madden. The testimony of Hamilton and

Knight is considered to be in support of Madden. The testimony of Allmand is considered erroneous. The violation is affirmed.

Sub-item (b) involved a tubular welded frame scaffold at the east end of Building A-4. The scaffold legs rested on scrap lumber, some of which were not in contact with the ground (Tr. 16). Employees of Block and Brick, a subcontractor, were working from the scaffold (Exh. C-2, top photograph; Tr. 17). Metric considered the base to be stable (Exh. R-20; Tr. 451-452). Sub-item (b) was cited because the board on which the scaffold rested did not make full contact with the ground. It is difficult to ascertain from the photograph whether the scrap lumber being used was in full contact with the ground. Madden testified it was not. Metric disputes the determination. The Secretary has the burden of proof. The testimony is disputed and the photographs do not clarify the facts. The Secretary has failed to meet its burden of proof.

Sub-item (c) involved a tubular welded frame scaffold at the west end of Building A-4. The scaffold legs on the south end rested on a cracked board. Part of the board was not in contact with the ground (Exh. C-2, bottom photograph; Tr. 18-19). Madden saw a Block and Brick employee working on this scaffold (Tr. 19). Metric argues that the cracked board was not unstable. The board was split along the center. It was a 2- by 12-inch board. A 2- by 12-inch board, when cut in two, creates a 2- by 6-inch board, which is a "proper" base (Tr. 101-103, 390-395, 454). The Secretary argues that cracks in a board are indicative of weakness, which means that the board is less likely to be able to support the weight of the scaffold. The standard specifically states that the basing must be such that it does not get settled or displaced. The weight of the scaffold caused the base to settle (Tr. 101-103). The amount of settlement does not affect the integrity of the scaffold.

The legs of the scaffold were resting on a long board that was cracked along the center. Metric points to notes made by Madden "that there was an unlikely probability that [the] board would break and the scaffold was rigid in most cases." He conceded that a board 2 by 3 inches was adequate to support a scaffold. Metric states that the standard does not define lumber as an unstable object. There is no question that there is a split in the board. At the same time, the board is of sufficient width to stabilize the legs of the scaffold.

Due to the width of the board, the split does not mean that the board is unstable. Sub-item (c) is vacated.

The tubular welded frame at the north end of Building A-4 is alleged to have its legs resting on scrap lumber which was not in full contact with the ground. The Secretary failed to introduce evidence in support of the allegation. Sub-item (d) is vacated for lack of evidence.

Sub-item (e) involved a tubular welded frame scaffold at the southeast corner of Building A-3. The scaffold was supported by scrap lumber, some of which cracked, and some of which were not in full contact with the ground (Exh. C-3; Tr. 20). An employee of Block and Brick was on the scaffold (Exh. C-26; Tr. 21, 167-168). Metric submits that the scaffold was partially dismantled and, therefore, it had no reason to believe employees would use it (Tr. 461). The Secretary argues that if the work were completed, as Metric claims, employees had to have been exposed to the unstable basing.

The photographs (Exh. C-3) introduced in support of the allegations show legs of the scaffold resting on scrap lumber. The standard does not prohibit the use of scrap lumber. The Secretary must show the scrap lumber does not provide a sound and rigid footing without settling or displacement. The evidence is insufficient (Exh. C-3, second photo) to establish a violation. The allegation is vacated.

Sub-item (f) involved a tubular welded frame scaffold on the east and west ends of Building A-3. This scaffold, constructed by Anderson Masonry, was resting on top of concrete blocks and scrap lumber (Exh. C-4; Tr. 22-23). One scaffold leg rested on a piece of lumber which had an empty space between it and the ground (Exh. C-4, bottom photograph). Phillip Knight testified that the conditions shown in this photograph were common throughout the site (Tr. 198-200). The Secretary states that the mere use of concrete blocks, let alone the other problems with the basing, makes the condition a violation of the standard.

The scaffold was in plain view (Tr. 35). At the time the photograph was taken, the height of the block that had been laid was about 40 inches (Tr. 107). Metric apparently introduced this fact to demonstrate that the block work could have been done from the ground rather than from the scaffold. This may be true. The basing was already down, as

was the scaffold, and additional work needed to be done on the building. This means that employees would have to come back to continue the work. Metric admitted that when erecting a scaffold, the basing is put down first and that, in the normal course of events, the basing would not be subsequently changed (Tr. 364-265, 406). While the wall had not progressed to a height requiring a scaffold, it was erected and employees had to work under it. "[A]ccess to the violative condition, not actual exposure, is the test." *Flint Engineering and Construction Co.*, 15 BNA OSHC 1946, 1992 CCH OSHD ¶ 29,923 (No. 90-2873, 1992), at p. 40,854; *Otis Elevator Co.*, 6 BNA OSHC 2048, 1978 CCH OSHD ¶ 23,135 (No. 16057, 1978). Employees were exposed to the unstable basing and the falling scaffold. The allegation is affirmed.

Sub-item (g) involved a tubular welded frame scaffolding on the west, north and east sides of Building B. The scaffold was erected on top of a patchwork of concrete block, cracked boards, spare wood, and some bricks (Exhs. C-5, C-7, R-4, R-6; Tr. 31). Work had been conducted on the building, and the scaffold was available for employee use (Exhs. C-5, C-7; Tr. 32). Metric again claims that the work had not been done and did not need to be done from the scaffold (Tr. 341-342, 361-362). The photographs reveal that the masonry work had not been completed. Knight, the BOP inspector, testified that he saw employees using the scaffold reflected in Exhibit C-6 (Tr. 242). He stated that the conditions seen in Exhibits C-5 and C-7 were common throughout the worksite before OSHA's inspection. He observed the condition in his daily inspections (Tr. 198-200). The allegation is affirmed.

Citations are duplicative where they involve substantially the same conduct and may be abated by the same method. The two standards could be met by one abatement method. Madden acknowledged on cross-examination that the use of adjustable screws and mud sills could be used to abate items 1 and 5 (Tr. 126-128). Metric states that it is undisputed that these items are duplicative and, should the Commission affirm any allegations in item 1 or 5, one item should be dismissed.

Item 2 - Alleged Violation of § 1926.451(a)(10)

The Secretary alleges that Metric was in violation of § 1926.451(a)(10). This item refers to three separate scaffolds. The standard requires that "all planking shall be Scaffold

Grades, or equivalent, as recognized by approved grading rules for the species of wood used." Scaffold grade lumber, which is usually marked as such and can be obtained from most lumber yards, is stronger than other lumber such as scrap (Tr. 36).

Sub-item (a) involved the scaffold located at the southeast end of the CU building. The photographs show several planks which Madden explained were not scaffold grade lumber (Tr. 16-17). Some of the boards were cracked and slightly warped (Exh. C-8; Tr. 37). Madden observed employees using the scaffold (Tr. 38). Knight testified that the scaffold had been in this condition for at least a month and that he observed an employee using it to fix some angle iron (Tr. 198, 225, 228-229). Metric did not dispute this fact. The allegation is affirmed.

Sub-item (b) involved a tubular welded frame scaffold on the southeast corner of Building A-3. The Secretary alleges that many of the boards were cracked, slightly warped, and were not scaffold grade (Exh. C-8; Tr. 37-38). An employee of Block and Brick used this scaffold (Exh. C-26; Tr. 37-38, 167-168). Whether anyone from Metric was with him when he saw this employee (Tr. 124) is irrelevant. This observation did not occur during the walk-around but when the compliance officer first came to the site and went to see the BOP representative (Tr. 89-90, 124). The crucial fact is that this employee was there and must have been there for a reason. Metric states that it conducted daily inspections. If reasonable diligence had been used, Metric should have observed the employees. Metric project manager Michael Adams claims that he was not aware of these cracked boards until he saw the photographs (Tr. 342). Someone from Metric *should* have seen them. The boards were in plain view. The evidence does not establish that the lumber was scaffold grade. The allegation is affirmed.

Sub-item (c) involved a tubular welded frame scaffold located inside the north corner of Building A-2. It had a cracked board which was not evenly shaped and two other boards which supported a piece of plywood (Exh. C-9; Tr. 38). An employee of Block and Brick was on the scaffold. His foot can be seen in the photograph (Exh. C-9; Tr. 38-39). Metric contends that this particular scaffold, which was located by a stairwell, would only have been up for a day or two or "a couple of days at most" (Tr. 343, 455). It did not state that it would be up for less than a day. Metric should have noticed the scaffold when it conducted

daily inspections. Madden testified that when employees work on planking that is not scaffold grade, especially plywood and cracked planks, the weight on the scaffold could cause the planking to break, thereby causing the employees to fall. The likely result of that is multiple injuries (Tr. 39). *See Knutson Construction Co.*, 4 BNA OSHC 1759 (No. 765, 1976), *aff'd*, 6 BNA OSHC 1077 (8th Cir. 1977). The allegation is affirmed.

Metric did not dispute that the lumber used in all of these instances was not scaffold grade. This condition [using cracked boards] was typical on this site according to BOP inspector Knight (Tr. 200-201). The violations were in plain view. Metric either knew or should have known of these violations since it supposedly conducted daily safety inspections.

The violation is affirmed.

Item 3 - Alleged Violation of § 1926.451(a)(13)

Item 3 alleges four violations of § 1926.451(a)(13), which requires that "[a]n access ladder or equivalent safe access [to work platforms] shall be provided." The Secretary determined a lack of safe access to the working level.

Sub-item (a) involved a tubular welded frame scaffold located at the east end of Building A-4. The scaffold contained five bucks. The ladder reached the fourth buck. There was no ladder between the fourth and fifth bucks (Exh. C-10). The scaffold was 27 feet high. Employees of Block and Brick were working on the fifth buck. They gained access to the platform by climbing the scaffold (Tr. 40-41). Knight observed the scaffold erected in that condition for at least a month (Tr. 199-200). Metric claims that at least in some places the fifth buck was just in the process of being built (Tr. 344, 396). Even if this were true, this does not explain why there is no ladder to that platform. Metric admits that employees needed to stand on the platform to complete the building (Tr. 406-407). They needed a ladder or equivalent safe means of access. Climbing the scaffold is not equivalent to gaining access by ladder. The allegation is affirmed.

Sub-item (b) pertains to a tubular welded frame scaffold at the west end of Building A-4. An employee of Block and Brick was working on the platform, and no ladder or stairway was available for access (Exh. C-11; Tr. 41). The employee gained access to the scaffold by climbing through a window (Tr. 41). A window is not a safe access (Tr. 117).

Metric denies knowledge of the condition. The employee, who was cleaning mortar around the window, could have done the work from the inside (Tr. 466-467). However, the easiest way to do the work is "to sit right there where he's [the employee in the photograph] sitting and scrape it off" (Tr. 475). Metric could and should have anticipated that the employee would do this work from the platform rather than from the inside. The allegation is affirmed.

Sub-item (c) involved a scaffold at the left wing of Building A-2. A Johnson Masonry employee was observed by Compliance Officer Luis Ramirez descending the scaffold, which is reflected in the photograph (Exh. C-12). Two employees were working on the scaffold from which the employee in the photograph was descending (Exh. C-12; Tr. 180-181). Ramirez testified that the Metric superintendent who accompanied him on the inspection informed him that this condition was "all over the job site" (Tr. 183). This is consistent with the testimony of Metric's regional safety supervisor Brian Peterson, project manager Michael Adams, and project superintendent Ty Dyar, who testified that they believed this type of access was safe and in compliance with the standard (Tr. 389-390, 402-403, 457). Peterson would not have stopped this practice if he had observed it (Tr. 402). He believed the practice was safe. The allegation is affirmed.

Sub-item (d) involved a tubular welded frame scaffold at the south end of the H, I, J, K and L building areas. Employees of Gray Construction worked from the platform of the scaffold. An employee was descending the scaffold (Exh. C-13; Tr. 42). Knight testified that this was the first day the scaffold was in use (Tr. 253). Metric believed this method of access was safe and complied with the standard. It does not satisfy the requirements of the standard. The allegation is affirmed.

The scaffolds varied in height from 6 feet to 27 feet. Falling from such heights could result in multiple injuries or death. The hazard of falling when there is no safe means of access, such as a ladder, is much greater than if a ladder is provided. Employees will probably ascend the scaffold by unsafe means if no ladder is available (Tr. 42-45).

The compliance officer specifically discussed with Ty Dyar the scaffold at issue in sub-item (a) of this item and pointed out the problems to him. The next day the scaffold

was still in the same condition (Tr. 43-44). Metric took no action. The violations were in plain view. Metric knew or should have known about them in its daily inspections.

Metric does not deny the conditions but claims that it is permissible to have employees ascend the scaffold (Tr. 389, 402-403, 457). Metric stressed that the "rungs" are evenly spaced (Tr. 403). The Secretary counters by pointing out that the problem is gaining access to the scaffold frame and to the platform, not going from "rung" to "rung." As shown in Exhibit C-12, the employee, in order to get from the "built in ladder" to the platform, would have to twist himself around and swing over. It was not possible to access at the end. The boards were too long. Employees were exposed to a fall hazard of over 12 feet. This is a serious violation of the standard. *Brickfield Builders, Inc.*, 15 BNA OSHC 1940, 1941, 1992 CCH OSHD ¶ 29,795 (No. 90-3219, 1992).

Item 4 - Alleged Violation of § 1926.451(a)(14)

Item 4 cites two conditions which were alleged to be violations of § 1926.451(a)(14), which requires that "[s]caffold planks be extended over their end supports not less than 6 inches nor more than 12 inches."

Sub-item (a) involved the same scaffold as in item 1(a). The scaffold and planking were approximately 3 to 4 inches from the wall (Tr. 45-46). Hamilton testified that he worked on another part of the scaffold which was connected to it (Tr. 261-262). Allmand testified that employees worked on an outrigger which connected to the scaffold (Tr. 492-496). Knight observed an employee working on the platform in this condition in order to bolt some angle iron (Tr. 198, 225, 228-229). Employees were exposed to the risk of an improper planking base. The scaffold planks were not extended as required by the standard. The allegation is affirmed.

Sub-item (b) involved a tubular welded frame scaffold at the southeast corner of Building A-3 where the boards extended over 12 inches at two places (Exh. C-14; Tr. 46). Knight had seen this scaffold condition previously (Tr. 203), and Madden observed a Block and Brick employee on it (Tr. 46-47). Even if this scaffold were in the process of being dismantled, as Metric claims (Tr. 345), this does not negate the violations. Metric admitted that employees had to go onto the scaffold in order to dismantle it (Tr. 407). They would

have been exposed to the over-extended planking. As shown by the photographs (Exh. C-14), work had been done along the entire platform.

Madden testified that if planking is extended less than 6 inches, vibrations in the scaffold created during use can cause the planking to come off, thereby causing employees to fall. If the scaffold planks are over-extended, they can tip over when an employee walks too far on the planks. Such a fall would likely cause multiple injuries (Tr. 47) and presented a serious hazard.

The violations were in plain view. Metric claims to have made daily safety inspections. It either knew of these violations or should have known about them. The allegation is affirmed.

Item 5 - Alleged Violation of § 1926.451(d)(4)

Item 5 involved five instances of alleged violations of § 1926.451(d)(4), which requires that "[s]caffold legs shall be set on adjustable bases or plain bases placed on mud sills or other foundations adequate to support the maximum rated loads." The Secretary cited Metric for violation of § 1926.451(a)(2), alleging that unstable objects were used to support the scaffolds (item 1) and for violation of § 1926.451(d)(4), alleging that the scaffold legs were not set on an adjustable base or plain base (item 5). Instances (b) through (e) of item 5 relate to the same scaffolds cited in item 1.

Sub-item (a) involved a scaffold erected by Devore Masonry at the west end of Building CH-2. The scaffold legs were placed on the dirt, and some of them were beginning to dig into the soil (Exh. C-15; Tr. 48-49). The bases were not adjustable. Madden presumed employees used the scaffold (Tr. 48). The scaffold was in plain view (Tr. 49). There was planking on top of the scaffold, indicating that it was built for work (Tr. 60). The blocking work had almost been completed to a point above the scaffold (Tr. 61). Employees generally laid block from the scaffold (Exh. C-15; Tr. 60-61). Even if this scaffold had just been erected in some places, as Metric contends (Tr. 347, 480), the Secretary argues that this does not negate the existence of the violations. On the contrary, the Secretary contends that Metric expected employees to use it in the near future. His argument assumes employees were exposed to improper basing. Work had ceased in the area. Ty Dyar stated

that the condition of the scaffold was corrected before work resumed (Tr. 463). The Secretary assumed exposure. The allegation is vacated.

Sub-item (b) pertains to the same scaffold found in violation of sub-item (a) of item 1. Some of the scaffold legs had no bases or mud sills. The end of the scaffold was sitting on the boards off the dock area, and the legs were digging into the wood (Exh. C-1; Tr. 50). Allmand, Metric's superintendent, testified that he had been instructed to dismantle the scaffold (Tr. 488-491) because it was unsafe (Tr. 482). He assumed employees used it but had no direct knowledge of its use (Tr. 489). Reliance (now Metric) employee Sam Hamilton testified that the basing was different when he worked on this scaffold (Tr. 260-265). Knight, BOP's construction inspector who was on the site daily, testified that in general the scaffold was in the same condition for at least a month. He observed an employee working on it (Exh. C-1; Tr. 194, 198, 225, 228-229). Madden interviewed an employee who stated he worked on the scaffold. Employees were exposed to the hazards. The allegation is affirmed.

Sub-item (c) involved a scaffold at the west end of Building A-4 where plain scaffold legs rested on a cracked board (Exh. C-2, bottom photograph; Tr. 50). The compliance officer saw Block and Brick employees working from the platform of the scaffold (Tr. 51). The fact that the board is split does not automatically violate any standard. The size of the crack, location, and width of the board must be considered. The split has been determined not to be in violation of § 1926.451(a)(2). The Secretary has proved that the board was split, but this has not proved that the scaffold was unstable or that the it would not support the maximum rated load. This allegation pertains to a lack of an adjustable base or mud sills. The allegation is affirmed. Metric has not shown compliance.

Sub-item (d) involved a scaffold on the east and west ends of Building A-3. Some scaffold legs were standing in the dirt without any bases and were sinking into the ground (Exh. C-16; Tr. 51). The scaffold was in plain view. Madden observed an employee doing touch-up work on the surface of the west end of the building (Tr. 63). The scaffold shown in the photograph (Exh. C-16) was erected by Anderson Masonry (Tr. 51). Metric claims that no work had begun (Tr. 464). It was available for use by employees. Metric admitted

that the basing is the first thing that goes down when erecting a scaffold and that once down, it would not normally be changed (Tr. 364-365, 406). The allegation is affirmed.

Sub-item (e) involved a scaffold from which employees of Cherokee Masonry worked, and surrounded the north, west and east sides of Building B-4. It was in plain view. Some of the scaffold legs were supported by a cracked board which was resting on two concrete blocks. The scaffold legs have no adjustable base or plain base and mud sills (Exh. C-17; Tr. 52). Several concrete blocks and some bricks were on the work platform of the same type that is seen about three quarters of the way up the wall (Tr. 64). Madden noticed a Block and Brick employee working on it. The allegation is affirmed.

Sub-items (b) through (e) involved scaffolds which have been found by the Secretary in violation of § 1926.451(a)(2). The violations contained in sub-items (b) through (e) can be satisfied by the same method of abatement. Madden admitted that the use of adjustable bases and mud sills could be used to abate both items. Metric submits that where a violation has a duplicate method of abatement, there should be only one violation. Compliance with both standards could have been abated by one method.

Sub-item (b) of item 5 involved the same scaffold referred to in sub-item (a) of item 1. Item 1(a) was affirmed. Sub-item (c) involves the same scaffold in sub-item (c) of item 1. This item was vacated. Sub-item (d) involves the same scaffold of sub-item (f) of item 1. Sub-item 1(f) was affirmed. Sub-item (e) involves the same scaffold involved in sub-item (g) of item 1. This item was affirmed. The scaffolds involved in sub-items (b), (d) and (e) have already been affirmed. Since the method of abatement is duplicate, the violations determined in sub-items (b), (d) and (e) are vacated. The scaffold involved in sub-item (c) was not determined to be in violation if item 1, and the violation for this sub-item is affirmed.

Item 6 - Alleged Violation of § 1926.451(d)(10)

Item 6 alleges four violations of § 1926.451(d)(10), which requires that:

> Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1 x 6 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. Toeboards shall be a minimum of 4 inches in height . . . .

Sub-item (a) involved a scaffold at the east end of Building A-4 where Block and Brick employees were working (Tr. 54-55). The photographs clearly show the violations. One photograph shows employees working in an area without guardrails (Exh. C-18). Another photograph shows an employee working at the end, on the left-hand side of the photograph, without sufficient guarding (Exh. C-18). The allegation is affirmed.

Sub-item (b) involved a scaffold at the west end of Building A-4. This scaffold was over 12 feet high and had no guardrails. A Block and Brick employee was on the scaffold (Exh. C-11; Tr. 55). Metric claims that there was no reason for this employee to be at this location because he could have done the work from the inside (Tr. 351). Dyar admitted that it was easier to work from the platform (Tr. 475). Metric should have expected this exposure to occur. There are blocks on the platform (Exh. C-11; Tr. 474). The photograph further indicates employee exposure. Metric was aware that masons were working on this building with no handrails or at least could have, with reasonable diligence, discovered the violative conditions. The allegation is affirmed.

Sub-item (c) involved a scaffold at the southeast corner of Building A-3. An employee of Block and Brick was working on this scaffold. The small piece of guarding on this scaffold was not in compliance with the standard because it had no midrail or toeboard (Exh. C-3, top photograph, Tr. 55-56). Metric's own documents indicate that it was aware in mid-March that masons were working on this building without handrails. The allegation is affirmed.

Sub-item (d) involved a scaffold at the southeast corner of the CU building. Hamilton testified that he worked on this scaffold without toeboards. The standard applies to outriggers. *Pyramid Masonry Contractors, Inc.*, __ BNA OSHC __, 1992 CCH OSHD ¶ 29,679 (No. 91-600, 1992). Knight testified that he saw a person working on the scaffold in that condition in order to fix the angle iron (Tr. 198, 225, 228-229). Metric did not dispute this fact. Employees were exposed to the condition. The allegation is affirmed.

The hazard involved with these violations is that employees working close to the edge of the scaffold could fall (Tr. 58-59). Metric had supervisors who purportedly inspected the site on a daily basis. Metric either knew or should have known of these violations.

Madden measured the scaffolds involved and determined that except for one scaffold, which was about 6 feet high, all the scaffolds were over 12 feet in height. The highest scaffold was 27 feet. The Secretary contends that the hazards could cause the scaffold to fall. Such falls, particularly from 27 feet, could result in multiple injuries and even death (Tr. 32-33). All the scaffold violations were serious.

Item 7 - Alleged Violation of § 1926.651(j)(2)

This item pertains to four alleged violations of § 1926.651(j)(2), which requires that excavated or other materials or equipment be placed:

> [A]t least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The first alleged violation occurred at a trench measuring 155 feet in length, 10½ to 25 feet in width, and 10 feet 6 inches in depth. Employees of Kirlin Construction Company worked in the trench (Tr. 67). Madden observed employees in the trench, and one of the photographs shows tools at the bottom of the trench (Exh. C-22; Tr. 67). The photographs (Exhs. C-20, C-22) show spoil piles closer than 2 feet from the edge of the trench. In some places, the piles are literally blending into the trench. Three employees of Kirlin testified that the photographs accurately represent the conditions of the trench as they had worked in it. They testified that this is how the trench looked. They worked in the trench in this condition on a daily basis for a six-month period, including the day of the inspection (Tr. 272-274, 290-291, 298-299). They stated that spoil piles were frequently at the edge of the trench (Tr. 272-273, 299-300). Employee Otis Edwin testified that the spoil piles in some cases were above his head (Tr. 305). Employee Mike Stephens testified that the piles were sometimes 12 to 15 feet high (Tr. 279). He also testified that Kirlin employees were never pulled out of the trench before the day of the inspection (Tr. 273). Brian Peterson also testified to this fact (Tr. 386, 397).

Metric did not dispute any of this testimony. Metric chief building engineer Saunders stated that employees were working in the trench regularly, including at the time of the inspection (Tr. 507-509). Metric has been cited previously for trenching violations (Tr. 79). It should have been aware of the requirements of the standard. The violative conditions are clear.

Metric claims that there were large spoil piles set back from the trench (Tr. 138, 354). The standard permits the spoil within 2 feet of the trench. There were spoil piles less than 2 feet from the trench. Metric also claims that some of those piles are about 1 foot in height (Tr. 139-140). The standard does not limit this requirement to piles of more than 1 foot. A foot of soil falling on an employee's head from over 10 feet above is a hazard. It would add extra weight to the wall of the trench and could possibly cause cracks and fissures in the trench.

Sub-item (b) involved a trench dug by A. D. Williams at the west end of Building A-1 where the spoil piles at the north and west ends were piled at the edge of the trench walls. The closeness of the spoil piles to the trench is clear from the photographs (Exhs. C-21, C-23). The trench was dug for the purpose of tying in water and fire valves or pipes (Tr. 467, 502). The photographs show pipes and valves, as well as some empty boxes at the bottom of the trench. These are indications that employees had worked there.

The allegations are affirmed.

Item 8 - Alleged Violation of § 1926.651(k)(1)

Item 8 alleges a violation of § 1926.651(k)(1), which requires that:

> [D]aily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could have resulted in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions.

Madden attempted to find out who the competent person was and whether the person in fact qualified as a competent person. He asked Metric's regional safety supervisor Brian Peterson and project superintendent Ty Dyar about the trenches, but they were unable to answer any of his questions. They informed him that a soil sample had been taken by the Government before the construction (Tr. 70-73). They did not indicate that a soil expert

was present on the site (Tr. 171). They directed Madden to a Kirlin employee who also was unable to answer any of his questions (Tr. 68-73, 174-177). There was no one on the site who could answer questions regarding soil levels or testing that had to be done in order to comply with the standard (Tr. 73-74, 174-177). Even if there had been someone who knew what was required to be known about soils, the standard would still be violated if he did not conduct daily inspections (Tr. 171).

Metric seemed uncertain as to whom was the competent person. Project manager Michael Adams believes it was the "inspector" for the laboratory SM&E (Tr. 382). SM&E had no contractual obligation to Metric (Tr. 382). He was obligated to BOP, not Metric (Tr. 369, 208). He was not required to conduct daily inspections of the trenches. His employment was for a different purpose. It was not part of his job to do inspections of the type required by the standard nor was it part of his job to determine whether and how to slope a trench (Tr. 207-208). Metric also ventured the name of J. T. Gore, an employee of Kirlin whom Metric believed was experienced in excavations as the competent person (Tr. 147, 356-358, 468-469). Metric could not say what Gore knew or did with respect to this standard. Even the Kirlin employees did not know whether he conducted daily inspections as required by the standard. They could not say whether he knew everything he must know to be a competent person (Tr. 278, 295, 303). There was no evidence that he had authority to correct any violations. Madden could not find anyone who fulfilled the requirements of the standard and qualified as a competent person. The violation is affirmed.

Item 9 - Alleged Violation of § 1926.652(a)(1)

Item 9 sets forth two allegations in violation of § 1926.652(a)(1) in that two trenches were not properly shored or sloped, thereby exposing employees to possible cave-ins.

Sub-item (a) involved the same trenches as item 7. Madden testified that he measured the slope of the trench and found it to be 75 to 90 degrees, clearly not in compliance with the standard regardless of the type of soil (Exh. C-22; Tr. 75). Metric's chief building engineer Saunders admitted that the trench was not properly shored, sloped or braced, at least in parts of it (Exh. C-22; Tr. 500-501, 503-504, 507). He also admitted that he observed employees of Kirlin working in it regularly, including at about the time of

the inspection (Tr. 507-509). The three Kirlin employees said that they had worked in the trench in this condition (Tr. 298-299, 272-274, 290-291). The violation has been clearly established. The fact that Metric may have had a dispute with Kirlin over who should provide shoring (Tr. 352-353) does not negate the violation. It further demonstrates Metric's knowledge of the violative conditions. Despite its knowledge, and despite Brian Peterson's claim that he inspected the trench (Tr. 383-386), Metric did not pull employees out of the trench as Kirlin employee Stephens testified (Tr. 273) and Brian Peterson admitted (Tr. 386, 397). The allegation is affirmed.

Sub-item (b) involved the same trench as in item 7. Madden discovered that the east and north ends of the trench were at a 90-degree angle and that the trench was 5 feet 10 inches in depth at the deepest part (Tr. 77, 144). The photographs reveal pipes and boxes at the bottom of the trench, indicating that employees had worked there (Exh. C-23). The allegation is affirmed.

The hazard of not having trenches properly shored or sloped is that a cave-in could occur causing death (Tr. 77-78). Violations of items 7, 8 and 9 were serious.

Item 1 - "Other" Citation

Alleged Violation of § 1926.59(e)(2)

Madden asked to see Metric's hazard communication program, and it was provided by Brian Peterson. He reviewed the program and determined that it failed to meet the requirements of § 1926.59(e)(2), which require:

> (2) *Multi-employer workplaces.* Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:
>
> > (i) The methods Metric will use to provide the other employer(s) with a copy of the material safety data sheet. . . . for each hazardous chemical the other employer(s)' employees may be exposed to while working;

(ii) The methods Metric will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and

(iii) The methods Metric will use to inform the other employer(s) of the labeling system used in the workplace.

Metric argues that its failure to include the above requirements was not a violation because all that was missing from the program was a sentence or a paragraph (Tr. 153). The standard specifically requires certain information to be included in a hazard communication program. Metric's program lacked some of that information. The fact that this is easily correctable does not negate the existence of the violation.

The violation is affirmed.

Item 2 - Alleged Violation of § 1926.150(a)(3)

This item alleges a violation of § 1926.150(a)(3), which requires fire-fighting equipment be conspicuously located. In the alternative, the Secretary alleges a violation of § 1926.150(c)(1)(i), which requires that a fire extinguisher, rated not less than 2A, to be provided for each 3,000 square feet of the protected building area or a major fraction thereof.

Madden searched the CU building for a fire extinguisher with Metric project manager Ty Dyar. None could be found. Metric employees were in the building, and employees were exiting and entering the building (Tr. 83-84). Metric claims that employees took the fire extinguisher to the loading dock outside the building where Metric employees were using a torch and that, after they were finished using the torch, they returned the fire extinguisher to the building (Tr. 398). While the statement is not openly challenged, the Secretary reasons that it is irrelevant. The fire extinguisher was not in the building. The building where Metric employees were present was unprotected. Metric could have provided for the use of torches outside by providing additional fire extinguishers on the job, but it chose not to do so.

The standard was violated.

Item 3 - Alleged Violation of § 1926.350(a)

This item alleged a violation of § 1926.350(a), which requires that "valve protection caps shall be in place and secured" when transporting, moving and storing compressed gas cylinders. Three compressed gas cylinders--two acetylene and one oxygen--were not capped (Exh. C-24; Tr. 84-85). Metric did not dispute this fact. It recounted a story about a delivery of full tanks during which, for some reason, the delivery men removed the caps from the full tanks they had delivered and put them on the empty tanks which they then took away. They returned the caps the next day (Tr. 360-361). Metric was aware at the time of the inspection that the caps were not being used. Brief duration of a hazardous condition does not negate the existence of a violation. *Morgan and Culpepper, Inc. v. OSHRC*, 676 F.2d 1065, 1069 (5th Cir. 1982); *Flint Engineering, supra*, _ CCH OSHD _ at p. 40,854 (No. __, __).

Metric failed to comply with the standard.

Item 4 - Alleged Violation of § 1926.651(c)(2)

Item 4 alleges a violation of § 1926.651(c)(2), which requires:

> (2) *Means of egress from trench excavations.* A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

The trench at issue here is the same as the one involved in item 7, sub-item (b), and item 9, sub-item (b), of Citation No. 1 above. This trench was 5 feet 10 inches in depth (Tr. 77, 144) and, as the photographs reveal, clearly lacked a ladder or stairway. It did have what may commonly be called a "ramp" but, as can be seen, it was very steep.

The allegation is affirmed.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining an 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.

One might conclude that Metric did a poor job in enforcing safety at the site. It must be remembered that this project involved construction of 29 buildings extending over 200 acres. It had eight masonry subcontractors, many of whom ignored OSHA standards. Metric conducted daily safety inspections, but the enormity of the project complicated the enforcement of safety with the number of personnel it had conducting inspections.

Most of the allegations pertain to alleged violations of scaffolding. Numerous violations were observed by the compliance officer. They involve the scaffolds which were 6 feet to 27 feet in height. In all cases employees were exposed to potential falls and having the scaffolds collapse on them. There was very little exposure, but employees were exposed in all situations. Taking into consideration the four criteria specified under section 17(j) of the Act, it is determined that the following penalties are appropriate:

Serious Citation No. 1

Item No.	Penalty Assessed
1	$ 800
2	800
3	1,000
4	800
5	300
6	1,800
7	800
8	900
9	2,000

"Other" Citation

Item No.	Penalty Assessed
1	- 0 -
2	- 0 -
3	- 0 -
4	- 0 -

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

ORDERED: (1) That sub-items (a), (f) and (g) of item 1 of the serious citation issued to Metric on October 9, 1992, are affirmed; that sub-items (b), (c), (d) and (e) are vacated and a penalty of $800 assessed;

(2) That item 2 of the serious citation issued to Metric on October 9, 1992, is affirmed in its entirety and a penalty of $800 assessed;

(3) That item 3 of the serious citation issued to Metric on October 9, 1992, is affirmed in its entirety and a penalty of $1,000 assessed;

(4) That item 4 of the serious citation issued to Metric on October 9, 1992, is affirmed in its entirety and a penalty of $800 assessed;

(5) That sub-items (a), (b), (d) and (e) of item 5 of the serious citation issued to Metric on October 9, 1992, are vacated; that sub-item (c) is affirmed and a penalty of $300 assessed;

(6) That item 6 of the serious citation issued to Metric on October 9, 1992, is affirmed in its entirety and a penalty of $1,800 assessed;

(7) That item 7 of the serious citation issued to Metric on October 9, 1992, is affirmed in its entirety and a penalty of $800 assessed;

(8) That item 8 of the serious citation issued to Metric on October 9, 1992, is affirmed and a penalty of $900 assessed;

(9) That item 9 of the serious citation issued to Metric on October 9, 1992, is affirmed in its entirety and a penalty of $2,000 assessed; and

(10) That items 1 through 4 of the "other" citation issued to Metric on October 9, 1992, are affirmed in its entirety with no penalty assessed.

JAMES D. BURROUGHS
Judge

Date: December 20, 1993