No. 07-3810

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELAINE L. CHAO, SECRETARY OF LABOR,

PETITIONER

v.

MANGANAS PAINTING CO., INC. and

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION,

RESPONDENTS

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission

FINAL BRIEF FOR THE SECRETARY OF LABOR

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Statement Regarding Oral Argument

This case involves the ability of the Secretary to enforce an occupational safety and health standard against an employer during the period it takes to resolve the employer's contest to a citation—a period that can last years. The Commission majority held that because the employer's contest to a citation was still pending when the Secretary discovered subsequent violations of the cited standard, the Secretary was not allowed to cite the employer for the subsequent violations. The Secretary agrees with the dissenting Commissioner that this ruling is "extraordinarily troubling for enforcement of the Act and for worker safety[;]" it "serves only as an inappropriate restraint on the Secretary's authority under the Act and a free pass to bad actors to continue to violate the Act—and endanger their employees." Accordingly, the Secretary believes that oral argument would be appropriate and therefore requests that oral argument be held in this case.

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Brief for the Secretary of Labor

Jurisdictional Statement

The Occupational Safety and Health Review Commission ("Commission") had jurisdiction under section 10(c) of the Occupational Safety and Health Act ("OSH Act" or "Act"), 29 U.S.C. § 659(c), because Manganas Painting Co., Inc. filed a timely notice of contest to citations the Secretary of Labor had issued under the Act.

This Court has jurisdiction pursuant to section 11(b) of the OSH Act, 29 U.S.C. § 660(b). The Commission issued its decision on April 25, 2007. That decision disposed of all of the claims involved in this proceeding, and the Secretary of Labor filed a timely petition for review with this Court on June 22, 2007.

Statement of Issue

In specifying when an employer is liable for daily penalties for not correcting a cited violation, § 10(b) of the Act provides that an employer need not correct the violation until the Commission resolves its contest to the citation. Manganas contested a citation for not installing guardrails on a scaffold. While the contest was pending, the Secretary cited Manganas for not installing guardrails on different scaffolds at another location and sought a penalty only for those missing guardrails. The Commission vacated the second citation on the ground that § 10(b) precluded its issuance. Did the Commission misapply § 10(b)?

Statement of the Case

This is an enforcement action under the OSH Act, 29 U.S.C. §§ 651-678. In 1993 and 1994, Manganas Painting Co., Inc. ("Manganas") performed a bridge painting project involving two bridges collectively referred to as the Jeremiah Morrow Bridge. In 1993, while Manganas was

working on the northbound bridge, the Secretary of Labor inspected the project and issued a citation alleging a violation of 29 C.F.R. § 1926.451(a)(4) for a scaffold that lacked guardrails. Manganas contested the citation, and the Commission eventually upheld the citation in a 2000 decision. In the meantime, in 1994 the Secretary inspected the southbound bridge and issued another citation for various scaffolds that lacked guardrails. Following Manganas's contest of the 1994 citation and an evidentiary hearing, the Commission vacated the 1994 citation on the ground that it and the 1993 citation covered the "same condition," and the employer could not be cited for additional violations of the scaffold requirement until the Commission issued a final decision on the earlier citation. The Secretary seeks review of that decision.[1]

Statement of Facts

A. The OSH Act

Finding that occupational injuries and illnesses "impose a substantial burden" upon interstate commerce, Congress enacted the OSH Act to "assure so far as possible" safe working conditions for "every working man

[1] The Commission decision affirmed and vacated numerous other items, but Manganas has not sought review of the affirmed items and, with regard to the vacated items, the Secretary seeks review only of the alleged scaffolding violations. Thus, only the Commission's disposition in OSHRC Docket No. 95-0103 of Items 13a, 13b, and 13c of Citation 2 are before this Court.

and woman in the Nation." 29 U.S.C. § 651(a), (b); *see also Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1275 (6th Cir. 1987) (Act's "purpose is neither punitive nor compensatory, but rather forward-looking; i.e., to prevent the first accident"). As part of its scheme for advancing that purpose, Congress created an "unusual regulatory structure" that divides regulatory, enforcement, and adjudicative functions between two independent administrative actors. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 151 (1991) ("*CF&I*"). Specifically, Congress gave the Secretary regulatory, policymaking, and enforcement responsibilities under the Act and conferred on the Commission purely adjudicative responsibilities. *Id.* at 147, 152-54.[2]

The Secretary's regulatory responsibilities include promulgating and enforcing "mandatory occupational safety and health standards." *See* 29 U.S.C. §§ 651(b)(3), 654, 655, 658, 659. The Secretary enforces these standards by conducting inspections and issuing citations when she discovers violations. *Id.* §§ 657-659. A citation must "describe with particularity the nature of the violation," require the employer to abate the violation and, where appropriate, assess a civil penalty. *Id.* §§ 658-659, 666.

[2] The Secretary has delegated the bulk of her duties under the OSH Act to the Assistant Secretary for Occupational Safety and Health Administration ("OSHA"). *See* 72 Fed. Reg. 31160 (June 5, 2007). Accordingly, this Brief uses the terms "the Secretary" and "OSHA" interchangeably.

If the citation is not contested within fifteen working days of receipt, it becomes a final order. *Id.* § 659(a); *see generally CF&I*, 499 U.S. at 152 (noting low rate of contests). If the employer contests the citation, the Commission's function is to act as a "neutral arbiter" and determine whether the Secretary's citation should be upheld. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam).

The OSH Act establishes a graduated penalty scheme to provide employers with a financial incentive to abate violations. *See* 29 U.S.C. § 666(a)-(d). Penalties of up to $7,000 may be assessed for "serious" and non-serious violations, with some penalty being mandatory for "each" serious violation. 29 U.S.C. § 666(b), (c); *see also id.* § 666(k) (defining "serious"). Penalties of up to $70,000 may be assessed for "willful" or "repeat" violations, with a mandatory minimum penalty of $5,000 for "each willful violation." 29 U.S.C. § 666(a).

The Act also includes a procedure for imposing a sanction on employers who fail to abate a violation as required by a final order. 29 U.S.C. § 659(b). If the Secretary determines that an employer has not abated "a violation for which a citation has been issued," she is authorized to issue a Notice of Failure to Abate proposing a daily penalty of up to $7,000 "for each day during which" the failure to abate had continued. 29 U.S.C. §§

659(b), 666(d). The provision of the Act establishing this remedy states that the period in which an employer is required to abate a cited violation "shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties." *Id.* § 659(b); *see also id.* § 666(d) (provision establishing the amount of failure-to-abate penalties that can be assessed and containing essentially the same language).

Shortly after enactment of the OSH Act, and pursuant to notice-and-comment rulemaking procedures, the Secretary adopted a regulation implementing § 10(b) and providing for the issuance of a failure-to-abate notice when OSHA discovers that an employer has not corrected an "alleged violation for which a citation has been issued." 36 Fed. Reg. 17,850, 17,853 (1971) (adopting 29 C.F.R. § 1903.18(a)). The regulation also provides that the "period for the correction of a violation for which a citation has been issued shall not begin to run until the entry of a final order of the Review Commission in the case of any review proceedings initiated by the employer in good faith and not solely for delay or avoidance of penalties." 29 C.F.R. § 1903.18(a).

B. The Scaffolding Standard

In 1994, when the conduct relevant to this case occurred, OSHA's scaffolding standard had "general requirements" as well as requirements for particular types of scaffolds. *See* 29 C.F.R. § 1926.451.[3] The citations at issue in this case involve one of the general requirements that provided, subject to two exceptions not relevant here, that guardrails "shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor." § 1926.451(a)(4). The scaffolding standard defined "scaffold" as "[a]ny temporary elevated platform and its supporting structure used for supporting workmen or materials, or both." § 1926.452(b)(27).

In 1996, OSHA revised the scaffolding standard. 61 Fed. Reg. 46,026, 46,104 (1996). The revised standard similarly contains "general requirements" as well as requirements for particular types of scaffolds, including scaffolds that were not specifically addressed in the former standard. *See* 29 C.F.R. §§ 1926.451, .452 (2006). One of these is a "catenary scaffold," which the standard defines as "a suspension scaffold consisting of a platform supported by two essentially horizontal and parallel ropes attached to structural members of a building or other structure." § 1926.450(b) (2006).

[3] Unless otherwise indicated, citations to OSHA's scaffolding standard are to the 1994 version.

The revised standard prescribes the use of personal fall arrest systems, rather than guardrails, for catenary scaffolds and certain other types of scaffolds. § 1926.451(g)(1)(i) (2006). Guardrails, either guardrails or the use of personal fall arrest systems, or both guardrails and the use of personal fall arrest systems are required for other types of scaffolds. *Id.* § 1926.451(g)(1)(ii)-(vii) (2006).

C. Manganas's project and OSHA's inspections and citations

1. *The project*

This case arises from a project Manganas performed in Ohio in 1993 and 1994 (R.104 Dec, pg. 1-2, Apx. pg. 11-12). The project involved painting one northbound bridge and one southbound bridge collectively referred to as the Jeremiah Morrow Bridge (R.104 Dec., pg. 1-2, 31, Steve Medlock at Tr. 1306, Apx. pg. 11-12, 41, 175). Because of weather-related contractual provisions, Manganas did not work on the project from November 1993 to late March 1994 (R.104 Dec., pg. 2, Andrew Manganas at Tr. 939, Apx. pg. 12, 160). The relevant work before this hiatus was on the northbound bridge, while the relevant work in 1994 was on the southbound bridge (Steve Medlock at Tr. 1173, 1306, Apx. pg. 162, 175).

Each bridge had its own roadway and supporting truss that had 64 bays (Nicholas Manganas at Tr. 1031, Andrew Manganas at Tr. 1602-03,

Apx. pg. 161, 191-92). Each bay was framed by vertical members at 90-degree angles between the horizontal upper and lower beams, also referred to as cords, that ran along and underneath the outer side and inner side of the roadway; the vertical members were 30 feet apart lengthwise along the cords, and 24-feet apart as measured horizontally from the inside to the outside cords (Andrew Manganas at Tr. 938, Nicholas Manganas at Tr. 1031, Exh. R-2, Apx. pg. 159, 161). The vertical distance between the upper and lower cords varied from 36 feet to 72 feet (Steve Medlock at Tr. 466-67, Apx. 157-58). Between the 90-degree vertical members there were vertical members at 45-degrees between the upper and lower cords (Andrew Manganas at Tr. 1591, Exh. C-75, Exh. R-2, Apx. pg. 189, 219).

To provide access to the steel members of the truss, Manganas installed cables throughout the truss onto which it placed "painter's picks," pieces of wood or metal approximately 20 inches wide and 20 feet long (Steve Medlock at Tr. 1256-57, Andrew Manganas at Tr. 1588-89, Apx. pg. 171-72, 186-87); *see also Manganas Painting Co.*, 19 O.S.H. Cas. (BNA) 1102, 1103 (Rev. Comm'n 2000), *aff'd*, 273 F.3d 1131 (D.C. Cir. 2001). The picks rested either solely on the horizontal cables or on cables and a steel member (Steve Medlock at Tr. 1255-56, 1270-71, Andrew Manganas at Tr. 1588-90, Exh. C-94 through C-100, Apx. pg. 170-71, 173-74, 186-88,

220-26). Employees accessed these picks either from a catwalk that ran underneath the bridge or from a ladder that was suspended from the roadway (Steve Medlock at Tr. 1238-39, Apx. pg. 166-67); *Manganas Painting Co.*, 19 O.S.H. Cas. at 1103.

Manganas had more than 200 picks at the site (Andrew Manganas at Tr. 1589, Apx. pg. 187). Most of the picks were placed within a "containment area" that was constructed to contain the debris produced by the abrasive blasting operation used to remove the existing paint from the steel members (R.104 Dec., pg. 2, John Collier at Tr. 1437, Andrew Manganas at Tr. 1588-90, 1604, Apx. pg. 12, 182, 186-88, 193). Once Manganas finished the abrasive blasting operations in one containment area and established a new one, it moved the picks to the new containment area (Andrew Manganas at Tr. 1589, Joseph Lang at Tr. 1935, Apx. pg. 187, 202).

Manganas did not install guardrails on the picks, and depending on the employee's location, employees on the picks were exposed to fall hazards ranging from approximately 30 feet to greater than 100 feet (Steve Medlock at Tr. 1231-33, John Collins at Tr. at 1437-38, Andrew Manganas at 1590-

91, Apx. pg. 163-65, 182-83, 188-89).[4] To protect employees from these fall hazards, Manganas relied on its policy requiring employees to tie off their safety belts to either flanges of steel beams or additional cables, referred to as safety lines or life lines, that were installed throughout the truss for that purpose (Andrew Manganas at Tr. 1592, Joseph Lang at Tr. 1936, Apx. pg. 190, 203).

2. *OSHA's inspections and citations.*

In April 1993, OSHA inspected the project while Manganas was working on the northbound bridge (Steve Medlock at Tr. 1173, 1306, Apx. pg. 162, 175). As a result of this inspection, OSHA issued a citation alleging, *inter alia*, that Manganas violated § 1926.451(a)(4) for not installing guardrails on "platform(s) more than 10 feet above the ground" (Exh. C-72, pg. 1, 9, Apx. pg. 217-18). In describing the violation, the citation referred to an employee that was exposed to a fall hazard of greater than 200 feet while working from an unguarded pick scaffold that was "[l]ocated under the I-71 Bridge deck approximate Bay 31" (*ibid.*).[5]

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[4] Manganas installed a net underneath the lower cord, but the net provided adequate protection only for falls to the inside of the truss and was adequate for these interior fall hazards only for those employees working on the lower portion of the truss (Steve Medlock at Tr. 1318-22, Andrew Manganas at Tr. 1707-08, Apx. pg. 176-80, 194-95); *see* 29 C.F.R. § 1926.105(c)(1) (2006) (nets must be no more than 25 feet below the working surface).

[5] The citation stated:

Manganas contended that the painter's pick would be classified as a "catenary scaffold" under OSHA's then pending proposed revisions to the scaffolding standard and that it was infeasible to install guardrails (Steve Medlock at Tr. 1271, Apx. pg. 174); *Manganas Painting Co.*, 19 O.S.H. Cas at 1104 n.6. Therefore, Manganas contended, its reliance on using safety belts to protect employees on the pick scaffolds complied with the standard. *See Manganas Painting Co.*, 19 O.S.H. Cas. at 1104 nn. 5 & 6.

Eventually, in 2000, the Commission affirmed the citation. *Manganas Painting Co.*, 19 O.S.H. Cas. at 1104, 1107. It determined that, because one end of the painter's pick rested on a permanent part of the bridge, it was not

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"29 CFR 1926.451(a)(4): Standard guardrails and toeboards were not installed on all open sides and ends of platform(s) more than 10 feet above the ground or floor:

"a) Located under the I-71 Bridge deck approximate Bay 31 an employee was working from a pick scaffold without standard guardrails and/or adequately secured lanyard /safety in that, the lanyard hook was just clipped to a column flange exposing the employee to a potential fall in excess of 200'."

(Exh. C-72, pg. 1, 9, Apx. pg. 217-18). As originally issued, the 1993 citation proposed a penalty that exceeded the statutory limit, and it was reissued to modify the penalty. *Ibid.* Both versions are cited because, on the copy submitted as Exhibit C-72, holes that were created so that the 1993 citation could be placed in an exhibit book obliterate a few words of the first three lines of the quotation, and the words obliterated from one version are shown in the other version. *See ibid.*; *see also* R.1 Citation, item 13, Apx. pg. 103-04 (1994 citation containing the same introductory language as the first 3 quoted lines for each of the 3 sub-items).

a "catenary scaffold." *Id.* at 1104 n.6. It also determined that even if the new standard's provision for catenary scaffolds were applicable and it would have been infeasible to use guardrails, the citation would still have to be affirmed because the employee on the cited pick scaffold had not used his safety belt and Manganas had not effectively implemented its safety belt policy. *Id.* at 1104 nn. 5 & 6.

In the meantime, based on a referral from a health professional who had been treating a Manganas employee, in August 1993 OSHA again inspected the bridge project. *Manganas Painting Co.*, 21 O.S.H. Cas. (BNA) 1964, 1968 (Rev. Comm'n 2007). As a result of this inspection, OSHA issued citations for violations of OSHA's lead-in construction standard. *Ibid.* Manganas contested those citations, and the Commission resolved that contest in a final order issued in March 2007 that vacated some items and affirmed many others. *Id.* at 2000.

Also in the meantime and during the hiatus between the 1993 and 1994 painting seasons, OSHA sought information from Manganas on the measures it would be taking to protect its employees from lead exposures when it resumed operations in 1994 (Exh. C-11, Apx. pg. 213-14). Manganas took the position that, in light of its contest to the lead citations, OSHA was precluded from initiating "any further proceedings to enforce

th[e] Act" (Exh. C-12 at pg. 1, Apx. pg. 215). OSHA disagreed and issued subpoenas for relevant information and then obtained and executed a warrant. *See In re Establishment Inspection of Manganas Painting Co.*, 104 F.3d 801, 802 (6th Cir. 1997).

Over Manganas's objections, the district court and this Court enforced the subpoena after limiting it to information relevant to conditions existing in 1994. *Reich v. Manganas*, 70 F.3d 434, 436, 438 (6th Cir. 1995). On jurisdictional, mootness, and ripeness grounds, the district court and this Court also rejected Manganas's challenge to the warrant. *Manganas Painting Co.*, 104 F.3d at 802-03.

Pursuant to the warrant and starting on June 17, 1994, OSHA inspected the project as Manganas was working on the southbound bridge (R.104 Dec., pg. 2, John Collier at Tr. 1412, Apx. pg. 12, 181). As a result of the inspection, OSHA issued the citations that are at issue here (*see* R.1 Citation, Item 13, Apx. pg. 103-04). The item at issue here alleges, in three sub-items, a violation of 29 C.F.R. § 1926.451(a)(4) for the lack of guardrails on "open sides and ends of platform(s) more than 10 feet above the ground" (*ibid.*). In describing the violations, the sub-items refer to employees working on pick scaffolds located in particular locations of the

bridge (*ibid.*).[6] The employees on these picks were exposed to falls to the interior of the truss of approximately 30 feet or more and to falls to the exterior of the truss of more than 100 feet (*ibid.*; Steve Medlock at Tr. 1231-33, 1239-40, John Collier at Tr. 1437-38, Apx. pg. 163-65, 167-68, 182-83).

D. The hearing

Manganas contested the citation, and the Commission held a hearing (R. 86 ALJ Dec., pg. 1-2, Apx. pg. 106-07). With regard to one of the sub-items, Item 13a, OSHA Compliance Officer Steven Medlock testified that he had observed a Manganas employee painting from two picks at different elevations between the upper and lower cords in bay 38 (Steve Medlock at Tr. 1231-33, C-94, C-95, Apx. pg. 163-65, 220-21). Both picks lacked guardrails and the employee was not using his safety belt or any other form of fall protection while he painted steel members from the picks (Steve Medlock at Tr. 1231-33, Apx. pg. 163-65). At both locations, the employee

[6] Item 13a referred to a pick scaffold under and along the east side of the south bound bridge at approximate panel point U38-L38; item 13b referred to a pick scaffold adjacent to the ladder suspended over the side of the bridge outside the containment area south of pier 4; and item 13c referred to a pick scaffold under and along the east side of the south bound bridge deck at approximate panel point U34 (R.1 Citation, Item 13, Apx. pg. 103-04). "U" and "L" refer to the upper cord and lower cord, respectively, with the number referring to the "panel point," a term used as a synonym for bay (Steve Medlock at 464-66, 1231-32, Apx. pg. 155-57, 163-64). The citation item is reproduced in the Appendix at 103-04 and is quoted in full below at pp. 33-35 n.13.

was exposed to a fall hazard of greater than 100 feet if he fell to the outside of the truss, and at the upper elevation, the employee was exposed to a fall hazard of approximately 30 feet if he fell to the inside portion of the truss (*ibid.*).

With regard to the second sub-item, Item 13b, OSHA Compliance Officer John Collier testified that he had seen three Manganas employees use a pick to access other work areas (John Collier at Tr. 1437-40, Apx. pg. 182-85). These employees had gone onto the pick after climbing down a ladder that was suspended from the road, and the pick partially rested on a permanent part of the bridge (*ibid.*; Exh. C-96, Apx. pg. 222). The pick lacked guardrails and the employees did not use a safety belt or any other form of fall protection when they went across the pick (John Collier at Tr. 1437-40, Apx. pg. 182-85). The employees were exposed to a fall of over 140 feet (*ibid.*).

With regard to the third sub-item, Item 13c, Medlock testified that near or at bay 34, he saw two Manganas employees walking across a pick after descending a ladder (Steve Medlock at 1238-40, Apx. pg. 166-68). The pick lacked guardrails and the employees were not using their safety belt or any other form of fall protection as they walked across the pick (*ibid.*). The employees were exposed to a fall of more than 30 feet if they

fell to the interior portion of the truss and to a fall of more than 100 feet if they fell to the outside of the truss (Steve Medlock at Tr. 1239-40, 1243, Apx. pg. 167-69).

Manganas's witnesses acknowledged that the picks lacked guardrails but contended that guardrails would have prevented employees from reaching their work (Andrew Manganas at Tr. 1590-91, Bruce Finnefrock at Tr. 1811, William Miller at Tr. 1823-24, Joseph DiPaolo at Tr. 1854, Timothy McCully at 1875-76, Joseph Lang at 1935-36, Nicholas Managanas at Tr. 1969, Apx. pg. 188-89, 196-204). They also contended that guardrails would have made it difficult to move the picks and made the picks top-heavy and thereby lead to the picks falling off the cables if employees leaned on the guardrails (Andrew Manganas at Tr. 1591, Bruce Finnefrock at Tr. 1811, William Miller at Tr. 1823-24, Timothy McCully at Tr. 1875, Joseph Lang at 1935-36, Apx. pg. 189, 196-98, 200, 202-03). Manganas also contended that the Secretary's evidence did not establish that the employees on the picks had failed to use their safety belts, and that if it did, Manganas neither knew nor could have known of those failures (R. 79 Employer's Post-Hearing Brief, pg. 57-58, Apx. pg. 105).

E. The ALJ and Commission decisions

Following an evidentiary hearing, the ALJ vacated the § 1926.451(a)(4) violation for the failure to install guardrails on the pick scaffolds (R.86 ALJ Dec., pg. 42-43, Apx. pg. 147-48). In the ALJ's view, two of the three instances of the scaffolding item were "essentially duplicative" of other items involving Manganas's failure to require its employees to use safety belts (R.86 ALJ Dec., pg. 43, Apx. pg. 148).[7] In addition, the ALJ determined that the Secretary failed to show that the scaffolds cited in the third instance and one of the "duplicative" items were "platforms" within the meaning of 29 C.F.R. § 1926.502—a standard in a separate subpart of OSHA's safety standards—because the evidence only

[7] The ALJ affirmed 9 separate instances in which Manganas failed to comply with § 1926.95(a), which requires the use of personal protective equipment when employees are exposed to hazardous conditions, based on the employees' failure to use safety belts when exposed to fall hazards (R.86 ALJ Dec., pg. 28-41, 48, Apx. pg. 133-46, 153). Some of these items involved the failure of the employees who were exposed to the fall hazards cited in Items 13b and 13c to use safety belts as they descended the ladder to get on to the picks (R.86 ALJ Dec., pg. 43, Apx. pg. 148). The Secretary disagrees with the ALJ that items involving fall hazards from the picks, as alleged in item 13, are duplicative of items involving falls from other locations such as the ladders, as alleged in the § 1926.95(a) items. But the issue is irrelevant to this proceeding, because the Commission vacated the § 1926.95(a) items on the grounds that the Secretary should have cited a different standard, § 1926.105(a), and the Secretary has not sought review of this aspect of the Commission's decision (R.104 Dec. 26-30, Apx. pg. 36-40). Therefore, there are no items that Item 13 can be duplicative of.

showed that employees had used the scaffolds to access other work areas (*see ibid.*).

In a divided decision, the Commission affirmed the ALJ's decision to vacate the § 1926.451(a)(4) item, but on different grounds than those relied upon by the ALJ (R.104 Dec., pg. 30-32, Apx. pg. 40-42). Commissioners Railton and Thompson relied on § 10(b) of the Act, which provides that an employer who has contested a citation is not required to correct the cited violation until the Commission issues a final order resolving the contest (R.104 Dec., pg. 30, Apx. pg. 40); *see* § 10(b), 29 U.S.C. § 659(b). Even though the majority found that the 1993 and 1994 scaffolding violations occurred at "essentially two different worksites," the majority nevertheless determined that the "citations 'covered the same condition' in that each item was based on Manganas' failure to guard the same type of pick scaffold" (R.104 Dec., pg. 31, Apx. pg. 41 (quoting *Hamilton Die Cast, Inc.*, 12 O.S.H.Cas. (BNA) 1797, 1798 (Rev. Comm'n 1986), *overruled in part by R & R Builders Inc.*, 14 O.S.H. Cas. (BNA) 1844 (Rev. Comm'n 1990)). The majority supported this determination by noting that Manganas's defense that the standard's guardrail requirements did not apply to its painter's picks applied equally to the 1993 and 1994 citations (*ibid.*). Thus, the majority concluded that § 10(b) of the Act prohibited the Secretary from citing

Manganas for not guarding the painter's picks while Manganas's contest to the 1993 citation was pending before the Commission (R.104 Dec., pg. 32, Apx. pg. 42).

Commissioner Rogers dissented (R.104 Dec., pg. 38-44, Apx. pg. 48-54). She determined that the 1993 and 1994 citations did not involve the "same condition," and that the majority's conclusion that § 10(b) prohibited the Secretary from citing Manganas for the violations that occurred in 1994 unduly encroached on the Secretary's authority to enforce the Act (R.104 Dec., pg. 40-44, Apx. pg. 50-54). She characterized the majority's holding as a "misuse of section 10(b)" that grants "a free pass to bad actors to continue to violate the Act—and endanger their employees" (R.104 Dec., pg. 38, 44 Apx. pg. 48, 54).

Summary of Argument

The Commission erred in vacating the 1994 citations based on its determination that, while Manganas's contest to the 1993 citation was pending, § 10(b) of the Act precluded issuance of the 1994 citation. Section 10(b) provides the Secretary with a remedy against an employer who fails to correct "a violation for which a citation has been issued." It further provides, to clarify when this remedy is available, that when a citation is contested in good faith, an employer's obligation to correct the cited

violation "does not begin to run" until the Commission issues a final order resolving the contest.

Section 10(b) only applies when a citation (or a failure-to-abate notice) involves "a violation for which a citation has been issued." Both the text and purpose of § 10(b) show that its language allowing an employer to defer correcting a cited violation applies only to that violation; § 10(b) is irrelevant when the original and subsequent citations involve different violations. Here, the 1994 and 1993 citations involve different violations because they involve different scaffolds. Thus, although Manganas's contest to the 1993 citation tolled its obligation to correct the violation cited in that citation, it did not grant Manganas a license to commit new and independent violations or immunize Manganas from liability for those violations.

The Commission majority's reasons for determining that § 10(b) precluded issuance of the 1994 citation do not withstand analysis. Both Commission and circuit court precedent have squarely rejected the majority's view that a scaffold is covered by an earlier citation simply because it is "the same type of" scaffold that was initially cited. Similarly, the majority's suggestion that the citations involved the same violation because Manganas's defense to the two citations did not vary is patently without merit. Whether two citations involve the same violation depends on

the wording of the Secretary's citations, not the employer's legal theory in defense of the citations. Finally, the Commission case on which the majority relied is inapposite, because the case did not even reach the issue of whether the two citations involved in that case addressed the same violation.

The Commission's misapplication of § 10(b) undermines the Act's purpose to assure, so far as possible, safe working conditions. The decision immunizes a cited employer from liability for additional violations of a cited standard during the often lengthy period the Commission takes to resolve the employer's contest to a citation. Accordingly, the Commission's order should be reversed and the matter remanded for a determination on whether the Secretary established the alleged violations of her scaffolding standard.

Argument

I. Standard of Review

The Commission's legal conclusions may be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *CMC Elec., Inc. v. OSHA*, 221 F.3d 861, 865 (6th Cir. 2000). The Commission findings of fact are reviewed under the substantial evidence standard of review. 29 U.S.C. § 660(a); *Fields Excavating, Inc. v. Secretary of Labor*, 383 F.2d 419, 420 (6th Cir. 2004).

On matters of statutory interpretation, the Court must first determine, using the traditional tools of statutory construction, whether Congress has expressed its intent on the interpretive question. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If in light of these tools "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Ibid.* If the traditional tools of statutory construction do not determine Congress' intent, the Court defers to the reasonable interpretation of the agency responsible for administering the statutory provision at issue; here, the Secretary. *See id.* at 843-44 (agency's legislative regulations are controlling if reasonable); *Martin v. OSHRC (CF&I Steel Co.)*, 499 U.S. 144, 150-57 (1991); *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 227 (2d Cir. 2002).

The Secretary's interpretations of her occupational safety and health standards and citations are entitled to deference if, in cases of ambiguity, the interpretations "sensibly conform[] to the purpose and wording" of the standards and citation. *See CF&I*, 499 U.S. at 150-51 (deference standard for Secretary's interpretation of her standards); *Am. Train Dispatchers Ass'n v. ICC*, 54 F.3d 842, 848 (D.C. Cir. 1995) (applying *CF&I* as the standard of review of an agency's interpretation of its order); *see also Consumers*

Energy Co. v. FERC, 226 F.3d 777, 781 (6th Cir. 2000) (court's review of an agency's interpretation of its own orders is highly deferential); *Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 260-63 (3d Cir. 2002) (reviewing Commission's interpretation of a citation under the arbitrary, capricious, abuse of discretion, or contrary to law standard). The Secretary's reasonable interpretation is entitled to deference even if the Commission has adopted a contrary interpretation. *See CF&I*, 499 U.S. at 150-57; *Russell P. Le Frois Builder, Inc.*, 291 F.3d at 227.

II. The Commission erred in vacating the citation on the grounds that the citation covered the "same condition" as an earlier citation that was still under contest.

A. *Introduction*

The issue in this case is whether § 10(b) of the Act precluded enforcement of the 1994 citation alleging that Manganas had violated 29 C.F.R. § 1926.451(a)(4) by exposing its employees to fall hazards of between 30 and 140 feet while they worked on specific pick scaffolds. To resolve this issue, the Court must first determine the appropriate scope of § 10(b)'s language that allows an employer to defer correcting a cited violation. The Court must then determine whether the 1994 citation alleges a violation that falls within that language.

As we show below, Congress unambiguously expressed its intent that the language of § 10(b) allowing an employer to defer correcting a cited violation applies only to the violation that is alleged in the citation. Even if it were possible to construe the language otherwise, interpreting § 10(b) as applying only to the violation alleged in the citation is plainly a reasonable interpretation of the provision. The 1993 and 1994 citations at issue here, however, involve different violations. Accordingly, the Commission erred in holding that § 10(b) barred issuance and enforcement of the 1994 citation, and the case should be remanded for a determination on the merits of that citation.

B. *Section 10(b) does not limit the Secretary's right to enforce the 1994 citation.*

1. The text and purpose of § 10(b) show that it applies only when successive citations (or a citation and subsequent failure-to-abate notice) involve the same "violation."

Section 10(b) authorizes the Secretary to issue a failure-to-abate notice proposing penalties of up to $7,000 per day if she determines that an employer has failed to "correct a violation for which a citation has been issued within the period permitted for its correction." 29 U.S.C. §§ 659(b), 666(d). For uncontested citations, the citation sets the period by which the employer must correct a violation. *See id.* §§ 658, 659(a). If the employer in good faith timely contests the citation, however, the period permitted for

correcting a cited violation does "not begin to run until" the Commission issues a final order resolving the contest. *Id.* § 659(b) (the "stay-of-abatement provision").[8]

The text of § 10(b) unambiguously limits its stay-of-abatement provision to the "violation for which a citation has been issued." 29 U.S.C. § 659(b). That is the only violation addressed by § 10(b), and therefore it is the only violation to which the stay-of-abatement provision can apply. *See ibid.*; *Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 261 (3d Cir. 2002) (a failure-to-abate notice may be issued for a condition that is "identical" to one that is cited in citation); 29 C.F.R. § 1903.18(a) (implementing § 10(b) and referring to employer's failure to correct "an alleged violation for which a citation has been issued"). Thus, the stay-of-abatement provision authorizes the employer who contests a citation in good faith to defer correcting a cited violation, but it does not purport to immunize an employer from liability for other violations. *See* 29 U.S.C. § 659(b); *Reich v. Manganas*, 70 F.3d 434,

[8] The relevant part of § 10(b) provides: "If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall" issue a notice proposing daily penalties of up to $7,000 per day for the failure to abate. A copy of § 10(b) and § 17(d), which sets the penalty limit, are reproduced in the addendum to this Brief.

437, 438 (6th Cir. 1995) ("mere filing of a notice of contest by an employer should not be interpreted so as to bar the Secretary" from protecting workers, and § 10(b) provides a defense to sanctioning of "the violation" but not for violations that are "separate from the earlier cited transgression").[9]

The purpose of § 10(b)'s stay-of-abatement provision also shows that it applies only to the "violation for which a citation has been issued." The provision, stated parenthetically, clarifies when an employer is exposed to the daily penalties authorized by that section of the Act. *See* 29 U.S.C § 659(b). Accordingly, the primary purpose of the stay-of-abatement provision is to ensure that the employer is not sanctioned for failing to abate a violation until an order requires it to do so. *See Manganas*, 70 F.3d at 438 (§ 10(b) "provides an employer with an absolute defense to administrative sanctioning of the [cited and contested] violation"). Presumably, the provision is also intended to ensure that the employer is not required to incur the expense of correcting a condition that is later determined to be in compliance.

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[9] *See also Andrew Catapano Enters.*, 17 O.S.H. Cas. (BNA) 1776, 1778-79 (Rev. Comm'n 1996) ("contesting a citation involving one worksite would stay only the correction of 'the violation for which a citation has been issued[;]'" it would not stay abatement of a violation of the same standard occurring elsewhere); *Simmons, Inc.*, 6 O.S.H. Cas. (BNA) 1157, 1159 (Rev. Comm'n 1977) (noting that failure-to-abate penalty provision was "inapposite" to successive citations issued for violations of the same standard occurring at different locations of the facility).

These purposes of the stay-of-abatement provision are not implicated if a second citation is for a different violation than the one originally cited. *See* R.104 Dec., pg. 44 n.36, Apx. pg. 54 n.36 ("an employer has no legitimate reason to avoid suffering *some* consequences for *multiple* violations of the same standard at different times and places") (Rogers, C., dissenting)). In that case, the second citation will not impose a sanction for failing to correct the initial violation or require the employer to incur the expense of correcting the initial condition. Instead, it will, if affirmed or uncontested, result in a sanction and abatement requirement only for the different violation that is alleged in the second citation, and only after the employer has had an opportunity to contest the second citation.

On the other hand, the purposes of the Act would be undermined if § 10(b)'s stay-of-abatement provision extended to violations other than the one originally cited. *See* R.104 Dec., pg. 44, Apx. pg. 54 (concluding that majority decision was "extraordinarily troubling . . . for worker safety") (Rogers, C., dissenting)). An employer obtains the benefit of the stay-of-abatement provision merely by filing a notice of contest "in good faith and not solely for delay or avoidance of penalties." 29 U.S.C. § 659(b). If this stay extended to violations other than the cited violation, an employer would

be able to grant itself a license to commit new and independent violations merely by contesting in good faith a citation for the first violation.

Congress could not have intended such a result. It provided for the failure to abate penalties authorized by § 10(b) to provide the Secretary with an additional enforcement tool for advancing the Act's goal of "assur[ing] so far as possible" safe working conditions. *See* 29 U.S.C. §§ 651(b), 659(b) (respectively, purpose and failure-to-abate provisions); *Alden Leeds*, 298 F.3d at 260 (discussing the place failure-to-abate penalties have in the Act's graduated penalty scheme). Construing § 10(b)'s stay-of-abatement provision as extending to violations other than the originally cited violation, and as a result immunizing the employer from liability for subsequent violations, would run counter to that purpose and undermine the deterrent effect OSH Act penalties are intended to have. *See Manganas*, 70 F.3d at 437-38; *Reich v. OSHRC (Jacksonville Shipyards, Inc.)*, 102 F.3d 1200, 1203 (11th Cir. 1997) (discussing the deterrent effect OSH Act penalties are intended to have). Therefore, such a construction should be avoided. *See Nat'l Eng'g & Contracting v. OSHA*, 928 F.2d 762, 767 (6th Cir. 1991) (OSH Act "must be liberally construed so as to afford workers the broadest possible protection").

Finally, the Secretary's regulation implementing § 10(b) represents her considered view that the statutory provision applies only with regard to the violation "alleged" in the initial citation. *See* 29 C.F.R. § 1903.18(a). In light of the text and purposes of the statutory provision, this is plainly a reasonable interpretation that merits this Court's deference.

Thus, the traditional tools of statutory interpretation establish that § 10(b) is relevant only when successive citations (or a citation and subsequent failure to abate notice) involve the same violation. Even if it were possible to construe § 10(b) otherwise—and the Secretary does not believe that it can be—the Secretary's interpretation is plainly reasonable, and this Court should accept that interpretation. *See supra* p. 23 (standard of review for interpretations of OSH Act).[10]

[10] Even if the Secretary's regulation did not answer the interpretive question at issue here and the standard of review for informally expressed agency views applied, the Court should accept the Secretary's interpretation because it persuasively interprets the statutory provision. *See Martin v. OSHRC (CF&I Steel Co.)*, 499 U.S. 144, 157 (1991) (interpretations that are embodied in the Secretary's citations and in her litigating position before the Commission are worthy of deference); *Cathedral Candle Co. v. United States Int'l Trade Comm'n*, 400 F.3d 1352, 1365-67 (Fed. Cir. 2005) (applying Supreme Court cases involving deference to an agency's informally expressed statutory interpretations); *see also infra* pp. 31-36 (explaining why the citations at issue here involve different violations under § 10(b)).

2. The 1993 and 1994 citations involve different "violations," and therefore § 10(b) does not preclude enforcement of the 1994 citation.

The scaffold standard cited in both citations required employers to install guardrails "on all open sides and ends of platforms more than 10 feet above the ground." 29 C.F.R. § 1926.451(a)(4). Under precedent predating the conduct at issue in this case by 15 years, each scaffold having a platform that lacks appropriate guardrails constitutes a separate violation of the cited standard. *Hoffman Constr. Co.*, 6 O.S.H. Cas. (BNA) 1274, 1275 (Rev. Comm'n 1978). Thus, although the 1993 and 1994 citations both alleged violations of 29 C.F.R. § 1926.451(a)(4)'s guardrail requirement, the two citations involve different violations of that requirement, and the 1994 citation does not implicate § 10(b)'s stay-of-abatement provision. 29 U.S.C. § 659(b); R.1 Citation, Item 13, Exh. C-72, pg. 1, 9 (1993 citation), Apx. pg. 103-04, 217-18.[11]

[11] *See also Major Constr. Corp.*, 20 O.S.H. Cas. (BNA) 2109, 2111 (Rev. Comm'n 2005) (Secretary may cite as separate violations "multiple instances . . . of the same [fall protection] standard based on different times or different places of occurrence"); *MJP Constr. Co.*, 19 O.S.H. Cas. (BNA) 1638, 1647 (Rev. Comm'n 2001) (noting that prior cases "specifically held that the Secretary may appropriately cite separate violations for each individual instance of improper fall protection where each alleged instance of violation involves either a different floor or a different location on each floor," and that "abatement of one instance of violation would not abate other violations occurring at different locations and other times") (citing *J.A. Jones Constr. Co.* 15 O.S.H. Cas. 2201, 2212-13 (Rev. Comm'n 1993) and

The 1993 citation was issued when Manganas was working on the northbound bridge and specifically cited as the violation the "platform(s)" of the scaffold Manganas had erected in bay 31. Exh. C-72, pg. 1, 9, Apx. pg. 217-18). Nothing in the 1993 citation seeks to impose abatement requirements with regard to scaffolds Manganas had not yet erected. *Ibid.*[12] Moreover, the penalty that was proposed, and the lower penalty that was ultimately assessed, was based on the facts surrounding the violation alleged in and proven under that citation. *See ibid.*; *Manganas Painting Co.*, 19 O.S.H. Cas. (BNA) 1102, 1104 (Rev. Comm'n 2000) (assessing $1,000 penalty based in part on fact that one employee was exposed to violation), *aff'd*, 273 F.3d 1131 (D.C. Cir. 2001).

Andrew Catapano Enterps., 17 O.S.H. Cas. 1776, 1786 (Rev. Comm'n 1996)), *aff'd*, 19 O.S.H. Cas. (BNA) 2179 (D.C. Cir. 2003) (unpublished).

[12] The 1993 citation stated:

"29 CFR 1926.451(a)(4): Standard guardrails and toeboards were not installed on all open sides and ends of platform(s) more than 10 feet above the ground or floor:

"(a) Located under the I-71 Bridge deck approximate Bay 31 an employee was working from a pick scaffold without standard guardrails and/or adequately secured lanyard /safety in that, the lanyard hook was just clipped to a column flange exposing the employee to a potential fall in excess of 200'"

(Exh. C-72, pg. 1, 9, Apx. pg. 217-18).

The 1994 citation, on the other hand, alleged as violations the "platform(s)" of scaffolds at different locations on the southbound bridge; these cited platforms had different supporting structures than the platform cited in 1993 and were indisputably different scaffolds than the scaffold cited in 1993. R.1 Citation, Item 13, Exh. C-72, pg. 1, 9 (1993 citation), Exh. C-2 (1994 construction diary for June 2, 4, and 5, 1994, documenting rigging for new containment in bays 37-50), Apx. pg. 103-04, 217-18, 205-12; 29 C.F.R. § 1926.452(b)(27) (defining "scaffold" as "[a]ny temporary elevated platform and its supporting structure used for supporting workmen or materials, or both"). Indeed, when the 1993 citation was issued, the scaffolds that were cited in the 1994 citation did not even exist. *See* Exh. C-72 (1993 citation), Exh. C-2 (1994 construction diary for June 2, 4, and 5, 1994, documenting rigging for new containment in bays 37-50), Apx. pg. 217-18, 205-12. And by its plain terms, the 1994 citation does not seek to assess a penalty for or abatement of the condition of any scaffold that was cited in 1993. R.1 Citation, Item 13 (1994 citation), Exh. C-72 (1993 citation), Apx. pg. 103-04, 217-18.[13]

[13] The 1994 citation states:

"Citation 2 Item 13a Type of Violation: Willful

"The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

"29 CFR 1926.451(a)(4): Standard guardrails and toeboards were not installed on all open sides and ends of platform(s) more than 10 feet above the ground or floor:

"(a) Located under and along the east side of the south bound bridge deck, approximate panel point between U38-L38, an employee was observed working from a pic scaffold spray painting a column and the upper cord or steel area without standard guardrails or equivalent, exposing the employee to perimeter exterior falls in excess of 100' and interior falls of approximately 30'.

"Date By Which Violation Must be Abated: Immediate Upon Receipt
"Proposed Penalty: $70000.00

"Citation 2 Item 13b Type of Violation: Willful

"29 CFR 1926.451(a)(4): Standard guardrails and toeboards were not installed on all open sides and ends of platform(s) more than 10 feet above the ground or floor:

"(a) Employees were exposed to a fall in excess of 140' while using the scaffold pic adjacent to the ladder suspended over the side of the bridge outside the containment area south of pier 4 in that there were no guard rails on the pic.

"Date By Which Violation Must be Abated: Immediate Upon Receipt

"Citation 2 Item 13c Type of Violation: Willful

"29 CFR 1926.451(a)(4): Standard guardrails and toeboards were not installed on all open sides and ends of platform(s) more than 10 feet above the ground or floor:

"(a) Located under and along the east side of the south bound bridge deck approximate panel point U34, employees were working from a pick

Presumably, as then-Judge Alito has explained, the Secretary could have drafted the 1993 (and for that matter the 1994) citation to allege as the violation Manganas's "practice" of not guarding pick scaffolds. *See Alden Leeds*, 298 F.3d at 263. Manganas's "practice" would then have been the "violation for which a citation ha[d] been issued," and Manganas's abatement obligations under such a citation would have extended beyond the specific scaffolds referred to in the citation. Manganas's contest to such a citation would implicate § 10(b) with regard to unlisted scaffolds, at least to the extent that the "practice" could be viewed as a "continuing violation." *See id.* at 260, 261 n.8 (for a failure-to-abate, the violation must exist "continuously" from the initial citation through its discovery on re-inspection).

The Secretary did not draft the 1993 citation, however, to allege as the violation Manganas's "practice" of not guarding pick scaffolds. Instead, she drafted the citation to allege as the violation the condition of a particular pick scaffold. This manner of alleging the violation is consistent with the requirements of the standard, *Hoffman Constr. Co.*, 6 O.S.H. Cas. at 1275,

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scaffold without standard guardrails or equivalent exposing employees to perimeter exterior falls in excess of 100' and interior falls in excess of 30'. "Date By Which Violation Must be Abated: Immediate Upon Receipt" R.1 Citation, Item 13, Apx. pg. 103-04.

and the alleged 1993 violation cannot be construed as implicating the condition of any other scaffold. *See Alden Leeds*, 298 F.3d at 262-63; *infra* pp. 39-42 (explaining that, barring citation language to the contrary, equipment-related citations are limited to the equipment listed in the citation). Therefore, the 1994 citation does not involve a "violation for which a citation ha[d] been issued," and § 10(b)'s stay-of-abatement provision is irrelevant here. Manganas's contest to the 1993 citation allowed it to defer correcting the violative scaffold covered by that citation, but it did not authorize Manganas to commit new violations such as the ones cited in the 1994 citation. *See* 29 U.S.C. § 659(b).

In the Secretary's view, the plain language of the 1993 and 1994 citations compels the conclusion that they each involve a different "violation" as that term is used in § 10(b). Even if the citations were susceptible to an alternative interpretation, however, construing them as involving different violations "sensibly conforms to the purpose and wording" of the citations. *See Martin v. OSHRC (CF&I Steel Co.)*, 499 U.S. 144, 150-51 (1991) (deference standard for Secretary's interpretation of her standards); *Am. Train Dispatchers Ass'n v. ICC*, 54 F.3d 842, 848 (D.C. Cir. 1995) (applying *CF&I* as the standard of review of an agency's interpretation of its order).

3. The Commission's reasons for determining that § 10(b) precluded issuance and enforcement of the 1994 citation are without merit.

Without attempting to show that its result was compelled by the language of § 10(b) or the citations or that the Secretary had unreasonably construed the provision or her citations, the Commission ruled that § 10(b) was a complete defense to the 1994 citation. *See* R.104 Dec., pg. 30-32, Apx. pg. 40-42. In the Commission's view, because both the 1993 and 1994 citations addressed the lack of guardrails on the "same type of pick scaffolds," and Manganas's defense to the two citations was the same, the two citations covered the "same condition." *Id.* at 31, Apx. pg. 41. The majority believed that a prior Commission decision, *Hamilton Die Cast, Inc.*, 12 O.S.H. Cas. (BNA) 1797 (Rev. Comm'n 1986), *overruled in part by R & R Builders Inc.*, 14 O.S.H. Cas. (BNA) 1844 (Rev. Comm'n 1990), supported this determination. *Id.* at 30-31, Apx. pg. 40-41. Based on this "same condition" determination, the Commission vacated the 1994 citation without examining the merits of the citation. *Id.* at 30-32, Apx. pg. 40-42. The Commission's analysis is untenable and leads to a result Congress could not have intended.

a. As shown above, it is clear that, for § 10(b) to apply here, the 1993 and 1994 citations must involve the same "violation." The Commission did not even address the statutory language and attempt to show—by reference

to the language of the citations or otherwise—that the two citations involved the same violation. Indeed, by acknowledging that the violations occurred at "essentially two different work sites" and involved the "same type of pick scaffold," the Commission implicitly determined that the citations involved different scaffolds at different locations and hence different violations. *See* R.104 Dec., pg. 31, Apx. pg. 41; *supra* p. 31 (a violation of the cited standard occurs for every scaffold that lacks required guardrails).

b. The Commission decision fares no better even if one assumes that the Commission majority used the phrase "same condition" as a synonym for the phrase "same violation."[14] As shown above, the two citations cannot be viewed as involving the same violation because they involve different scaffolds and nothing in the 1993 citation can be construed as imposing abatement obligations with regard to scaffolds that had not yet been erected, such as the ones listed in the 1994 citation.

[14] Because § 10(b) unambiguously refers to "a violation," there is no need to consider the possibility that the Commission may have intended "same condition" to mean something other than "same violation." If the Commission intended the two phrases to have different meanings, its decision would necessarily contravene the plain language of § 10(b). Similarly, the Commission must have relied on § 10(b)'s does "not begin to run" language, as nothing else in the provision even arguably supports its result.

c. The Commission majority's observation that both the 1993 and 1994 citations involved Manganas's failure to guard the "same type of pick scaffold" in no way supports a determination that the citations involved the same violation. Regardless of the similarities between the scaffolds cited in the 1993 and 1994 citations, to establish each cited violation the Secretary had to prove that the terms of the standard were not met with regard to each cited scaffold. *See R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 818 (6th Cir. 1998) (stating Secretary's burden of proof). The fact that two scaffolds are of the "same type" does nothing to establish, for example, that either one was more than ten feet above the ground and that therefore Manganas had to install guardrails on either of them. *See* 29 C.F.R. § 1926.451(a)(4) (requirement for guardrails).[15] Similarly, Manganas's defenses concerning the feasibility of guardrails and the use of safety belts as an alternative form of protection depend on the particular circumstances surrounding the particular pick scaffolds described in the citations and the employees' use or non-use of safety belts while on the pick scaffolds. *See*

[15] For example, it was undisputed that there were no nets under the scaffold at issue in the 1993 citation. *Manganas Painting Co.*, 19 O.S.H. Cas. (BNA 1102, 1103 (Rev. Comm'n 2000), *aff'd*, 273 F.3d 1131 (D.C. Cir. 2001). Here, a net was in place, and Manganas suggested that the net provided sufficient fall protection. *See* R.104 Dec., pg. 29, R.79 Employer's Post-Hearing Br., pg. 57, Apx. pg. 39, 105.

Manganas Painting Co., 19 O.S.H. Cas. (BNA) 1102, 1104 (Rev. Comm'n 2000) (rejecting, based on the facts of that case, Manganas's claims that a cited pick scaffold was a catenary scaffold and that it effectively protected employees by requiring use of safety belts), *aff'd*, 273 F.3d 1131 (D.C. Cir. 2001).

In fact, both the U.S. Court of Appeals for the Third Circuit and Commission precedent have squarely rejected the Commission majority's theory that two citations involve the same violation if they involve the "same type" of equipment. In *Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256 (3d Cir. 2002), the Third Circuit reversed a Commission decision upholding a failure-to-abate notice for 33 instances of improperly stored chemical oxidizers where the citation had alleged 13 different instances of improperly stored oxidizers and the employer had remedied those specific instances. 298 F.3d at 260-62. The court concluded that the earlier citation alleging specific instances of improper storage could not be read broadly to cover all oxidizers stored in Alden Leeds's plant. *Id.* at 262-63. Similarly, in *Lumex Med. Prods., Inc.*, 18 O.S.H. Cas. (BNA) 2002 (Rev. Comm'n 1999) ("*Lumex*"), the Commission held that unguarded machines that had not been listed in a citation for other unguarded machines could not form the basis of a failure-to-abate notice, even though in a settlement agreement resolving

the employer's contest to the citation the employer had agreed to guard the unlisted machines; because the settlement agreement failed to modify the citation, the employer's abatement obligations under the citation did not extend to the unguarded machines. 18 O.S.H. Cas. at 2003-06.

The issue whether current and prior citations involve the same "violation" is identical whether § 10(b) is used to determine whether an employer is liable for daily failure-to-abate penalties, as in *Alden Leeds* and *Lumex*, or, as the majority used it here, to determine whether a cited violation is covered by § 10(b)'s stay-of-abatement provision. *See supra* p. 26 (§ 10(b) addresses only one "violation"). In either case, the wording of the citations is controlling, and if the earlier citation alleges only a particular instance of a hazardous condition as the violation, a later citation for a different instance of the same type of hazardous condition involves a different violation for the purposes of § 10(b). *Alden Leeds*, 298 F.3d at 261-63; *Lumex*, 18 O.S.H. Cas. at 2004-06. As shown above, in light of the wording of the citations involved here, the 1993 and 1994 citations involve different "violations" for the purposes of § 10(b).[16]

[16] The Secretary's position here—that the wording of the citations is controlling and that the citations here involved different violations—is fully consistent with her positions in *Lumex* and *Alden Leeds* that the citations and failure-to-abate notifications involved in those cases covered the same violation. In *Lumex*, the Secretary argued that the settlement agreement

d. The Commission majority's observation that Manganas presented the same legal argument in defense of both the 1993 and 1994 citations also fails to support its determination that the citations covered the same violation. Whether two citations involve the same violation depends on the specific wording of the citations, not the employer's legal theory in defense of the citations. As explained both above and below, Congress could not have intended that an employer could grant itself a license to commit additional and independent violations of a standard by contesting a citation and then raising a defense that, regardless of its merits, is broad enough to be applied to subsequent and wholly distinct violations. *See supra* at pp. 28-29; *infra* at pp. 44-45; *see also* R.104 Dec., pg. 38, Apx. pg. 48 (majority's

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modified the citation. 18 O.S.H. Cas. at 2004. And *Alden Leeds* involved a violation of the requirement to free workplaces from "recognized hazards," 29 U.S.C. § 654(a)(1), and the Secretary argued that the cited violation was the presence of the recognized fire hazard from the improper storage of oxidizers, rather than the presence of particular piles of improperly stored oxidizers. 298 F.3d at 258, 260-61. The Secretary has long recognized that, barring citation language to the contrary, for equipment-related violations only equipment that is specifically identified in a citation can be the basis of a failure-to-abate notification. *See Long Mfg. Co., N.C., Inc. v. OSHRC*, 554 F.2d 903 (8th Cir. 1977) (involving failure-to-abate notice for machines listed in original citation and a repeat citation for another machine); 29 C.F.R. § 1903.19(i), App. C (abatement verification provisions for cited movable equipment); OSHA Instruction CPL 2.103, *Field Inspection Reference Manual*, Ch. III, C.2.f (6) (Sept. 26, 1994) ("A failure to abate situation exists when *an item of equipment* or condition previously cited has never been brought into compliance . . . .") (emphasis added), *reprinted in* 4 O.S.H. Rep. (BNA) Reference File 77:0101, :0185.

holding was a "misuse of section 10(b)" that grants "a free pass to bad actors to continue to violate the Act—and endanger their employees") (Rogers, C., dissenting).

e. The Commission's reliance on its decision in *Hamilton Die Cast*, 12 O.S.H. Cas. 1797, is misplaced. In that case, the Secretary effectively conceded that the two citations involved the same violation; she argued that the second citation was nevertheless appropriate because, in her view, "the period permitted for . . . correction" of the violation had expired. The Secretary argued that the ALJ's decision affirming the initial citation had become a final order when the Commission did not direct review of that ruling, but directed review of another aspect of the ALJ's decision. 12 O.S.H. Cas. at 1798-99. The Commission rejected the Secretary's view of finality and affirmed the ALJ's decision vacating the second citation without reaching the issue whether the two citations in fact addressed the same violation. *See id.* at 1798, 1804 (noting, respectively, that the Secretary's petition for review had taken "exception only to the judge's earlier ruling that the undirected face protection item in *Hamilton I* was not a final order," and that in light of the Secretary's failure to argue to the contrary, it was "adopt[ing] the judge's view that citation of the same condition" was improper).

Moreover, any determination on whether the two citations involved in *Hamilton Die* involved the same violation would necessarily have been based on the wording of those citations, which involved a different standard. A determination that those citations both involved the "same condition" provides no support for concluding that the two citations here involved the same violation. *See* R.104 Dec., pg. 43, Apx. pg. 53 (citation in *Hamilton Die* was for "an allegedly violative practice") (Rogers, dissenting).

f. The Commission's decision leads to a result Congress could not have intended. Under the Commission's decision, Manganas's contest of the 1993 citation relieved Manganas of the obligation to protect its employees as they worked on pick scaffolds until its contest was resolved by the Commission—as it turns out, a seven-year period—no matter how many pick scaffolds Manganas used during this seven-year period and no matter where and when during this seven-year period Manganas erected these pick scaffolds. Thus, rather than applying § 10(b) as an enforcement tool to advance the Act's goal of "assur[ing] so far as possible" safe and healthful conditions, the Commission converted § 10(b) into a means by which Manganas was able to grant itself a license to commit new violations of the cited standard merely by filing a notice of contest in good faith. This turns § 10(b) on its head and, if allowed to stand, reduces the incentive to comply

with the OSH Act that the Act's penalty provisions are intended to provide to employers. *Supra* pp. 29.[17]

[17] Unfortunately, it is not uncommon for the Commission to take several years to resolve contested cases. Indeed, the seven-year period the Commission took to resolve the initial contest is approximately one-half the time the Commission took to resolve other citations arising from Manganas's work on the Jeremiah Morrow Bridge Project. *See* R.104 Dec., pg. 2, Apx. pg. 12 (citing *Manganas Painting Co.*, OSHRC No. 94-588 (Comm'n March 23, 2007)).

CONCLUSION

Under any reasonable reading of § 10(b) and the citations, § 10(b) did not provide Manganas with a defense to the 1994 citation. Thus, the Commission's order vacating the 1994 citation should be reversed and the matter remanded for a determination on the citation's allegations.[18]

Respectfully submitted.

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[18] Although Manganas admits that the scaffolds lacked guardrails, it raised numerous affirmative defenses and challenged the probative value of the Secretary's evidence that its employees did not use safety belts. Even if this Court were to reject these defenses as a matter of law, it would still have to remand the matter for a determination on whether the violations were willful and a penalty assessment, and to decide these matters, the Commission would have to review much of the same evidence that must be reviewed to determine that the Secretary proved the violations. Thus, the Secretary believes that the most appropriate course is to leave the issue of whether the violations were established for the Commission to determine on remand.

Certificate of Compliance

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), this is to certify that the foregoing brief complies with the type-volume limitation prescribed in Federal Rule of Appellate Procedure 32(a)(7)(B). It uses Times New Roman 14-point typeface and contains 10,637 words.

_____

Ronald J. Gottlieb
Attorney

Certificate of Service

I hereby certify that on this 16th day of November, 2007, I served two copies of the Final Brief for the Secretary of Labor by Federal Federal Express overnight delivery on the following:

Manganas Painting Co.
Attention: Nick Manganas
688 S Crest Dr
Pittsburgh PA 15226

Nick Manganas, President
255 Linden Creek Rd
Canonsburg, PA 15317

_____
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Attorney

Statutory and Regulatory Addendum

§ 659. Enforcement procedures

(a) Notification of employer of proposed assessment of penalty subsequent to issuance of citation; time for notification of Secretary by employer of contest by employer of citation or proposed assessment; citation and proposed assessment as final order upon failure of employer to notify of contest and failure of employees to file notice

If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) Notification of employer of failure to correct in allotted time period violation for which citation was issued and proposed assessment of penalty for failure to correct; time for notification of Secretary by employer of contest by employer of notification of failure to correct or proposed assessment; notification or proposed assessment as final order upon failure of employer to notify of contest

If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 666 of this title by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) Advisement of Commission by Secretary of notification of contest by employer of citation or notification or of filing of notice by any employee or representative of employees; hearing by Commission; orders of Commission and Secretary; rules of procedure

If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

(Pub. L. 91–596, §10, Dec. 29, 1970, 84 Stat. 1601.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 660, 666, 667 of this title; title 2 section 1341; title 3 section 425.

§ 666. Civil and criminal penalties

(a) Willful or repeated violation

Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

(b) Citation for serious violation

Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $7,000 for each such violation.

(c) Citation for violation determined not serious

Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $7,000 for each such violation.

(d) Failure to correct violation

Any employer who fails to correct a violation for which a citation has been issued under section 658(a) of this title within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 659 of this title initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

(e) Willful violation causing death to employee

Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Giving advance notice of inspection

Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) False statements, representations or certification

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(h) Omitted

(i) Violation of posting requirements

Any employer who violates any of the posting requirements, as prescribed under the provisions of this chapter, shall be assessed a civil penalty of up to $7,000 for each violation.

(j) Authority of Commission to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) Determination of serious violation

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(l) Procedure for payment of civil penalties

Civil penalties owned under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

(Pub. L. 91–596, §17, Dec. 29, 1970, 84 Stat. 1606, 1607; Pub. L. 101–508, title III, §3101, Nov. 5, 1990, 104 Stat. 1388–29.)

CODIFICATION

Subsec. (h) of this section amended section 1114 of Title 18, Crimes and Criminal Procedure, and enacted note set out thereunder.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101–508, §3101(1), substituted "$70,000 for each violation, but not less than $5,000 for each willful violation" for "$10,000 for each violation".

Subsecs. (b) to (d), (i). Pub. L. 101–508, §3101(2), substituted "$7,000" for "$1,000".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 659, 660, 667 of this title.

29 C.F.R. s **1926.451**

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
SUBTITLE B--REGULATIONS RELATING TO LABOR
CHAPTER XVII--OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR
PART 1926--SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION
SUBPART L--SCAFFOLDING

s **1926.451** Scaffolding.

(a) General requirements.
(1) Scaffolds shall be erected in accordance with requirements of this section.
(2) 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 brick, or concrete blocks, shall not be used to support scaffolds or planks.
(3) No scaffold shall be erected, moved, dismantled, or altered except under the supervision of competent persons.
(4) 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 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.
(5) Guardrails shall be 2 x 4 inches, or the equivalent, approximately 42 inches high, with a midrail, when required. Supports shall be at intervals not to exceed 8 feet. Toeboards shall be a minimum of 4 inches in height.
(6) Where persons are required to work or pass under the scaffold, scaffolds shall be provided with a screen between the toeboard and the guardrail, extending along the entire opening, consisting of No. 18 gauge U.S. Standard wire 1/2 -inch mesh, or the equivalent.
(7) Scaffolds and their components shall be capable of supporting without failure at least 4 times the maximum intended load.
(8) Any scaffold including accessories such as braces, brackets, trusses, screw legs, ladders, etc. damaged or weakened from any cause shall be immediately repaired or replaced.
(9) All load-carrying timber members of scaffold framing shall be a minimum of 1,500 fiber (Stress Grade) construction grade lumber. All dimensions are nominal sizes as provided in the American Lumber Standards, except that where rough sizes are noted, only rough or undressed lumber of the size specified will satisfy minimum requirements.
(10) All planking shall be Scaffold Grades, or equivalent, as recognized by approved grading rules for the species of wood used. The maximum permissible spans for 2- x 10-inch or wider planks shall be as shown in the following:

TABLE L-3--MATERIAL

Full thickness undressed lumber	Nominal thickness lumber [FN1]				
Working load (p.s.f.)	25	50	75	25	50

29 C.F.R. s **1926.452**

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
SUBTITLE B--REGULATIONS RELATING TO LABOR
CHAPTER XVII--OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR
PART 1926--SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION
SUBPART L--SCAFFOLDING

s **1926.452** Definitions applicable to this subpart.

(a) [Reserved]
(b) "Scaffolding"--
(1) "Bearer"--A horizontal member of a scaffold upon which the platform rests and which may be supported by ledgers.
(2) "Boatswain's chair"--A seat supported by slings attached to a suspended rope, designed to accommodate one workman in a sitting position.
(3) "Brace"--A tie that holds one scaffold member in a fixed position with respect to another member.
(4) "Bricklayers' square scaffold"--A scaffold composed of framed wood squares which support a platform, limited to light and medium duty.
(5) "Carpenters' bracket scaffold"--A scaffold consisting of wood or metal brackets supporting a platform.
(6) "Coupler"--A device for locking together the component parts of a tubular metal scaffold. (The material used for the couplers shall be of a structural type, such as a drop-forged steel, malleable iron, or structural grade aluminum.)
(7) "Crawling board or chicken ladder"--A plank with cleats spaced and secured at equal intervals, for use by a worker on roofs, not designed to carry any material.
(8) "Double pole or independent pole scaffold"--A scaffold supported from the base by a double row of uprights, independent of support from the walls and constructed of uprights, ledgers, horizontal platform bearers, and diagonal bracing.
(9) "Float or ship scaffold"--A scaffold hung from overhead supports by means of ropes and consisting of a substantial platform having diagonal bracing underneath, resting upon and securely fastened to two parallel plank bearers at right angles to the span.
(10) "Guardrail"--A rail secured to uprights and erected along the exposed sides and ends of platforms.
(11) "Heavy duty scaffold"--A scaffold designed and constructed to carry a working load not to exceed 75 pounds per square foot.
(12) "Horse scaffold"--A scaffold for light or medium duty, composed of horses supporting a work platform.
(13) "Interior hung scaffold"--A scaffold suspended from the ceiling or roof structure.
(14) "Ladder jack scaffold"--A light duty scaffold supported by brackets attached to ladders.
(15) "Ledgers (stringers)"--A horizontal scaffold member which extends from post to post and which supports the putlogs or bearers forming a tie between the posts.
(16) "Light duty scaffold"--A scaffold designed and constructed to carry a working load not to exceed 25 pounds per square foot.
(17) "Manually propelled mobile scaffold"--A portable rolling scaffold supported by casters.
(18) "Masons' adjustable multiple-point suspension scaffold"--A scaffold having a continuous platform supported by bearers suspended by wire rope from overhead supports, so arranged and operated as to permit the raising or lowering of the platform to desired working positions.
(19) "Maximum rated load"--The total of all loads including the working load, the weight of the scaffold, and such other loads as may be reasonably anticipated.
(20) "Medium duty scaffold"--A scaffold designed and constructed to carry a working load not to exceed 50 pounds per square foot.
(21) "Midrail"--A rail approximately midway between the guardrail and platform, secured to the uprights erected along the exposed sides and ends of platforms.

(22) "Needle beam scaffold"--A light duty scaffold consisting of needle beams supporting a platform.
(23) "Outrigger scaffold"--A scaffold supported by outriggers or thrustouts projecting beyond the wall or face of the building or structure, the inboard ends of which are secured inside of such building or structure.
(24) "Putlog"--A scaffold member upon which the platform rests.
(25) "Roofing or bearer bracket"--A bracket used in slope roof construction, having provisions for fastening to the roof or supported by ropes fastened over the ridge and secured to some suitable object.
(26) "Runner"--The lengthwise horizontal bracing or bearing members or both.
(27) "Scaffold"--Any temporary elevated platform and its supporting structure used for supporting workmen or materials, or both.
(28) "Single-point adjustable suspension scaffold"--A manually or power- operated unit designed for light duty use, supported by a single wire rope from an overhead support so arranged and operated as to permit the raising or lowering of platform to desired working positions.
(29) "Single-pole scaffold"--Platforms resting on putlogs or cross beams, the outside ends of which are supported on ledgers secured to a single row of posts or uprights, and the inner ends of which are supported on or in a wall.
(30) "Stone setters' adjustable multiple-point suspension scaffold"--A swinging type scaffold having a platform supported by hangers suspended at four points so as to permit the raising or lowering of the platform to the desired working position by the use of hoisting machines.
(31) "Toeboard"--A barrier secured along the sides and ends of a platform to guard against the falling of material.
(32) "Tube and coupler scaffold"--An assembly consisting of tubing which serves as posts, bearers, braces, ties, and runners, a base supporting the posts, and special couplers which serve to connect the uprights and to join the various members.
(33) "Tubular welded frame scaffold"--A sectional panel or frame metal scaffold substantially built up of prefabricated welded sections which consists of posts and horizontal bearer with intermediate members.
(34) "Two-point suspension scaffold (swinging scaffold)"--A scaffold, the platform of which is supported by hangers (stirrups) at two points, suspended from overhead supports so as to permit the raising or lowering of the platform to the desired working position by tackle or hoisting machines.
(35) "Window jack scaffold"--A scaffold, the platform of which is supported by a bracket or jack which projects through a window opening.
(36) "Working load"--Load imposed by men, materials, and equipment.

[55 FR 47687, Nov. 14, 1990]

PART 1926--SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

Source: 44 FR 8577, Feb. 9, 1979; 44 FR 20940, Apr. 6, 1979; 51 FR 24526, 24528, July 7, 1986, unless otherwise noted.

Editorial Note: At 44 FR 8577, Feb. 9, 1979, and corrected at 44 FR 20940, Apr. 6, 1979, OSHA reprinted without change the entire text of 29 CFR part 1926 together with certain General Industry Occupational Safety and Health Standards contained in 29 CFR part 1910, which have been identified as also applicable to construction work. This republication developed a single set of OSHA regulations for both labor and management forces within the construction industry.

SUBPART L--SCAFFOLDING

Authority: Sec. 107, Contract Work Hours and Safety Standards Act (40 U.S.C. 333); secs. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), or 1-90 (55 FR 9033), as applicable.

Source: 55 FR 47687, Nov. 14; 58 FR 35310, June 30, 1993, unless otherwise noted.

29 C. F. R. s **1926.452**

Secretary of Labor's Designation of Items
to be Included in the Joint Appendix

The Secretary of Labor hereby designates the following items to be included in the Joint Appendix.

1. The Certified List of the Occupational Safety and Health Review Commission.

2. The Secretary of Labor's Petition for Review.

3. The Commission's Decision, Dated April 25, 2007 (item 104 of Volume 33 of the Certified List).

4. The Administrative Law Judge's Decision and Order, Dated June 14, 1996 (item 86 of Volume 29 of the Certified List).

5. Item 13 of the Secretary's Citation 2 in OSHRC No. 95-0103, Dated December 14, 1994 (item 1 of Volume 21 of Certified List).

6. Page 57 of Employer's Post-Hearing Brief (item 79 of Volume 28 of Certified List).

7. The following Transcript Pages from the Hearing:

a. Steve Medlock: 464-67 (Volume 2 of the Certified List); 1173, 1231-33, 1238-40, 1243, 1255-57, 1270-71, 1306, 1318-22 (Volume 6 of the Certified List);

b. Andrew Manganas: 938-39 (Volume 5 of Certified List); 1588-92, 1602-04 (Volume 7 of the Certified List); 1707-08 (Volume 8 of the Certified List);

c. Nicholas Manganas: 1031 (Volume 5 of the Certified List); 1969 (Volume 9 of the Certified List);

d. John Collier: 1412, 1437-40 (Volume 7 of the Certified List);

e. Bruce Finnefrock: 1811 (Volume 8 of the Certified List);

f. William Miller: 1823-24 (Volume 8 of the Certified List);

g. Joseph DiPaolo: 1854 (Volume 8 of the Certified List);

h. Timothy McCully: 1875-76 (Volume 8 of the Certified List);

i. Joseph Lang: 1935-36 (Volume 8 of the Certified List);

8. The following Exhibits and portions of Exhibits introduced into evidence at the Hearing:

a. C-2, entries for the days June 2, 4, 5, and 6, 1994 (Volume 10 of the Certified List);

b. C-11 (Volume 10 of the Certified List);

c. C-12 (Volume 10 of the Certified List);

d. C-72, pages 1 and 9 (Volume 12 of the Certified List);

e. C-75 (Volume 12 of the Certified List);

f. C-94 (Volume 12 of the Certified List);

g. C-95 (Volume 12 of the Certified List);

h. C-96 (Volume 12 of the Certified List);

i. C-97 (Volume 12 of the Certified List);

j. C-98 (Volume 12 of the Certified List);

k. C-99 (Volume 12 of the Certified List);

l. C-100 (Volume 12 of the Certified List).

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