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SECRETARY OF LABOR, Complainant, v. FALCON STEEL CO., INC., Respondent.	OSHRC Docket Nos. 89-2883 & 89-3444

DECISION

BEFORE: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

Falcon Steel Company, Inc. ("Falcon"), a steel erection company, subcontracted to perform the steel erection work on a 60-story high-rise building known as "Liberty II" in Philadelphia, Pennsylvania. The building has a structural concrete core while the remaining structural elements are steel. Compliance officers John Wiseman and Charles Ferguson of the Department of Labor's Occupational Safety and Health Administration ("OSHA") conducted two inspections of the worksite in the late summer of 1989,[1] resulting in the issuance of eight willful, sixteen serious, and five other-than-serious citations.

Review was directed on four items, all addressing fall hazards. Falcon petitioned for review of an administrative law judge's affirmance of a citation for a willful violation of 29 C.F.R. § 1926.550(g)(2), restricting the use of personnel platforms known as "man baskets." The judge assessed a penalty of $10,000. The Secretary of Labor petitioned for review of

[1] This matter is a consolidation of two cases. Docket No. 89-2883 arises from the inspection of August 17-18, 1989. Docket No. 89-3444 arises from the inspection of August 28 - September 27, 1989.

the judge's vacation of three citation items: one willful violation of 29 C.F.R. § 1926.750(b)(1)(iii), requiring wire-rope cables at the perimeter of open-sided temporary floors, and two willful violations of 29 C.F.R. § 1926.105(a), requiring employers to provide some means of protection against falls of more than 25 feet.[2]

For the reasons set forth below, we find that the judge did not err in finding a violation of the man basket standard. We affirm this violation as willful and assess a penalty of $10,000. We find that the judge did err in vacating the other two citations. Falcon willfully violated the perimeter cable standard and committed a serious violation of the safety belt standard. We assess penalties of $5,000 and $1,000, respectively.

I. Section 1926.550(g): Man Basket Violation

By the time of the inspection, the general contractor had installed four exterior personnel hoists (elevators) reaching up to the 38th floor. From there, access to the next ten floors was provided by interior ladders. Despite this fact, the compliance officer observed a personnel platform or "man basket" suspended from an overhead crane being used to transport employees between the ground and their workplaces on the 46th and 48th floors of the building.

Falcon was cited for violating 29 C.F.R. § 1926.550(g)(2).[3] The judge found that Falcon failed to prove that alternatives to the man basket were either impossible or more hazardous and affirmed the citation.

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[2] We will refer to these as the "man basket" violation (Docket No. 89-3444, citation no. 2, item 3); the "perimeter cable" violation (Docket No. 89-3444, citation no. 2, item 4); and the two "safety belt" violations (Docket No. 89-3444, citation no. 2, item 1 and Docket No. 89-2833, citation no. 2, item 2).

[3] The standard, found in Subpart N--Cranes, Derricks, Hoists, Elevators, and Conveyors, provides:

> **§ 1926.550 Cranes and derricks.**
>
> . . . .
>
> (g) *Crane or derrick suspended personnel platforms* . . . .
>
> . . . .
>
> (2) *General requirements.* The use of a crane or derrick to hoist employees on a personnel platform is prohibited, except when the erection, use, and dismantling of conventional means of reaching the worksite, such as a personnel hoist, ladder, stairway, aerial lift, elevating work platform or scaffold, would be more hazardous, or is not possible because of structural design or worksite conditions.

A. Burden of Proof

The judge placed the burden on Falcon to show that its case fell within the exception to the standard's general ban on man baskets. Falcon, citing *Century Steel Erectors, Inc.*, 888 F.2d 1399, 1402 (D.C. Cir. 1989), and *Astra Pharmaceuticals Prods., Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,577 (No. 78-6247, 1981), claims that because greater hazard and impossibility are integral parts of the standard, it is the Secretary's burden to prove them. Further, Falcon contends that the judge erred in improperly relieving the Secretary of his obligation to prove the elements of the standard. The Secretary, on the other hand, cites a number of cases supporting the judge's allocation of the burden of proof. *E.g., Peavey Grain Co.*, 15 BNA OSHC 1354, 1987-90 CCH OSHD ¶ 29,027 (No. 89-3046, 1991); *Carabetta Enterp., Inc.*, 15 BNA OSHC 1429, 1987-90 CCH OSHD ¶ 28,934 (No. 89-2007, 1991).

The Commission has held that the party claiming the benefit of an exception bears the burden of proving that its case falls within that exception. *E.g., Dover Elevator Co.*, 15 BNA OSHC 1378, 1381, 1991 CCH OSHD ¶ 29,524, p. 39, 849 (No. 88-2642, 1991). Therefore, the judge was correct in placing the burden on Falcon here.

B. Impossibility and Greater Hazard

It is undisputed that because the elevators only reached the 38th floor, Falcon was unable to use them to transport its employees all the way to their work stations on the 46th through 48th floors. Falcon further argues that without the man basket, employees--some carrying tool belts weighing 15 to 20 pounds--would have been required to climb ladders eight to ten floors several times a day. The parties disagreed on the number of trips that would have been necessary per day and whether tools could have been safely stored at the work level or hauled up by crane.

Falcon does not claim that using ladders was "impossible," since employees sometimes used the ladders to reach their work stations. Nonetheless, Falcon alleged in its answer that because of "fatigue and the consequent increased possibility of injury to employees," use of the ladders would have posed a greater hazard than transport by use of the man basket. Because allegations made in pleadings do not constitute evidence, and

because Falcon produced no evidence to establish that using a combination of elevators and ladders would be more hazardous than traveling by man basket the full height of the building, the record does not support Falcon's claim of greater hazard.[4]

In summary, the evidence does not show (1) that it was impossible "because of structural design or worksite conditions" to reach the upper floors except by man basket, or (2) that the use of any other means of transport would have created a greater hazard than using a man basket. We therefore concur with the judge's finding that Falcon failed to prove that its case fell within the standard's impossibility[5] or greater hazard exception. It was possible, and not proven to be more dangerous, to use a combination of elevators and ladders, rather than a man basket, to approach the working levels. The violation was established. We therefore affirm item 3 of citation no. 2 in Docket No. 89-3444.

C. Willfulness

The Commission has described a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2012, 1991 CCH OSHD ¶ 29,223, p. 39,133 (No. 85-0369, 1991). *See Babcock & Willcox Co. v. OSHRC*, 622 F.2d 1160, 1167 (3d Cir. 1980); *Frank Irey, Jr. v. OSHRC*, 519 F.2d 1200 (3d Cir. 1974). A willful violation is differentiated from others by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. Logically, then, a willful charge is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard,

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[4] Falcon objected to the judge's differentiating the problem of travel between the 1st and 38th floors (elevator access) from that of travel between the 38th and 48th floors (ladder access). The judge concluded that even if using ladders were shown to be more hazardous than using the man basket for the second leg of the trip, Falcon failed to show that the elevators were more hazardous than the man basket for the first leg, so the violation would still exist as to the lifting of employees from the ground to the 38th floor. Since we find that Falcon failed to carry its burden as to the trip as a whole, we do not reach that hypothetical result.

[5] The reference in the standard to the term "impossibility" does not preclude an employer from raising an infeasibility defense. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1227, 1991 CCH OSHD ¶ 29,442, p. 39,683 (No. 88-821, 1991) (an employer may establish a defense by showing that compliance would be unreasonable or senseless). Falcon did not properly plead this affirmative defense here.

even though the employer's efforts are not entirely effective or complete. *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one--whether the employer's belief concerning a factual matter or concerning the interpretation of a rule was reasonable under the circumstances. *Id.* at 1259, 1986-87 CCH OSHD at p. 36,591.

Based on a number of factors, the judge found that Falcon willfully violated the man basket standard and assessed a penalty of $10,000. Falcon introduced as evidence letters it had sent complaining about the general contractor's failure to provide elevator access all the way to the erection floors. In those letters, Falcon noted the expense in operating the crane-hoisted man basket. The judge interpreted these letters to focus on cost rather than safety. The judge also noted what he perceived to be an intentional disregard of Falcon's own safety consultant's warnings about the man basket involving certification of load capacity and use of safety lines. While emphasizing that these warnings were not based on the inherent, relative danger of the man basket compared to elevators and ladders, he found that they were nonetheless safety-related and indicative of Falcon's disregard for the safety of its employees. He also found a heightened awareness on Falcon's part because the consultant had informed the company's vice president in writing that the "[n]ext OSHA penalty for use of man baskets will be in the range of $10,000." On the basis of these factors, the judge concluded that Falcon had made a "studied decision" to ignore its own safety consultant's recommendations in order to save money--more money than Falcon had reason to think it could lose in an OSHA penalty. The judge concluded that this demonstrated "a callousness toward employee safety which is willful under virtually all definitions of that term. *Bland Constr. Co.*, 15 BNA OSHC 1031, 1991 CCH OSHD ¶ 29,325 (No. 87-992, 1991)."

On review now before us, Falcon claims that it did not ignore the advice of its safety consultant and that the record is inconclusive as to whether the specific problems noted in the consultant's reports dealing with the man basket were ultimately resolved. It also asserts that it believed in good faith that section 1926.550(g)(2) permitted it to use the man basket in the circumstances of this case.

In most cases, the hiring of a safety consultant will help to establish that an employer was making a good faith effort at compliance. However, we find no basis for extending such credit here because we are uncertain how seriously Falcon took the consultant's advice. At the same time, we recognize that penalizing employers for their response (or lack thereof) to their own consultant's warnings might discourage employers from creating and developing their own safety programs. Consequently, we will ascribe neither credit nor blame for the results of Falcon's self-audits. *See General Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2066, 1984-85 CCH OSHD ¶ 26,961, p. 34,611 (No. 78-1443, 1984) (consolidated), *aff'd*, 764 F.2d 32 (1st Cir. 1985) ("[i]f employers are not to be dissuaded from taking precautions beyond the minimum regulatory requirements, they must be able to do so free from concern that their efforts will be relied on to establish their knowledge of an alleged hazard").

We instead base our finding of willfulness on an entirely different premise: the uncompromising language of the standard itself. The standard demands that before resorting to a man basket, an employer must show--not that alternative methods are merely inconvenient or more expensive--but that they are either impossible or more hazardous. Falcon argues that this is not a case in which it ignored the plain mandate of a safety regulation but that, to the contrary, Falcon believed in good faith that the standard permitted the use of the basket under the conditions at the site. Yet the record leaves no doubt that Falcon was not driven to use the man basket by either physical impossibility or safety concerns, but rather by frustration with the general contractor, whose actions, in our view, led Falcon to seek an easier, faster (and thus less expensive) way to reach the upper floors.

Most of the testimony and exhibits on this issue relate to an "impossibility" argument that the judge rejected and that Falcon abandoned on review. Falcon had argued and sought to prove that the elevators took too long and that sometimes there was substantial waiting time by Falcon employees because of the limited capacity of the elevators and the priority given to other subcontractors' employees, thus increasing Falcon's costs. Hence, Falcon asserted it was "impossible" to use the elevators. Falcon points out that the safety consultant himself testified that it would not have been "very practical" for Falcon to cease

using the man basket because the elevators would have been "too time consuming." Despite the fact that this argument was later abandoned, the evidence remains. Far from helping to establish that elevators and ladders were impossible or more hazardous, this evidence only shows Falcon's underlying motivation for using the man basket: convenience and cost. As Falcon well knew, the standard requires more. Had Falcon offered evidence supporting its allegations that climbing ladders would have subjected employees to a greater risk of injury than riding in the man basket, it might well have been able to establish that the exception applied in this case.

D. Penalty

In assessing a penalty, we find, as did the judge, that Falcon was a large employer and that the employees' exposure was not so brief as to mitigate the otherwise serious injury to which they were exposed. *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1047, 1981 CCH OSHD ¶ 25,712 at p. 32,057 (No. 76-4765, 1981) (duration of employee exposure is not determinative of the seriousness of a violation; it relates rather to the gravity factor in assessing a penalty). The absence in the record of recent prior history is outweighed by Falcon's lack of good faith, so no factors mitigate against imposing the maximum penalty allowable for a willful violation. We therefore affirm the $10,000 penalty as proposed by the Secretary and assessed by the judge.

II. Section 1926.750(b)(1)(iii): Perimeter Cable Violation

A. Parties' Positions and Judge's Decision

The compliance officer observed four instances (grouped together as one citation item) of employees exposed to a fall hazard at the edge of open-sided temporary floors that were not guarded with perimeter cables, as required by 29 C.F.R. § 1926.750(b)(1)(iii).[6]

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[6] The standard, found in Subpart R--Steel Erection, provides:

> **§ 1926.750 Flooring requirements.**
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> . . . .
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> (b) *Temporary flooring--skeleton steel construction in tiered buildings.* (1) . . . .
>
> . . . .
>
> (iii) Floor periphery--safety railing. A safety railing of ½-inch wire rope or equal shall be installed, approximately 42 inches high, around the periphery of all temporary-planked or temporary metal-decked floors of tier buildings and other multifloored structures during structural steel assembly.

The judge vacated the citation item because he found that the Secretary failed to show that the decking installation had been "substantially completed" at the time of the inspection. According to the judge:

> Under the wording of the standard and the reasoning of *Williams* [*Enterp. of Georgia, Inc.*, 12 BNA OSHC 2097, 1986-87 CCH OSHD ¶ 27,692 (No.79-4618, 1986), *rev'd on other grounds*, 832 F.2d 567 (11th Cir. 1987)], a bolted-up and plumbed-up level of open steel columns and beams does not become a temporary metal-decked floor until at least a substantial portion of the level has received decking. The [cabling] requirement thus does not become effective at a level of steel erection until temporary floors or decking is substantially in place.

Applying this "substantial completion test"--that a substantial portion of the entire floor be decked--to the facts of the case before him, the judge found the evidence on the degree to which the decking installation had been completed to be "less than clear." On that basis, he found that the Secretary failed to prove a prima facie case and vacated the citation item.[7]

Falcon concurs with the judge's finding that at the time of the inspection, perimeter cables were not yet required under section 1926.750(b)(1)(iii). The Secretary contends that the decking was substantially completed and maintains that the key factor is that should be that enough of a floor had been put down so that employees were actually using the floor as a working surface.

B. Secretary's Prima Facie Case

At the parties' urging, the judge ruled that the test for determining when cable must be installed is whether the decking on the *entire* floor has been substantially completed. The Secretary agrees in part, but argues that employees, in addition, should be protected if they are exposed to perimeter falls while working on a substantially completed *portion* of a partially decked floor, citing *Walker Towing Corp., Paducah River Service*, 14 BNA OSHC

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[7] The judge found *Williams* "instructive" in understanding the typical sequence of various stages of the steel erection process. In the *Williams* case, the Commission noted witnesses' testimony that "the industry practice is to wait until a temporary floor has been installed before putting up the wire-rope railing required under § 1926.750(b)(1)(iii). Thus, customarily, not even wire-rope railings are installed until sometime after the bolt-up and plumb-up crews complete their work on the perimeter beams." 12 BNA OSHC at 2107 n.16, 1986-87 CCH OSHD at p. 36,157 n.16.

2072, 2075, 1991 CCH OSHD ¶ 29,239, p. 39,159 (No. 87-1359). In cases involving simple rectangular floors, the judge's "substantial completion test," which assesses the condition of the entire floor, will yield the proper result. *See The Ashton Co.*, 3 BNA OSHC 1968, 1969, 1975-76 CCH OSHD ¶ 20,351, p. 24,275 (No. 5111, 1976). In cases such as this, however, waiting for the entire floor to reach the substantial completion stage before installing perimeter cable denies the protection contemplated by the standard. In our view, it is not inconsistent with the Williams *holding to interpret "substantially complete" to mean that* if (1) a portion of a floor[8] is (2) decked to the outer edge so as to constitute an open-sided floor (3) on which employees are exposed to exterior falls, then perimeter guarding is required. We find that the critical factor is generally the extent to which decking has actually been laid on a given story or floor in terms of total area, unless employees, as here, are exposed to an exterior fall from a finished section that serves as a discrete work area.

The photographic exhibits in this case, along with the testimony of the compliance officer and others, demonstrate that in each instance the decking was laid to the outer edge and was functioning as a work surface. Employees were thus exposed to exterior fall hazards while working at the perimeter of these open-sided floors and ought to have been protected by a perimeter cable. For instance, the photographs that depict the vicinity of the employee exposure in instance (a), on the 48th floor, offer several perspectives of an expanse of decking that reaches to the outer edge of the building. No cable has been strung between the structural steel columns in view. As Compliance Officer Wiseman testified, one of the pictures shows "employees carrying and sorting iron out on the floor. They are using this floor as an erection floor and there is no perimeter cable around it." Falcon's own erection estimator, John Egyed, upon being asked when he usually puts up the safety cable, responded, "Well, this would be the time. You have installed your deck. You have a working floor and that is when you put your cable up." Instance (c), a violation observed later in the inspection, was on the 54th floor, which by that time was serving as the erection

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[8] The entire floor in this case is not a simple rectangular deck, but a squared-off doughnut or angular ring surrounding the concrete core of the building. Segments or arcs of this ring are planked outward from the core to the outer perimeter. Thus, each arc or segment constitutes a discrete work areas with a guardable edge.

floor. The evidence relating to instance (c) resembled that offered to prove the violation in instance (a).

Instance (b) was observed seven floors below the erection floor, on the 41st floor. The photograph of the area shows an expanse of open-sided floor, decked to the outer edge. The compliance officer testified that the photograph shows an employee leaning over the edge of the floor with a hand line pulling up a welding torch. The photograph introduced in connection with instance (d), a segment of the 45th floor, shows two employees walking over a large area of metal decking toward the decked, but unguarded, outer edge of the building. The employees on whose exposure instance (d) was based were much closer to the outer edge than the two in the picture. The parties do not dispute that in each instance employees were either walking or working at or near the edge, and therefore exposed to a fall hazard.

In sum, the Secretary's prima facie case under section 1926.750(b)(1)(iii) will depend not only on how much of an entire level is covered, but on whether a substantial portion of the floor has been decked to the outer edge so as to create a discrete work area. (Work surfaces fashioned out of temporary metal decking that do not skirt the outer edge of the building would not constitute open-sided floors, but might nevertheless be cited under other fall-protection standards if they pose interior fall hazards).

In this case, regardless of what a bird's eye view of the floor would reveal about the proportion of decking to open beams on the floor as a whole, employees were exposed to exterior fall hazards at the perimeter of open-sided floors which were serving as their work surfaces. Citing *Walker Towing Corp.*, the Secretary emphasizes that the Commission has rejected an all-or-nothing approach to compliance with the requirements of standards. Instead, the Commission has insisted on compliance to the extent possible and necessary. In *Walker Towing*, we criticized the employer for failing to attempt even partial compliance, *i.e.*, to implement a limited use of guardrails along the deck of a barge. The Secretary argues in this case that the fact that the entire floor at a given story or level was not completely decked over does not explain or justify the failure to install a perimeter cable where and when it was possible to do so. We agree on the facts here. It was not necessary for the decking crew to have completed its work around the entire perimeter of the building

before the requirement for cabling around a portion of perimeter arose. Cable should have been installed wherever employees were working at the edge, or could be expected to pass near it in the course of their duties. *North Berry Concrete Corp.*, 13 BNA OSHC 2055, 1987-1990 CCH OSHD ¶ 28,444 (No. 86-163, 1989).

Accordingly, we find that the "substantial completion" test adopted by the judge focused here too narrowly on the condition of the entire floor. The location and physical area covered by decking in a given instance will be important to the Secretary in determining the most specifically applicable standard. *See, e.g., Williams Enterp., Inc.*, 11 BNA OSHC 1410, 1983-84 CCH OSHD ¶ 26,542 (No. 79-843, 1983), *aff'd in part, rev'd in part*, 744 F.2d 170 (D.C. Cir. 1984) (construing a guardrail standard, court found that an unguarded "bridge," consisting of three or four 3-foot wide pieces of interlocking metal decking spanning a 30- to 40-foot stretch of beams, constituted a "walkway," not a "platform"). But there is no question that the cited standard, section 1926.750(b)(1)(iii), applies here. The issue is rather when cable should be installed. Waiting for the entire floor to be "substantially completed" before putting up cable *anywhere* along the perimeter, when employees were exposed to exterior falls while working on portions of the floor, is contrary to *Walker Towing*.

The Commission's reviewing authority includes the authority to decide all issues it could decide as the initial decision-maker. *Stevens Equip. Co.*, 1 BNA OSHC 1227, 1229, 1971-73 CCH OSHD ¶ 15,691, p. 20,987 (No. 1060, 1973) (citing the Administrative Procedure Act, 5 U.S.C. § 557(b)). The courts have recognized the authority of the Commission to develop its own principles for determining the sufficiency of evidence. *A.E. Burgess Leather v. OSHRC*, 576 F.2d 948 (1st Cir. 1978). We find that in instances (a), (b), (c), and (d), the Secretary established a prima facie violation of the perimeter cable standard. We now consider Falcon's affirmative defenses.

C. Falcon's Affirmative Defenses

1. Greater Hazard

First, we consider what may amount to Falcon's attempt to raise a greater hazard defense. Falcon seems to perceive the Secretary as requiring cable to be installed promptly after the skeletal steel has been erected, even before any decking has been installed. Falcon neither pleaded the "greater hazard" defense in its answer nor mentioned it as such in its brief, and the judge does not characterize his discussion of these matters as such. For the reasons that follow, we find that even if Falcon had properly pleaded this affirmative defense, it has not been established on this record. To establish the greater hazard defense, the employer must demonstrate that:

(1) the hazards of compliance are greater than the hazards of noncompliance;
(2) alternative means of protection are unavailable; and
(3) a variance was unavailable or inappropriate.

Lauhoff Grain Co., 13 BNA OSHC 1084, 1088, 1986-87 CCH OSHD ¶ 27,814, pp. 36,397-98 (No. 81-984, 1987). Falcon's argument in its brief to the Commission touches only on the first element of the defense. Citing the judge's decision instead of specific testimony in the record, Falcon claims that the compliance officer testified that Falcon should have had ironworkers crossing beams to weld angle irons into place so that cable could be installed before the floor in question was metal-decked to the outer edges. Our reading of the compliance officer's testimony, however, does not support this version of what he said. The compliance officer's remarks do not show that he thinks employees should string perimeter cables *before* the decking has reached the perimeter. On the contrary, he suggests the opposite: "If there were no columns and there was a means of putting in . . . perimeter cable[,] then it should have been put in *after* the decking went down." (Emphasis added.)

If the Secretary were to interpret the standard as requiring employees to venture out onto bare, undecked perimeter beams to put up cable, *e.g.*, before the creation of an open-sided floor to fall off of, such an interpretation would be patently unreasonable. A convincing "greater hazard" argument might certainly be made in that event. Neither the evidence nor the argument before us proposes such an interpretation. Even if it did, Falcon has not established the other two elements of the defense: the record is silent on whether

some alternate means of protection could have been used in lieu of perimeter cable (*e.g.*, safety belts), and there is no evidence that Falcon sought a variance. Therefore, to the extent that Falcon relies on a "greater hazard" defense, it has not been established here.

2. Infeasibility

Falcon included the defense of infeasibility in its formal pleadings and vigorously sought to build a record on the issue during the hearing. However, Falcon all but abandoned this defense in its brief before the Commission, relying instead on the judge's findings under the "substantial completion" test. Given our holding that the Secretary has made out a prima facie case, we must now consider Falcon's infeasibility defense.

One of Falcon's positions was that, in some circumstances, it is physically impossible to string cable when there are no columns nearby to which cable may be attached. Another position was that in other circumstances, namely, on a floor being actively used as an erection floor, putting up cable might be physically possible but would be seriously disruptive of the scheduled steel erection operations.

In the only sentence in its brief to the Commission actually using the term "feasibility," Falcon criticizes the Secretary: "[T]he Secretary argues, based on Wiseman's unqualified opinion, that it was feasible to install perimeter cable in each of the cited instances." The burden, however, is on Falcon to make out its affirmative defense of infeasibility, not on the Secretary to show the feasibility of the standard's requirements. *Seibel Modern Mfg. & Welding Co.*, 15 BNA OSHC 1218, 1227, 1991 CCH OSHD ¶ 29,442, p. 39,683 (No. 88-821, 1991) (any employer seeking to be excused from implementing a cited standard's abatement measure on the basis of infeasibility has the burden of establishing the infeasibility of the specified abatement method and of alternative measures). The appropriate test is whether compliance would so interfere with performance of necessary work as to be infeasible under the circumstances. *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1949, 1956-59, 1986-87 CCH OSHD ¶ 27,650, pp. 36,024-27 (No. 79-2553, 1986) *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988) (employer established that guardrails were incapable of being used anywhere for a sufficient length of time to serve any practical purpose of protection and would have disrupted the work to such a degree that compliance was infeasible).

(a) Infeasibility as Physical Impossibility

In testifying about what he observed at the worksite, the compliance officer pointed out in the photographic exhibits a number of columns to which cable could have been attached. He further testified that for situations in which there was no column available, owing to the design of the building or the stage of the steel erection process to which the raising gang had progressed, Falcon could have used angle irons or other means of support to hang the cable.

Dennis Allessandrine, a journeyman ironworker for 27 years and one of Falcon's witnesses, testified that when cable could not be strung from column to column, angle irons were welded in place to carry the cable. A number of the exhibits show cable strung from angle irons on other stories. Other exhibits show angle irons in place without any cable installed. This abatement method has been proposed in other cases. *E.g., Walker Towing*, 14 BNA OSHC at 2076-77, 1991 CCH OSHD at p. 39,159.

The testimony of both the compliance officer and Falcon employees, as well as the photographic exhibits, suggest that in the absence of columns, the use of angle irons would have been feasible. Therefore, Falcon's claim of infeasibility on grounds of physical impossibility is not supported by the evidence.

(b) Infeasibility as Interference with Operations

As already mentioned above, many of the photographic exhibits show steel columns to which perimeter cable could have been attached. Several even show the eyelets through which cable is typically strung already welded onto the columns. In these instances, Falcon asserts not physical impossibility but interference with necessary work as the grounds for its infeasibility defense, claiming that perimeter cable would prevent or delay the steel erection process. We therefore now consider whether the Commission should recognize a defense to a prima facie section 1926.750(b)(1)(iii) case, and allow the employer to show that cable need not be strung on certain sides of an erection floor--even though employees are exposed at the edge of that work surface--until structural steel assembly has progressed to a point at which the cable will no longer interfere with the raising gang's work.

In this case, the compliance officer maintained throughout the hearing that the proper order of events on the erection floor, also called a working floor, is (1) structural steel erec-

tion of a level of open beams, (2) decking of that level, (3) cabling of that level, (4) more erection, working from that level upward, two stories at a time. A number of witnesses for Falcon testified that that was not the actual sequence of events. For example, Allessandrine testified that he believed it would be "too hazardous" to put up cable on an erection floor: "There is too much activity going on there with the crane swinging around and everything. It would be done afterwards." In addition, he hypothesized regarding the placement of cable on the working floor from which the structural steel for the next two stories is being erected:

> If you had the perimeter cable up on the working floor, when you bring a load of iron up, sometimes the iron does protrude out over the end of the building. So you couldn't just bring the load straight down if the cable was there . . . you just couldn't work up there like that.

Similarly, John Egyed, Falcon's estimator, testified:

> By the time we are putting safety cable on, the erection process has started again. We are erecting the next tier. We do not put the safety cable on the working floor in order to erect the next tier columns and the beams from the working floor to the next level. It could possibly get tangled in the safety cable.

The Secretary offered no evidence in rebuttal. The language of the standard itself does not preclude such an affirmative defense. The standard specifically requires that cable be installed "during structural steel assembly."[9] Applying *Dun-Par*, to delay the installation of cable on any substantially completed portion of an open-sided erection floor, an employer must show that installation of cable along affected portions of the perimeter would interfere with receiving, sorting and raising activities. The preponderance of the evidence in this case demonstrates that on certain sides of open-sided erection floors, installing perimeter cable too early or in the wrong places would have disrupted the normal sequence of steel erection activities and endangered employees on that floor or those below at ground level

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[9] Falcon abandoned its earlier position that as long as cable was installed *sometime* "during structural steel assembly," the standard would be satisfied. The judge properly rejected this argument, since under that reading of the standard, no perimeter protection would be required on any floor until the last piece of structural steel was in place, and such a result would be inconsistent with the intent of the Act and the standard.

by blocking the normal path of steel beams as they were being delivered and maneuvered on the deck.[10]

In conclusion, we find that Falcon established an infeasibility defense with respect to instances (a) and (c), floors 48 and 54, the erection floors. As to instances (b) and (d), floors 41 and 45, however, these lower floors were not serving as erection floors at the time they were inspected. The erection activities on those floors were completed, and Falcon's infeasibility defense does not apply. Accordingly, based on the violative conditions observed in instances (b) and (d), we affirm item 4 of citation no. 2 in Docket No. 89-3444.

D. Willfulness

In light of his decision to vacate the perimeter cable citation, the judge did not reach the characterization issue. Falcon likewise does not address this issue in its brief.

The Secretary argues that these violations were willful. He points out that Falcon's own safety consultant advised Falcon of a number of unguarded floors during his inspections. Compliance officer Wiseman testified on cross-examination that he took Falcon's overall attitude toward safety into account as a factor in determining whether a willful violation had occurred, and that he similarly considered Falcon's voluntary, periodic self-auditing program. However, he testified:

> The company had a paper program and they had consultants to come to the job to give them written reports. It was my understanding and from my observations that they were not paying much attention to the recommendations that were being made by the consultant at the job site.

Mr. Michael Champagne, the safety consultant, denied having made any statement to Wiseman that might have contributed to that impression. Champagne testified that his impression of Falcon was as of "[v]ery good company, safe company," and when asked whether his multi-item safety reports contradicted him, he replied, "Well on a job of that size[,] of that magnitude[,] where you have 100 ironworkers spread over an area of the tower, the retail section, the hotel section . . . for a job that big that is not a lengthy report."

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[10] Under *Seibel*, in addition to establishing the infeasibility of the specified abatement method, an employer must also show that an alternative measure was used or there was no feasible alternative measure. In this case, safety belts tied off to the same columns to which perimeter cable would be attached would pose a similar hazard to employees in that their lifelines could become entangled as the steel was being landed. We find that Falcon has carried its burden under *Seibel*.

At the same time, he admitted that in his experience as a safety expert, he had noted a particular difficulty in achieving safety compliance among ironworkers, explaining that "I try to communicate with them. They are somewhat independent [--] I think that is a good word [for] the way the[y] work." As mentioned in connection with the man basket violation above, holding the results of a company's voluntary self-audits against it would not ultimately serve the interests of employee safety and health. *See General Motors*, 11 BNA OSHC at 2066, 1984-85 CCH OSHD at p. 34,611.

The Secretary also relies on Falcon's history of prior citations in support of his charge of willfulness. Falcon was cited for a violation of section 1926.750(b)(1)(iii) only four months earlier, in April 1989. How a company responds to citations may be considered in assessing willfulness. *See Carabetta Enterp., Inc.*, 15 BNA OSHC 1429, 1991 CCH OSHD ¶ 29,543 (No.89-2007, 1991), (citing *Brock v. Morello Bros. Constr.*, 809 F.2d 161 (1st Cir. 1987)). "Once an employer has been cited for an infraction under a standard, this tends to apprise the employer of the requirement of the standard and to alert him that special attention may be required to prevent future violations of that standard." *Dun-Par Engd. Form Co. v. Marshall*, 676 F.2d 1333, 1337 (10th Cir. 1982). Compliance Officer Wiseman testified that he had characterized the violation as willful "[b]ecause they had been cited before on this same job site. I had cited and talked to the employer on a previous occasion and besides, there was floor after floor that needed perimeter protection on it."

In light of the prior citations for violations of the same standard during an earlier part of the project on the same job site, we find Falcon's violation of the perimeter cable standard to be willful. Our affirmance today of two other violations related to fall hazards only bolsters our finding that Falcon had the "heightened awareness" of the standards and of its own noncompliance that amounts to a conscious disregard for or plain indifference to employee safety. *Williams Enterprises*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,589.

E. Penalty

In determining an appropriate penalty, Falcon's size and prior history of similar citations weigh in favor of a heavy penalty. Moreover, Falcon displayed a lack of good faith

in failing to attempt even partial compliance with the standard on the two floors for which we find a violation. At the same time, there was evidence that Falcon employed a work gang whose sole responsibility was the installation of perimeter cable and that double cable was strung to accommodate the rules for other trades. The record does show that cable had been installed on other floors, and we have accepted Falcon's infeasibility defense with regard to the affected portions of two of the floors cited in this case. The presence of cables that Falcon did install, and the absence of cables that Falcon had a valid reason for not installing, reduced the overall exposure of employees to serious injury. These efforts lead us to assess less than the maximum penalty of $10,000 proposed by the Secretary. Accordingly, having considered the criteria set forth in section 17(j) of the Act, we assess a penalty of $5,000.

III. Section 1926.105(a): Safety Belt Violation

Falcon was cited twice for willfully violating 29 C.F.R. § 1926.105(a).[11] Two pairs of employees were observed doing bolt-up work--one individual was standing at the edge of the open-sided floor, while the other three were sitting astride beams; another employee was seen standing outside a perimeter cable while installing studs on metal decking; and another two employees, taking a coffee break, were seen sitting close to the edge of the deck. (Instances (a), (b), and (c), all in Docket No. 89-3444, and the single instance in Docket No. 89-2883, respectively.) Not one of these employees was wearing a tied-off safety belt, and no safety nets or other fall protection devices had been installed. The instances observed by Compliance Officer Wiseman carried a proposed a penalty of $9,000; the instance detected by Compliance Officer Ferguson carried a $7,000 proposed penalty.

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[11] The standard, found in Subpart E--Personal Protective and Life Saving Equipment, provides:

> **§ 1926.105(a) Safety nets.**
> (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground . . . where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

Implicit in this standard is that devices other than nets must be used, if practical. The Secretary commonly cites any exterior fall protection violation under this standard.

The standard provides that safety nets are required where other devices are impractical, not that safety nets are required unless other devices are practical. This distinction has, as the judge observed, generated extensive litigation, particularly over the allocation of the burden of proof. Perhaps the most comprehensive discussions of the standard, if also the most challenging to reconcile, are by the Court of Appeals for the District of Columbia Circuit. That court most recently considered the standard, as well as the burden of proof issues, in *Century Steel Erectors, Inc. v. Dole*, 888 F.2d 1399 (D.C. Cir. 1989) ("*Century Steel*"), in which it reviewed other leading fall-protection cases, including its own decisions in *L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664 (D.C. Cir. 1982) ("*Willson I*") and *Brock v. L.R. Willson & Sons*, 773 F.2d 1377 (D.C. Cir. 1985) ("*Willson III*"). The parties and the judge focus almost exclusively on these cases.

A. Parties' Positions and Judge's Decision: The* Century Steel *Case

To paraphrase the court's holdings in *Century Steel*:

> (1) if the Secretary cites an employer for failure to provide *safety nets*, and if none of the fall protection devices listed in section 1926.105(a) was used, then the Secretary will establish a prima facie case upon showing that employees were exposed to a fall in excess of 25 feet and that none of the protective devices was used; and
>
> (2) if the Secretary cites an employer for failure to provide a fall protection device listed in section 1926.105(a) *other than safety nets* [*e.g.*, belts], then the Secretary must prove that use of that device is practical.

See Century Steel, 888 F.2d at 1402, 1405. The *Century Steel* court's distinction between the two categories of cases seems to depend on the nature of the Secretary's citation, not on any act or omission of the employer, or on any physical condition at the workplace. *Century Steel* seems first to force the Secretary to choose among a variety of abatement methods, and then to force the trier of fact to second-guess the Secretary's choice.

As the judge lamented, "[u]nfortunately, this case does not fall easily into one of the two categories established by the *Century* holding." Apparently feeling bound under *Century Steel* to discern whether the Secretary cited Falcon for failing to provide and ensure the use of belts or for failure to install nets, the judge examined each sentence fragment in the

citations themselves and each pertinent allegation in the complaint, all to no avail. Based on each compliance officer's testimony about his understanding of the citation he had recommended and about what he believed would be appropriate abatement methods, however, the judge concluded that the compliance officers thought that either belts or nets would have served to abate the violations they observed and belts would have been practical. Considering the citations and complaints to be compatible with this thinking, the judge found that the Secretary cited Falcon for failing to provide a fall protection device other than safety nets, *i.e.*, safety belts. He then said that under *Century Steel*, the Secretary must show that safety belts were practical in each instance.

The judge discounted the probative value of the compliance officers' testimony regarding the practicality of using belts. However, his ultimate finding was that the Secretary failed to make even a prima facie case that safety belts were practical. This amounts to a finding that safety belts were impractical. Under the plain wording of the standard, safety nets are the device of last resort, required if the other enumerated devices, including belts, are impractical. Since the judge found that safety belts were impractical in this case, he then should have gone on to consider the merits of the safety net allegation. *See, e.g.*, cases cited *supra*, note 15. Unlike the *Century Steel* case, where the Secretary had already conceded that nets were infeasible, here the nets issue would--if we were to uphold the judge's finding that belts were impractical--remain to be decided.[12] However, because we find, for reasons set out in detail below, that belts were practical in each instance, we need not remand to the judge for resolution of the nets issue.

The Secretary concentrates on the argument that the "absence of nets was a fundamental issue in this case," presumably striving to maintain as many open options as possible under *Century Steel*. He further claims that the only time he is compelled to prove that belts are practical is if he concedes that nets are infeasible. He also argues alternatively, however, that even if the judge is correct that the case turns on the practicality of belts,

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[12] As the Secretary points out, a total of about 530 pages (almost half the testimony in the case) dealt with the economical and technological feasibility of installing safety nets.

the Secretary showed that belts were practical in each of the instances and has thus met his burden of proof.

Falcon, for its part, maintains that the Secretary's case was "confused" because of his "overzealous" enforcement policy, seeking to mandate safety nets.[13] Falcon asserts that the Secretary failed to prove a violation of section 1926.105(a) for absence of nets, but that even if the Commission found such a prima facie violation, Falcon has established a technological and economic infeasibility defense. The rest of Falcon's argument follows the judge's decision focusing on the practicality of belts.

B. Secretary's Prima Facie Case: Practicality of Safety Belts

Our *de novo* review of the exhibits and testimony leads to a finding--contrary to the judge's decision--that the Secretary *did* make out a prima facie case that belts were practical in each instance. Although it is equally applicable here, we will not repeat our discussion, *supra*, concerning the scope of review and deference to the judge except to add that on the belts issue in this case, the judge did not purport to base his decision on factors uniquely observable by him, such as demeanor. He did not state that he was making credibility findings; rather, he referred to the relative weight of the testimony of the witnesses. Here, we are in as good a position as the judge to determine the practicality of belts in this case. *All Purpose Crane, Inc.*, 13 BNA OSHC 1236, 1239, 1986-87 CCH OSHD ¶ 27,877, p. 36,550 (No. 82-284, 1987).

The holdings of the leading fall protection cases[14] suggest a three-part test for

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[13] While we take no position on the underlying motivation or strategy behind the Secretary's presentation in this case, his multi-faceted approach is due at least in part to the cumbersome language of the standard itself. For instance, any clear admission early in the case that the Secretary had cited Falcon only for the absence of belts would have narrowed the issues in the case to the practicality of belts, a limitation the Secretary may understandably have been unwilling to accept, given his view that either nets or belts would have abated the violative conditions. Without knowing whether the judge will focus on belts as the pivotal issue, the parties are almost always compelled to try their nets case in the alternative, making for needlessly complicated litigation. We agree with courts that have urged the Secretary to promulgate a more precise fall protection standard. *E.g., Willson I,* 685 F.2d at 676, and cases cited.

[14] Although this case may be appealed to the Third Circuit, that jurisdiction's case law provides little guidance for disposition of a case such as this one in which belts are shown to be practical and the nets issue need not be reached. *See, e.g., Donovan v. Adams Steel Erec., Inc.*, 766 F.2d 804, 805-06 (3d Cir. 1985) (reinstating judge's affirmance of a citation for failure to provide safety nets, where judge found that safety belts for

(continued...)

determining practicality consisting of (1) evidence on where and how employees could have tied off in this case, (2) the role of the "substantial portion of the workday test" or the "not actually used test" or both, and (3) evidence on industry custom and practice. *See Willson I, Willson III*, and *Century Steel*. The results of each of these inquiries, taken as a whole, lead us to conclude that the Secretary established a prima facie case of practicality here.

1. Case-specific Evidence on Tying Off

The judge, finding that the Secretary had failed to establish a prima facie case, characterizes the record on the practicality of belts as "meager indeed." For example, the judge characterizes one portion of the compliance officer's testimony recounting each of his observations using photographs to illustrate his proposed abatement methods as "only [a] brief unexplained conclusion" that "the safety belt and line system would have been very easy to do. They could have hooked up a line with a safety belt going to the area and performed their task without falling." According to the judge, "[i]ndeed, the most that can be said of the testimony of the compliance officers on this record is that they stated, in each instance, that Falcon employees 'could' have used a safety belt." In our view, this testimony is hardly patently unsatisfactory. Although neither compliance officer testified, in so many words, that use of belts was "practical," they both considered that to be the case. As in *Century Steel*, the sum and substance of the testimony of the compliance officers, taken in context, was that safety belts were practical. *Century Steel*, 888 F.2d at 1403.

The judge discounted the probative value of the compliance officers' opinions, ostensibly because they had not been proffered as "experts." However, we believe that this approach only encourages "battles of experts." Such battles may sometimes be inevitable, a fact both parties recognized in trying the alternative nets issue in this case. Depending on the nature of the standard, the violation, and the Secretary's theory of the case, certain

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[14](...continued)
employees who were "constantly in motion" were both impractical and would expose employees to greater hazard) and *United States Steel Corp. v. OSHRC*, 537 F.2d 780, 782 (3d Cir. 1976) (affirming an OSHRC decision requiring safety nets for connectors, where the opinion evidence concerning the feasibility of safety belts was "diverse" and belts were not used, thus narrowing the dispute to the net issue). Cases from other jurisdictions that focus exclusively on the nets issue are similarly unhelpful for our purposes. *E.g., Corbesco, Inc. v. Sec'y of Labor*, 926 F.2d 422 (5th Cir. 1991) (upholding judge's decision requiring nets).

situations may require the Secretary to produce an expert. The title of "compliance officer" does not always carry as much weight as the Secretary might hope. At the same time, the judge neither explains why he saw fit to require "expert" testimony on the issue of practicality, nor intimates what the qualifications of such an expert might be; nor does he assure us that he took into account these lay-witnesses' significant field experience. Wiseman, who was actually employed as an ironworker for a time early in his career, has been a compliance officer since 1974, performing approximately 1600 inspections, mostly of construction sites, 10 to 15 percent of which were buildings at least fifteen stories tall and about a dozen of which were over thirty stories. Ferguson had 7 years' experience and had conducted 800 inspections--over half involving the construction industry and at least a dozen involving buildings over fifteen stories high. A reasonably competent, alert compliance officer conducting hundreds of inspections cannot help but observe, on a regular basis, what ironworkers do, and in particular, where and when ironworkers tie off. Yet the judge "accorded little probative weight" to their testimony, calling some of it "sheer unsupported speculation." We are unable to adopt the judge's evaluation of the evidence here. An experienced compliance officer's reasonable suggestion as to how an employer could have set up a safety line based on previous specific personal observations or on specific training strikes us as possibly sufficient to make out a prima facie showing of practicality under the standard. Any rebuttal evidence would, of course, have to be considered in turn.

The judge suggests that the record contained no evidence or opinion that tying off to perimeter cables or static lines, as prescribed by the compliance officers, had proven successful in protecting employees from injury. In the judge's words, "[s]uch is the essence of 'practicality' under section .105(a)." However, not only did the compliance officers suggest that a safety line could have been tied off to cables, but Dr. John Rumpf, a consulting engineer whom the judge qualified as an expert in steel erection, also testified to that effect. In addition, one of Falcon's own witnesses testified that this practice was not uncommon. *Also see Williams Enterprises*, 11 BNA OSHC at 1419, 1983-84 CCH OSHD at p. 33,879.

In conclusion, we think that the very evidence the judge criticizes as being inadequate actually at a minimum supports a finding of a prima facie case with respect to the practicality of safety belts here.

2. "Substantial Portion of the Workday Test" or "Not Actually Used Test" or Both

Falcon argues that "where, as here, the Secretary alleges a failure to use safety belts, [he] must prove that belts were not impractical in that workers could have been, but were not, protected by the use of safety belts for a substantial portion of the day," citing *Willson I* and *Willson III* in support. The Secretary counters that the so-called "substantial portion of the workday test" does not apply here since no fall protection devices were actually used, citing *Willson III* and *Century Steel*. We find that the workday test does not apply in this case, but for a different reason: the test only applies in cases in which the nets issue is reached, and then only if some other device provided partial protection from falls.[15]

(a) The "Substantial Portion of the Workday Test"

The substantial portion of the workday test ("the workday test") was introduced in *Marshall v. Southwestern Indus. Contrac. & Riggers, Inc.*, 576 F.2d 42, 44 (5th Cir.1978), a case involving a safety net violation under section 1926.105(a). In that case, the evidence showed that employees, who were engaged in securing concrete beams, were using safety belts but were actually tied off only "about one-half of the time." *Id.* at 43 n.1. To the court this meant that the employees were not tied off, and were thus totally unprotected, for a "substantial portion of the workday." *Id.* at 44 n.2, 45. The court found that because safety belts were not and could not be used in any meaningful sense for a substantial portion of the workday, the employer should have provided some "means of reasonably continuous fall protection" like nets. *Id.* at 45.

The workday test was then modified in *Willson I*. In *Willson I*, a case similar to *Southwestern* in that the Secretary sought to prove that nets were required even though belts were in use, the test was refined to prevent the Secretary from arguing that whenever safety

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[15] This scenario presents the missing third prong of the *Century Steel* holdings, *see supra*: (1) Secretary cites for absence of nets where no device at all is used, (2) Secretary cites for absence of device other than nets, (3) Secretary cites for absence of nets where another device is already in use.

belts fail to provide "continuous" protection, *i.e.*, if workers are not tied off "at all times," the employer must install nets as back-up protection. *Willson I*, 685 F.2d at 674, 676. The court in *Willson III* confirmed this reading of *Willson I*, noting that "the [*Willson I*] court concluded that the employer could not be required to provide nets to bolster the practical protection already provided by safety belts for a substantial portion of the work day." *Willson III*, 773 F.2d at 1386. Thus, under the *Southwestern - Willson I* workday test, if belts are available but the Secretary demands that nets be installed as well, he has the additional burden of showing that the belts are, in effect, impractical because they are not tied off for a substantial portion of the workday. In the words of the *Willson III* court:

> [t]he court in *Willson I* held that whether the safety belts used in that case were practical as protective devices depended on the amount of time during the work day that they could be used. The court's conclusion was that "the inability to use safety belts during a significant period of the work day renders them 'impractical' within the meaning of section .105(a)." 685 F.2d at 675.

Willson III, 773 F.2d at 1385. However, since the Secretary in *Willson I* produced no evidence demonstrating that Willson's employees did not use safety belts during a substantial portion of the workday, he failed to prove impracticality and the court vacated the safety nets violation. Again, *Willson I* and *Southwestern* were cases, unlike the case now under consideration, in which the burden was on the Secretary, in order to prove a nets violation, to show that belts were impractical, *i.e.*, employees were not tied off for a substantial portion of the workday. The workday test could have been fatal to the Secretary's case here--or could at least have compelled a remand--had we not found that the preponderance of evidence indicates that belts were practical, thus truncating our inquiry into the nets violation. Had we reached the nets issue in this case, depending on the evidence adduced, the Secretary might have used the test to show that nets were required because belts, even when tied off at the appropriate times, did not protect each of the cited employees for a substantial portion of the workday. On the other hand, Falcon might have relied on the test

to show that nets were not required, because employees were already protected by belts for a substantial portion of the workday.[16]

We therefore reject Falcon's contention that the Secretary failed to prove an essential element of his case--that belts could have been, but were not, used for a substantial portion of the day. The workday test cases do require the Secretary to prove that employees are not tied off for a substantial portion of the workday when his ultimate goal is to prove that belts are impractical. None of these cases, on the other hand, makes it incumbent on the Secretary to prove the converse, that employees are tied off for a substantial portion of the workday, when his ultimate goal is to prove that belts are practical, as opposed to impractical. To sum up, the workday test is used only to show *im*practicality, not practicality, of belts.

(b) The "Not Actually Used Test"

As a final note, the Secretary argued that the workday test is inapplicable here because no fall protection devices were actually used in this case. While it is true that in each of the four instances here, belts were, in some sense, not actually used, our review of the cases construing the so-called "not actually used" test suggests that this one does not fall into that category. The "not actually used" test reflects a long line of judicial and Commission decisions holding that section 1926.105(a) is violated if none of the listed safety devices is being used. *Willson III*, 773 F.2d at 1383. Many of those cases involve connectors, or other ironworkers performing an operation that keeps them continually in motion, under circumstances in which fall protection is not only literally "not used," but also not required, encouraged, ensured, or even provided or available. *See Century Steel*, 888 F.2d at 1404; *Willson III*, 773 F.2d at 1383-84 and cases cited; and most recently, ***Peterson Bros. Steel Erec. Co.***, (No. 90-2304, April 27, 1993). Therefore, contrary to the Secretary's characterization, this is not a case in which no fall protection devices were used. Rather, the evidence shows that many employees at the site involved in the same or similar activities as those cited were

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[16] As it happens, there is no need to remand this case to gather evidence on what portion of the workday employees were exposed and not tied off during the activities in question. However, the parties will never know definitively in advance whether the judge or the Commission will reach the nets issue, so they should introduce evidence on this point in section 1926.105(a) cases.

actually using belts and tying off appropriately, and, moreover, that even those seven employees observed not using belts were supposed to be using them.

In summary, the "not actually used" test does not end our inquiry because belts *were* used in this case, and the workday test is inapplicable not, as the Secretary argues, because this case is like *Willson III* and *Century Steel* in that no fall protection devices were actually used (here, safety belts were generally in use), but because it is *unlike Southwestern* and *Willson I* in that this is not a case that turns on the absence of nets.

3. Industry Custom and Practice

Falcon observes in its brief that unless the term "impractical" in section 1926.105(a) is interpreted in the context of practice and custom in the steel industry, the requirements of the fall protection standard are impermissibly vague, citing *Century Steel*, 888 F.2d at 1403-05. In *Century Steel*, the court observed:

> [w]hile evidence of the steel erection industry's custom and practice might well shed little light on the *feasibility* of using safety belts in the circumstances here at issue, it is clearly relevant to the question of *practicality* as reflected by the industry's actual usage.

Id. at 1405. (emphasis in original).

Our review of the record revealed one of Falcon's own exhibits, an August 14, 1987 submission by the Safety Advisory Committee of the Structural, Ornamental, Rigging and Reinforcing Steel Industries, representing both labor and management, which provides comments on the Secretary's November 25, 1986 proposed rulemaking on Subpart M fall protection. In a section entitled "Iron Workers Moving From Point to Point," the Committee lists a number of activities it thinks should be exempt from the 6-foot lanyard tie-off requirement. Among the sixteen different activities listed were "1. Bolt up man moving from one location to another to install bolts;" and "2. Welder moving from one location to another to weld." Notably, every single activity speaks of a person "moving from one location to another." The last sentence of the section reads: "However, it should be understood that once ironworker employees have arrived at their work station, they should be protected from falls as required." Testimony of both the Secretary's and Falcon's

witnesses generally supported this view, and Falcon does not attempt to refute the basic principle, relying instead on an unpreventable employee misconduct defense.

A fair statement of industry practice and custom on safety belts, then, is that ironworkers move freely about when they are actually en route from one location to another, but that they tie off when stationary. Barring proof of an exception to this general rule, which was not forthcoming from Falcon, the ironworkers involved in this case should all have been tied off, as all were sitting or standing in place.

The judge, finding that the Secretary did not establish even a prima facie case, did not consider the merits of any unpreventable employee misconduct defense. Since we find that the Secretary did establish a prima facie case showing that safety belts were practical in each instance and that Falcon failed to rebut that case with evidence proving that belts were in fact impractical, we turn now to Falcon's affirmative defense.

C. Falcon's Affirmative Defense: Unpreventable Employee Misconduct

As we have already stated, the evidence in this case demonstrates that safety belts were not only practical but were generally used elsewhere on the site by other employees under circumstances similar to the ones cited here, yet the compliance officers observed at least seven employees who failed either to wear a belt or to tie off. The issue remains whether Falcon may defend against these apparent violations of section 1926.105(a) by establishing the unpreventable employee misconduct defense. To prove this affirmative defense, an employer must show that:

> (1) it had established work rules designed to prevent the violation;
> (2) the work rules had been adequately communicated to its employees; and
> (3) it had taken steps to discover violations, and had effectively enforced the rules when violations had been discovered.

Gary Concrete Prods., 15 BNA OSHC 1051, 1054-55, 1991 CCH OSHD ¶ 29,344, p. 39,452 (No. 86-1087, 1991); *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979). Although Falcon failed to raise this affirmative defense in its answer, Falcon's counsel raised the possibility late in the hearing that the issue may have been tried by consent. For the reasons that follow, we find that even if Falcon had properly pleaded this affirmative defense, it has not been established on this record.

Falcon claims in its brief that any evidence of employees failing to tie off is evidence of four isolated instances of employee misconduct, evidence which does not support a violation of the Act, citing *Pennsylvania Pwr. & Light Co. v. OSHRC*, 737 F.2d 350, 354 (3rd Cir. 1984) ("*PP&L*"). In the *PP&L* case, which dealt with a single employee failing to comply with an electrical grounding standard, the court found that the Act does not impose strict liability on employers for isolated and idiosyncratic instances of employee misconduct, and that PP&L had successfully defended itself on that basis. The Secretary, for his part, emphasizes that seven employees, not one individual as in *PP&L*, were involved here. He argues that the cumulative effect of all the cited instances undermines any claim that the incidents are "isolated." We agree. The misconduct here is more systemic than it is idiosyncratic.

The evidence in this case does show, as Falcon claims, that: Falcon had a policy requiring its workers to tie off when bolting up steel, whenever tying off was feasible and practical, *i.e.*, whenever they were stationary and not moving from point to point; Falcon provided safety belts and lines for this purpose; and this subject was addressed at safety meetings. At the same time, however, one Falcon foreman expressed the result of these efforts this way: "Most of the men complied. You might have to tell some guys sometimes to tie off." He acknowledged that he had done just that on occasion. In fact, although the evidence showed that Falcon had threatened to discharge employees who failed to tie off in appropriate circumstances, there was no evidence that it had ever acted on that threat. For example, one ironworker who had been with Falcon for 13 years testified that the union steward, who ran the safety meetings, had at one point warned the crew that "the next person who . . . was caught not tied off [would be] fired or terminated from his job." This testimony suggests that Falcon supervisors were aware of what had developed into a recurring problem. In *B-G Maintenance Mgt., Inc.*, 4 BNA OSHC 1282, 1283, 1976-77 CCH OSHD ¶ 20,744, p. 24,881 (No. 4713, 1976), a case in which the Commission denied the employer's unpreventable employee misconduct defense, the employer was "aware . . . of the tendency of its employees not to use safety belts and lifelines. Indeed, its supervisory personnel had seen such violative conduct before, but had never disciplined an employee on

that account." *Cf. Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1986-87 CCH OSHD ¶ 27,579 (No. 78-5159, 1986) (no evidence that supervising personnel were aware of violations of work rule involving machine shut-down procedures).

In light of the less than compelling evidence on communication and enforcement of the work rule, the incidents here seem to be four in an ongoing series, representative of a pattern of disregard for the work rule rather than, as Falcon would have us conclude, four separate coincidences during which the compliance officer happened to be present when an errant employee strayed from the routine. In *Daniel Constr. Co. of Alabama*, 9 BNA OSHC 2002, 2006, 1981 CCH OSHD ¶ 25,553, p. 31,862-63 (No. 13874, 1981), where four employees out of 2,500 to 3,000 were spotted without hard hats, the Commission held that the employer's workrule was uniformly and effectively enforced, and that noncompliance was unpreventable. This case involves a much closer ratio: four incidents involving seven out of a total of approximately thirty employees. (We find this rate of noncompliance significant, even taking into account that the inspections spanned the course of a month.)

That the incidents here involved pairs of employees instead of single individuals exacerbates the degree of noncompliance in this case. In *Daniel Intl. Corp., Brown & Williamson Proj.*, 9 BNA OSHC 1980, 1982-83, 1981 CCH OSHD ¶ 25,492, p. 31,790 (No. 15690, 1981), all four members of a crew, out of a total of 175 ironworkers on the site, failed to tie off. The Commission noted that where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct shows weak enforcement of the rule. *Id.* at 1983 n.9, 1981 CCH OSHD at p. 31,790 n.9. Similarly, in *Daniel Constr. Co.*, 10 BNA OSHC 1549, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982), the compliance officer observed five failures to tie off involving two pairs of employees, a threesome including a supervisor, and a single employee. The Commission held that "looking at the record as a whole, the instances of employees failing to tie off their lanyards are too numerous to permit a conclusion that Daniel's rule . . . was effectively enforced." *Id.* at 1552, 1982 CCH OSHD at p. 32,672. *Accord Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1866, 1981 CCH OSHD ¶ 25,358, p. 31,497-98 (No. 16147, 1981) ("a number of proven instances of noncompliance with the safety belt rule" together with an

employee's testimony that "he did not always tie off and had seen other employees wearing safety belts without tying off" blocked the defense).

Also to be taken into account is evidence of prior violations or instances of noncompliance. Although Falcon's safety consultant's reports include notations on a number of tie-off violations, as mentioned in connection with the two other citation items in this case, using the results of a company's voluntary self-audits against it is counterproductive. *See General Motors Corp., GM Parts Div.*, 11 BNA OSHC at 2066, 1984-85 CCH OSHD at p. 34,611. A history of previous citations, on the other hand, tends to show that the employer knew its workrule communication and enforcement efforts required improvement. *Dun-Par*, 676 F.2d at 1337. Falcon had been cited twice before, most recently in April 1989, for bolters not being tied off. In one instance, employees were on structural beams; in another, they were installing bolts in a concrete deck, outside the perimeter guard. In *PP&L*, instances of lax enforcement of safety rules raised at the hearings were dismissed as having little or no probative value because they related to incidents long before the accident, and there was no evidence of prior citations. *PP&L*, 737 F.2d at 359. Here, the incidents are not from the remote past, but quite recent and remarkably similar to the cited instances.

For all these reasons, we find that Falcon failed to establish an unpreventable employee misconduct defense. We therefore find a violation of section 1926.105(a) for failure to use safety belts. Accordingly, item 1 of citation no. 2 in Docket No. 89-3444 and item 2 of citation no. 2 in Docket 89-2833 are affirmed.

D. Willfulness

As with the other vacated citation in this case, the judge did not reach the issue of willfulness; Falcon also does not address it. The Secretary argues the willfulness issue only in the broader sense of Falcon's failure to provide "fall protection" for its workers.

We find the Secretary's burden in showing willfulness in this context to be somewhat heavier than his burden in other situations. The man basket and perimeter cable violations, both of which we found to be willful, required affirmative decisions by Falcon's supervisors on a daily basis, decisions directly attributable to Falcon's management alone. By contrast, individual employees have some degree of discretion in deciding whether and when to wear

safety belts. This is not to say that an employer may not ever be held liable for a willful violation of a safety belt or other personal protective equipment standard. In *Williams Enterprises*, 11 BNA OSHC at 1420, 1983-84 CCH OSHD at p. 33,880, for example, despite repeated warnings from a compliance officer over the course of a month, the employer obstinately refused to take any steps to provide and ensure the use of appropriate fall protection devices (temporary floors and safety belts). The compliance officer posted an imminent danger notice and warned employees and supervisors about the violative conditions, to no avail. A return trip to check up on the situation several months later proved that the problem was still recurring. The Commission affirmed the violation as willful. In contrast, we find that Falcon's compliance problem here, while serious and deserving of concentrated remedial measures, does not amount to "intentional, knowing or voluntary disregard for the requirements of the Act, or . . . plain indifference to employee safety." *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated).

E. Penalty

Having considered the statutory criteria, we assess a single penalty of $1,000 for these consolidated violations.

IV. Order

In summary, we affirm item 3 of citation no. 2 in Docket No. 89-3444 as a willful violation of section 1926.550(g)(2) and assess a $10,000 penalty; we affirm item 4 of citation no. 2 in Docket No. 89-3444 as a willful violation of section 1926.750(b)(1)(iii) and assess

a $5,000 penalty; we affirm item 1 of citation no. 2 in Docket No. 89-3444 and item 2 of citation no. 2 in Docket 89-2833 as serious violations of section 1926.105(a) and assess a single penalty of $1,000.

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: April 27, 1993

FOULKE, Chairman, concurring in part and dissenting in part:

While I concur with most of the findings contained in the main opinion, I disagree with the characterization of items 1 and 2 of citation no. 1 as willful. In sum, the main opinion accurately cites the law on the determination of willfulness, but misapplies that law. The evidence in the record of this case simply does not support a characterization of willfulness for either of these violations.

In citation no. 1, item 1, Falcon is cited for an alleged violation of 29 C.F.R. § 1926.550(g)(2), restricting the use of personnel platforms known as "man baskets." After correctly finding that the facts support a finding of a violation, the judge concludes that a characterization of willfulness is also supported on two grounds: (1) in disregard for the recommendation from its consultant, Falcon chose to use the man baskets; and (2) Falcon wrote letters to the general contractor complaining about the unavailability of elevators to work floors. This evidence, the judge concludes, establishes the requisite state of mind for a willful characterization.

In affirming this determination, the majority opinion is inconsistent. First, the majority opinion unequivocally states that employers should not be discouraged from seeking advice from consultants, and therefore will "ascribe neither credit nor blame for the results of" Falcon's self-audit. I agree, but point out that in so stating the majority negates one of the two grounds used by the judge to support his finding of willfulness. Second, in the letters to the general contractor, Falcon criticizes it for having elevators that run only as high as the 38th floor. Falcon complains that for its employees to have to take the elevator to floor 38, and then climb the additional floors by ladder is too slow. Because this process takes too long for employees to arrive at their work stations, Falcon also complains that the arrangement is prohibitively expensive. In its briefs to the Commission, Falcon argues that this practice also creates a greater hazard, for the reasons addressed in the main opinion. Although I agree that a greater hazard defense is not shown on this record, Falcon's concerns in this regard are certainly legitimate enough to cast doubt on the majority's finding of willfulness.

That these grounds are not supportive of the violations being characterized as willful is demonstrated in the majority opinion by the fact that the majority chooses not to address

their merits. Instead, the majority opinion chooses to "...base [its] finding of willfulness on an entirely different premise: the uncompromising language of the standard itself."

This matter does not require discussion at great length. A finding of willfulness based on the "uncompromising language of the standard" alone is a practice heretofore unrecognized in Commission law. In contrast, the Commission has consistently noted in its analysis of willfulness that proof of knowledge by the Secretary is required for a finding of any violation. Thus, something more--a state of mind of conscious disregard or plain indifference--must be evidenced. As stated earlier, the majority opinion correctly identifies the precedent in the area of willfulness, but here, chooses to depart from that law entirely.

Based on the aforesaid reasons, I conclude that for item 1 of citation no. 1, the characterization of this violation as willful is not supported by the evidence in this record, or by the law. I would find this a serious violation and hold that the judge erred in characterizing this violation as willful.

In citation no. 1, item 2, Falcon is cited for an alleged violation of 29 C.F.R. 1926.750(b)(1)(iii), requiring wire-rope cables at the perimeter of open-sided temporary floors. Once again, the characterization as willful is not supported by the facts presented at the hearing.

The main opinion relies exclusively on Falcon's "prior citations for violations of the same standard" and "[o]ur affirmance today of two other violations related to fall hazards" to find willfulness. In doing so, the main opinion ignores that the facts herein were sufficient to lead the judge to vacate this citation item entirely based on his reading of the law. Under these circumstances, where a legitimate question of law exists, I cannot agree with a finding of willfulness and would instead characterize this violation otherwise.

Edwin G. Foulke, Jr.
Chairman

April 27, 1993
Dated

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SECRETARY OF LABOR, Complainant, v. FALCON STEEL COMPANY, INC., Respondent.	Docket Nos. 89-2883 & 89-3444

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 27, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

April 27, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket Nos. 89-2883 & 89-3444

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Secretary of Labor, Complainant, v. Falcon Steel Company, Inc. Respondent.	Docket Nos. 89-2883 and 89-3444

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 28, 1991. The decision of the Judge will become a final order of the Commission on July 29, 1991 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 July 18, 1991** 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
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

June 28, 1991
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-2883 anc -3444

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. FALCON STEEL COMPANY, INC. Respondent.	Docket Nos: 89-2883 and 89-3444 (Consolidated)

Appearances:

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Philadelphia, Pennsylvania
For Complainant

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Janet L. Miller, Esq.
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Washington, D.C. and Cleveland, Ohio

and

David L. Westerman, Jr., Esq.
Westerman and Tryon
Garden City, New York
For Respondent[1]

BEFORE: MICHAEL H. SCHOENFELD,
Judge, OSHRC

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29. U.S.C. §§ 651 - 678 (1970) ("the Act").

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[1] Respondent was initially, and for only a short time, represented by a lay representative. After the hearing, Jones, Day, Reavis & Pogue withdrew as counsel for Respondent. Filing the post-hearing brief on behalf of Respondent was Westerman and Tryon.

On August 16 and 17, 1989, and again on August 28, 1989, through September 27, 1989, the sixty story high rise construction site located at 16th and Chestnut Streets in Philadelphia, Pennsylvania was inspected by Compliance Officers ("CO") of the Occupational Safety and Health Administration ("OSHA") of the U.S. Department of Labor. Falcon Steel Company, Inc. ("Respondent") had employees engaged in steel erection working at the site which is commonly referred to as Liberty Place, Phase II or "Liberty II."

As a result of the earlier inspection two citations were issued on September 11, 1989, to Respondent alleging that it had committed four serious and two willful violations of the Act. Respondent timely contested the citations. This contest was docketed before the Commission as Docket No. 89-2883. The latter inspection resulted in the issuance on November 13, 1989, of three citations alleging six willful, twelve serious, and five other than serious violations of the Act. Again, Respondent timely contested the citations. This second matter was docketed with the Commission under Docket No. 89-3444. The matters were consolidated for trial and decision.

After extensive prehearing activities, a hearing was held from August 14 through 21, 1990. No affected employees or authorized representative of affected employees sought party status. Inasmuch as new counsel for Respondent was not engaged until December 6, 1990, time for filing post-hearing briefs was extended. Briefs were filed on March 4 and 11, 1991. Neither party availed itself of the opportunity to request permission to file a reply brief.

Jurisdiction

The complaints allege and Respondent does not deny that it is a corporation engaged in the business of steel erection, had employees at the inspected work site so engaged, and that it uses tools, materials and supplies originating outside the Commonwealth of Pennsylvania. (Complaint, ¶ II; Answer, ¶ 2). I so find.

Accordingly, I conclude that Respondent is an employer within the meaning of § (3)(5) of the Act.[2]

DISCUSSION

Numerous alleged violations were subject to either withdrawal by the Secretary or settlement (TR 8, 9, 279).[3] Those alleged violations which were neither withdrawn nor settled were heard, argued, and briefed.[4]

Docket No. 89-2883
Citation No. 2, Item No. 2
Docket No. 89-3444
Citation No. 2, Item No. 1
29 C.F.R. § 1926.105(a)
Fall Protection

The cited standard, 29 C.F.R. § 1926.105(a) (1989), reads as follows:

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[2] Title 29 U.S.C. § 652(5).

[3] References to the record are as follows; TR - transcript of hearing; Exhibits 1,2, 3, Etc. (1 through 46), Complainant's Exhibits; Exhibits A, B, C, Etc. (A through JJJJ).

[4] The following items were tried. Docket No. 89-2883, Citation No. 2, Item No. 2. Docket No. 89-3444, Citation No. 1, Items 1 and 9. Citation No. 2, Items 1 through 6.

1926.105 Safety Nets

> (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The application of this standard has, to say the least, been the subject of extensive litigation. The Court of Appeals for the District of Columbia Circuit in Century Steel Erectors, Inc. v. Secretary, 888 F.2d 1399 (1989) ("Century") reviewed its decisions in the Willson cases[5] and in Donovan v. Williams Enterprises, Inc., 744 F.2d 170 (D. C. Cir. 1984).

Assigning burdens of proof in cases brought under the cited standard occupied much of the Court's decision. After extensive discussion the Century court observed;

> The standard established by section .105(a) contains several elements; those that the Secretary must prove depend on the nature of the violation described in the OSHA citation.

888 F.2d at 1402. (Emphasis added.) The court went on to distinguish between those cases in which none of the fall protection devices listed in section .105(a) were used and the Secretary cited an employer for the failure to provide safety nets as opposed to those cases in which an employer is cited under section .105(a) for failure to provide fall protection other than safety nets. The court set out two different burdens of proof.

In those cases in which no devices were used and the employer

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[5] L.R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664 (D.C. Cir. 1982) ("Willson I"); Brock v. L.R. Willson & Sons, 773 F.2d 1377 (D.C. Cir. 1985) ("Willson III").

was cited for failure to provide nets, the Century court said;

> [T]he Secretary will establish a prima facie case upon showing that the employees were exposed to a fall in excess of twenty-five feet and that none of the protective measures was used.

Id. (Citations omitted.) On the other hand;

> [W]hen an employer is cited under section .105(a) for failure to provide a fall protection safeguard other than safety nets, the Secretary must prove that its use is practical.

888 F.2d at 1405. Thus, under the Century holdings, analysis must begin with a determination as to the nature of the alleged violations. Complainant's statement as to the appropriate requirements for a prima facie set out in her post-hearing brief (p. 24) is applicable only if, under Century, the citations at issue charge that no safety devices were used and Falcon was cited for its failure to provide nets.

Unfortunately, this case does not fall easily into one of the two categories established by the Century holding. It cannot be reasonably determined by reading the citations themselves whether the nature of each of the alleged violations of section .105(a) is based upon (1) the failure to use any fall protection combined with a lack of safety nets, or (2) the failure to use safety belts -- an enumerated fall protection safeguard.

Indeed, the alleged violations as described in the citations themselves are discrepant. In Docket No. 89-3444, general language introducing the three "instances" of alleged violations of section

.105(a), merely repeats the wording of the standard.[6] The citation goes on to describe each instance of an alleged violation in more detail. The detailed description of instance (a) is silent as to both nets and belts[7] while instance (b) describes employees not using safety belts[8], and instance (c) is not specific but fairly infers a failure to use belts in that it is hard to envision how and employee would "use" safety nets.[9] The citation in Docket No.

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[6] This introductory paragraph reads:

> Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts was impractical:

[7] The citation describes instance (a) as follows:

> a) 16th and Chestnut Streets, Liberty Place II, Philadelphia PA 19103, East Side of The 48th Floor of The Tower. Observed 8 /29/89

[8] Instance (b) is described as:

> b) 46th Floor - employees bolting up steel were not using safety belts, where there was a potential of falling 46 floors. Observed 8/29/89

[9] The citation describes Instance (c) as follows:

> c) Southwest Corner of The 4th Floor of the Retail Section - fall protection was not provided and used by an employee working outside the perimeter protection where there was a potential of falling 4. floors. Observed 9/7/89

89-2883, after the same introductory language, states, in pertinent part, that "employees were not wearing safety belt and lanyard or provided any other equivalent fall protection." Thus, based on the citations themselves, it cannot be determined if OSHA cited Falcon for failure to provide one of the enumerated fall protection devices or for a failure to provide safety nets.

The complaints in these cases add little illumination.[10] In Docket No. 3444, paragraph XXI(c) of the complaint describes the three instances by again using an introductory paragraph repeating the language of the standard[11] combined with a separate description of each instance.[12] In Docket No. 89-2883, the relevant paragraph

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[10] Under Commission Rule 35(b)(3), 29 C.F.R. § 2200.35(b)(3) (1989), the complaint is to contain a separate subparagraph which "clearly and concisely" states;

> The factual basis for each allegation necessary to establish that the cited circumstances, conditions, practices or operations violated the cited provision of the Act, standard, regulation, rule or order

[11] The introductory paragraph used in the complaint reads:

> Respondent was in violation of 29 C.F.R. § 1926.105(a) on August 29 and September 7, 1989, in that in three instances observed by the compliance officer respondent did not provide safety nets when workplaces were more that 25 feet above ground or other surface where the use of ladders scaffolds catch platforms; temporary floors or safety belts was impractical:

[12] The complaint describes each instance as follows;

> 1) On August 29, at the East Side of the 48th Floor of the Tower, the compliance officer observed two employees bolting steel. One had a safety belt but was not using it. The other

of the complaint mimics the terms of the standard itself.[13]

The citations were issued based upon the recommendations of two compliance officers who inspected the worksite. Where, as here, there is ambiguity in the language of a citation, the rationale of the issuing compliance officer as set forth in his testimony can be used to clarify the ambiguity. See, Martin v. Occupational Safety and Health Review Commission, 111 S. Ct. 1171 (1991). Both compliance officers testified as to the reasons why they recommended the citations be issued. Additionally, how the Compliance Officers believed abatement could have been accomplished is strong evidence at to what each of them thought was the essential nature of the violation at the time the citations were

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> did not have a safety belt. Respondent did not provide nets. [Instance a]
>
> 2) On August 29, 1989, at the 46th floor two employees (sic.) the compliance officer observed two employees working alone (sic.) the edge of the building bolting up steel. Neither employee was using a safety belt and no nets were provided. [Instance b]
>
> 3) On September 7, 1989 at the Southwest corner of the 4th floor the compliance officer observed an employee working outside the perimeter protection. He was not wearing a safety belt and no nets were provided. [Instance c]

[13] Paragraph XI of the complaint in Docket No. 89-2883 states:

> (c) Respondent was in violation of 29 C.F.R. 1926.105(a) on August 17, 1989 in that safety nets were not provided when workplaces were more that 25 feet above the ground or water surface or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts were impractical.

drafted.

In Docket No. 89-3444, compliance officer Wiseman testified as to instance (a) that he recommended the issuance of the citation because employees were working along the edge of a floor without fall protection - meaning without tying off safety belts and in the absence of safety nets (TR 44). He thought Falcon could have remedied the hazard created by instance (a) by either installing nets or having the employees use a safety belt and lanyard system (TR 54-55). The CO recommended the issuance of a citation regarding instance (b) because "[h]ere again, employees [were] working at the perimeter of the building without protection (TR 48). He opined that nets or safety belts could abate the hazard (TR 56). Similarly, instance (c) was cited because an employee was seen outside a perimeter cable without fall protection (TR 51), a situation the CO thought could be remedied by either safety nets or the use of safety belts (TR 57). Compliance officer Furgeson recommended issuance of the citation alleging a violation of section .105(a) in Docket No. 89-2883 because he observed two employees sitting on the edge of a floor drinking coffee "with no fall protection whatsoever." Asked by what he meant by fall protection, he replied "They were not tied off. There was no safety net, no available protection there." (TR 285-286). In describing how to abate this alleged violation the CO spoke of tying off safety belts (TR 287-288).

The testimony of the two compliance officers indicates that their belief that Falcon could have enforced the use of safety

belts and lanyards or could have installed safety nets led to the issuance of the citations in these cases. It is thus clear that both of the compliance officers, in issuing their citations, were of the belief that the use of safety belts was practical at the worksite. The ambiguous citations and complaints are compatible with the initial reasoning of the Compliance Officers. I thus find in this case that OSHA, through its Compliance Officers, issued citations which charged Falcon with violating section .105(a) by failing to provide a fall protection other than safety nets, i.e., safety belts.

For the above reasons, I hold that in order to show a violation of the cited standard in this case Complainant bears the burden of proving that the use of safety belts for Falcon employees at Liberty II was practical. Century Steel Erectors, Inc. v. Secretary, 888 F.2d 1399 (D.C. Cir. 1989).

As was the case in Century, the Secretary's prima facie case must include a showing that the use of safety belts (in each cited instance) was practical. If such a case is made, consideration must then be given to Falcon's rebuttal evidence, if any, relevant to the question of the practicality of using safety belts. Where an employer rebuts the prima facie showing of practicality, or any other element of her prima facie case;

> the Secretary bears the ultimate burden of proving, by a preponderance of the evidence, that the employer indeed violated the regulation.

888 F.2d 1399. (Citations omitted.)

For the following reasons, I conclude that the Secretary has

failed to make a prima facie case that the use of safety belts was, under the conditions present upon inspection, practical.

The record in this case as to the practicality of the use of safety belts and lanyards is meager indeed. As to each of the four allegedly violative situations, the compliance officers testified that they had observed employees of Falcon exposed to the requisite fall hazards and that in each situation, the employees were not wearing safety belts, or if safety belts were worn, that the lanyards used to secure the belts to a safety line or solid object, were not tied off (TR 44, 48, 51, 285-286). While this evidence is relevant to the factual issues of non-compliance and employee exposure to hazardous conditions, it is not evidence of the practicality of using life lines and safety belts. Although both compliance officers mentioned life lines and safety belts they were not closely questioned as how such belts and lanyards could be used under the circumstances encountered at the cited workplace.

Addressing instances (a) and (b) in Docket No. 2883, compliance officer Wiseman gave only the brief unexplained conclusion that;

> the safety belt and line system would have been very easy to do. They could have hooked up a line with a safety belt going to the area and performed their task without falling.

(TR 56-57). As to instance (c), compliance officer Wiseman opined that the exposed employee working outside the perimeter protection could have tied off his safety belt to an existing steel cable shown in photographs Exhibits 6 & 7). Compliance officer Furgeson, testifying in Docket No. 89-3444, stated that the

employees shown sitting at the edge of an open-sided floor could have been protected from the fall hazard by safety belts and lanyards if they had been wearing safety belts with lanyards tied off to a static line which, in turn, could have been placed between columns which were not shown in the relevant photographic exhibit (TR 287-288, Exhibit 36).

Neither compliance officer offered a specific opinion as to whether the use of safety belts and lanyards was practical or feasible.[14] This is not a case, such as Century, where a compliance officer offered an opinion which amounted to a conclusion that the use of safety belts case was "practical." See, Century, 888 F.2d at 1403. Indeed, the most that can be said of the testimony of the compliance officers on this record is that they stated, in each instance, that Falcon employees "could" have used a safety belt. The compliance officers testified that safety belts could have been tied off either (1) to an existing perimeter cable (instance (c)) or (2) to some other lines or cables which would have had to be installed in the area (instances (a) and (b) and Docket No. 89-2883). This testimony is insufficient to make a prima facie case that the use of safety belts was practical under the circumstances existing at the workplace.

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[14] The court in Century relied on Webster's Ninth New Collegiate Dictionary (1983) for the definition of "practical" as "relating to, or manifested in practice or action: not theoretical or ideal." The court noted that the Dictionary distinguished between "practicable" and "practical" by explaining that "PRACTICAL applies to things and to persons and implies proven success in meeting the demands made by actual living or use." Century Steel Erectors, Inc. v. Dole, 888 F.2d 1399, 1405 (D.C. Cir., 1989).

The compliance officers' testimony as to what Falcon could have done is evidence as to "feasibility" not evidence as to "practicality." The court noted that "feasible" was defined as "capable of being done or carried out." Century, 888 F.2d at 1405. The testimony of the compliance officers here does not amount to an assertion that the use of safety belts as they prescribed had proven successful in preventing in protecting construction workers from falls under such conditions. For example, there is no evidence or opinion that the perimeter cables to which compliance officer Wiseman suggested safety belts be tied could (or in the past had) sufficient strength to hold a falling worker. Such is the essence of "practicality" in cases under section .105(a).

Moreover, even though not testifying as to practicality, the compliance officers' opinions as to feasibility are accorded little probative weight. Neither was proffered as an expert witnesses. Compliance officer Wiseman's attempts to testify as to his opinions regarding matters generally requiring expertise and specifically his opinions as to what Falcon could have done was vigorously challenged (TR 42-43, 47, 148-155, 249-251, Exhibit F). Rulings on those objections resulted in permitting Wiseman's opinions into evidence for the limited purpose of explaining the basis of his conclusions. They were not accepted as probative of the validity of those conclusions (TR 54-55). Compliance officer Furgeson's testimony as to practicality was that the exposed employees could have been protected by static lines strung between columns whose location and distance from the exposed employees is not shown or

discussed. He presented no reason or opinion as to how such static lines would be successful in preventing employee falls. His testimony in this regard amounts to sheer unsupported speculation.[15] Thus, I find that the testimony of both compliance officers fails to show either the feasibility or practicality of using safety belts.

Accordingly, I conclude that Complainant has failed to demonstrate that Respondent failed to comply with the requirements of 29 C.F.R. § 1926.105(a) as alleged in Docket No. 89-2883, Item No. 2 of Citation No. 2 and in Docket No. 89-3444, Item No. 1 of Citation No. 2.[16] These items are vacated.

Docket No. 89-3444
Citation No. 1, Item No.1
Section 5(a)(1) of the Act
Entrance Overhead Protection

Compliance officer Weisman observed construction personnel, including Falcon employees, entering and leaving the job site by walking in an area where there was work progressing above them and where materials had fallen or were falling and could strike them. Although some falling concrete struck the CO (TR 30-31) he did not establish that materials had actually fallen on or near Falcon employees (TR 37). He described the danger as that of materials

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[15] The transcript at p. 287, line 22, should read "BY MR. ROSENTHAL." It is hereby so corrected.

[16] Other issues, particularly the asserted economic infeasibility of installing perimeter safety nets, raised as an affirmative defense, are not reached. Inasmuch as Complainant failed to make a prima facie case, matters of affirmative defense are irrelevant to the determination.

falling from upper floors which could strike Falcon employees while they were going in or out of the building and could result in serious harm or death (TR 30). He maintained that Falcon could have provided a covered entrance at the building to protect its employees (TR 68) by constructing an overhead canopy using welded frame scaffolds with two inch wood planking on top (TR 69).

The CO stated, in reference to falling concrete, that a contractor other than Falcon was doing the concrete work and that several other contractors were cited for the same lack of overhead protection (TR 159). He agreed that citing several contractors indicated his belief that a number of different employers at the site had the power to abate (TR 160). The CO, conceding that he did not discuss any potential problem of craft union jurisdiction with the union tradesmen at the site, nonetheless maintained that any of the craft trades could have installed the overhead protection (TR 161).

Michael Champagne, a safety specialist employed by Construction Safety Consultants (TR 532), prepared reports of his inspections of Liberty II (Exhibits 40, 41, 43, 44 and 49; TR 539) for its client, Falcon (TR 534, 539). He stated that there was one special inspection because Falcon was concerned about falling materials (Exhibit 43; TR 554-556).

Falcon's job estimator, John Egyed, who has extensive credentials and familiarity with the high rise construction business in the Philadelphia area, (TR 580-604) prepared Falcon's job estimates for both Liberty I and II (TR 604). He testified that sidewalk

bridges are traditionally installed by carpenters. He opined that if the ironworkers on Liberty II had tried to build one there would have been a union dispute and a possible work stoppage (TR 692).

Fhane Jones, an Ironworkers International Vice President and former officer of the Camden, New Jersey, Ironworkers local noted that it was part of his job to monitor what other craft unions were doing in the Philadelphia area (TR 823). As an officer in the local he was personally involved in jurisdictional disputes and collective bargaining (TR 815). He testified that determining which craft union would have the jurisdiction to build overhead protection would depend upon the nature of the materials used in the construction of the overhead canopy. He stated that, as a general matter, if a craftsman began work that "belonged" to another craft there would be a disturbance or a job shut-down. In addition, if pipe scaffolding were used to construct an overhead canopy, the work would be under the jurisdiction of the carpenters union. He opined that the only way the ironworkers would have had jurisdiction to build such protection were if it required major structural steel supports (TR 826-827). Finally, Mr. Jones maintained that if, in fact, ironworkers removed wood barriers in the elevator shaft openings, the carpenters would have "raised hell" (TR 827-828).

Jeffery Flannigan, an ironworker with 13 years experience who was foreman of the ironworker crew erecting elevator rails in the elevator shafts (TR 868-869) noted that the workers in the shafts had overhead protection installed in the 23rd floor which consisted

of "erected steel beams, scaffold planked over and completely sheeted with plywood" (TR 872). He also stated that there were a few occasions when ironworkers stripped wooden forms from elevator shaft openings (TR 873).

Section 5(a)(1) of the Act,[17] the "general duty clause," provides that each employer;

> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees...

To prove a violation of the general duty clause, the Secretary must demonstrate that;

> the cited employer failed to free the workplace of a hazard that was recognized by the cited employer or its industry, that was causing or likely to cause death or serious physical harm, and that could have been materially reduced or eliminated by a feasible and useful means of abatement.

Pelron Corporation, 12 BNA 1833, 1835 (No. 82-0388, 1986).

Falcon argues that the general duty clause is inapplicable because there is a specific standard, 29 C.F.R. 1926.100(a), which addresses the hazard. Inasmuch as the hazard described by the Compliance Officer encompasses the danger of falling debris hitting a person on any exposed area of the body, the hard hat requirement is irrelevant. Indeed, the CO, although uninjured, was himself struck on the shoulder by debris. The general duty clause is thus applicable.

The Secretary has made out a prima facie case of a violation.

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[17] 29 U.S.C. § 654(a)(1).

The CO's testimony that materials had fallen in an area where Respondent's employees generally and usually entered and left the worksite is sufficient to demonstrate that a hazard to Respondent's employees existed. In addition, as discussed, Respondent's actual knowledge of the existence of the hazard is demonstrated by the fact that it requested its own safety consultant to inspect the worksite with reference to the problem of falling objects. It is also reasonable to infer that a person hit by almost any object found on a construction site which had fallen a distance of at least several stories would likely suffer serious bodily injury or death.

Falcon maintains that because it neither created nor had the ability to abate the hazard it has established the so-called multi-employer affirmative defense. Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, (7th Cir. 1975); Anning-Johnson, Co., 4 BNA OSHC 1193 (1976).

> The Commission's Anning-Johnson defense requires a noncontrolling, noncreating subcontractor to show either that its exposed employees were protected by other realistic measures taken as an alternative to literal compliance with the cited standard or that it did not have, nor with the exercise of reasonable diligence could have had, notice that the condition was hazardous.

D. Harris Masonry Contracting, Inc. v. Secretary of Labor, 876 F.2d 343, 345 (3rd Cir., 1989).

Identifying the hazard as an unprotected entrance to the project, Falcon maintains that the general contractor who failed to construct a canopy was not under its control. Further, argues Falcon, it could not abate the hazard because the employees it had

at the site, being ironworkers, could not construct the canopy without creating a craft union dispute and a possible work stoppage.

The Secretary argues that Respondent's employees at the site had the expertise to erect an overhead canopy protection using tubular steel scaffolding covered with planking as described by the CO. "Control" as used in the so-called multi-employer work site cases refers to the hazard itself. Indeed, a respondent at a multi-employer work site "controls" a hazard if it is shown that it possessed the expertise and personnel to abate the cited hazard. Union Boiler Company, 11 BNA 1241 (No. 79-0232, 1983). On this record, other than speculating as to possible labor-management problems, Falcon has not shown that its employees at the site lacked the ability to construct an overhead canopy as described by the CO.

Even where a respondent has personnel who have the ability to abate a cited hazard, the Commission has held that a sub-contractor on a multi-employer worksite lacks the "control" over a hazard requisite for finding a violation where it demonstrates that union work rules precluded it from abating the hazard. See, Lewis & Lambert Metal Constructors, Inc., 12 BNA OSHC 1026, 1029 (No. 80-5295). Recognizing that two witnesses indicated that union jurisdictional problems could arise if Respondent's employees constructed the overhead canopy, the Secretary points to two pieces of evidence to the effect that some extra-jurisdictional work had been performed at the site without incident, i.e., carpenters

installed safety cables in elevator shaft openings and ironworkers removed wood forms to gain access to the elevator shaft openings (TR 797, 873).

Moreover, the Secretary maintains that the record demonstrates that Respondent's employees, without incident, at times crossed jurisdictional boundaries, doing work assertedly belonging to another craft. On this basis, she argues that even if the construction of such overhead protection was not within the craft union jurisdiction of Respondent's employees, the canopy could have been constructed by them without the labor relations friction or job shut-down predicted by other witnesses.

Inasmuch as it is part of an affirmative defense, Respondent bears the burden of persuasion that if its employees had constructed a canopy, there would have been a genuine risk of a union jurisdictional dispute and job shutdown. Respondent has made such a claim here. The evidence is however, unpersuasive. One witness who stated that a job stoppage might result was Respondent's job estimator. While highly experienced in the general field of steel erection and intimately familiar with the design and planning of the Liberty II, his opinion that a craft union jurisdictional dispute and work stoppage could have resulted if Respondent's employees erected overhead protection at ground level amounts to speculation. The more qualified witness in this regard is the Ironworkers International union official. Mr. Jones answered one question couched in "generic" terms (TR 826) but did not specifically address the likelihood of a job shutdown at Liberty II. He

did not address the statements that there had been occasions at Liberty II where craft jurisdiction lines had been ignored. Mr. Jones did not explain why the general prediction he made, that there would be labor relations problems if craft jurisdictional lines were crossed, did not occur at Liberty II.

The fact that there were examples of employees at the site performing some tasks outside of their union jurisdiction as relied upon by the Secretary, is not by itself persuasive. The examples, however, demonstrate that at least one of Respondent's supervisory personnel (foreman Flannigan) felt free to do work within another craft's jurisdiction and did so without labor relations friction or strife resulting. The predictions that if Respondent had embarked on installing a canopy entrance to the work site labor strife would have resulted are speculative and inconsistent with actual, albeit limited, experience at the site. Thus, Respondent has not fulfilled its burden of proving that it did not control the cited hazard of a lack of overhead protection at the ground level entrance to the work site.

Finally, in the absence of an ability to abate a hazard on a multi-employer worksite, a sub-contractor is under an obligation, at the minimum, to take reasonable actions to have the general contractor provide the necessary protection. See, Weisblatt Electric Co., 10 BNA OSHC 1667 (No. 79-2537, 1982). There is no such showing here. While Respondent was concerned enough about the very hazard created by falling materials to have a special inspection conducted by its own safety consultant regarding that

problem, there is no record that Respondent suggested, requested or demanded that the general contractor install an overhead canopy at the building entrances. Accordingly, Respondent has failed to establish the multi-employer work site affirmative defense by a preponderance of the evidence.

The Secretary has shown that Respondent failed to provide overhead protection for its employees at the entrance to the building site. Respondent has not established that it could not abate the hazard or that it took reasonable alternative measures to protect its employees. Accordingly, I conclude that Respondent violated § 5(a)(1) of the Act as alleged.

The violation of § 5(a)(1) is serious in that objects falling seven stories or more are likely to cause serious physical harm or death.

In all contested cases in which a violation is found, the Commission is charged with the responsibility to assess a civil penalty

> giving due consideration 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.

Section 17(j), 29 U.S.C. 661(i). Long Manufacturing Co. v. OSHRC, 554 F.2d 902 (8th Cir. 1977). The gravity of the offense, taking into account the number of employees exposed to the risk of injury, the duration of the exposure, the precautions taken against injury, if any, and the degree of probability of the occurrence on an injury, is the most important of the considerations. National

Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1 BNA OSHC 1422 (D.C. Cir. 1973).

As to Respondent's size, its answer indicates it had approximately 100 employees at Liberty II, a project on which Falcon bid $16.7 million dollars (TR 656). Falcon is one of the largest of the 6 or 8 high rise steel erection companies in the Northeast (TR 725). The Secretary entered scant evidence as to how the amount of proposed penalty was arrived at (TR 38) and devotes one conclusory sentence to penalty calculations in her post-hearing brief (Complainant's brief, p. 62.) Regarding gravity, there is no factual basis provided by the Secretary as to the number of employees exposed or the duration of the exposure. Similarly, there is no evidence, other than that Respondent's employees used hard hats, as to any precautions taken against injury. While the CO was himself splattered with some falling concrete, the Secretary put in no evidence of the likelihood of occurrence. Respondent's good faith as to employee safety is in serious doubt as discussed in detail in other sections of this decision. Other than the two citations in this case, the Secretary presented no evidence as to a history of prior violations.

On the above considerations, the assessment of a penalty of $1,000 as proposed by the Secretary does not appear to be warranted, particularly in the absence of any way to assess the likelihood of a falling object hitting a Falcon employee. Lacking any evidence as to gravity, the most important element, I find that a penalty of $200 is appropriate.

Docket No. 89-3444
Citation No. 1, Item No. 9
29 C.F.R. § 1926.451(d)(10)
Lack of Railing on Scaffold

Item No. 9 of Citation No. 1, alleges that Respondent failed to comply with the standard at 29 C.F.R. § 1926.451(d)(10) which provides, in pertinent part:

> (10) Guardrails...shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

Compliance Officer Wiseman testified that two employees were inside an elevator shaft working from a scaffold which had no guardrail (TR 39, Exhibit 2). The scaffold was at the 38th floor level. He saw one employee walk across the top of the scaffold which was not fully planked (TR 39-40). The CO was of the opinion that a fall of 38 stories was possible (TR 39). A photograph was taken of the end of the scaffold while an employee was doing welding or cutting. There was no guardrail in place (Exhibit 2). A Falcon foreman was present (TR 41). On cross examination the CO agreed that there came a time when the employee tied off his safety belt to the scaffold but could not recall if the employee's safety belt was tied off while he was working. The CO pointed out that the employee had to walk across "a single plank to get to this work station" (TR 187-188). He agreed, however, that a de minimis violation would exist where employees were tied off while on a scaffold lacking guardrails (TR 190).

Several witness testified that Falcon had installed temporary flooring and nets inside the elevator shafts (TR 573, 695, 784-

785). The arrangement used by Falcon could have resulted in a fall of up to 25' (TR 875).

Complainant argues that Falcon's installation of decking and nets within the elevator shafts was incomplete, leaving gaps in the protection which could have resulted in falls of great distances. Nonetheless, argues Complainant, since the distance between floors at Liberty II was 12 1/2', even if the floor below were completely covered with decking, the employee was exposed to a fall of greater than the 10' specified by the standard. Complainant argues that even if the employee in the photograph (CX 2) was shown to be tied off while performing the cutting operation, he was not tied off when he walked across the two narrow planks to get to his work station. Complainant reasons that at that time he was exposed to the fall hazard.

Respondent takes the position that the installation of a guardrail at the end of the scaffold would have "interfered" with the employee's ability to do the cutting operation. Falcon states that it provided its employees with safety belts and required their use (TR 693, 167), that the employee was tied off, and that in tying off where there was no guardrail created, at most, a de minimis violation according to the OSHA Field Operations Manual (TR 121, 190; Exhibit C).

In general, to prove a violation of a standard, the Secretary must prove by a preponderance of the evidence that (1) the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by

the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. Astra Pharmaceutical Products, Inc., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). Employee exposure to a hazard is established where it is reasonably predictable that employees, in the course of their duties, will be, are or have been in the zone of danger created by the violative condition. Gilles & Cotting, Inc., 3 BNA OSHC 2002 (No. 504, 1976). Even brief exposures involved in passing or standing near an open edge constitute "access." Walker Towing Corp., 14 BNA OSHC 2072, 2074 (No. 87-1359, 1991).

There is no dispute that the cited standard applies. It is less than clear however, that there was non-compliance with the terms of the standard. First, it must be recognized that the scaffold was located on decking which was the entire width of the elevator shaft but only half the length of the shaft. Thus, in order to fall over 10' from the scaffold, the fall would have to be from the end of the scaffolding closest to the viewer as shown in Exhibit 2. Indeed, Exhibit 2 shows the employee working at the very end of the scaffold with his left leg over the side rail. A fall to that side of the scaffold would have been greater than 10'. The CO, however, did not know if the employee was tied off when he was working in that position. Moreover, the CO did not know when the employee did tie off his safety belt. Complainant rests its case solely on the argument that the employee was not tied off or protected by railings while walking across the two planks to get to the end of the scaffold. This argument is specious. As is clearly

demonstrated by Exhibit 2, a fall from either side of the two plank walkway would have resulted in a fall to the deck on which the scaffold rested, a distance the Secretary has not shown to be greater than 10'. Only if the employee fell off the end of the planking closest to the viewer of exhibit GX 2 would the fall be greater than 10'.

On this record there is no reason to find it more likely that the employee failed to tie off for some period of time after reaching the end of the scaffold than to believe that employee tied off immediately upon reaching the end of the scaffold. Only if he did the former would there have been a violation of the cited standard. Given the fact that the employee did, in fact tie off at some time and given the lack of direct evidence as to when he tied off, I find that the Secretary has failed to show by a preponderance of the evidence that there was a violative condition as alleged. Having failed to make a prima facie case of a violation, there is no need to reach the affirmative defenses asserted by Respondent. Accordingly, Citation No. 1, Item 1 is VACATED.

Docket No. 89-3444
Citation No. 2, Item No. 2
29 C.F.R. § 1926.500(d)(1)
Unguarded Elevator Shaft Openings

Citation No. 2, Item No. 2, sets forth four instances in which it is alleged that Respondent failed to comply with the standard at 29 C.F.R. § 1926.500(d)(1). That standard provides, in pertinent part;

> (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level

> shall be guarded by a standard railing, or the equivalent...on all open sides....

The cited standard does not apply to the cited conditions. The item must thus be vacated.

Liberty II was built by making a slip-form poured concrete "core" around which the rest of the building was constructed in the usual steel erection fashion. A wooden form for the core was devised. Starting below ground level, the form was filled with concrete which was allowed to cure. Once the concrete had enough strength, the form was raised straight up by jacks into a position where more concrete was poured. Again, after the new concrete set sufficiently, the form was raised to the next level. The process was repeated numerous times so that the interior "core" which remained was a concrete structure with walls of solid concrete all the way to the top of the building. The "core" was designed to have certain spaces in the concrete open to the outer parts of the building. In the form these areas were constructed of wood so the finished concrete would contain the openings. After the concrete cured and the form was raised to the next pouring level, the wooden areas in the newly formed concrete wall could be removed thus leaving openings into the core.

The concrete "core" became the vertical shaftway into which elevators were to be installed. Falcon, the steel erection contractor, not only installed the steel outer parts of the building but also installed vertical steel rails in the shafts on which the elevators would eventually ride.

The conditions encountered by the Compliance Officer thus

consisted of floors of steel decking surrounding the concrete core. The photographic exhibits, CX 10 in particular, amply demonstrate that a person standing on the decking, facing the center of the building, would be looking at steel deck flooring ending at a concrete wall in which there were openings. Indeed, the Compliance Officer described "openings in the wall" (TR 69). See, Cowen Construction, Inc., 7 BNA OSHC 1206 (No. 78-1600, 1979) (ALJ Blythe) (Digest). But, see also, Structural Development Corp., Inc., 12 BNA OSHC 1872 (No. 85-1370-S, 1986) (ALJ Blythe) (Digest). Judge Blythe was correct the first time, an opening into an elevator shaft is not "an open-sided floor or platform" within the meaning of the cited standard.

While the definitions applicable to the standards covering floor and wall openings as well as stairways[18] do not define "floor," they do contain specific meanings of both "platform" and "wall opening." "Platform" is defined by § 1926.502(e) as "[a] working space for persons, elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery and equipment." Although defining a "platform" in part as a "platform" provides little guidance, it is clear that there are no open-sided platforms at issue here. Section 1926.502(o) defines "wall opening" as "[a]n opening at least 30 inches high and 18 inches wide, in any wall or partition through which a person may fall, such as a yard-arm doorway or chute opening." On the record in this case, I find that the cited conditions were wall openings,

[18] 29 C.F.R. §§ 1926.500 -.502 (1989).

not open-sided floors or platforms. Falcon was thus not in violation of 29 C.F.R. § 1926.500(d)(1) as alleged in the citati and complaint.

A more specific standard, 29 C.F.R. § 1926.500(c)(1), is applicable in this case. It reads as follows;

> (c) Guarding of wall openings. (1) Wall openings, from which there is a drop of more than 4 feet, and the bottom of the opening is less than 3 feet above the working surface, shall be guarded as follows:
>
> (i) When the height and placement of the opening in relation to the working surface is such that either a standard rail or intermediate rail will effectively reduce the danger of falling, one or both shall be provided:
>
> (ii) The bottom of a wall opening which is less than 4 inches above the working surface, regardless of width, shall be protected by a standard toeboard or an enclosing screen either of solid construction or as specified in paragraph (f)(7)(ii) of this section.

The existence of a more applicable standard does not, by itself, necessarily require vacating a citation which referred to a different standard. Due process requires, however, that a Respondent have a fair opportunity to defend against alleged violations. Thus, where there is a more specifically applicable standard, a violation of that standard may be found after the hearing if both parties, with their concurrence or by their actions actually conducted a hearing on all issues related to the more applicable standard. The Secretary, in her post-hearing brief maintains that if the elevator shaft openings are found to be "wall openings," a violation of C.F.R. § 1926.500(c)(1) has been

established by the record and that such issue was tried by consent of the parties. The Secretary is incorrect on both counts.

Questions as to whether and to what degree, if any, citations and complaints may be amended after a hearing have been before the Commission many times. The issue is governed by Rule 15(b) of the Federal Rules of Procedure made applicable to Commission proceedings by Commission Rule 2[19]. The Commission has held that the consent of the parties to the trial of an issue which had not been pleaded can only be found where the parties "squarely recognized" that they were trying the issue which had not been pleaded. Seward Motor Freight, Inc., 13 BNA OSHC 2230, 2234 (No. 86-1691, 1986), quoting McWilliams Forge Co., 11 BNA OSHC 2128 (No. 80-5868, 1984). In this case, some issues relevant and necessary for a determination of whether there was a violation of 29 C.F.R. § 1926.500(c)(1) were not tried at all.

Under the cited standard, § 1926.500(d)(1) a "standard railing," the detailed specifications of which are contained in yet other standards, 29 C.F.R. § 1926.500(f)(i) - (iv), must be in place "on all open sides" of "every open-sided floor or platform 6 feet or more" above the floor or ground. Under § 1926.500(c)(1) no barrier is required in a wall opening unless "the bottom of the opening is less than 4" above the working surface." Similarly, a particular type of protection is needed where the bottom of the wall opening is less than 4" above the work surface according to

[19] Rules of Procedure of the Occupational Safety and Health Review Commission, 29 C.F.R. §§ 2200.1 - .212, as amended, 58 Fed. Reg. 22780-83 (June 4, 1990).

§ 1926.500(c)(ii). Moreover, a wall opening barrier, which might or might not be a standard railing as required by § 1926.500(d)(1), must be placed in a wall opening only where the relationship of the opening to the work being performed to be such that a barrier "will effectively reduce the danger of falling."

By not identifying the more applicable standard before or at the hearing, Respondent had no opportunity to either cross examine the compliance officer as to the specific conditions for the standard to apply such as critical measurements or the relationship between the work being performed and the danger of falling through the wall openings. Evidence was not introduced as to these questions. The parties thus never "squarely recognized" that an unleaded issue was being tried nor was the issue fully tried. Accordingly, Complainant's motion, contained in its brief, to amend the citation and complaint is DENIED.[20]

Accordingly, Citation No. 2, Item No. 2 is VACATED.

Docket No. 89-3444
Citation No. 2, Item No. 3
29 C.F.R. § 1926.550(g)(2)
Use of Man Basket

It is alleged that Falcon wilfully violated the standard at 29 C.F.R. § 1926.550(g)(2) in permitting its employees to be raised

[20] Moreover, even if Respondent were fully aware that it had to defend against 29 C.F.R. § 1926.500(c)(1) charges, I would find that the Secretary failed, in all four alleged instances, to show by a preponderance of the evidence, that Respondent was in violation. There is no record of the necessary measurements having been made nor is there sufficient testimony as to the nature of the work activities in relation to the wall openings.

and lowered in a man basket at Liberty II. The standard provides:

> (2) General requirements. The use of a crane or derrick to hoist employees on a personnel platform is prohibited except when the erection, use, and dismantling of conventional means of reaching the worksite, such as a personnel hoist, ladder, stairway, aerial lift, elevating work platform or scaffold, would be more hazardous, or is not possible because of structural design or worksite conditions.

It is undisputed that Falcon employees working at the upper reaches of the building (over 40 stories) were hoisted from the ground to their working levels and back down by the use of a man basket suspended from an overhead crane (TR 90, 274, 570). Thus, the standard is applicable. In addition, there is no dispute that Respondent knew of the condition. A number of letters signed by Respondent's Vice President, oral statements made by him to the CO and a written report made to Respondent by it's safety consultant all acknowledge that employees were being hoisted in a man basket suspended from an overhead crane (e.g., Exhibits Y, Z, AA through II; Exhibit 43, TR 93-94).

The record in this case also establishes non-compliance with the requirements of the standard. Under the standard, hoisting employees by crane is prohibited except where the use of alternative means are "more hazardous" or "not possible." Respondent's post-hearing argument that;

> [t]he Secretary has not proved that the use of Falcon's man basket was more hazardous than the use of hoists and ladders, even when such use was permitted by site conditions

(Respondent's brief, p. 39.) is misplaced. By alleging that it

comes within an exception to a general rule Respondent has the burden of proving the exception.[21] The Secretary's prima facie case under this standard has been established by showing the applicability of the standard, the fact that employees were being lifted in a man basket, and showing that Respondent actually knew of the activity. See, Astra Pharmaceutical Products, Inc., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The burden now shifts to Respondent.

Respondent maintains both that worksite conditions made the use of personnel hoists (elevators) impossible and that it was more hazardous for employees to use the personnel hoists.

Impossibility has not been established by Respondent. There is no dispute that at the time of the inspection the uppermost level reached by the four personnel hoists was the 38th floor and that Falcon employees were working as many as eight or ten floors above that level (TR 92, 205-06, 567, 679; Exhibits Y, Z, AA, BB, CC, DD, EE, FF, HH, KK, LL, OO and XX).

There are two distinct areas of concern; first, from ground level up to the 38th floor, and second, from the 38th floor up to the working positions at about the 46th or 48th floor. Respondent first claims that because the personnel hoists only went up to the 38th floor, the hoists were "unable to transport Falcon's men to their stations." Respondent is incorrect. The inability of the

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[21] The exception appears to be consistent with the recognized affirmative defenses of "greater hazard" and "infeasibility of compliance" both of which were raised by Respondent in its amended answer (¶¶ 37, 38) but neither of which was specifically identified or argued in its post-hearing brief.

personnel hoists to reach the 46th or 48th floors does not mean that the employees had to be hoisted in a man basket from the ground. They could have used the personnel hoists as far as the 38th floor then used other means to reach their work stations at the 46th and 48th floors.

Respondent argues that it was "impossible" for its employees to use the personnel hoists. Respondent cites considerable testimony that each personnel hoist had a somewhat limited capacity, that the operator of the personnel hoists, the general contractor, at times gave lower preference to Falcon's employees in their use, and that sometimes there was a substantial waiting time for transportation by personnel hoist. Respondent's argument amounts to a claim that increasing the time its employees had to spend using personnel hoists, thus increasing its cost, amounted to work site conditions rendering the use of the personnel hoists "impossible." The argument is rejected. In the first instance, the standard speaks to impossibility not increased costs. Thus, literally, increased cost of compliance is not acceptable under this standard. Moreover, even if increased economic costs could rise to the "impossibility" required by the standard, the evidence on this record is insufficient to demonstrate the severe economic displacement which might be cognizable as impossibility. There is a paucity of reliable evidence as to how much Falcons' costs were increased by the use of the personnel hoists as compared to the man basket. There are several self-serving letters from Falcon to the general contractor claiming as much as $313,707.85 in increased

costs (Exhibit BB) but there is no basis for such calculations or testimony in support thereof. In addition, there are several indications that Respondent was planning to charge the general contractor for its assertedly increased costs (Exhibits Z, EE).

I conclude that Respondent has failed to demonstrate by a preponderance of the credible evidence of record that it was impossible or more hazardous[22], within the meaning of the cited standard, for its employees to have used the existing personnel hoists to reach the 38th floor from the ground.

A somewhat different question arises in considering how Falcon employees were to reach the 46th or 48th floors from the 38th. The CO opined that Respondent's employees could have taken personnel hoists from the ground to the 38th floor, then used existing interior ladders to reach their work stations several floors above.[23] There is testimony that some of Falcon's employees did, in fact, use the ladders (TR 571-572). Respondent nonetheless argues that it would have been "impossible" and "more hazardous" for its employees to use the ladders. Respondent takes the position that it was less hazardous to use a man basket than to require ironworkers to climb several stories of ladders "several times a day" from the 38th floor to their work stations. Respon-

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[22] The opinion of one individual regarding an easily correctable problem in the manner a particular operator ran one personnel hoist (TR 839) does not demonstrate that the hoists were hazardous.

[23] So long as the secretary shows that some other means of reaching work areas existed, the standard does not require the Secretary to specify the particular means of abatement as is the case in alleged violations of § 5(a)(1).

dent points to the strenuous nature of ladder climbing, especially when wearing a tool belt weighing 15 to 20 pounds. Falcon disagrees with the CO's contention that the tool belts could have been stored at the working levels and need not have been carried up and down daily. Initially, other than some evidence that ironworkers in general are assumed to be qualified to participate in the unloading of trucks, there is no persuasive evidence that Falcon's employees would have had to climb the ladders "several times" per day. It is obvious that ladder climbing while wearing a tool belt of some 10 to 20 pounds is not an easy task, but the testimony in support of Falcon's argument consists primarily of observations that the ironworkers usually carried their tools up and down with them (e.g., TR 578, 759) and speculation that tools left in tool shanties or tool boxes might be stolen (TR 785). The fact that some ironworkers left their tools in the tool shanties or tool boxes which were provided for them (TR 758, 785) and the absence of any cogent reason why all who wanted to could not do so leaves Falcon short of carrying its burden of persuasion[24]. Respondent has thus failed to show that it was either impossible or more hazardous to use the man basket.

Even if the contested facts regarding the ladders were resolved in Respondent's favor and it were found that it was impossible or more hazardous (or both) to require Falcon's employees to use ladders from the 38th floor up to the 46th or 48th

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[24] There is no explan ion as to why the ironworkers' tool belts and supplies could not be lifted into position by crane.

floors, the violation would exist as to the lifting of employees from the ground to the 38th floor.[25]

In the absence of persuasive evidence that it was impossible for Falcon's employees to reach their worksite by use of available means or that the use of the available means of reaching the worksite was more hazardous, I conclude that Respondent was in violation of the standard.

For the following reasons, I conclude that the violation was willful. A willful violation has been described by the Commission as a violation;

> committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.

A. P. O'Horo Company, Inc., 14 BNA OSHC 2004, 2012 (No. 85-0369, 1991).

Respondent's own safety consultant, Michael Champagne, recommended that Falcon cease using the man basket apparently because there was no certification on the assembly, as well as for other, unstated reasons (TR 570). Champagne testified, however, that he felt that it was not "very practical" for Falcon to cease using the man-basket because use of the elevators would have been "too time consuming" (TR 571).

Falcon was clearly put on notice by its own safety consultant

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[25] Assuming Respondent had proven that it was either "impossible" or "more hazardous" to use the ladders from the 38th floor to the working levels, that same evidence has not shown that it was "impossible" or "more hazardous" to use the personnel elevators rather than the man basket from the ground to the 38th.

that the use of the man-basket should cease. Although the spe fic basis for the consultant's recommendation was not the violation found here, it was nonetheless safety related. That is, Falcon was given warnings about safety shortcomings of the man basket by its own safety consultant but continued to use the man basket solely for economic reasons. Respondent's Vice President told the CO during the inspection that Falcon used the basket because the elevators took too long (TR 94). That statement is consistent with all of the other evidence on this record. Falcon's studied decision to ignore a safety recommendation in order to save money is conduct which constitutes plain indifference of employee safety demonstrative of willfulness. The degree of willfulness is demonstrated by the fact that Falcon continued to use the man basket although its own consultant wrote to Falcon's Vice President "[The] [n]ext OSHA penalty for use of man baskets will be in the range of $10,000" (GX 43). Falcon thus knowingly decided to risk a $10,000 OSHA penalty rather than correct the problem.

Two other factors which weigh heavily in finding this violation to be willful. First, the correspondence from Falcon to the general contractor, which Falcon cites as evidence supporting its argument that it was impractical for its employees to use the personnel elevators, is silent as to the safety of its employees. All, however, complain of added costs to Falcon (Exhibits Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, and II) (See also exhibits LL, MM, NN, OO and XX.) The close attention to costs while making no mention of employee safety in relation to an OSHA violation brought to its

attention demonstrates indifference to employee safety. Second, although based on another safety concern, Falcon not only continued to use the man basket against the recommendation of its own safety expert, it has not shown that it took any action whatsoever to correct those safety problems raised by the expert. The failure of Falcon to address even the specific man basket safety problems pointed out to it by its expert, while at the same time deciding to continue the use of the basket because it saved more money, than an anticipated OSHA penalty demonstrates a callousness towards employee safety which is willful under virtually all definitions of that term. See Bland Construction Co., ___ BNA OSHC ___, ___ (No. 87-0952, 1991).

Respondent is a large employer with many ironworkers at the site. Those ironworkers were hoisted daily for a period of time. There are no factors on this record mitigating against imposing the maximum penalty allowable for a willful violation.[26] Accordingly, I find that a penalty of $10,000 is appropriate.

Docket No. 89-3444
Citation No. 2, Item No. 5
29 C.F.R. § 1926.751(a)
Beam and Column Connections

Citation No. 2, Item No. 5 alleges that Falcon failed to

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[26] Although the facts of this case appear to warrant the imposition of a monetary penalty in an amount at least as great as the amount of money saved by Respondent in willfully violating the standard, the seven-fold increase in the maximum penalty for willful violations is not applicable where, as here, the violation occurred before the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, was amended by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (Nov. 5, 1990).

comply with the cited standard which requires the installation of "not less than two bolts, or the equivalent at each connection" before the steel member is released from the hoisting line.

The cited standard, 29 C.F.R. § 1926.751(a), provides;

> (a) During the final placing of solid web structural members, the load shall not be released from the hoisting line until the members are secured with not less than two bolts, or the equivalent at each connection and drawn up wrench tight.

There is no dispute as to the operative facts regarding this alleged violation. The CO saw and photographed, and other witnesses testified as to the presence of numerous steel members which were held in position with only one bolt at the connection before the hoisting lines were released (TR 110-115, 841, 999-1000, Exhibits 21-23). Moreover, that Respondent had knowledge of and sanctioned the procedure is also undisputed in that the placements were done at the direction and in the presence of a foreman (TR 114). The controversy here is whether Falcon's one-bolt connections were the "equivalent" of the required two bolt connection.

Falcon takes the position that if it had used "traditional" double-angle connections two bolts would have been required but since it was using a shear plate connection, one bolt was sufficient.

Respondent's position is specious. Falcon went to great lengths to repeatedly identify the type of connection it was using as a shear plate connection in an attempt to distinguish it from a double angle connection. Mr. Becker, clearly qualified as an expert in the field, somewhat reluctantly conceded that framing

angle connections and shear plate connections are both types of web connections in that they connect the web of a beam to a supporting element (TR 999, 1038-1039). Respondent would thus have the two bolt requirement apply to one type of web connection (framing angles) but not to another (shear plates). There is no basis on this record to make such a distinction.

The Commission has noted that the purpose of the two bolt requirement includes both preventing the beam from rolling or twisting when walked upon and the "security requirement" of assuring that "steel members are secure before loads are placed on them." Williams Enterprises, Inc., 13 BNA OSHC 1249, 1252, n. 6 (No. 85-0355, 1987). The CO testified similarly (TR 110). Since the two-bolt requirement is at least two-fold, testimony that one-bolt shear connections prevent the attached beam from twisting when walked upon (TR 702-3, 843) is not, by itself, enough to show that the one-bolt method is equivalent.

Moreover, perhaps the most important hypothetical question asked of Mr. Becker points up the problem. Mr. Becker was asked;

> Q. In your opinion, is -- do you have an opinion on whether a one-bolt connection and a shear plate connection if drawn up wrench tight is equivalent to a two-bolt connection and a standard pair of framing angles, insofar as it protects an ironworker from a fall ?

(TR 1001) (Emphasis added.) The question itself deals only with the potential of the beam rotating or twisting. It esentially

instructs the witness to ignore the "security requirement."[27] The answer, when asked to state his opinion, is also instructive. Mr. Becker replied;

> A. Well, in my opinion, a one-bolt shear plate connection has sufficient stability and strength for the erection forces that are on it, including workmen, decking, whatever is going to be put on it.

(TR 1002). Testimony that the one-bolt shear plate connection is "sufficient" is not evidence that it is equivalent to a two-bolt connection. While both may be sufficient, this testimony fails to show that the one-bolt connection is as good as or better than the two-bolt arrangement.

Finally, although not pursued in its post-hearing brie Respondent's attempt at the hearing to imply that the shear plate connection was developed after the standard was adopted and thus could not have been contemplated by the drafters of the regulation is rejected. The evidence as a whole shows that the shear plate method of web connection has been recognized for at least 20 years (TR 702, 719, 1000, 1027 - 1028). Even if the shear plate connection were developed after the standard was issued, there is no showing on this record that it is equivalent to the use of two bolts to secure the beam before removing its hoisting line.

The Secretary alleges the violation to have been willful. The sole evidentiary basis for this recommendation is the CO's

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[27] Moreover, since Respondent was using shear plate connections throughout the building, the more appropriate comparison would have been between a one-bolt shear plate connection and a two-bolt shear plate connection.

testimony that at some prior inspection he had talked to Respondent's president about one bolt connections and on another occasion, at a hearing, he "had quite a conversation" with the father of Respondent's president about it (TR 115). I find such evidence fails to demonstrate the degree of indifference essential to proving a violation to have been willful. See, A. P. O'Horo Company, Inc., 14 BNA OSHC 2004, 2012 (No. 85-0369, 1991).

The violation is serious in that death or serious physical injury is clearly the likely consequence of either an ironworker falling from some 50 stories or the possible collapse of a steel beam held in place with only one bolt. The above evidence, coupled with the fact that the non-compliant method of connection steel was used on a regular basis at Liberty II until after the OSHA inspection (TR 110-114, 753, 755) resulting in the exposure of numerous employees to the dangers of improper bolting, demonstrates that a penalty of $1,000 is appropriate for this serious violation.

Accordingly, Citation No. 2, Item No. 5, alleging a violation of the standard at 29 C.F.R. § 1926.750(a) is affirmed. the violation is found to be serious but not willful, as alleged. A penalty of $1,000 is appropriate.

Docket No. 89-3444
Citation No. 2, Item No. 6
29 C.F.R. § 1926.752(j)
Unguarded Deck Openings

Item No. 6 of Citation No. 2 alleges that in seven separate instances Respondent failed to comply with 29 C.F.R. § 1926.705(j) in that its employees were exposed to openings in the decking which

should have been either covered over or guarded.[28]

The CO described and presented photographs of openings in the decking he found on the following floors:

Instance	Floor	Testimony	Exhibit(s)
A	42	TR 121	24 - 26
B	40	TR 121	27
C	43	TR 124, 127	28
D	44	TR 127 - 8	29
E	45	TR 130	20
F	46	TR 131	30
G	48	TR 139	31 - 35

Speaking in general terms, the CO conceded that there are times when deck openings must exist in order to do welding or other bolting and that in some places the decking must be cut to size to properly fit the opening (TR 215-217). He agreed that after the initial decking was put into place unguarded, unplanked openings would exist until the next step in the process was performed (TR 217-218). In examining photographs he agreed that extra decking material was next to at least three openings (TR 218, Exhibits 26, 28 & 29). In addition also conceded, as to all of the cited

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[28] The cited standard provides:

> (j) All unused openings in floors, temporary or permanent, shall be completely planked over or guarded in accordance with Subpart M of this part.

openings, that it was possible that the decking could have been in place prior to his inspection and had been removed to allow other work to be performed (TR 246). He agreed that steel erection and the installation of decking were actually in progress on the 48th floor (Instance G) at the time of his inspection (TR 221). He opined, however, that the level on to which the steel was unloaded from the ground should have been completely decked (with no openings remaining) before landing (unloading) steel beams (TR 223). One of the cited openings, Instance B, was occasioned by the removal of the mast of a tower crane (TR 248). It was agreed amongst the contractors at the site that the crane structure was to be removed towards the end of the day's shift and another contractor, HCB, was to install guard rails each night around the resulting openings (TR 248-249). The procedure to be used for the removal of the tower crane was confirmed by Mr. Egyed (TR 701 - 704).

James Halpin, the foreman in charge of the decking crews at Liberty II, testified that there were three "gangs" installing decking, one each on the erection floor and one on the intermediate floor. A third crew "finalized" the decking by cutting around columns and welding the decking into place (TR 760 - 770). The foreman testified that, in general, areas of decking were not left open but that if they came across an opening they would plank it immediately (TR 772). As to instance A, this witness testified that Exhibit 24 (42d floor) showed the foreman of one of the decking crews on an intermediate floor where previously installed

decking had been pulled back so cutting around columns could be done (TR 771). Similarly, he identified Exhibit 28 (43d floor, Instance C) as depicting an area where men who were installing the decking were momentarily away getting materials just when the photo was taken (TR 772-773). As to Exhibit 29 (referring to the 45th floor, sic.), the witness stated that the piece of decking had been in place previously, but had been removed to tighten up bolts in a beam (TR 773). Viewing Exhibit 30 (46th floor, instance F) the witness could not say whether decking had been in place then pulled back (TR 776). While examining Exhibits 32, 33, 34 and 35 (Instance G, 48th floor), the witness described welding leads and tools that were used to fill in the openings and the process of placing the decking on the erection floor (TR 778-779). He also described the area shown in Exhibit 27 as a hole created by the removal of the mast of the tower crane which was supposed to be immediately protected by another contractor constructing guard rails (TR 780-781). In sum, the decking foreman testified several times that he was not allowed and did not in fact, permit deck holes to remain open but required them to be planked or protected promptly.

The Secretary relies on the testimony of the CO to the effect that at the time the photographs were taken Falcon employees were not performing work at most of the openings (TR 247). The Secretary argues that the CO's concession that two areas on the 48th floor which were observed (Exhibits 33 & 34) could have been areas in which Falcon employees were welding, does not vitiate its

case as there were other openings in the 48th floor which were not actually in use at the time of the inspection.

Respondent argues that still photographs fail to demonstrate the activity at the site. Claiming that the Secretary is attempting to show a violative condition at "one frozen point" (Respondent's Brief, p. 44), Respondent points to the testimony of the decking foreman as to almost every exhibit that work was in progress just before or just after the photograph was taken. In sum, Respondent posits that an employer is not in violation of § 1926.752(j) "during the brief interval of time necessary for a crew to arrive and cover the opening that another crew has just finished using." Respondent maintains that the CO took most of his photographs just a moment before a crew arrived to close the opening or just a moment after a crew, which had been working in the opening. left the scene.

Respondent's position is rejected in regard to all instances except instance G (48th floor). There is no dispute that at least at the moment each photo was taken, no employees were performing work in or immediately adjacent to each opening depicted. Thus, the floor openings were "unused" at the time the photographs were taken. It is not reasonable to infer that seven photographs (Exhibits 24 through 30), showing on 6 different floors under construction, all happened to be taken just at the precise moment when employees, not shown in any of the photographs, were preparing to work in the openings or to cover them. Nor did Respondent elicit from the CO testimony as to whether he saw the openings used

at any time before or after the photographs were taken. The decking foreman's testimony as to the activities which supposedly occurred immediately prior to the taking of each of the photographs is granted little credible weight. There is ni evidence that he accompanied the compliance officer during the inspection nor is there direct testimony that he was present when each of the photographs were taken. His testimony is based on his memory of conditions long after the fact of inspection and contains detailed descriptions of a very few specific floor openings which occurred on a project some 60 stories in height. These factors lead me to find that his testimony as to these specifics is not reliable.

Moreover, while Respondent might well be correct that a violation of the cited standard does not occur in the few moments between the laying of the deck and the arrival of a crew to finish the bolting and cutting necessary to tightly fit the deck, there is no showing here that such an interval was anywhere near a "few moments." The evidence on this record is insufficient to make any reasonably based finding as to how long the photographed floor openings (with the exception of those on the 48th floor) remained open. Absent a time requirement as part of the standard, once the existence of a violative condition has been established, the duration of the existence of the condition becomes, in essence, an element of the gravity of the violation in that the shorter the duration of the existence of the condition, the less employee exposure can occur.

As to the 48th floor, the evidence fails to raise the

inference that floor openings were not covered or protected as soon as was possible. The 48th floor at the time the photographs were taken was the erection floor. It is undisputed, in contrast to the other cited floors, that decking crews were actually working on the 48th floor at the time of the inspection. The conditions there were thus changing virtually from minute to minute as decking crews were in the process of performing their duties. Surely, even in the most efficient construction scheme some amount of time must elapse between the creation of a floor hole and the covering of that hole. The Secretary has not demonstrated that, as to the 48th floor, deck openings were left open.

Falcon, having created the floor openings and having a foreman and crews whose responsibility it was to close off the openings is chargeable with knowledge of the violative conditions.

Employee exposure, that is Falcon employees passing near deck openings was testified to by the CO without rebuttal (Exhibits 24 & 25; TR 118, 121, 124, 125-126, 128 and 138). There is, however, specific evidence of Falcon employee exposure to only one of the cited floor holes (Exhibits 24 & 25; TR 118, Instance A) other than those on the 48th floor. There is no evidence as to the duration or frequency of such employee exposure.

On this record, the Secretary has shown that the cited standard applies, that Respondent failed to comply with the terms of the standard, that Falcon's employees were exposed or had access to the hazard created, and that Falcon knew or, with the exercise of reasonable diligence, could have known of the condition. A

violation of 5(a)(2) has thus been established. See Astra Pharmaceutical Products, Inc., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); Dun-Par Engineered Form Co., 12 BNA OSHC 1949 (No. 79-2553), rev'd & remanded on other grounds, 843 F.2d 1135 (8th Cir. 1988), decision on remand, 13 BNA OSHC 2147 (1989).

Given that falls through any of the openings cited in instances A through F would have resulted in falls of more than 12' to a steel deck or concrete floor below, the violations are serious within the meaning of the Act.

The Secretary's allegation that these violations are willful does not withstand scrutiny. This record lacks the evidence that Falcon willfully disregarded employee safety as to the deck openings. There is no evidence on which to base an inference, as the Secretary argues, that Falcon did not cover the openings to save time and money.

In arriving at an appropriate penalty for the six instances of violation of 29 C.F.R. § 1926.752(j) the evidence of Respondent's size is already on record. There is a paucity of evidence as to gravity except to say that some unknown number of employees were exposed to falls of over 12" for an unknown period of time. Respondent's history is a matter of record, as is its good faith. On these factors, I find that a penalty of $600 per violation for each of the six instances is appropriate. The appropriate total penalty for Item No. 6 of Citation No. 2, is thus $3,600.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

Docket No. 89-2883

3. Respondent was not in violation of 29 C.F.R. § 1926.105(a) as alleged in Citation No. 2, Item No. 2.

Docket No. 89-3444

4. Respondent violated § 5(a)(1) of the Act as alleged in Citation No. 1, Item No. 1. The violation was serious within the meaning of § 17(k) of the Act. A civil penalty in the amount of $200 is appropriate for this violation under § 17(j) of the Act.

5. Respondent was not in violation of 29 C.F.R. § 1926.451(d)(10) as alleged in Citation No. 1, Item. No. 9.

6. Respondent was not in violation of 29 C.F.R. § 1926.105(a) as alleged in Citation No. 2, Item No. 1.

7. Respondent was not in violation of 29 C.F.R. § 1926.500(d)(1) as alleged in Citation No. 2, Item No. 2.

8. Respondent was in violation of 29 C.F.R. § 1926.550(g)(2) as alleged in Citation No. 2, Item No. 3. The violation was willful under § 17(a) of the Act. A civil penalty in the amount of $10,000 is appropriate for this violation under §17(j) of the Act.

9. Respondent was not in violation of 29 C.F.R. § 1926.750(b)(1)(iii) as alleged in Citation No. 2, Item No. 4.

10. Respondent was in violation of 29 C.F.R. § 1926.751(a) as alleged in Citation No. 2, Item No. 5. The violation was serious within the meaning of § 17(k) of the Act. The violation was not willful as alleged. A civil penalty of $1,000 is appropriate for this violation under § 17(j) of the Act.

11. Respondent was in violation of 29 C.F.R. § 1926.752(j) as alleged in instances (a) through (f) in Citation No. 2, Item No. 6. The alleged violations were serious within the meaning of S 17(k) of the Act. The violations were not willful as alleged. A civil penalty of $3,600 is appropriate for the violations under § 17(j) of the Act. Respondent was not in violation of 29 C.F.R. § 1926.752(j) as alleged in instance (g) in Citation No. 2, Item No.6.

ORDER

Docket No. 89-2883

1. Item No. 2 of Citation No.2 is VACATED.

Docket No. 89-3444

2. Item No. 1 of Citation No. 1 is AFFIRMED.

   A civil penalty of $1,000 is assessed for this violation.

3. Item No. 9 of Citation No. 1 is VACATED.

4. Item No. 1 of Citation No. 2 is VACATED.

5. Item No. 2 of Citation No. 2 is VACATED.

6. Item No. 3 of Citation No. 2 is AFFIRMED.

   A civil penalty of $10,000 is assessed for this violation.

7. Item No. 4 of Citation No. 2 is VACATED.

8. Item No. 5 of Citation No. 2 is MODIFIED.

   A civil penalty of $1,000 is assessed for this violation.

9. Item No. 6 of Citation No. 2 is MODIFIED.

   A civil penalty of $3,600 is assessed for this violation.

Michael H. Schoenfeld
Judge, OSHRC

Dated: JUN 28 1991
Washington, D.C.