UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. J.A. JONES CONSTRUCTION COMPANY, Respondent.	OSHRC Docket No. 87-2059

DECISION

BEFORE: FOULKE, Chairman; and MONTOYA, Commissioner.

BY THE COMMISSION:

This case is before the Commission for the second time. On February 19, 1993 the Commission largely affirmed a decision by Administrative Law Judge Edwin G. Salyers. The judge had concluded that Respondent, J.A. Jones Construction Company ("Jones"), violated the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") by failing to comply with the fall protection requirements set forth in 29 C.F.R. § 1926.500, but the judge found that the violations were serious rather than willful in nature. On review of that decision, the Commission concluded that the judge had not erred, but the Commission remanded the case to the judge for further proceedings to determine the appropriate penalties to be assessed for the instances of noncompliance with section 1926.500 in question. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶ 29,964 (No. 87-2059, 1993).

In conformity with the remand order, Judge Salyers made explicit factual findings with respect to the penalty assessment criteria prescribed in section 17(j) of the Act, 29 U.S.C. § 666(j), and he assessed penalties for each individual violation based on those findings. Both

parties filed petitions for review taking exception to the judge's decision on remand, and the Commission directed review. We affirm.

Jones contends that the judge's factual findings are not sufficiently specific.[1] In Jones' view, the judge made vague and conclusory statements regarding the degree of employee exposure to the hazardous conditions without relating his conclusions to the particular allegations in question and without citing any supporting evidence. The Secretary filed a cross-petition asserting that the judge erred in denying the Secretary's motion to amend the pleadings to allege that the violations were repeated in nature. The Secretary contends that contrary to the judge's decision, the issue of repeated violations was tried with the consent of the parties and that granting the motion to amend would not require the taking of additional evidence. Accordingly, the Secretary asks that the penalties be assessed in accordance with the higher maximum penalty amount for repeated violations set forth in the Act.[2]

Addressing the Secretary's contentions first,[3] we find no indication whatever in the record that the parties tried by consent the unpleaded issue that the instances of violative conduct were repeated as well as willful. Although the Secretary introduced evidence of prior

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[1]Jones also requests that we review the judge's decision on the same grounds that Jones previously set forth in its petition for review of the judge's original decision, and a copy of its earlier petition is attached to its current petition. The refiling of Jones' previous petition, however, does not set forth reasons for us now to review those issues which we have already addressed, or expressly declined to address, in our first decision. Accordingly, we exercise our discretion to limit our review to those arguments which relate to the subject of our remand order, the amount of penalties to be assessed. *Pennsylvania Steel Foundry & Machine Co.*, 12 BNA OSHC 2017, 2019 n.3, 1986-87 CCH OSHD ¶ 27,671, p. 36,063 n.3 (No. 78-638, 1986), *aff'd*, 831 F.2d 1211 (3d Cir. 1987).

[2]At the time this case arose, section 17(a) of the Act, 29 U.S.C. § 666(a), provided that either a willful or repeated violation could be assessed a penalty of up to $10,000 whereas the maximum penalty under section 17(b) for a serious violation was $1000. These amounts were subsequently raised to $70,000 and $7,000, respectively, in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990).

[3]Although the Commission's direction for review stated that a briefing order would issue, on further consideration, we conclude that the questions before us at this time can be decided without briefs from the parties. Although Commission Rule 93, 29 C.F.R. § 2200.93, provides that the Commission ordinarily will afford the parties the opportunity to file briefs, the Commission retains discretion not to solicit briefs from the parties. We further note that the Secretary has already stated the grounds for his motion to amend in a supporting memorandum filed with the judge and that the parties also had the opportunity to present their positions through their petitions for review. As the Commission observed in its prior decision in this case, the Commission's procedures for petitions for review satisfy the requirements of the Administrative Procedure Act, 5 U.S.C. § 557(c), that the parties be entitled to submit exceptions to an administrative law judge's decision. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2204 n.6, 1993 CCH OSHD ¶ 29,964, p. 41,022 n.6 (No. 87-2059, 1993).

violations of section 1926.500, that fact alone does not demonstrate that the parties "squarely recognized" that they were litigating the unpleaded issue. *Armour Food Co.*, 14 BNA OSHC 1817, 1823-24, 1987-90 CCH OSHD ¶ 29,088, p. 38,885 (No. 86-247, 1990). On the contrary, the evidence of Jones' compliance history was relevant to the pleaded allegation of willfulness as well as the unpleaded charge that the violations were repeated in nature. Indeed, the Secretary so concedes in his petition for review:

> The Secretary's purpose in introducing evidence of several previous citations to Jones for violations of § 1926.500 was to establish employer knowledge of the requirements of the *cited* standard, and therefore the willfulness of the violations. The Secretary plainly relied on the similarity of the current violations to the hazardous conditions represented by the previous final orders, in arguing willfulness.

(Emphasis in original). Since the evidence in question pertained to both the pleaded and unpleaded issues, it cannot be said on the record here that the parties consented to try the unpleaded issue of whether the violations were repeated. *McWilliams Forge Co.*, 11 BNA OSHC 2128, 2130, 1984-85 CCH OSHD ¶ 26,979, p. 34,669 (No. 80-5868, 1984).

The judge also properly determined that the record would have to be reopened if the Secretary's motion were allowed. A repeated violation exists where the employer has previously committed a substantially similar violation. The Secretary's evidence that Jones had previously failed to comply with section 1926.500 establishes a prima facie case that the current and previous violations are substantially similar. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167, 1993 CCH OSHD ¶ 30,041, p. 41,219 (No. 90-1307, 1993); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). A full evidentiary record, though, does not exist unless the employer has had an opportunity to introduce evidence to rebut the Secretary's proof. *See Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p. 38,819 (No. 88-310, 1990). Because the issue of repeated violations was not tried by consent, Jones could not have been aware of any need to introduce rebuttal evidence showing lack of substantial similarity.

At this late stage in the proceedings, however, we do not consider it appropriate to reopen the record to allow Jones to present a case in rebuttal. The Secretary had an opportunity to raise the issue of the characterization of the violations when the Commission

first reviewed the judge's decision, after the judge had originally ruled that the violations were not willful. At that time, the Secretary filed a petition for review arguing only that the violations were willful in nature. The Secretary did not move to amend the pleadings, nor did he make any other attempt to raise an issue relating to a repeated violation until after the Commission remanded the case to the judge for the limited purpose of determining penalties for violations characterized as serious but nonwillful. In these circumstances, we consider the Secretary's motion to be untimely, and we will not protract this matter for further proceedings on an unpleaded issue.

We also conclude that Jones' objections to the judge's decision are without merit. When we remanded this case to the judge, we noted that, generally speaking, gravity is the most important factor in the assessment of a penalty. We also observed that the judge's original factual findings indicated that the gravity factor varied widely among the different fall protection violations. We pointed out that in some instances employees performed their work in close proximity to the hazardous conditions whereas in other instances the hazards were simply accessible to employees in the area. Additionally, we noted that the fall distances themselves differed from as little as 10 feet to as much as nine stories. We therefore instructed the judge to decide the penalty assessment based on an evaluation of the circumstances applicable to each individual instance of noncompliance with section 1926.500. 15 BNA OSHC at 2204, 1993 CCH OSHD at pp. 41,032-33.

In his decision on remand, the judge made explicit factual findings as to the fall distance and degree of employee exposure with respect to each instance of violative conduct. He then evaluated the gravity on a scale from low to moderate to high based on these findings. In making these findings, the judge in turn relied on his original detailed and extensive factual findings which we noted in our decision and which were largely based on the testimony of the Secretary's compliance officer. In further accordance with our remand order, the judge also addressed and made specific findings regarding the other criteria for penalty assessment set forth in section 17(j): the employer's size, its history of prior violations, and whether it acted in good faith. Based on consideration of all four factors, he assessed penalties in a range of $200 to $600 for the various violations.

Contrary to Jones' argument in its petition for review, the judge's factual findings with regard to the penalty assessment are clearly associated with each individual instance of violative conduct. Indeed, we are unable to discern what Jones means by its contention that the judge "did not connect [his] conclusions with the particular charges at issue." In addition, the judge's findings on the penalty assessment are in part based on the evidentiary discussion in his earlier decision in which the judge noted the pages of the hearing transcript and the exhibits on which he was relying. We therefore reject Jones' contention that the judge failed to cite any evidence of record in support of his findings. In the circumstances, we also conclude that the judge's findings regarding employee exposure are sufficiently specific to support his assessments. Lastly, the judge's decision fully complies with the terms of our remand order. Accordingly, we see no basis on which to disturb or set aside the judge's findings, and we affirm his decision.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: December 15, 1993

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SECRETARY OF LABOR, Complainant, v. J. A. JONES CONSTRUCTION CO., Respondent.	Docket No. 87-2059

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on December 15, 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.

December 15, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 87-2059

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SECRETARY OF LABOR
Complainant,
v.
J. A. JONES CONSTRUCTION CO.
Respondent.

OSHRC DOCKET
NO. 87-2059

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 23, 1993. The decision of the Judge will become a final order of the Commission on October 25, 1993 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 October 13, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
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Petitioning parties shall also mail a copy to:

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

FOR THE COMMISSION

Ray H. Darling, Jr. /SKW

Date: September 23, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 87-2059

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SECRETARY OF LABOR,	
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v.	OSHRC Docket No. 87-2059
J. A. JONES CONSTRUCTION CO.,	
Respondent.	

DECISION AND ORDER ON REMAND

This case has been remanded by the Review Commission for reconsideration of the penalties assessed in connection with the violations affirmed under 29 C.F.R. § 1926.500. In particular, this court has been directed to evaluate the gravity factor for each individual instance based upon specific factual findings. *J. A. Jones Construction Co.*, __ BNA OSHC __, 1993 CCH OSHD ¶ 29,964 (No. 87-2059, 1993).

Section 17(j) of the Occupational Safety and Health Act (29 U.S.C. § 651, *et seq.*) requires the Commission in assessing penalties to give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations. Each of these factors are not necessarily accorded equal weight but can, in appropriate circumstances, serve to reduce a penalty assessment below

the maximum allowed by the Act. At the time of the Secretary's inspection in this case, the maximum penalty provided for a serious violation was $1,000.[1]

In assessing respondent's size, good faith and previous history, this court concludes respondent is not entitled to a penalty reduction for either size or good faith but should receive a reduction for previous history under the circumstances of this case.

It is uncontroverted that respondent is a large construction contractor with widespread operations throughout the United States and abroad. At the worksite in question, respondent utilized its own employees together with those of numerous subcontractors. At any given time, hundreds of employees were engaged at this project over which respondent maintained control as the prime contractor. Accordingly, respondent is not entitled to a reduction based upon size.

This court considered in its initial decision respondent's "good faith" in connection with its deliberations on the "willfulness" charge. While this court concluded respondent's conduct did not reach a sufficient level of malevolence to support a willful charge, it can hardly be concluded on this record that respondent has demonstrated it acted in good faith. Respondent did not take effective steps to insure that its fall protection system was installed and maintained as required. It did not implement or enforce its policy which required subcontractors to replace or repair fall protection devices which had been removed or damaged by the subcontractors. It did not provide an accident prevention program which included frequent and regular inspections to disclose and correct fall hazards on the worksite. Its safety crew, which was responsible for repairing and maintaining the fall protection devices, was inadequate to perform this function. Respondent had knowledge of the foregoing circumstances which resulted in the widespread violations disclosed by the Secretary's inspection. Respondent is not entitled to any special considerations for reduction of penalties based upon good faith.

In its decision in this case, the Review Commission assessed the circumstances of respondent's prior history in connection with its deliberation concerning the willful

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[1] The Act was amended by the Omnibus Budget Reconsideration Act of 1990, Public Law #101-508, Section 3101 (1990), which raised the penalty for a willful violation from $10,000 to $70,000 and for a serious violation from $1,000 to $7,000. This amendment was not in effect at the time of the Secretary's inspection in this case.

characterization of the charges. It noted that Jones had been inspected on numerous occasions prior to the current inspection but concluded "the number and severity of Jones' violations of § 1926.500 have been relatively inconsequential in comparison to the number of inspections that OSHA had made at Jones worksites." It further concluded "Jones' prior history of OSHA citations is not sufficient to place Jones on notice of any serious or fundamental flaws in its overall safety program." *Id.* at 41,030. The undersigned adopts the Commission's assessment of respondent's prior history and will allow a reduction in penalties based upon this factor.

In its remand decision the Commission notes that an assessment of the gravity of a particular item depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶ 25,738, p. 32,107 (No. 76-2644, 1981). It also notes:

> A review of the judge's factual findings indicates that there is a wide variation in the magnitude of the gravity factor among the various fall protection citation items. For example, in some instances no fall protection whatever was in place whereas other items involve only improperly secured or overly flexible railings or cables. The severity of employee exposure varies as well; some of the hazardous conditions were simply accessible to employees in the area whereas in other instances employees worked in close proximity to the fall hazard. Similarly, the possible fall distances range from as little as 10 feet to as much as nine stories.

J. A. Jones Construction Co., supra, at p. 41,032-33.

It is noted at the outset that Compliance Officer Payne who conducted this inspection did not determine in each instance either the number of employees exposed to the hazardous condition or the duration of the exposure. He did, however, determine in most instances that the hazardous conditions were "accessible" to employees working in the area or that employees were working "in close proximity" to these conditions. Some of the photographs taken by Payne show employees in the hazardous areas (Exh. C-17). While this circumstance makes it difficult to assess the gravity factor based upon exposure and will result in significant reduction of the penalties assessed for each item, it is not fatal to the

Secretary's case since exposure is only one of the factors to be considered in penalty determinations.

The following determinations as to each cited item are based upon the findings made in the body of this court's initial decision (pages 22 through 41) and its findings of fact (pages 54 through 88). The gravity determination in each case will depend upon the following factors:

(1) The nature of the violative condition, *i.e.*, whether there was a complete absence of fall protection or a system where the railings or cables were improperly secured or overly flexible.

(2) Whether employees worked in close proximity to the hazardous condition or the condition was only accessible.

(3) The fall distance presented by the hazardous condition. This court concludes any fall of 16 or more feet would result in serious injury or death.

The Charges Under § 1926.500(b)(1)

(Floor Openings and Holes)

Item 2(a)

Payne observed a floor opening which was not protected by a guardrail on one side. The guardrails on the remaining sides were unstable and could be deflected with "slight force." Several employees were working near this opening and were exposed to a fall distance of 16 feet which could result in serious injury or death in the event of a fall. The gravity factor for this item is considered moderate, and a penalty of $400 is assessed.

Item 2(b)

Payne observed and photographed a floor opening at level minus 2, line H-19, which was not fully protected since the guardrail did not completely surround the opening nor were the existing guardrails stable. Employees of Jones, together with those of subcontractors,

were working in close proximity to this condition which presented a fall hazard of 16 feet. The gravity factor of this condition is considered moderate, and a penalty of $400 is assessed.

Item 2(c)

Payne observed a floor opening enclosed by guardrails with no intermediate uprights. He tested these railings, noted significant deflection, and concluded the railings were unstable. The fall distance at this location was 10 feet, and the area was accessible to employees using an operational stairway immediately adjacent to the opening. The gravity factor for this item is considered low since no employees were directly exposed. A penalty of $200 is appropriate.

Item 2(d)

A floor opening near a stairway did not have intermediate posts spaced at 8-foot intervals and was not supported by cross-braces to minimize deflection causing the guardrails to be unstable. The area was accessible, and the fall distance was 30 feet. Due to the height of the fall distance, the gravity is assessed as low to moderate and a penalty of $300 is appropriate.

Item 2(e)

A floor opening at the street level was guarded by an unstable guardrail. Employees were working in close proximity to this condition which presented a fall hazard of 16 feet. The gravity is considered low to moderate, and a penalty of $300 is appropriate.

Item 2(f)

On the second floor Payne observed a partial guardrail system where parts of the guardrail had been removed and replaced with a "caution" tape. This condition was accessible to employees and presented a fall hazard of 16 feet. The gravity is considered low

since employees were not working in close proximity to the condition. A penalty of $200 is appropriate.

Item 2(g)

At stairway No. 6 on the second floor of the building, Payne observed a floor opening which was unprotected by any guardrails or toeboards. While the fall distance at this location was 10 feet, employees were working in close proximity to this condition, thereby increasing the potential for falls. Gravity is assessed as low to moderate, and a penalty of $300 is appropriate.

Item 2(h)

A floor opening on the third floor was not protected by an adequate guardrail since midrails and toeboards were missing and the system was unstable. This condition was accessible to employees and presented a fall distance of 16 feet. The gravity is considered low since there was no direct exposure, and a penalty of $200 is appropriate.

Item 2(i)

A floor opening on the third floor was protected by guardrails which had no toeboards on two sides and were missing cross-braces to minimize deflection. This area was accessible, and the fall distance was 16 feet. The gravity is considered low since there was no direct exposure, and a penalty of $200 is appropriate.

Item 2(j)

Payne observed a floor opening on the fourth floor where the guardrails did not fully extend around the opening. The space between the end post and the adjacent wall was 1½ feet. While this area was accessible and presented a fall distance of 16 feet, the

narrowness of the opening and the absence of direct exposure reduces the gravity factor to low. A penalty of $200 is appropriate.

Item 2(k)

On the fifth floor Payne observed a floor opening protected by guardrails which were unstable, had cracked midrails, and were missing toeboards. Employees were working in close proximity to these guardrails, and the fall distance was five stories. The gravity with respect to this item is considered moderate to high, and a penalty of $600 is appropriate.

Item 2(l)

A floor opening west of stairway No. 5 was protected by guardrails with unsecured top and midrails. The condition was accessible to employees and presented a fall distance of 16 feet. Since the evidence does not show direct exposure, the gravity is considered low. A penalty of $200 is assessed.

Item 2(m)

A floor opening on the seventh floor was protected by an unstable guardrail system with missing toeboards. This opening was accessible and posed a 16-foot fall hazard. Since the evidence does not reflect immediate exposure, the gravity is assessed as low and a penalty of $200 is appropriate.

Item 2(n)

On the seventh floor guardrails surrounding a floor opening were missing a midrail and toeboards. While this condition posed a potential fall distance of seven stories, no employees were directly exposed. The area was accessible, and the gravity is considered moderate. A penalty of $400 is appropriate.

Item 2(o)

On the north side of the twentieth floor a floor opening was protected by a guardrail which was not securely anchored to the floor and could be moved several inches with the application of pressure. The railing was missing an intermediate upright. This area was accessible to employees and presented a fall distance of 16 feet. Since there was no direct exposure of employees, the gravity is considered low and a penalty of $200 is appropriate.

Item 2(p)

On the sixteenth floor employees were working near a floor opening where the guardrails were unstable. The fall distance at this location was 16 feet, and the area was accessible. Since the evidence fails to reflect direct exposure to this condition, the gravity is considered low and a penalty of $200 is assessed.

Item 2(q)

On the eighth floor employees were working in close proximity to a floor opening which had no guardrails on two sides. The fall distance at this location was 16 feet, and the gravity is considered moderate. A penalty of $400 is appropriate.

Item 2(r)

Employees were working in close proximity to a floor opening on the third floor. The guardrailing protecting this opening was unstable since it was not braced to minimize deflections. Payne was able to pull the guardrail free with minimum exertion. The fall distance at this location was 16 feet, and the gravity is considered low to moderate. A penalty of $300 is appropriate.

The Charges Under § 1926.500(c)(1)

(Wall Openings)

Item 3(a)

On the south side of the fourth floor employees were working in close proximity to a wall opening protected by wire rope. The top rope was hanging 29 inches above the floor, and the bottom rope was 12 inches above the floor. Upon application of pressure, these ropes could be deflected closer to the floor. In essence, this condition provided no fall protection to employees. The fall distance was 50 to 60 feet, and the gravity is considered moderate to high. A penalty of $600 is appropriate.

Item 3(b)

On the south side of the second floor Payne observed a wall opening near a material hoist. This opening was not protected by any means of guardrails or ropes. It was used by employees as a "travel way" and was accessible. The fall distance was 16 feet, and the gravity is moderate. A penalty of $400 is assessed.

The Charges of § 1926.500(b)(1)

(Open-Sided Floors, Platforms, and Runways)

Item 4(b)

On the fifth floor employees were working in close proximity to an unguarded floor edge. The cables on the guardrails had been removed from anchorage and were lying on the floor. This condition exposed employees to a fall of five stories, and the gravity is moderate to high. A penalty of $600 is appropriate.

Item 4(f)

On the eighth floor an open-sided floor was protected by wire ropes which were not drawn tight to assure a minimum of deflection. The top rope was slack, and the bottom rope deflected to the floor. The fall distance at this location was eight stories. This area was accessible, but the evidence does not show direct exposure to this condition. Accordingly, the gravity is considered moderate and a penalty of $400 is appropriate.

Item 4(g)

On the east side of the building at the ninth level, an open-sided floor was protected by wire ropes which could be deflected with minimum pressure. The fall distance at this location is nine stories. The area was accessible, but the evidence does not show any direct exposure. Accordingly, the gravity factor is considered moderate and a penalty of $400 is assessed.

Item 4(h)

On the southeast corner of the second floor employees were working in close proximity to an open-sided floor which was protected by wire rope not drawn tight to assure a minimum of deflection. The top ropes could be deflected to within 20 inches of the floor. The fall distance at this location was two stories, and the gravity is considered moderate. A penalty of $400 is appropriate.

Item 4(i)

At level minus 2 Payne observed guardrails which did not extend along the full length of an opening under a ramp. There were no midrails at this location. The fall distance was 11 feet, and the area was accessible. Since the evidence does not show direct exposure, the gravity is considered low and a penalty of $200 is assessed.

Item 4(j)

On the second floor of the West Podium Payne observed guardrailing around the perimeter which was not securely anchored or braced to minimize deflection. This area was accessible, and the fall distance was 16 feet. Since the evidence does not show direct exposure, the gravity factor is considered low and a $200 penalty is considered appropriate.

Item 4(k)

At stairway No. 5 the landings or platforms between the first and second floors were not equipped with midrails. This area was accessible to employees and presented the potential for a 16-foot fall. Since the evidence does not reflect direct exposure, the gravity is considered low and a penalty of $200 is appropriate.

Item 4(l)

On the south side perimeter of the second floor a guardrail did not fully extend between two columns leaving an open space of approximately 5 feet. The fall distance at this location was 16 feet, and the area was accessible. Since the evidence does not show direct exposure, the gravity is considered low and a $200 penalty is appropriate.

Item 4(m)

On the second floor of the building employees were working in close proximity to an open-sided floor protected by wire ropes which could be deflected to within 12 to 21 inches of the floor. The fall distance at this location was two stories, and the gravity is considered low to moderate. A penalty of $300 is appropriate.

Item 4(n)

On the second floor between columns A-19 and A-21 an employee was working in close proximity to an open-sided floor. The wire ropes erected to protect the open-sided floor were slack and could be deflected to within 12 to 21 inches of the floor. The fall distance at this location was 16 feet. The gravity is considered to be low to moderate, and a penalty of $300 is appropriate.

Item 4(o)

On stairway No. 6 between the second and third floors, the guardrail protecting the stairway was missing a midrail. The fall hazard at this location was 15 feet. The condition was accessible to employees, but the evidence reflects no direct exposure. Accordingly, the gravity is considered low and a penalty of $200 is assessed.

Item 4(p)

On the north side of the third floor employees were working in close proximity to an open-sided floor. This area was protected by a wood railing which lacked a midrail. The fall distance at this location was three stories, and the gravity is considered moderate. A penalty of $400 is assessed.

Item 4(q)

On the east side of the third floor an open-sided floor was surrounded by a wire rope guardrail system. The ropes were not taut, and with minimum effort the top rope could be deflected to within 21 inches of the floor and the bottom rope directly to the floor. The fall distance at this location was three stories. The area was accessible, but the evidence reflects no direct exposure. The gravity is considered moderate, and a $400 penalty is appropriate.

Item 4(r)

On stairway No. 1 between the third and fourth floors employees were working near an open-sided floor which was not properly guarded since there were no midrails. The fall distance at this location was 10 feet, and the gravity is considered low. A penalty of $200 is assessed.

Item 4(s)

A situation similar to that just described was observed on stairway No. 6. Employees were working in close proximity to a floor opening whose guardrails were missing midrails. The fall distance at this location was 10 feet, and the gravity is considered low. A penalty of $200 is appropriate.

Item 4(t)

A similar situation to the foregoing was observed on stairway No. 1 between the fourth and fifth floors. Employees were working in close proximity to a guardrail that contained no midrails. The fall distance was 10 feet, and the gravity is considered low. A penalty of $200 is appropriate.

Item 4(u)

On the west side of the fifth floor employees were working in close proximity to an open-sided floor guarded by perimeter ropes that were not drawn tight and could be deflected to within 9 inches of the floor. The fall distance at this location was five stories, and the gravity is considered moderate to high. A penalty of $600 is appropriate.

Item 4(v)

On the west side of the sixth floor employees were working near an open-sided floor. The guardrails at this location were unstable and could be deflected with minimum effort. The fall distance was six stories, and the gravity is considered moderate to high. A penalty of $600 is appropriate.

Item 4(w)

On the northeast corner of level 7½ a floor opening was not guarded by a proper guardrail. The wire rope, which was intended to serve as the midrail, was not placed midway between the top rail and the floor. The fall distance at this location was 7½ stories. The area was accessible, but the evidence does not reflect any direct exposure. The gravity is considered moderate, and a penalty of $400 is appropriate.

Item 4(x)

On level 7½ Payne observed an open-sided floor which was not protected by proper guardrails since the midrails were missing. The fall distance at this location was 7½ stories. The area was accessible, but the evidence does not reflect any direct exposure. The gravity is considered moderate, and a penalty of $400 is appropriate.

Item 4(y)

On the north side of the eighth floor a floor opening was guarded by perimeter cables which sagged to within 18 inches of the floor. This condition provided no fall protection but only aggravated the situation. Employees were working in close proximity to the edge, and the fall distance was eight stories. The gravity is considered moderate to high, and a $600 penalty is assessed.

Item 4(z)

On the south side of the ninth floor an open-sided floor near a job trailer was guarded by wire rope. The top rope sagged to within 23 inches of the floor, and the midrope was lying on the floor. The fall distance at this location was nine stories. This area was accessible to employees, but the evidence does not reflect any direct exposure. The gravity is considered moderate, and a $400 penalty is assessed.

The Charges of § 1926.500(e)(1)(ii)

(Stairway Railings and Guards)

Item 5(a)

On the twelfth floor a stairway had no protective railings as required by the standard. The fall distance at this location was 16 feet. The evidence reflects no exposure at this location, but the area was accessible. The gravity is considered low, and a penalty of $200 is appropriate.

Item 5(b)

A stairway on the twelfth floor was missing a guardrail on the left side. The evidence reflects no direct exposure at this location, but the area was accessible. The gravity is considered low, and a $200 penalty is appropriate.

Item 5(c)

A stairway on the south side of the twelfth floor was missing a railing on the left side. No direct exposure of this condition is disclosed in the record, but the area was accessible. The fall distance was 16 feet. The gravity is considered low, and a $200 penalty is appropriate.

CONCLUSIONS AND ORDER

In view of the foregoing, the citation items discussed above are affirmed as serious. The gravity level and penalties are assessed as follows:

Citation Item	Gravity	Penalty Assessed
2(a)	Moderate	$400
2(b)	Moderate	400
2(c)	Low	200
2(d)	Low to Moderate	300
2(e)	Low to Moderate	300
2(f)	Low	200
2(g)	Low to Moderate	300
2(h)	Low	200
2(i)	Low	200
2(j)	Low	200
2(k)	Moderate to High	600
2(l)	Low	200
2(m)	Low	200
2(n)	Moderate	400
2(o)	Low	200
2(p)	Low	200
2(q)	Moderate	400
2(r)	Low to Moderate	300
3(a)	Moderate to High	600
3(b)	Moderate	400
4(b)	Moderate to High	600
4(f)	Moderate	400
4(g)	Moderate	400
4(h)	Moderate	400
4(i)	Low	200
4(j)	Low	200
4(k)	Low	200
4(l)	Low	200
4(m)	Low to Moderate	300
4(n)	Low to Moderate	300
4(o)	Low	200
4(p)	Moderate	400
4(q)	Moderate	400

Citation Item	Gravity	Penalty Assessed
4(r)	Low	$200
4(s)	Low	200
4(t)	Low	200
4(u)	Moderate to High	600
4(v)	Moderate to High	600
4(w)	Moderate	400
4(x)	Moderate	400
4(y)	Moderate to High	600
4(z)	Moderate	400
5(a)	Low	200
5(b)	Low	200
5(c)	Low	200
	Total	$14,600

SO ORDERED.

EDWIN G. SALYERS
Judge

Date: September 13, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET, N.W.
4TH FLOOR
WASHINGTON, D.C. 20006-1246
FAX 8/ (202) 634-4008

April 25, 1990

IN REFERENCE TO SECRETARY OF LABOR v.

J. A. Jones Construction Co.

OSHRC DOCKET NO. 87-2059

NOTICE IS GIVEN TO THOSE LISTED BELOW:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., N. W., Room S-4004
Washington, D. C. 20210

John H. Secaras, Regional Solicitor
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Suite 900
Washington, D.C. 20005

Judge Edwin G. Salyers
OSHRC
1365 Peachtree Street, N.E.
Suite 240
Atlanta, GA 30309

NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on 4/25/90. The decision of the Judge will become a final order of the Commission on 5/25/90 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received on or before 5/15/90 in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. sec. 2200.91. Under Rule 91(h) petitioning corporations must also file a declaration of parents, subsidiaries, and affiliates.

All pleadings or other documents that may be filed shall be addresses as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

A copy of any petition for discretionary review must be served on the Counsel for Regional Trial Litigation, Office of the Solicitor, USDOL, 200 Constitution Ave., N.W., Room S4004, Washington, D. C. 20210. If a Direction for Review is filed the Counsel for Regional Trial Litigation will represent the Department of Labor.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

(3/90)

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

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SECRETARY OF LABOR,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 87-2059
	)	
J. A. JONES CONSTRUCTION CO.,	)	
	)	
Respondent.	)	

APPEARANCES:

Rafael Alvarez, Esquire, and Susan J. Bissegger, Esquire, Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, on behalf of complainant.

Robert D. Moran, Esquire, Cooter and Gel, Washington, D. C., on behalf of respondent.

DECISION AND ORDER

SALYERS, Judge: J. A. Jones Construction Company (hereinafter "respondent" or "Jones") is a large general contractor with home offices located in Charlotte, North Carolina. During the period relevant to this case, Jones was engaged as the prime contractor at a huge construction site located at 900 North Michigan Avenue in Chicago, Illinois. The project was a planned multi-level, 67-story tower, with two adjacent 10-story towers at either end (Exs. R-9, R-10).

The adjacent structures were known respectively as the east and west podiums.[1] Each floor in the tower was approximately the size of three football fields (Tr. 1787).

Jones began construction of this complex in June 1986. The plan called for the first 30 stories of the main tower to be constructed of structural steel. At the time of the Secretary's inspection in May 1987, structural steel assembly was in progress on the upper levels of the main tower which had reached the 26th level or floor.[2] Most structural steel operations below the 26th floor had been completed. The west podium was at the tenth level and the east podium had not yet been built. Kelley Steel Erectors, one of approximately 19 subcontractors at the jobsite, was in charge of all steel erection. Upon completion of the steel erection, it was Kelley's responsibility to install fall protection devices around the perimeter of each floor. This was accomplished by welding bolts to the steel columns which were then used to string wire rope (or cable) around the outside perimeter (Tr. 244). Once this perimeter protection was installed by Kelley, it then became Jones' responsibility to maintain the integrity of the perimeter protection to insure that the cable remained taut and stable. It was also Jones' responsibility to

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1 Also referred to in the record as "atriums."

2 The terms "level" and "floor" are used interchangeably in the record.

install and maintain fall protection devices around floor openings and stairways on all completed floors (Tr. 81-82, 154, 160, 375, 1276-1277, 1776-1777, 2521, 2591). It was Jones' policy to require each subcontractor who damaged or removed a fall protection device to reinstall or repair the device or to alert Jones' supervisory personnel so that Jones' safety crew could accomplish this task (Tr. 1265, 1508, 2249, 2253).

On May 6, 1987, an employee of Kelley fell to his death while working on the main tower's fifth level. This incident was reported to the Occupational Safety and Health Administration Area Office and precipitated an inspection under the provisions of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.). Compliance Officer Ronald Payne conducted this inspection which commenced on May 6 and concluded June 9, 1987. Payne was assisted from time to time by Safety Supervisor Phillip L. Colleran.

Following Payne's inspection, the Secretary of Labor issued to respondent on November 4, 1987, willful citation and notification of penalty no. 1 charging respondent with 76 violations of the Act's fall protection and accident prevention standards. Specifically, the Secretary alleged that respondent failed to provide for frequent and regular inspections of the jobsite [29 C.F.R. § 1926.20(b)(1) and 29 C.F.R. § 1926.20(b)(2)]; failed to adequately guard 18 floor openings with standard railings and toeboards [29 C.F.R. §

1926.500(b)(1)]; failed to guard two wall openings in a way which would reduce the danger of falling [29 C.F.R. § 1926.500(c)(1)]; failed to guard 26 sides of open-sided floors with standard railings or the equivalent protection [29 C.F.R. § 1926.500(d)(1)]; failed to guard three stairways with at least one stair railing [29 C.F.R. § 1926.500(e)(1)(ii)]; and failed to guard open-sided floors with toeboards on the outside perimeter of the main tower and the atriums [29 C.F.R. § 1926.500(f)(1)]. The citation and complaint were amended by order of this Administrative Law Judge on December 28, 1988, to incorporate 29 C.F.R. § 1926.500(d)(1) for item numbers 51 through 76 and to incorporate 29 C.F.R. § 1926.500(b)(1) for item numbers 77 and 78.[3] The citation proposed an abatement date of November 9, 1987, for all violations, with proposed penalties totalling $259,000.

After extensive discovery and pretrial proceedings, the case was tried over an 11-day period in Chicago. The record consists of a transcript containing 2,648 pages and 40 documentary exhibits.

Respondent contests all aspects of the Secretary's charges and contends that the Secretary did not carry her burden of proof, did not observe applicable requirements of

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[3] The original citation designated items by number and alphabetical letter. In her complaint, the Secretary modified the designation method by eliminating the alphabetical letters and using a numerical equivalent with the items designated from 1 to 78.

law and committed other errors during the course of her inspection and prosecution of this case which significantly prejudiced the rights of respondent. Each cited item will be considered separately giving due regard to the evidence and respondent's contentions.

ITEM 1 - ACCIDENT PREVENTION PROGRAM

The complaint alleges that "[o]n or about May 6 through June 9, 1987:"

> Respondent violated 29 C.F.R. Section 1926.20(b)(1) and (2) as stated in subparagraph (a) above, in that: (1) a safety program was not initiated and maintained to provide compliance with applicable safety and health standards, including but not limited to, 29 C.F.R. 1926, Subpart M-Floor and Wall Openings, and Stairways, and more specifically 29 C.F.R. 1926.500(b)(1), (c)(1), (d)(1), (e)(1) and (f)(1); and, (2) an accident prevention program was not initiated and maintained to provide frequent and regular inspection of the jobsite, materials, and equipment, including but not limited to inspection and perimeter rope protection and other fall protection systems for damage and/or defects.

Section 1926.20 of 29 C.F.R., entitled "General safety and health provisions," provides:

> (b) Accident prevention responsibilities. (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.
>
> (2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

The Secretary's position concerning this charge is outlined in the testimony of Philip L. Colleran, a safety supervisor in the OSHA Area Office, who assisted Compliance Officer Payne in the inspection. Colleran has been employed by OSHA for 15 years and is a safety supervisor in the Chicago North Area Office (Tr. 753). He has conducted over 2,000 inspections, most of which have been in the field of construction (Tr. 760). He has participated in numerous training programs and has conducted seminars in fall protection (Tr. 757-759). At Payne's request, he visited respondent's work site on two occasions to give a "second opinion" concerning the prevalence of violations (Tr. 763). His main function, however, was to review and evaluate respondent's safety program to determine if respondent had violated 1926.20(b)(1) and (2). Colleran determined that respondent did have a "comprehensive" written safety program (Tr. 765) but did not conduct frequent and regular inspections to insure that employees were protected in accordance with the fall protection standards (Tr. 766).

Colleran's conclusion that respondent's inspection program was inadequate was based upon his premise that the numerous instances of violations in existence at the work site, as reported to him by Payne, constituted evidence that respondent was not inspecting and correcting these deficiencies (Tr. 766). In his discussions with James Jackson, Chris Shanahan and Jim Jennings during his

walkaround, he concluded that Jackson was too busy with other matters to make regular and frequent inspections of the jobsite (Tr. 768, 775, 792). He also concluded that Jones' "subcontractors responsibility" policy requiring subcontractors to replace or repair missing or defective fall protection devices was ineffective since this policy was not followed in actual practice.

Respondent has a comprehensive safety program embodied in its corporate safety manual (Ex. C-15). Section 1 sets forth respondent's intention to "provide a protective standard beyond the requirements of federal, state and local laws" and that "compliance with safety regulations is essential to the effectiveness" of its project safety program (Ex. C-15, p. 1-1).

Sections 2, 3, 4 and 5 outline the duties and responsibilities of respondent's supervisory personnel with respect to safety and designate the project manager at each site as the person having the primary accountability for jobsite safety (Ex. C-15; p. 2-4). This section further provides for safety training for all safety personnel from the construction manager to the field safety engineer (Ex. C-15, p. 2-5).

Section 3 contains the position descriptions for all safety personnel and delineates their respective duties. This section describes the duties of a safety inspector who

coordinates "safety and first aid on a project" and lists as primary responsibilities (Ex. C-15, p. 3-15 and 3-16):

> 2. Conduct daily surveys of J. A. Jones' and contractors'/subcontractors' operations to ensure compliance with OSHA and state safety standards and regulations. Identify safety defects and initiate corrective action by responsible supervisor.
>
> 3. Maintain current knowledge of all applicable OSHA standards and regulations; maintain current knowledge of all applicable state or other governmental safety and health standards and regulations; ascertain that all subordinate personnel are appropriately knowledgeable; coordinate application and administration of such requirements at such project site.
>
> * * *
>
> 13. Keep area safety supervisor advised in timely manner of project safety program progress or unresolved safety problems.

Section 5 contains what is referred to in the record as respondent's "subcontractor responsibility" which the Secretary urges is a primary cause of the alleged deficiencies in this case. In essence, this section requires each subcontractor to comply with all OSHA and state safety regulations and holds them accountable for any infractions as follows (Ex. C-15, p. 5-2, 5-3, 5-4):

> J. A. Jones will monitor the safety performance of the contractors working under its direction. When violations of the statutory safety requirements, J. A. Jones project safety procedures,or the owner's safety regulations are observed, the responsible contractor(s) shall be informed if possible and a Notice of Non-compliance shall be prepared by the Safety Representative or Safety Coordinator for signature by the Project Manager. Each violation

observed shall be identified and a brief description of the violation and the exact location shall be included in the Notice.

* * *

If the contractor fails to correct the conditions described in the Notice of Non-compliance within the time specified, a second Notice of Non-compliance should be issued.

If no action is taken by the contractor in the time set forth in the second Notice, a meeting should be scheduled with the contractor's superintendent, the J. A. Jones Project Manager, the Safety Representative or Safety Coordinator. This meeting should result in a documented agreement of the contractor's intended action and timing to correct the violation(s).

Failure to reach agreement, or failure to correct the violation, shall be documented, and the matter referred to the appropriate J. A. Jones Construction Manager for resolution with the subcontractor's senior management.

* * *

After the second Notice of Non-compliance form has been issued and the subcontractor still fails to correct the safety violation creating a hazard for persons or property, J. A. Jones can perform, or cause to be performed, the necessary work and unilaterally backcharge the subcontractor.

Section 6 deals with safety education and provides for regular safety meetings as follows (Ex. C-15, p. 6-1):

Tool Box Safety Meetings shall conform to the following guidelines:

- Weekly meetings shall be conducted preferably on Monday or Tuesday mornings before work begins for the day.
- The subject material developed by the Safety Representative shall be typed, reproduced, and distributed to each foreman. (Information for Tool Box Topics

shall be distributed regularly by the Corporate Safety Department).

- The subject material shall be pertinent to the work being performed.
- The meetings shall be conducted by each Craft Supervisor with his crew at the time designated, using the subject material furnished.
- The meetings shall provide employees with the opportunity to ask questions regarding safety.

The Project Manager/Superintendent and/or Safety Representatives, and other supervisory personnel will regularly attend these meetings.

Section 26 delineates the measures required to protect employees from fall hazards pertaining to "floors, wall openings and stairways." This section defines, in considerable detail, what steps must be taken to install and maintain fall protection devices and parallels the specifications established in the cited OSHA standards. It specifically requires (Ex. C-15, p. 26-1 to 26-12):

1. The use of standard railings consisting of top rail, intermediate rail, toeboard and posts.
2. The anchoring of post to assure that the system can "withstand a load of at least 200 pounds applied in any direction at any point on the top rail with a minimum of deflection.
3. Cables should be taut to meet minimum deflection requirements.
4. The need for toeboards, stair railings and handrails.
5. The necessity for guarding floor openings, wall openings, stairways and opensided floors.

In addition to respondent's corporate safety policy, Jones also developed a safety program for the work site at 900 Michigan Avenue (Ex. C-11). This program provided:

> A representative from the Safety Department will tour the Project on a daily basis. All safety violations are documented and given to J. A. Jones Project Superintendent for implementation. All subcontractor safety violations found will be documented, copies of violations will be sent immediately to responsible subcontractor and J. A. Jones Superintendent.

It further provided for regular safety meetings (Ex. C-11):

A. J. A. JONES SAFETY MEETINGS:

Meetings are held at the beginning of the shift on Mondays and attended by safety personnel and J. A. Jones workers. Items of concern are discussed by craft foremen and documented.

B. J. A. JONES SUBCONTRACTORS SAFETY MEETING:

Meetings are held at 10:00 a.m. each Monday in the Safety Office. Stewards from subcontractors discuss safety problems common to all, and agree to solutions as a group. J. A. Jones Safety Personnel attend these meetings, directs and documents problems and interfaces with management personnel to make necessary corrections.

C. J. A. JONES SCHEDULE COORDINATION MEETING:

Meetings are held at 1:00 p.m. each Tuesday to discuss progress in the schedule by subcontractor project management. The meeting is also attended by J. A. Jones safety personnel who discuss problems that are common to all of the subcontractors.

The record discloses that respondent took steps to implement its corporate safety policy at this work site. It employed two full-time safety supervisors, James Jackson and Pat Conroy,[4] who worked directly under the project manager to monitor and coordinate respondent's safety program. It provided weekly safety meetings for its craft employees, the union stewards and the subcontractors during which safety was the principal topic of discussion (Tr. 1692, 1693, 2588). Respondent's safety supervisors attended the weekly stewards' meeting which lasted from 30 minutes to an hour and provided the stewards an opportunity to bring safety concerns to the attention of management (Tr. 1700). Respondent employed a full-time safety crew consisting of six carpenters and six laborers whose sole function was to construct and maintain safety devices throughout the site (Tr. 1779, 1815).

Jackson and Conroy operated from a small trailer but tried to keep their "office time" to a minimum so that they could spend as much time as possible "in the field," i.e., walking the floors of the building or inspecting for hazards (Tr. 1701). Jackson acknowledged that it was common practice for subcontractors to remove or damage fall protection devices and "just walk away and leave it" (Tr. 1793), and that he encountered this circumstance during his inspection tours (Tr. 1792-1793). He testified, however, that he was always

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[4] Conroy did not appear as a witness.

on the look out for missing or defective fall protection devices and would use a two-way radio system to advise the carpenter foreman of any unsafe conditions so that the foreman could arrange for immediate repair by the safety crew (Tr. 1702, 1703). Jackson testified he spent from 65 to 75 percent of his time "in the field" (Tr. 1722, 1802) making inspections, which he considered to be "the most important part of the job" (Tr. 1803). Jackson's responsibility, however, included a host of other duties which encompassed first aid, sanitation and security. It was not uncommon for the other duties to disrupt or interfere with his attempts to inspect the work site (Tr. 1722, 1787-1790).

Jackson admits that he had a conversation with Colleran concerning the need to spend more time inspecting for fall hazards (Tr. 1720) but denies that he made an admission that his other duties prevented him from adequately performing this function (Tr. 1721-1723). He admits that fall protection hazards were raised at the stewards' safety meetings but maintains that this topic was broached by the safety supervisors and not by the stewards (Tr. 1724, 1820). He also denies that fall protection hazards were brought to his personal attention by Christopher Shanahan and James Jennings on a regular and frequent basis (Tr. 1725). He admits that Chris Shanahan made frequent requests for additional members to be added to the safety crew but surmises that this was merely an attempt to increase employment of union carpenters

on the project rather than a legitimate concern for the crew's capacity to perform its safety responsibilities (Tr. 1737-1738, 1818-1819).

Walter E. Wrobleski was the project manager at the Michigan Avenue site and has 18 years' experience in the construction industry (Tr. 2581). He described the company policy of conducting weekly subcontractor safety meetings and subcontractor coordination meetings (Tr. 2583); the minutes of which were received, reviewed, and filed in his office (Exs. R-11, R-12; Tr. 2584). At each of these meetings, safety items were "the first order of business" (Tr. 2588). The responsibility for making safety inspections of the work site rested primarily with the safety superintendents (or engineers) but also included respondent's other supervisory personnel who also made inspections (Tr. 2589). Wrobleski made an accounting review of company records to determine the number of manhours expended on the installation and repair of safety rails and barricades (Tr. 2592). During the period in question, respondent averaged 535 manhours per week in this regard (Tr. 2594). He considered this to be an adequate resource allocation to accomplish respondent's safety policies (Tr. 2596). As the project superintendent, it was his testimony that he was not made aware of any serious or on-going safety concerns emanating from respondent's failure to inspect and repair fall protection devices (Tr. 2616-2618).

William McGuire has been a carpenter for 24 years and worked for Jones at the Michigan Avenue site from the time of its inception (Tr. 2472-2472). In January 1987, he was given the job of foreman in charge of a safety crew (Tr. 2477), which was responsible for "the first ten floors . . . including the west podium" (Tr. 2481). It is important to note, however, that his area of responsibility did not include the upper floors of the tower which was the area served by Mr. Shanahan's crew (Tr. 2486, 2490). McGuire regularly conducted safety meetings with his crew (Tr. 1486), at which everyone was afforded the opportunity to bring up safety concerns (Tr. 2487). He and his crew of about a dozen were responsible for spotting and correcting all missing or defective fall protection devices in their area of responsibility (Tr. 2477-2481). He received instructions from the carpenter foreman by means of a two-way radio when a safety matter required attention and would respond in "a matter of minutes" (Tr. 2488-2489). Based upon his experience, it was his opinion that Jones dedicated "a great deal more manpower" to accomplish safety objectives than he had witnessed on other jobs (Tr. 2494).

Christopher Shanahan began work as a carpenter at the Michigan Avenue site in October 1986 (Tr. 2226). In December, he was designated the carpenter steward and was assigned to the safety crew in the main tower (Tr. 2227-2228). This crew was responsible for constructing and repairing guardrails and

maintaining wire rope protection around openings and floors in the main tower above the tenth floor (Tr. 2229-2232). Shanahan received no instructions from respondent's supervisors concerning his duties or those of his crew with respect to inspecting the jobsite for safety hazards. He considered this to be a function of "the guy in the safety office" (Tr. 2245-2246). He would, however, look for safety hazards when not otherwise engaged in work assigned by the carpenter foreman and would repair or replace theses items as time permitted (Tr. 2247-2248, 2332). He described, in his testimony, the constant problem resulting from subcontractors removing or damaging fall protection devices without restoring or replacing them (Tr. 2243, 2262, 2332). On several occasions, he voiced his concern in this regard directly to the safety supervisors but was always told that "whoever took it down puts it back up" (Tr. 2244, 2249, 2253-2254, 2265). Shanahan explained his concerns to the safety supervisors that the other crafts did not have the skills or tools to replace or repair the devices, but his concerns were largely ignored and no action was taken (Tr. 2243-2244, 2254). During the period preceding Payne's inspection, Shanahan's safety crew consisted of three carpenters and one laborer (Tr. 2257-2258). He considered this allocation totally inadequate to accomplish the task of installing and repairing safety devices in the numerous floors of the main tower to which it was assigned but was give no additional members to accomplish this task

(Tr. 2341-2342). Shanahan raised the problem of guardrails and ropes at least once a month at the stewards' safety meeting (Tr. 2249).

Casimir Vrasic is the business representative for the Carpenters Union and had jurisdiction over the carpenters employed at the Michigan Avenue work site (Tr. 1880). He makes random visits to work sites where carpenters are employed (Tr. 1881). During these visits, he makes safety checks with the union steward; and, if hazardous conditions are disclosed, he discusses this with management officials and attempts to resolve the problem (Tr. 1882-1883). If resolution can not be achieved on a voluntary basis, he refers the matter to OSHA (Tr. 1889).

During the period preceding Payne's inspection, Vrasic visited respondent's work site on several occasions[5] and raised safety concerns about guardrails and floor openings with Bill Wheeler, respondent's carpenter foreman (Tr. 1904, 1906, 1912, 1914). On occasions, he discussed with Wheeler the adequacy of the safety crews to perform its responsibilities (Tr. 1937) and the need to maintain and repair fall protection devices (Tr. 1927). On the morning of

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[5] Vrasic gave conflicting testimony concerning the frequency of his visits to the work site. Initially, he testified his visits were "numerous" (Tr. 1890), but later clarified this to twice a month (Tr. 2060). While his testimony was discredited somewhat on this point, this court concludes that he did visit the work site on several occasions and discussed safety concerns with management officials.

the accident, he visited the work site in response to a complaint from Shanahan that his crew was falling behind on its safety work and needed more assistance (Tr. 1941). He toured the site with Shanahan and observed a number of conditions which he considered hazardous. Following this tour, he prepared a memorandum containing the substance of his observations which included references to missing guardrails and sagging wire ropes (Ex. C-27).

James Jennings was the electricians' steward at the project and has 15 years' experience in the trade (Tr. 1184). He testified concerning an on-going problem at the site of employees being struck by objects falling from upper floors and decks (Tr. 1212, 1213). This problem was discussed with Jackson or Conroy and was also brought up at safety meetings (Tr. 1218-1220). Installing toeboards to correct this problem was suggested at the safety meetings (Tr. 1223) but was rejected on grounds that toeboards were not required around the perimeter of the building and that it was the subcontractors' responsibility to assure that objects were not "kicked off the deck" (Tr.1238). Jennings also confirmed the "on-going" problem of missing or defective guardrails and wire ropes (Tr. 1251, 1273). When this problem was presented to respondent's safety personnel or brought up in safety meetings, the response was always that it was the subcontractors' responsibility to replace or repair the missing or defective devices (Tr. 1256-1258). Jennings voiced

his concerns to respondent's safety supervisors that this policy "wasn't working, that giving everybody this responsibility, nobody was doing it" (Tr. 1265-1266). When the job expanded in the Spring of 1987, Jennings noted an alarming increase in fall protection hazards and brought this to the attention of Conroy or Jackson five to ten times per week (Tr. 1486).

Jennings believed that the size of the safety crew was inadequate to accomplish the inspection and repair of fall protection devices throughout the working areas of the building (Tr. 1277-1278, 1285). He was present when Shanahan brought this problem to the attention of safety personnel "time after time" with no positive results (Tr. 1361-1362).

Peter B. Zimmer is an engineering manager for Aetna Life and Casualty Company (Tr. 1089), respondent's insurance carrier for the last 25 years (Tr. 1091). Zimmer made periodic inspections of respondent's work sites to evaluate safety practices and to assist respondent in loss prevention and control. On January 21, 1987, Zimmer inspected the Michigan Avenue work site and noted a number of loose perimeter cables on the upper floor levels. He tested these cables by using pressure applied by hand (Tr. 1097) and determined that these conditions were unsafe. He discussed this condition with respondent's management personnel (Wrobleski, Conroy and Jackson) (Tr. 1095) and included it in a written report (Ex. C-12, p. 3). On April 28, 1987, Zimmer

returned to the work site and found this same condition. Once again, he discussed the problem with respondent's management and noted in his report that perimeter cables should be checked and tightened to provide for employee safety (Ex. C-13, p. 4; Tr. 1105, 1106).

The voluminous and often conflicting testimony in this case has complicated the task of resolving the facts with respect to this issue. Resolution of the matter requires a credibility determination with respect to the testimony of Jackson, Shanahan and Jennings. This court concludes that Jackson was less than candid in his testimony concerning his awareness of the hazardous conditions in the tower and his efforts to detect and correct these conditions. His denial that these conditions were brought to his direct attention by Shanahan and Jennings and were frequently raised at the stewards' safety meetings is in conflict with the credible evidence in this case. This court is not persuaded that Jackson performed his responsibility to inspect on a regular and frequent basis nor did he enforce respondent's subcontractor responsibility policy by requiring the subcontractors to replace or repair the missing or damaged fall protection devices. As a result of his failure to adequately perform his primary responsibility, safety at this work site was compromised.

Shanahan was not an impressive witness. However, this court concludes that Shanahan accurately assessed the

inability of his crew to meet the demands imposed upon it and communicated this circumstance to respondent's safety supervisors. It is concluded that he voiced his safety concerns at least once a month at the stewards' meetings and brought these concerns to the direct attention of the safety supervisors on a fairly frequent basis.

This court finds Jennings to be a fully credible witness. His description of the numerous and on-going safety hazards at the work site is considered to be an accurate portrayal of the circumstances existing before and during the Secretary's inspection. His testimony in this regard is fully supported by the numerous instances of fall protection hazards disclosed in Payne's inspection. I also find as a fact that Jennings regularly and repeatedly brought these conditions to the attention of respondent's safety supervisors, who took no effective action to deal with this persistent problem.

What emerges from this record is a safety program that had form but lacked substance as described in the testimony of Colleran and Payne. Respondent's subcontractor responsibility policy was largely ignored by the subcontractors who had neither the inclination or tools to replace or repair the missing or damaged fall protection devices. This policy was not enforced by respondent's safety supervisors or other supervisory personnel charged with this responsibility. As a result of this failed policy, the existence of missing or defective devices was rampant in the tower area served by

Shanahan's crew. These conditions were readily apparent to the safety supervisors during their daily walkarounds and could have been detected and corrected with the exercise of reasonable diligence. Respondent's safety supervisors were put on notice of these conditions through direct complaints received from Shanahan and Jennings and through complaints made during the stewards' weekly safety meetings. Respondent was also made aware of these conditions as a result of inspections by its insurance carrier on two separate occasions prior to the Secretary's inspection. Despite repeated admonitions, respondent's safety supervisors took no effective steps to abate these conditions.

Based upon the foregoing, it is concluded that the Secretary has met her burden of showing that respondent did not meet its responsibilities under 29 C.F.R. § 1916.20(b)(1) and (2). Accordingly, the citation will be affirmed.

THE FALL PROTECTION STANDARDS

This aspect of the case was conducted by Compliance Officer Ronald Payne, who has made over 1,500 inspections, including approximately 850 construction sites (Tr. 37). Payne holds a degree from Northwestern University and is a member of the American Society of Safety Engineers (Tr. 45).

Payne conducted an inspection of the Michigan Avenue work site during the period May 6 to June 6, 1987. Throughout his inspection, Payne was accompanied by a Jones' representative

(either Conroy, Jackson or Wrobleski) (Tr. 134-135). Payne took photographs whenever he observed what he considered to be a violative condition. These photographs and Payne's testimony are the primary basis upon which the Secretary predicates the following charges in this case.

THE 29 C.F.R. § 1926.500(b)(1) CHARGES[6]

At level minus 2, line 21,[7] Payne saw and photographed men working near a floor opening (Ex. C-17, Item 2; Citation Item 2a). These men were identified by Jones' representatives who accompanied Payne on the walkaround as Jones' employees (Tr. 69). The floor opening was unprotected by guardrails and presented a fall hazard of approximately 16 feet to the next floor (Tr. 71). At this same location, Payne also noted the guardrail was unstable. Using only "slight force," Payne was able to move the guardrail four inches and measured this deflection with a tape (Tr. 72-73). Based upon

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Section 1926.500(b)(1) of 29 C.F.R. provides:

> (b) Guarding of floor openings and floor holes. (1) Floor openings shall be guarded by a standard railing and toe boards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

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Level minus two indicates a floor two levels below ground level. Line 21 is the location of a column on that floor (Tr. 63, 64).

this information, Payne concluded the standard had been breached.

At level minus 2, line H-19, Payne observed a floor opening as depicted in Exhibit C-17, Item 3 (Citation Item 2b). This opening was not completely protected since the guardrail did not "fully surround" the entire opening nor was the existing guardrail stable. Payne was able, "with very little exertion," to move the railing about four inches in a lateral direction (Tr. 84-85). He also noted that one end post supporting the railing was "free standing" and could be deflected with "very little exertion," (Tr. 87-88) further adding to the guardrail's instability. Jones' employees were working in the area (Tr. 89).

At level minus 2, line 5, he observed a floor opening (Ex. C-17, Item 4, Citation Item 2c) without intermediate uprights[8] (Tr. 96). He shook the top of the guardrail and noted it had a "significant amount" of deflection (several inches) (Tr. 97). He then placed his hand on the midrail and "with slight exertion, the rail holding it up against the wall pulled out and the railing fell to the floor" (Tr. 98). The fall distance at this opening was ten feet (Tr. 100-101), and the opening was adjacent to an operational stairway which was in regular use (Tr. 101). He saw "dozens" of employees,

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[8] The standard requires an intermediate upright at eight-foot intervals between end posts to promote stability (Tr. 100).

including Jones', using the stairway while he was at this location (Tr. 101). Should an employee fall against this guardrail, it was his opinion the rail would give way causing the employee to fall through the opening causing serious injury or death (Tr. 100, 102).

At level minus 2, line 5, he observed what is depicted in Exhibit C-17, Item 5 (Citation Item 2d), a guardrail surrounding a floor opening (Tr. 104). There were no intermediate uprights between the end posts and applying pressure to the railing caused deflection which indicated to Payne the device was unstable (Tr. 105-106). This railing was adjacent to an open stairway and was accessible to employees (Tr. 109).

At the ground or floor level on the northeast section of the building, Payne observed the conditions depicted in Exhibit C-17, Item 6 (Citation Item 2e). One end post of the guardrail (shown in photograph with a circle) was not securely fixed to the floor. Payne was able to move this post and guardrail "four to six inches" with a "slight amount of pressure" (Tr. 113). The fall distance at this location was 16 feet and the railing was immediately adjacent to a stairway in use by employees (Tr. 114, 116).

On the second floor, Payne observed a partial guardrail system where part of the railing had been removed and replaced by a yellow caution tape (Ex. C-17, Item 7, Citation Item 2f). Aside from the hazard of the missing section of guardrail,

Payne considered the use of the caution tape to be inappropriate. If tape is to be used to restrict access, it should be "set back from the danger point" so that employees will avoid the area completely (Tr. 121-125). In Payne's opinion, the tape could not be substituted for a standard guardrail (Tr. 127). Employees had access to this condition (Tr. 126).

At stairwell number six on the second floor at the building's southwest corner, Payne observed and photographed (Ex. C-17, Item 8, Citation Item 2g), a floor opening devoid of guardrails and toeboards (Tr. 128). This opening was adjacent to a stairway which was open for use. Employees were working in the area (Tr. 131) and were exposed to a potential fall to the floor below (Tr. 130).

On the north side of the building on the third floor, he observed and photographed (Ex. C-17, Item 9, Citation Item 2h) a floor opening approximately 3 feet by 16 feet (Tr. 140) on the building's perimeter. This opening had a top rail but was missing a midrail, toeboards and intermediate upright between the end posts (Tr. 134). He tested the top rail with arm pressure and "was able to deflect it several inches towards the opening" (Tr. 138). He further noted some employees of a subcontractor working in the area (Tr. 139). The fall from this location was approximately 16 feet (Tr. 140).

On the southeast section of the third floor, he observed and photographed (Ex. C-17, Item 10, Citation Item 2i) a floor

opening with a guardrail system in place which was ostensibly in compliance with the requirements of the standard, i.e., top and midrails with some toeboards. On close examination, he noted toeboards were missing on each end of the enclosure; and, upon testing the system with pressure, the railing was "very unstable" (Tr. 142). He observed employees working in the area which was accessible and not cordoned off (Tr. 144). He concluded this situation created a hazard of falls through the opening and also the missing toeboards could result in injuries to employees working at lower levels (Tr. 145).

On the fourth floor between C4 and 6, Payne observed and photographed (Ex. C-17, Item 11, Citation Item 2j) a floor opening where the guardrails did not fully extend around the opening nor was the opening protected by toeboards along the east side (Tr. 148). He measured the space between the end post and a concrete block wall and found the space to be one and one-half feet wide (Tr. 148) and concluded these conditions violated the floor opening standard. He further noted the area was accessible to employees, that work was still in progress on this floor (Tr. 149), and that Jones' employees would be exposed to this condition in the performance of their duties (Tr. 154). The fall hazard was "in excess of one story" (approximately 16 feet) which could cause serious injury (Tr. 155).

Payne observed and photographed (Ex. C-17, Item 12, Citation Item 2k) two floor openings in the southeast section

of the fifth floor. While guardrails had been erected around these openings, one midrail was broken and loose, toeboards were missing around much of the perimeter and one end post was free standing without being tied into the floor or wall. He tested the guardrail and found "there was a lot of play" and that he could move the top rail "horizontally in the direction of the floor opening" (Tr. 158-159). Work was in progress at this location and the area was accessible to employees, including those employed by Jones (Tr. 159-160).

At stairway number five on the fifth floor, Payne observed but did not photograph a guardrail which was not securely anchored (Item 13, Citation Item 21). He was able to push the top rail "several inches towards the open side" (Tr. 165). This condition existed around a stairway used by employees going to and from the lower and higher floors (Tr. 165-166).

Payne observed and photographed (Ex. C-17, Item 14, Citation Item 2m) a floor opening at stairway number four on the seventh floor protected by a guardrail attached to an end post which was not anchored securely to the floor. He was able to move the top rail several inches. He also noted missing toeboards in the area (Tr. 169-170). The entire area was not cordoned off and was accessible to employees using the stairway (Tr. 171-172).

On the seventh floor in the southeast section, he observed and photographed (Ex. C-17, Item 15, Citation Item

2n) a missing midrail at one end of a floor opening (Tr. 174-175). This condition constituted "a 16 square foot area through which somebody could fall" (Tr. 176). The area was accessible to employees (Tr. 177) and exposed them to a seven-story fall (Tr. 178). No toeboards were in place.

On the north side of floor 20, Payne observed and photographed (Ex. C-17, Item 16, Citation Item 2o) a guardrail surrounding a floor opening. The railing was not securely anchored to the floor and could be moved several inches "with little exertion." The railing was missing an intermediate upright (Tr. 181-182). This area was accessible to employees, including those of Jones (Tr. 183).

On the 16th floor, Payne observed and photographed (Ex. C-17, Item 17, Citation Item 2p) a floor opening protected by top rail, midrail, toeboards, intermediate uprights and end posts. However, when he tested this system with minimum exertion, he could displace the top rail several inches (Tr. 193). Employees were in the area (Tr. 195).

On the eighth floor at column A4, Payne observed but did not photograph a floor opening approximately four feet by eight feet which was not protected by any guardrailing on two sides (Item 18, Citation Item 2q). The other two sides had guardrailing which "was not secure" (Tr. 198). Some employees were installing concrete block near this area and the entire area was accessible (Tr. 199).

On the third floor in the southeast corner, Payne observed and photographed (Ex. C-17, Item 19, Citation Item 2r) a floor opening with guardrails along its north side which were not anchored and were free standing (Tr. 200-201). He touched it and was able to pull it away (Tr. 202). Employees working on a scaffold were using this area to exit and came in close proximity to this unsecured railing (Tr. 201)

This court concludes Payne's testimony and supporting photographs sustain the Secretary's charges with respect to each of the foregoing instances of failure to guard floor openings and holes. Payne is an experienced compliance officer and was a fully credible witness. In each case, he made careful observations of the violative conditions, including the testing of wire ropes and guardrails for stability. He also determined in each instance that employees were exposed to the hazardous condition at the time of his observation or that these areas were readily accessible to employees working in the area. Exposure to each of these hazards could result in a fall causing serious injury or death to an employee. Complaint items 2 through 19 and Citation Items 2a through 2r will be affirmed.

THE 29 C.F.R. § 1926.500(c)(1) CHARGES[9]

On the south side of the fourth floor, Payne observed and photographed (Ex. C-17, Item 20, Citation Item 3a) a wall opening approximately 16 feet in length (Tr. 204). This opening was guarded by two wire ropes, one 29 inches and the other 12 inches above the floor. Each rope was further deflected towards the floor when Payne applied pressure (Tr. 205). Employees were working in this area and on occasion came to "within a foot" of the opening (Tr. 206). The area was accessible and the potential fall from the opening was 50 to 60 feet (Tr. 207).

On the south side of the second floor, Payne observed and photographed (Ex. C-17, Item 21, Citation Item 3b) another wall opening near a material hoist. This opening was not protected by any means of guardrails or ropes (Tr. 210-212). This area was "commonly used as a travelway" by employees of

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Section 1926.500(c)(1) of 29 C.F.R. states:

> (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;

all trades (Tr. 213). The fall potential at this location was one floor or about 16 feet.

For the same reasons assigned above in connection with floor openings, this court concludes the Secretary has sustained her charges with respect to failure to guard wall openings. Complaint items 20 and 21, citation items 3a and 3b will be affirmed.

THE 29 C.F.R. § 1926.500(d)(1) CHARGES[10]

During the course of his inspection, Payne was furnished pictures taken by Kelley Steel allegedly depicting conditions in existence at the work site on May 6 prior to Payne's arrival at the scene (Ex. C-17; Items 22, 24, 25, 26). Payne could not authenticate the pictures or give first-hand testimony concerning the existence of these conditions (Tr. 246-247). During the testimony of Chris Shanahan, however, these pictures, which purport to show the conditions of perimeter ropes on the northeast corner of the fourth through

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Section 1926.500(d)(1) of 29 C.F.R. provides:

> (d) Guarding of open-sided floors, platforms, and runways. (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, as specified in paragraph (f)(1) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

eighth floors, were presented for his identification. While Shanahan did not take the pictures, he did view the areas shown and testified the pictures were an accurate representation of what he observed (Tr. 2299-2310). Shanahan was unable, however, to establish exposure of employees to these conditions, an essential element of the Secretary's proof. Accordingly, these items will be vacated.

When Payne arrived at the work site in the late afternoon of May 6, he went to the fifth floor of the building (the accident scene) and took the photographs shown in Exhibit C-17, Item 23 (Citation Item 4b). He observed the top perimeter cable had been removed from its anchorage and was lying on the floor (Tr. 238). He observed employees working in this area in proximity to the unguarded edge (Tr. 240) and concluded they were exposed to a fall of five stories (Tr. 241).

On the south side of the building at the eighth floor level, Payne observed and photographed a rope cable strung midway between the floor and a steel beam which cable was sagging and was not anchored with a proper clip (Ex. C-17, Item 27, Citation Item 4f; Tr. 248). Payne's supervisor, who was accompanying him at the time, was able to press this cable with his foot "all the way down to the floor" (Tr. 250). The rope was connected with "bailing wire" rather than a standard rope clip (Tr. 252). The area was regularly travelled by

employees and Payne observed employees "within a few feet" of this condition (Tr. 254).

On the east side of the building at the ninth level, Payne observed but did not photograph perimeter ropes running between columns (Item 28). These ropes were not drawn taut (Tr. 255) and could be deflected with minimum pressure (Tr. 256). While no employees were working at this location at the time he made his observations (6:30 p.m. on October 6), the area was accessible and was used as a "walkway, travelway" (Tr. 260).

On the southeast corner of the second floor, Payne observed perimeter ropes which were "slacked out" (Item 29, Tr. 265). He tested these ropes and found they could be deflected to within 20 inches of the floor. He observed employees of Jones and other subcontractors performing work at this location which was "within a few feet" of an elevator (Tr. 266).

At level minus 2, line F14, Payne observed and photographed (Ex. C-17, Item 30, Citation Item 4i) guardrails which did not extend along the full length of an opening under a ramp. While the beam running from the end of the guardrail to the next column would serve as a top rail to guard against falls, there was no midrail along this opening. Payne considered this situation created the potential for falls in between the beam and the floor (Tr. 272, 273).

On the second floor of the West Podium (atrium), Payne observed but did not photograph a guardrailing system with "a lot of play in it" (Tr. 275; Citation Item 4j). With a minimum of hand pressure, he was able to push the top rail "at least four inches towards the open side" (Tr. 277). The area was accessible (Tr. 275).

Payne observed at stairway number five the landings or platform between the first and second floors were not equipped with midrails[11] (Item 32, Citation Item 4k). Failure to erect midrails at this location constituted a fall hazard to employees using the stairs in their regular duties and also in the event of emergency use (Tr. 281-284).

On the south side perimeter of the second floor, Payne observed and photographed (Ex. C-17, Item 33; Citation Item 41) a guardrail which did not extend fully between two columns leaving an open space of approximately five feet between the end post and the column (Tr. 287-288). Employees were working in this area which was open and accessible (Tr. 289-290).

Directly to the east of the area just described, Payne observed and photographed (Ex. C-17, Item 34; Citation Item 4m) perimeter cables which were not taut and could be deflected downward from 12 to 21 inches (Tr. 292-293). Employees were working in the area which was "fully accessible" (Tr. 294-295).

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[11] Payne used Exhibit C-17, Item 48, to support his testimony concerning this charge (Tr. 280).

In this same area between columns A19 and 21, Payne observed and photographed (Ex. C-17, Item 35; Citation Item 4n) perimeter ropes which were not drawn tight and could be deflected 12 to 21 inches with hand pressure (Tr. 299-300). The area was accessible and employees were observed receiving material to the west of this condition (Tr. 302).

At stairway number six, Payne observed and photographed (Ex. C-17, Item 36; Citation Item 4o) a landing platform midway between the second and third floors which was not guarded by a midrail to prevent falls through an opening of 31 to 33 inches high and approximately six feet in length (Tr. 305-306). This stairway was open for use.

On the north side of the third floor, there was a floor opening[12] which Payne observed and photographed (Ex. C-17, Item 37; Citation Item 4p). This opening was protected by a top rail but no midrail (Tr. 307). Employees of Jones and the window subcontractor were working in the area (Tr. 309).

On the east side of the third floor, Payne observed and photographed perimeter ropes around the atrium (Ex. C-17, Item 38, Tr. 311; Citation Item 4q). The ropes were not taut and Payne was able, with little effort, to deflect the top rope to within 21 inches of the floor and the bottom rope directly to

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[12] Payne determined this was a floor opening rather than a wall opening, because there was no extension of the wall across the opening but only a toeboard (Tr. 308).

the floor (Tr. 311-312). Payne saw an employee in the area (Tr. 315).

At stairway number one, Payne observed and photographed a landing platform between the third and fourth floors which was not equipped with midrails (Ex. C-17, Item 39; Citation Item 4r) to protect from falls between the beam above and the platform below (Tr. 315-319). This stairway was open and accessible (Tr. 320).

Payne observed similar situations to the one just described at stairway number six at a platform between the third and fourth floors (Item 40; Citation Item 4s) and at stairway number one between the fourth and fifth floors (Item 41; Citation Item 4t) (Tr. 321-324) although no photographs were made.

At the west side of the fifth floor in the atrium area, Payne observed and photographed the perimeter protection around a large floor opening (Ex. C-17, Item 42; Citation Item 4u). The system included wooden guardrails and perimeter ropes (Tr. 327). Payne tested the ropes and found they could be deflected within nine inches of the floor (Tr. 328). He also noted the guardrail system around the opening "was very, very flimsy" (Tr. 330) and that the wooden rails acted like a "sling shot" when deflected. He testified that "when I pulled the top rail on the wood guard rail and let it go, it actually continued to shake after I released it" (Tr. 331). He further noted that employees (including Jones' employees)

were working in this area and had access to the opening (Tr. 329-330).

On the west side of the sixth floor in the atrium area, Payne observed and photographed another system similar to the one just described (Ex. C-17, Item 43; Citation Item 4v), consisting of "a wood guard railing system that was tied in with some wire rope perimeter protection . . . and it had the same sling shot effect" (Tr. 332). He was able to deflect both the guardrail and the wire rope "with very little force" (Tr. 333). Employees were working in this area which was near a stairway and accessible (Tr. 334).

Payne observed a missing midrail on the northeast corner at level 7½ (a mezzanine above the seventh level). Exhibit C-17, Item 44, shows a wire rope extending underneath a beam. This wire rope was 33 inches above the floor (Tr. 336). Although the beam in this case served as a top rail, the wire rope was too high above the floor to serve as a midrail since it would not prevent an employee from falling through the space between the beam and the floor. It should have been located midway between the floor and the beam (approximately 17 inches) (Tr. 336-337). The area was accessible to employees working in the area (Tr. 338).

On the southeast corner of level 7½, Payne observed and photographed (Ex. C-17, Item 45; Citation Item 4x) wire ropes intended as midrails which had been dropped. These ropes provided no protection to prevent a fall through the space

between the beam and the floor (Tr. 339-340). The photograph depicts an employee walking near the perimeter and the area was accessible (Tr. 342).

On the north side of the eighth floor, Payne observed and photographed (Ex. C-17, Item 46; Citation Item 4y) a condition where perimeter cables were sagging to within 18 inches of the floor (Tr. 344-345). This circumstance provided no fall protection but only served to aggravate the situation. The photograph shows two employees working in close proximity to the edge and the area was accessible (Tr. 347).

On the south side of the ninth floor, Payne observed and photographed (Ex. C-17, Item 47; Citation Item 4z) an area where a subcontractor trailer had been parked. He observed that perimeter rope protection adjacent to the trailer was not drawn taut between a column and stanchions. Rebar had been placed "about one foot inward from the edge of the floor" (Tr. 350) to a height of 23 inches. The wire rope was lying on top of this rebar barrier. In the absence of a taut wire rope above the rebar, this situation created a hazard for employees who could fall over the rebar resulting in a nine-story fall (Tr. 351). The situation was aggravated since the steps leading into the trailer were in close proximity to the rebar.[13]

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[13] The situation was further aggravated since wind conditions in the area increased the hazard. Payne experienced an incident while on the trailer steps where "wind caught the door of the trailer . . . and slammed the

For the reasons assigned above in connection with floor openings, this court concludes the Secretary has sustained her charges with respect to failure to guard open-sided floors. Complaint Items 23 and Citation Item 4b, together with complaint items 27 through 47 and Citation Items 4f through 4z will be affirmed. Complaint items 22, 24, 25, and 26 and Citation Items 4a, 4c, 4d and 4e will be vacated for failure of proof.

THE 29 C.F.R. § 1926.500(e)(1)(ii) CHARGE[14]

Payne observed three instances where stairways had not been provided with standard railings on an open side. He observed this situation at stairway number five located in the southwest corner of the building on the second floor. Exhibit C-17, Item 48, (Citation Item 5a) shows the absence of a railing on the right side of the stairway. This condition

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door . . . into the side of the trailer." Had he been within the swing radius of the door, he would have been knocked over the edge (Tr. 351-352).

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Section 1926.500(e)(1)(ii) of 29 C.F.R. provides:

> (e) Stairway railings and guards. (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified below, the width of the stair to be measured clear of all obstructions except handrails:
>
> * * *
>
> (ii) On stairways less than 44 inches wide having one side open, at least one stair railing on the open side;

created a falling hazard to employees who used this stairway moving to and from the second floor (Tr. 354).

On the 12th floor, Payne observed and photographed (Ex. C-17, Item 49; Citation Item 5b) a similar situation at the north stairway. No railing was provided on the left side of this stairway to provide protection from falls to the lower level (Tr. 359). The stairway was open for use and readily accessible to employees (Tr. 360).

On the south stairway on the 12th floor, Payne observed and photographed (Ex. C-17, Item 50; Citation 5c) a missing railing on the left side of the stairway (Tr. 361). This stairway was open for use and readily accessible to employees in the area (Tr. 362).

For the reasons assigned above with respect to floor openings, this court concludes the Secretary has sustained her charges with respect to respondent's failure to guard stairways with standard railings. Complaint Items 48, 49 and 50 and Citation Items 5a, 5b and 5c will be affirmed.

THE TOEBOARD CHARGE[15]

Throughout his inspection, Compliance Officer Payne had occasion to observe the outside perimeters of floors 2 through

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15 This charge was originally lodged under 29 C.F.R. § 1926.500(f)(1). Prior to trial, the Secretary amended her complaint and the citation to include charges under § 1926.500(b)(1) and § 1926.500(d)(1) (See Judge's Ex. 5i, Tr. 365).

26 and noted that toeboards were not installed at the edge to prevent objects from being knocked or blown off the floor to lower elevations (Tr. 365-366). This same condition was also observed in the atriums (Tr. 378). The fact that toeboards were not utilized on the outer perimeters of the building and atriums is not contested by respondent (Tr. 2297) and was conceded in the testimony of James B. Jackson, respondent's safety supervisor (Tr. 1728). This fact alone, however, does not constitute a violation of the cited standards.

During his inspection, Payne did not inspect each of the 26 floors in the tower or atrium floors for the purpose of gathering specific evidence upon which to base these charges.[16] Accordingly, he did not develop proof that there were "materials" on each of these floors, that there existed a reasonable probability that these "materials" would fall or be blown over the unguarded edge and that employees were exposed to falling objects at each of the areas located below these floors. Payne's general, nonspecific testimony (Tr. 369-375) is insufficient to cure this defect. Complaint items 51 through 78 will be vacated.

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Payne originally intended to charge only one item under this standard. This approach was later changed when the Secretary chose to expand the complaint to include separate charges for all floors.

RESPONDENT'S DEFENSES

Respondent contends that the Secretary's delay in issuing the citation violates the provisions of 29 U.S.C. 658(c) which require the Secretary to issue citations with "reasonable promptness" and prohibit such issuance "after the expiration of six months following the occurrence of any violation."

The inspection in this case was completed on June 9, 1987, and the citation and notification of proposed penalties was issued and served on November 4, 1987, by personal service upon respondent (Tr. 623-624). Service was effected within the six-month period provided in the statute. The issue, therefore, is whether the Secretary acted with "reasonable promptness."

In Chicago Bridge & Iron Co., 74 OSAHRC 3/E10, 1 BNA OSHC 1485, 1973-74 CCH OSHD ¶ 17,187 (No. 744, 1974), the Commission held that the reasonable promptness language of the statute required issuance of the citation within three working days (72 hours) after the area director formed his belief that a violation occurred. This rule was rejected on review by the seventh circuit, Brennan v. Chicago Bridge & Iron Co., 514 F.2d 1081 (7th Cir. 1975), as being unsupported by the statute or legislative history and totally impractical to implement.

The Commission adopted a new rule in Coughlan Construction Co., 75 OSAHRC 87/F6, 3 BNA OSHC 1636, 1975-76 CCH OSHD ¶ 20,106 (Nos. 5303 & 5304, 1975), holding that

regardless of the delay in issuance of the citation, it would not be vacated unless the employer could show substantial prejudice. This rule has been supported by the decisions of the Courts of Appeal. Stephenson Enterprises, Inc. v. Marshall, 578 F.2d 1021, 1023, (5th Cir. 1978); United Parcel Service of Ohio, Inc., v. OSHRC, 570 F.2d 806, 809 (8th Cir. 1978); Todd Shipyards Corp. v. Secretary of Labor, 566 F.2d 1327, 1330 (9th Cir. 1977); Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871, 876 (3d Cir. 1979).

Respondent's contention that it has been prejudiced by the Secretary's delay is unsupported in the record. Except for general allegations of prejudice made by respondent's counsel during the course of the hearing, respondent made no specific showing that the delay in issuing the citation prevented the respondent from preparing its defenses. In the absence of such a showing, this defense must fail. Craig D. Lawrenz & Associates, Inc., 77 OSAHRC 60/D8, 4 BNA OSHC 1464, 1976-77 CCH OSHD ¶ 20,910 (No. 5540, 1976); National Industrial Constructors, Inc., 81 OSAHRC 94/A2, 10 OSHC 1081, 1981 CCH OSHD ¶ 25,743 (76-4507, 1981); Rangaire Corp., 76 OSAHRC 62/B5, 7 BNA OSHC 1928, 1979 CCH OSHD ¶ 23,770 (No. 78-1595, 1979); Chessie System, 76 OSAHRC 140/A2, 4 BNA OSHC 1874, 1976-77 CCH OSHD ¶ 21,287 (No. 10687, 1976); Stripe-A-Zone, 80 OSAHRC 111/D12, 10 BNA OSHC 1694, 1982 CCH OSHD ¶ 26,069 (No. 79-2380, 1982); Kelly Steel Erectors, Inc., ___, 8 BNA OSHC 1191, 1979 CCH OSHD ¶ 24,111 (No. 79-25,

1979); Cedar Construction Co., 77 OSAHRC 63/D2, 5 BNA OSHC 1311, 1975-76 CCH OSHD ¶ 19,960 (No. 10929, 1975).

Respondent contends that Payne's inspection was improper because at the time it was commenced, a case arising out of a prior inspection was still pending before the Commission.[17] This argument is based upon a provision in Chapter II of the OSHA Field Operations Manual entitled "Effect of Contest," which provides that OSHA programmed inspections should be delayed or carried over when a case is pending before the Review Commission against the employer under inspection. The FOM contains only guidelines for use by OSHA in its execution of enforcement operations. These guidelines are intended only for internal application to promote efficiency and not to create an "administrative straightjacket." They do not have the force and effect of law, nor do they accord procedural or substantive rights to employers. FMC Corp., 77 OSAHRC 153/D4, 5 BNA OSHC 1707, 1975-76 CCH OSHD ¶ 20,640 (No. 13155, 1977). This minor departure from the Secretary's internal directives does not serve to invalidate the proceedings against the respondent.

Respondent asserts that the Secretary's charges in this case were brought under the wrong standards. The contention is made that since the work site in question was a structural

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17 Respondent was issued a citation in 1986 which was disposed of by a settlement agreement dated May 27, 1987. A final order was entered on June 11, 1987, two days after Payne concluded his inspection (Ex. C-4).

steel building, the steel erection standards (subpart "R" of Part 1926) rather than the construction standards should apply. This contention is without merit. While it is true that Kelley Steel, the steel erection subcontractor, was engaged in operations falling within subpart "R", neither Jones' employees nor those of the other subcontractors engaged in steel erection activities. The areas inspected by Payne were in locations where the steel erection had been completed. Employees working in these areas were engaged in regular construction activities and subject to the general construction standards.

Respondent contends it had no knowledge of the violative conditions disclosed in Payne's inspection. Section 17(k) of the Act indicates there can be no violation of the Act "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." (Emphasis supplied.) This indicates that knowledge may be either actual or constructive. "Reasonable diligence" has been defined as "such watchfulness, caution and foresight as under all the circumstances of the particular service; a corporation controlled by prudent officers ought to exercise." Ames Crane & Rental Service, Inc., 75 OSAHRC 64/E12, 3 BNA OSHC 1279 at 1282, 1974-75 CCH OSHD ¶ 19,724 at 23,534 (No. 2578, 1975).

There is good reason to conclude that respondent had actual knowledge of the persistent and hazardous conditions

existing in the tower. Many of these conditions (sagging wire ropes, missing guardrails) were readily apparent to the naked eye while others (unstable guardrails and ropes) could be detected upon performance of a simple hand deflection test. Diligent inspections by respondent's safety supervisors would have identified these conditions with a minimum of effort.

In any event, the Secretary is not required to make a showing of actual knowledge. To sustain this element of proof, the Secretary need only show that the employer could have known of the hazardous conditions through the exercise of reasonable diligence. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981); Bechtel Power Corp., 82 OSAHRC 49/B8, 10 BNA OSHC 2003, 1982 CCH OSHD ¶ 26,261 (No. 77-3222, 1982); Austin Building Co. v. OSHRC, 657 F.2d 1063 at 1067-1068 (10th Cir. 1981); Kenneth P. Thompson Co., 80 OSAHRC 67/A2, 8 BNA OSHC 1696, 1980 CCH OSHD ¶ 24,593 (No. 76-2623, 1980); Del-Cook Lumber Co., 78 OSAHRC 14/A2, 6 BNA OSHC 1362, 1978 CCH OSHD ¶ 22,544 (No. 16093, 1978); J. H. MacKay Electric Co. and U. S. Engineering Co., 78 OSAHRC 77/B10, 6 BNA OSHC 1947, 1978 CCH OSHD ¶ 23,026 (No. 16110, 1978). The Secretary has established this element of her case.

Respondent asserts that the Secretary has failed to show exposure of employees to the fall hazards described in Payne's testimony. In many instances, Payne observed employees (including Jones' employees) in close proximity to hazardous

conditions. In other cases, he was able to show that the zones of danger were readily accessible to employees using stairways or walkways in the immediate vicinity. In each instance (except for Items 22, 24, 25 and 26, and the toeboard items), Payne showed either actual exposure or accessibility to the hazard.

Although early decisions of the Commission required an actual exposure test, this requirement was rejected in Underhill Construction Corp., 76 OSAHRC 89/A2, 4 BNA OSHC 1489, 1976-77 CCH OSHD ¶ 20,918 at 25,121 (No. 3042, 1976), as follows:

> The Commission has recently reconsidered the issue of whether the Secretary must establish actual exposure to a hazard in order to prove the existence of a violation. Gilles & Cotting, Inc., Docket No. 504, BNA 3 OSHC 2022, CCH OSHD ¶20,448 (R.C. February 20, 1976). See also Brennan V. OSHRC & Underhill, 513 F.2d 1032 (2d Cir. 1975). We said that the question is factual and is to be determined by considering the zones of danger created by the hazard, employee work activities, their means of ingress-egress, and their comfort activities on the jobsite. We determined that an actual exposure requirement is inconsistent with the purposes of the Act, whereas an access theory furthers the purposes of the Act. In that case we defined access on a basis of reasonable predictability as requested by the Secretary.

The circumstances disclosed in Payne's testimony are sufficient to meet the "reasonable predictability" test announced in Underhill.

WILLFULNESS

The question of what constitutes a willful violation of the Act has been the subject of numerous decisions of the Review Commission and the circuit courts, most of which are cited in the briefs of counsel. In general, a violation is willful "if committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." Asbestos Textile Co., 84 OSAHRC 50/83, 12 BNA OSHC 1062 at 1063, 1984-85 CCH OSHD ¶ 27,101 at 34,948 (No. 79-3831, 1984); Williams Enterprises, Inc., 87 OSAHRC 33/A2, 13 BNA OSHC 1249 at 1256, 1987 CCH OSHD ¶ 27,893 (No. 85-355, 1987).

In Williams Enterprises, supra, the Commission expanded its definition as follows (Id. at 13 BNA OSHC 1256-1257):

> A willful violation is differentiated by a heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete. See Brock v. Morello Brothers Construction, Inc., 809

F.2d 161, 163-65 [12 OSHC 2033, 1035-36] (1st Cir. 1987), and cases cited therein; Asbestos Textile Co.; Marmon Group, Inc., 84 OSAHRC 27/C2, 11 BNA OSHC 2090, 2092, 1984-85 CCH OSHD ¶26,975, p. 34,643 (No. 79-5363, 1984); Mel Jarvis Construction Co., 81 OSAHRC 89/B13, 10 BNA OSHC 1052, 1981 CCH OSHD ¶25,563 (No. 77-2100, 1984).

While it has been concluded that respondent's safety program was defective in that regular and frequent inspections were not made of the tower area, it is undisputed that respondent made significant and substantial efforts to promote safety at this work site. It employed full-time safety supervisors and conducted safety meetings with all employees each week. It utilized a safety crew whose principal duty was to repair and replace safety devices. During the period preceding the Secretary's inspection, respondent spent $60,000.00 per month in providing safety rails and barricades (Tr. 1794) and devoted 535 manhours per week to this endeavor (Tr. 2594). This is not the type of conduct that shows either "intentional" disregard of the Act or "plain indifference" to employee safety. At most, the evidence in this case shows that respondent was careless or failed to exercise diligence in discovering or eliminating the hazards. Respondent's significant effort to deal with this problem negates a finding of willfulness even though its efforts were not effective or complete. Accordingly, the charges in this case will be classified as serious rather than willful.

THE PENALTIES

Respondent challenges the Secretary's authority to issue separate charges under the same standard on an "instance by instance" basis. The controlling language of the Act is found in section 17(b) which provides: "Any employer who has received a citation for a serious violation of the requirements of section 5 of the Act . . . may be assessed a civil penalty of not more than $1,000 for each violation . . . ." (Emphasis added.) The clear language of the statute empowers the Secretary to propose the assessment of a separate civil penalty for each violation of the Act.

This question was addressed by the Review Commission in Hoffman Construction Co., 78 OSAHRC 2/A2, 6 BNA OSHC 1274, 1977-78 CCH OSHD ¶ 22,489 (No. 4182, 1978). In that case, the Secretary issued two separate citations for violations of a single standard. The ALJ grouped both citations and assessed a single penalty. The Commission noted that, where citations of the same standard involve "entirely different and separate" facts, the Secretary is "justified in issuing separate citations." The Commission explained that because different facts underlay each charge of violation (Id. at 1275):

> [T]he charges are not duplicative . . . . The Secretary chose to cite Hoffman for separate violations of the same standard, and under these circumstances, it is within his discretion as the prosecutor under the Act to do so.

In this case, the Secretary has exercised her prerogative to issue separate citations and proposed penalties for each infraction of the cited standards. Each charge involves a different location and different factual circumstances. As the prosecutor under the Act, the Secretary is free to propose separate penalties for each infraction subject to Commission review to assure that the proposals are reasonable and in accord with the Secretary's obligation to promote the overall effectiveness of the Act. RSR Corp., 85 OSAHRC 85/40/A3, 11 OSHRC 1163, 1983 CCH OSHD ¶ 26,429 (Nos. 79-3813, 80-1602, 79-6392, 79-5062, 1983).

In this case, the assessment of a $1,000 penalty with regard to each of the affirmed items is considered appropriate to insure respondent's future compliance with the Act's requirements.

FINDINGS OF FACT

1. Respondent, J. A. Jones Construction Company, is a general contractor incorporated in the State of North Carolina. During the period from January to June 1987, respondent was engaged as the prime contractor in the construction of an office complex at 900 Michigan Avenue in Chicago, Illinois.

2. As the prime contractor at the work site, respondent was responsible for erecting and maintaining standard guardrails (as defined in the cited standards) around floor

openings and open-sided floors throughout the working areas and standard handrails on all stairways. In addition, it was respondent's responsibility to maintain wire rope guards initially installed around the perimeters of the building by Kelley Steel Erectors, its subcontractor.

3. As the prime contractor, respondent was required by 29 C.F.R. § 1926.20(b)(1) and (2) to initiate and maintain an accident prevention program and to provide for frequent and regular inspection of the jobsite to detect and correct hazardous conditions.

4. During the period in question, it was common practice for subcontractors to remove or damage fall protection devices without replacing or repairing the devices. While respondent had a policy requiring subcontractors to correct these conditions or call them to the attention of respondent's supervisors, this policy was largely ignored by both the subcontractors and respondent's supervisory employees. As a result, the existence of missing or damaged fall protection devices at this work site was a persistent and recurring problem.

5. The foregoing conditions were in plain view or readily discernible by performance of a simple hand pressure test and could have been detected with the exercise of reasonable diligence. Respondent did not, however, establish an inspection program to assure that these conditions were routinely detected and corrected.

6. Respondent's safety supervisors were informed by employees of these conditions during the course of their daily tours of the work site and also at the weekly stewards' safety meetings but took no effective steps to alleviate the conditions. The existence of these conditions was also brought to respondent's attention by its insurance carrier on two occasions prior to the Secretary's inspection.

The following proposed findings submitted by the Secretary are adopted with modification:

7. Citation Item 2a

a. On May 11, 1987, at 2:40 p.m., at level minus 2, line 21, two employees of J. A. Jones Construction Company were hand shoveling concrete and breaking down and setting up the concrete supply pump that delivers the concrete into the area. They were in the process of removing the concrete supply pump and were working in close proximity to a floor opening that was not guarded as required by 29 C.F.R. § 1926.500(b)(1) by a standard guardrail.

In addition, employees of J. A. Jones were also working in close proximity to a partial guardrail. The partial guardrail was not adequately braced to permit a minimum of deflection. The deflection was four inches. The partial guardrail was not guarded as required by 29 C.F.R. § 1926.500(b)(1) by a standard guardrail.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have known of the above-described conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, the fall would have been 16 feet and could have resulted in death or serious physical harm (Ex. C-17; Tr. 60-83).

8. Citation Item 2b

a. On May 11, 1987, at 2:20 p.m., at level minus 2, line H19, employees of J. A. Jones Construction Company were pouring concrete. They were working in close proximity to a floor opening that was not guarded as required by 29 C.F.R. § 1926.500(b)(1), because an end post was not anchored and guardrails were not braced to minimize deflection. Employees of other construction companies also were in close proximity to the floor openings.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have

known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, the fall would have been 16 feet and could have resulted in death or serious physical harm (Ex. C-17; Tr. 83-94).

9. Citation Item 2c

a. On May 12, 1987, at 8:00 a.m., at level minus 2, line 5, a floor opening directly north of the stairway was not guarded by a standard guardrail as required by 29 C.F.R. § 1926.500(b)(1). The top rail moved more than six inches, the mid-rail fell to the ground, and the posts were not spaced eight feet or less on center to provide strength and stability. Said floor opening was accessible to employees at the work site because it was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, the fall would have been 30 feet and could have resulted in death or serious physical harm (Ex. C-17; Tr. 95-103).

10. Citation Item 2d

a. On May 12, 1987, at 8:00 a.m., on level minus 2, line 5, a floor opening directly south of the stairway did not have posts spaced eight feet or less and the guardrails did not have cross braces to minimize deflection. The floor opening was not guarded by a standard guardrail as required by 29 C.F.R. § 1926.500(b)(1). Said floor opening was accessible to employees at the work site because it was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, the fall would have been a distance of 30 feet and could have resulted in death or serious physical harm (Ex. C-17; Tr. 103-111).

11. Citation Item 2e

a. On May 12, 1987, at 8:50 a.m., at the ground floor on the street level, a floor opening was not guarded by a standard guardrail as required by 29 C.F.R. § 1926.500(b)(1) in that the end post, the top and mid rail were not secured or braced for minimum deflection. Employees of J. A. Jones

Construction Company and other subcontractors were in close proximity to the floor opening because it was a walkway.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. It an employee fell through or off the floor opening, the fall would have been 16 feet and could have resulted in death or serious physical harm (Ex. C-17; Tr. 111-119).

12. Citation Item 2f

a. On May 12, 1987, at 11:30 a.m., on the second floor, a floor opening was not guarded by a standard guardrail as required by 29 C.F.R. § 1926.500(b)(1) in that a section of the guardrail was removed and toeboards were missing. Said floor opening was accessible to all employees at the work site because it was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known

of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, the fall would have been 16 feet and could have resulted in death or serious physical harm (Ex. C-17; Tr. 119-128).

13. Citation Item 2g

a. On May 12, 1987, at 12:40 p.m., on stairway number six on the second floor at the southwest corner, an employee of Thorlief-Larson and Sons was bringing bricks up to the second floor and placing materials north of the stairway. Employees of Fujitech America were installing railings for the elevators in some of the shaftways.

b. The above employees were working in close proximity to the floor opening that was not guarded as required by 29 C.F.R. § 1926.500(b)(1) by not having guardrails or toeboards. Also, employees working below were exposed to the hazard of falling objects.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, the fall would have been at least ten feet or the employee would have rolled down the stairway. In either case,

the result could have been death or serious physical harm (Ex. C-17; Tr. 128-133).

14. Citation Item 2h

a. On May 12, 1987, at 1:00 p.m., on the north side of the third floor near column 25, a floor opening was not guarded by a standard guardrail as required by 29 C.F.R. § 1926.500(b)(1) in that there were no midrails, posts were not spread eight feet or less on center and toeboards were missing. Said floor opening was accessible to employees at the work site because it was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, the fall would have been 16 feet and could have resulted in death or serious physical harm (Ex. C-17; Tr. 133-142).

15. Citation Item 2i

a. On May 12, 1987, at 1:15 p.m., in the southeast section of the third floor, employees of PPG were working with metal frames. They were working in close proximity to a floor opening that was not guarded as required by 29 C.F.R. §

1926.500(b)(1). The floor opening did not have toeboards in the north and south side and cross braces on the guardrail to minimize deflection.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, it would be more than 16 feet and the result could have been death or serious physical harm. Also, if material fell off the floor opening due to a lack of toeboards, an employee below could have been seriously injured or killed (Ex. C-17; Tr. 142-147).

16. Citation Item 2j

a. On May 12, 1987, at 2:10 p.m., on the fourth floor between Columns 4 and 6, employees of PPG were working with metal frames. They were working in close proximity to a floor opening that was not guarded as required by 29 C.F.R. § 1926.500(b)(1) in that said floor opening did not have a top and midrail and toeboards along a one and one-half foot wide perimeter.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, it would be more than 16 feet and the result could have been death or serious physical harm. Also, if material fell off the floor opening due to a lack of toeboards, an employee below could have been seriously injured or killed (Ex. C-17; Tr. 147-156).

17. Citation Item 2k

a. On May 12, 1987, at 2:30 p.m., at the southeast section of the fifth floor, employees of Fujitech were building an elevator shaft. They were working in close proximity to the floor opening that was not guarded as required by 29 C.F.R. § 1926.500(b)(1) by not having an end-post tied into the floor or the wall, the midrails were cracked and there were no toeboards.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have

known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, it would have been at least five stories and the result could have been death or serious physical harm. Also, if material fell off the floor opening because of a lack of a toeboard, an employee below could have been seriously injured or killed (Ex. C-17; Tr. 156-164).

18. Citation Item 21

a. On May 12, 1987, west of stairway number five, a floor opening was not guarded by a standard guardrail as required by 29 C.F.R. § 1926.500(b)(1) by not having the top and midrail secured. Said area was accessible to all employees at the work site since it was adjacent to stairway number five and the area was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, the distance would be 16 feet and could have resulted in death or serious physical harm (Ex. C-17; Tr. 164-168).

19. Citation Item 2m

a. On May 13, 1987, at 10:05 a.m., on stairway number four at the seventh floor, a floor opening was not guarded by a standard guardrail as required by 29 C.F.R. § 1926.500(b)(1) in that the guardrail around the stairway displaced and there were no toeboards. Said floor opening was accessible to employees at the work site because it was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, the distance would be 16 feet and could result in death or serious physical harm (Ex. C-17; Tr. 168-174).

20. Citation Item 2n

a. On May 13, 1987, at 10:20 a.m., at the southeast section of the seventh floor, a floor opening was not guarded by a standard guardrail as required by 29 C.F.R. § 1926.500(b)(1) by having a midrail and toeboards. Said floor opening was accessible to employees at the work site because it was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, it would be a distance of seven stories and could result in death or serious physical harm. If material fell through the floor opening because of a lack of toeboards and hit an employee, it could result in death or serious physical harm (Ex. C-17; Tr. 174-179).

21. Citation Item 2o

a. On May 13, 1987, at 2:30 p.m. on the north side of the 20th floor, a floor opening was not guarded by a standard guardrail as required by 29 C.F.r. § 1926.500(b)(1) in that a section of the guardrail lacked mid and top rails, end posts were not secured and posts were not spaced eight feet or less on center.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have

known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening it would have been 16 feet and result in death or serious physical harm (Ex. C-17; Tr. 179-185).

22. Citation Item 2p

a. On May 13, 1987, at 2:15 p.m., on the 16th floor, an employee of CECO Construction Company was erecting form work for encasing a beam. The employees were working in close proximity to the floor opening that was not guarded as required by 29 C.F.R. § 1926.500(b)(1) in that the guardrailing was not anchored or braced to minimize deflection.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, it would have been a distance of 16 feet or more. The result could have been death or serious physical harm (Ex. C-17; Tr. 193-197).

23. Citation Item 2q

a. On the eighth floor near column four, employees of Thorlief-Larson were installing concrete block along the north perimeter. They were working in close proximity to the floor opening that was not guarded as required by 29 C.F.R. § 1926.500(b)(1) in that a four-foot-by-eight-foot area lacked guardrailing on the north and east sides and the guardrail on the west side was not secure.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, it would have been approximately 16 feet and the result could have been death or serious physical harm (Ex. C-17; Tr. 197-200).

24. Citation Item 2r

a. On June 9, 1987, at 9:00 a.m., on the third floor, the southeast corner near the alleyway, employees of Thorlief-Larson were placing concrete block. They were working in close proximity to the floor opening that was not guarded as required by 29 C.F.R. § 1926.500(b)(1) in that the

guardrailing along the north edge was not braced to minimize deflections.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the floor opening, it would have been approximately 16 feet and the result could have been death or serious physical harm (Ex. C-17; Tr. 200-203).

25. Citation Item 3a

a. On May 12, 1987, at 2:15 p.m., on the south side of the fourth floor, employees of Thorlief-Larson were positioning or moving concrete block. The employees were in close proximity to the wall opening that was not guarded as required by 29 C.F.R. § 1926.500(c)(1) in that the perimeter ropes between column M14 and 15 were not drawn tight to assure a minimum of deflection. The top rope was hanging 29 inches above the floor and the bottom rope was 12 inches above the floor. Both ropes could be deflected close to the floor.

b. J. A. Jones contracted with Kelley Steel Erectors Corporation to erect wire ropes, but J. A. Jones

Construction Company had the responsibility to maintain the perimeter wire rope guards.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the wall opening, the distance would have been approximately 16 feet and the result could have been death or serious physical harm (Ex. C-17; Tr. 203-210).

26. Citation Item 3b

a. On May 12, 1987, at 10:10 a.m., on the south side of the second floor west of the material hoist, employees of MGM Electrical Contractors had a shanty for electrical storage and were installing electrical equipment. They were working in close proximity to the wall opening that was not guarded as required by 29 C.F.R. § 1926.500(c)(1) in that a guardrail was missing at the wall opening directly under the north side of the stairway.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard guardrails around floor openings at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

was not guarded by a standard railing or equivalent as required by 29 C.F.R. § 1926.500(d)(1) in that the perimeter ropes running south between columns A4 and B4 were not drawn tight to assure a minimum of deflection. The top rope was slack. The bottom rope deflected to the floor. Said open-sided floor was accessible to employees at the work site because it was not cordoned off.

b. J. A. Jones Construction Company contracted work with Kelley Steel Erectors to erect perimeter wire rope guards on open-sided floors, but J. A. Jones Construction Company had the responsibility to maintain the perimeter wire rope guards.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been nine stories and result in death or serious physical harm (Ex. C-17; Tr. 247-264).

29. Citation Item 4g

a. On May 8, 1987, at 8:15 p.m., at the southeast corner of the second floor, employees of Thorlief-Larson were doing masonry work. They were working in close proximity to the open-sided floor that was not guarded as required by 29 C.F.R. § 1926.500(d)(1) in that the perimeter ropes running

west and north from column M4 were not drawn tight to assure a minimum of deflection. The top ropes could be deflected to within 20 inches of the floor or Q-deck.

b. J. A. Jones Construction Company contracted work with Kelley Steel Erectors to erect perimeter wire rope guards on open-sided floors, but J. A. Jones Construction Company has the responsibility to maintain the perimeter wire rope guards.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the second floor, the distance would have been two stories and result in death or serious physical harm (Ex. C-17; Tr. 265-267).

30. Citation Item 4i

a. On May 11, 1987, at 3:00 p.m., in level minus 2, line F14, an open-sided floor was not guarded by a standard railing as required by 29 C.F.R. § 1926.500(d)(1) in that a guardrail was not extended above the full length of the floor underneath the ramp heading up to the next level. Said open-sided floor was accessible to employees at the work site because it was not cordoned off. Said opening was 11 feet and near the CECO Corporation shanty. Employees of CECO Corporation worked in this area.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance could have been ten feet and result in death or serious physical harm (Ex. C-17; Tr. 268-274).

31. Citation Item 4j

a. On May 12, 1987, at 9:45 a.m., in the west podium second floor, an open-sided floor was not guarded by a standard railing as required by 29 C.F.R. § 1926.500(d)(1) in that the guardrailing erected around the perimeter of the atrium was not securely anchored or braced to minimize deflection. Said open-sided floor was accessible to employees at the work site because it was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known

of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been 16 feet and result in death or serious physical harm (Ex. C-17; Tr. 274-278).

32. Citation Item 4k

a. On May 12, 1987, at 9:50 a.m., on stairway number five between the first and second floors, a landing or platform was not guarded by a standard railing as required by 29 C.F.R. § 1926.500(d)(1) in that the stairway landing was not equipped with a midrail. Said landing or platform was accessible to employees at the work site because it was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the landing or platform, the distance would have been 16 feet and result in death or serious physical harm (Ex. C-17; Tr. 279-284).

33. Citation Item 4l

a. On May 12, 1987, at 3:30 p.m., on the north side of the building at the second floor, employees of Thorlief-Larson were doing masonry work. They were working in close proximity to the open-sided floor that was not guarded as required by 29 C.F.R. § 1926.500(d)(1) in that the removable guardrails erected between columns A12 and 13 were not extended along the entire distance between the columns.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been 16 feet and result in death or serious physical harm (Ex. C-17; Tr. 284-291).

34. Citation Item 4m

a. On May 12, 1987, at 11:30 a.m., at the north side of the building, second floor between columns A11 and A12, employees of Thorlief-Larson were doing masonry work. They were working in close proximity to the open-sided floor that was not guarded as required by 29 C.F.R. § 1926.500(d)(1)

in that the top rope was 12 to 21 inches from the floor and the bottom rope could be pushed to the ground.

b. J. A. Jones Construction Company contracted work with Kelley Steel Erectors to erect perimeter wire rope guards on open-sided floors, but J. A. Jones Construction Company had the responsibility to maintain the perimeter wire rope guards.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been two stories and result in death or serious physical harm (Ex. C-17; Tr. 291-298).

35. Citation Item 4n

a. On May 12, 1987, at 12:30 p.m., on the north side of the building on the second floor between columns A19 and 21, an employee of Thorlief-Larson was doing masonry work. He was working in close proximity to the open-sided floor that was not guarded as required by 29 C.F.R. § 1926.500(d)(1) in that the perimeter ropes were not drawn tight. The top rope could be deflected 12 to 21 inches and the mid-rope could be deflected to the ground.

b. J. A. Jones Construction Company contracted work with Kelley Steel Erectors to erect perimeter wire rope

guards on open-sided floors, but J. A. Jones Construction Company had the responsibility to maintain the perimeter wire rope guards.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been 16 feet and result in death or serious physical harm (Ex. C-17; Tr. 299-304).

36. Citation Item 4o

a. On May 12, 1987, at 12:40 p.m., on stairway number six between the second and third floors, the stairway was not guarded as required by 29 C.F.R. § 1926.500(d)(1) in that it was missing a midrail. Said stairway was available to employees at the work site because it was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the stairway, the distance would have been 15 feet and result in death or serious physical harm (Ex. C-17; Tr. 304-307).

37. Citation Item 4p

a. On May 12, 1987, at 1:00 p.m. on the north side of the third floor near column 19, employees of PPG were installing windows. They were working in close proximity to the open-sided floor that was not guarded as required by 29 C.F.R. § 1926.500(d)(1) in that the wood railing at the perimeter of the floor lacked a midrail.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been three stories and result in death or serious physical harm (Ex. C-17; Tr. 307-310).

38. Citation Item 4q

a. On May 12, 1987, at 1:30 p.m., on the east side of the third floor between columns eight and nine, an open-sided floor was not guarded as required by 29 C.F.R. §

1926.500(d)(1) in that the perimeter ropes were not drawn tight to assure a minimum deflection. The top rope could be deflected to within 21 inches of the floor and the bottom rope could be deflected to the floor.

b. J. A. Jones Construction Company contracted work with Kelley Steel Erectors to erect perimeter wire rope guards on open-sided floors, but J. A. Jones Construction Company had the responsibility to maintain the perimeter wire rope guards.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been three stories and result in death or serious physical harm (Ex. C-17; Tr. 311-315).

39. Citation Item 4r

a. On May 12, 1987, at 2:00 p.m., on stairway number one between the third and fourth floors, employees of PPG were installing windows. They were working in close proximity to the open-sided floor that was not guarded as required by 29 C.F.R. § 1926.500(d)(1) in that there were no midrails.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings

or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been more than ten feet and result in death or serious physical harm (Ex. C-17; Tr. 315-320).

40. Citation Item 4s

a. On May 12, 1987, at 2:00 p.m., on stairway number six between the third and fourth floors, employees of PPG were installing windows. They were working in close proximity to the stairway landing or platform that was not guarded as required by 29 C.F.R. § 1926.500(d)(1) in that there were no midrails.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the stairway landing or platform, the distance could have been more than ten feet and result in death or serous physical harm (Ex. C-17; Tr. 320-323).

41. Citation Item 4t

a. On May 12, 1987, at 2:25 p.m., on stairway number one between the fourth and fifth floors, employees of PPG were installing windows. They were working in close proximity to the stairway or platform that was not guarded as required by 29 C.F.R. § 1926.500(d)(1) in that there was not a midrail.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the stairway landing or platform, the distance could have been more than ten feet and result in death or serious physical harm (Ex. C-17; Tr. 323-324).

42. Citation Item 4u

a. On May 12, 1987, at 3:00 p.m., on the west side of the fifth floor at the atrium, employees of Thorlief-Larson

were doing masonry work. They were working in close proximity to the open-sided floor that was not guarded as required by 29 C.F.R. § 1926.500(d)(1) in that the perimeter ropes were not drawn tight. The top rope could be deflected to within 29 inches of the floor and the bottom rope to within 9 inches. On the west side of the atrium the ropes were drawn together.

b. J. A. Jones Construction Company contracted work with Kelley Steel Erectors to erect perimeter wire rope guards on open-sided floors, but J. A. Jones Construction Company had the responsibility to maintain the perimeter wire rope guards.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been five stories and result in death or serious physical harm (Ex. C-17; Tr. 324-331).

43. Citation item 4v

a. On May 13, 1987, at 8:15 a.m., on the west side of the sixth floor around the atrium, employees of Thorlief-Larson were doing masonry work. They were working in close proximity to the open-sided floor that was not guarded as required by 29 C.F.R. § 1926.500(d)(1) in that the wood

guardrails and perimeter ropes were not constructed to stand a minimum of deflection.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floors, the distance would have been six stories and result in death or serious physical harm (Ex. C-17; Tr. 331-335).

44. Citation Item 4w

a. On May 13, 1987, at 10:00 a.m., on the northeast corner of level 7½, employees of Thorlief-Larson were doing masonry work. They were working in close proximity to an open-sided floor that was not guarded as required by 29 C.F.R. § 1926.500(b)(1) in that there was no midrail along the east perimeter.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been seven and one-half stories and result in death or serious physical harm (Ex. C-17; Tr. 336-339).

45. Citation Item 4x

a. On May 13, 1987, at 10:15 a.m., at the southeast corner of level 7½, employees of Thorlief-Larson were doing masonry work. They were working inclose proximity to an open-sided floor that was not guarded as required by 29 C.F.R. § 1926.500(b)(1) in that a midrail was not installed along the east perimeter and the wire rope serving as a midrail on the south perimeter was 17 inches above the floor.

b. J. A. Jones Construction Company contracted work with Kelley Steel Erectors to erect perimeter wire rope guards on open-sided floors, but J. A. Jones Construction Company had the responsibility to maintain the perimeter wire rope guards.

c. The above-described violative conditions were in plain view. J. A. Jones Construction Company could have known of the above-described violative conditions with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been seven and one-half stories and result in death or serious physical harm (Ex. C-17; Tr. 339-342).

46. Citation Item 4y

a. On May 13, 1987, at 11:30 a.m., on the north side of the eighth floor between columns 20 and 21, employees were working in close proximity to an open-sided floor which was not guarded as required by 29 C.F.R. § 1926.500(b)(1). Said floor was accessible to all employees at the work site because it was not cordoned off.

b. J. A. Jones Construction Company contracted work with Kelley Steel Erectors to erect perimeter wire rope guards on open-sided floors, but J. A. Jones Construction Company had the responsibility to maintain the perimeter wire rope guards.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been eight stories and result in death or serious physical harm (Ex. C-17; Tr. 342-347).

47. Citation Item 4z

a. On May 11, 1987, at 11:30 a.m., on the south side of the ninth floor, an open-sided floor adjacent by the Kelley Steel Erectors' office trailer was not guarded as required by 29 C.F.R. § 1926.500(b)(1) in that the top rope was 23 inches high and mid-rope was lying on the floor. Said open-sided floor was accessible to employees at the work site because it was not cordoned off.

b. J. A. Jones Construction Company contracted with Kelley Steel Erectors to erect perimeter wire rope guards on open-sided floors, but J. A. Jones Construction Company had the responsibility to maintain the perimeter wire rope guards.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the open-sided floor, the distance would have been nine stories and result in death or serious physical harm (Ex. C-17; Tr. 347-352).

48. Citation Item 5a

a. On May 13, 1987, at 1:00 p.m., on the south stairway, 12th floor, a stairway on the left side did not have any railings as required by 29 C.F.R. § 1926.500(e)(1)(ii). Said stairway was accessible to employees at the work site because it was not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the stairway, a distance of 16 feet, the result could have been death or serious physical harm (Ex. C-17; Tr. 360-362).

49. Citation Item 5b

a. On May 12, 1987, at 9:45 a.m., on stairway number five, the first flight of stairs from the second floor, there was no stair railing on the right side as required by 29 C.F.R. § 1926.500(e)(1)(ii). Employees had access to the stairs because they were not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the stairway, the result could have been death or serious physical harm. The distance would have been 16 feet or more.

50. Citation Item 5c

a. On May 13, 1987, at 1:00 p.m, on the north stairway, 12th floor, a stairway was not equipped with railings at the left side as required by 29 C.F.R. § 1926.500(e)(1)(ii). Employees had access to the stairs because they were not cordoned off.

b. It was the responsibility of J. A. Jones Construction Company to erect and maintain standard railings or the equivalent on open-sided floors or platforms at the work site.

c. The above-described violative condition was in plain view. J. A. Jones Construction Company could have known of the above-described violative condition with the exercise of reasonable diligence.

d. If an employee fell through or off the stairway, it would have been a distance of 16 feet and result in death or serious physical harm (Ex. C-17; Tr. 357-360).

CONCLUSIONS OF LAW

1. This court has jurisdiction of the parties and subject matter in this case.

2. Respondent seriously violated 29 C.F.R. § 1926.20(b)(1) and (2) by its failure to initiate and maintain

a safety program that included the frequent and regular inspection of the work site to detect and correct hazardous conditions.

3. Respondent seriously violated 29 C.F.R. § 1926.500(b)(1), 1926.500(c)(1), 1926.500(d)(1), 1926.500(e)(1)(ii) and 1926.500(f)(1) as set forth in findings of fact 7 through 50.

ORDER

It is ORDERED:

1. Citation No. 1, Items 1a and 1b, are affirmed as serious violations with a total penalty of $2,000.00 assessed.

2. Citation No. 1, Items 2a through 2r, and complaint items 2 through 19 are affirmed as serious violations with a total penalty of $18,000.00 assessed.

3. Citation No. 1, Items 3a and 3b, complaint items 20 and 21, are affirmed as serious violations with a total penalty of $2,000.00 assessed.

4. Citation No. 1, Items 4b, and 4f through 4z, complaint items 23 and 27 through 47 will be affirmed as serious violations with a total penalty of $22,000.00 assessed.

5. Citation No. 1, Items 4a, 4c, 4d and 4e, complaint items 22, 24, 25 and 26, are vacated.

6. Citation No. 1, Items 5a, 5b, and 5c, complaint items 48, 49, and 50, will be affirmed as serious violations with a total penalty of $3,000.00 assessed.

7. Citation No. 1, Item 6, is vacated.

Dated this 18th day of April, 1990.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge