SECRETARY OF LABOR, Complainant, v. CAPEWAY ROOFING SYSTEMS, INC., Respondent.	OSHRC Docket No. 00-1986

DECISION

Before: RAILTON, Chairman; STEPHENS, Commissioner.

BY THE COMMISSION:

Before us is a decision involving Capeway Roofing Systems, Inc. ("Capeway"). The case arose out of an inspection by two compliance officers of the Occupational Safety and Health Administration ("OSHA") at a firehouse under construction in a residential area in South Weymouth, Massachusetts. Capeway was installing the roof on the multi-roofed firehouse, which had four distinct roof areas. The central roof was sloped at a pitch of 6 in 12, was 22 feet above the ground at the eaves and 26 feet 7 inches at the peak. There were two intermediate roofs, one on each side of the central steep roof, which were 17 feet 10 inches high, and a lower flat roof 13 feet 8 inches high adjacent to one of the intermediate roofs.

As a result of its inspection, OSHA issued citations alleging that Capeway had violated construction safety and health standards governing fall and head protection, training, material storage, and the inspection of safety equipment. A total penalty of $119,000 was proposed. Capeway contested the citations, and a hearing was held before Chief Administrative Law Judge Irving Sommer, who affirmed all the citations and assessed a total penalty of $117,000. His decision was directed for review by former Chairman Thomasina Rogers pursuant to 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Four of

the citations, involving seven of the nine violations found by the judge, are before the Commission. For the reasons that follow, we affirm the judge's decision.

SEQUESTRATION

The first issue on review in this case is whether the judge committed reversible error in his rulings on sequestration of witnesses at the hearing. Capeway claims that the judge did not abide by the provisions of Federal Rule of Evidence 615 ("Rule 615"), which governs witness sequestration in Commission proceedings. Commission Rule 71, 29 C.F.R. § 2200.71.[1] Specifically, Capeway protests the fact that compliance officer ("CO") James Holiday and Area Director ("AD") Brenda Gordon were excepted from the judge's sequestration order. Capeway claims prejudice based on the fact that Holiday was allowed to remain in the courtroom and hear the testimony of another CO, Peter Barletta, before giving his own testimony on many of the same subjects. As a remedy for the sequestration error, Capeway contends that the case should be remanded for "a new hearing before a new judge."

While the Commission concludes that any error resulting from the judge's rulings regarding sequestration was harmless, Chairman Railton and Commissioner Stephens have different views of the issue. Their separate views follow:

Commissioner Stephens

After careful review of the record, I conclude that while the judge did not strictly comply with the provisions of Rule 615, Capeway failed to raise proper objections to the judge's rulings at the hearing. In addition, Capeway failed to provide adequate support for its objections to these rulings as raised for the first time in its post-hearing brief to the judge. In any event, I find any error resulting from the judge's rulings to be harmless.

Federal sequestration rule

[1]The incorporation of the sequestration rule, in accordance with the Federal Rules of Evidence, is not unique to the Review Commission. *See, e.g., Unga Painting*, 237 NLRB 1306 (1978) (sequestration of charging parties who are alleged discriminatees approved as practice, in response to urging by reviewing courts); *Medite of New Mexico, Inc.*, 314 NLRB 1145 (1994), *enforced*, 72 F.3d 780 (10th Cir. 1995).

Sequestration of witnesses during a judicial proceeding is a time-honored practice. *See, e.g., United States v. Jackson*, 60 F.3d 128, 133 (2d Cir. 1995) ("Rule 615 codified a well-established common law tradition," and the practice "is at least as old as the Bible"), *cert. denied sub nom. Barretto v. United States*, 516 U.S. 980 (1995). "The aim of imposing 'the rule on witnesses,' as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid." *Geders v. United States*, 425 U.S. 80, 87 (1976). *See also 29* Charles Alan Wright & Victor J. Gold, *Federal Practice and Procedure: Evidence* § 6242, pp. 53-54 (1st ed. 1997) ("Wright & Gold").

Under the common law, the judge was afforded exceedingly broad discretion in deciding whether to order the sequestration of witnesses. *See Holder v. United States*, 150 U.S. 91, 92 (1893). Rule 615 has somewhat limited that discretion by requiring the judge to order sequestration upon motion of a party, though the judge may also order sequestration *sua sponte*:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

Notwithstanding the benefits of sequestration, Rule 615 recognizes certain competing interests warranting the continuing presence of certain categories of witnesses and therefore carves out four exceptions, two of which are relevant here. The exception set forth under paragraph (2) of Rule 615 permits the attorney representing a party that is not a natural person, such as a corporation or a governmental entity, to designate an officer or an employee of the party who will remain in the courtroom throughout the hearing. Typically, this exception is applied to an investigative agent of the government such as a compliance officer. *See* Wright & Gold, § 6245, at 76-77.

The other pertinent exception, set forth under paragraph (3) of Rule 615, allows a party to establish that the presence of a witness is "essential to the presentation of the party's cause." Although the rule does not define "essential," the Advisory Committee's Note indicates that

"[t]he category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation." Insofar as a compliance officer might qualify as an "agent who handled the transaction being litigated," Rule 615(3) arguably affords the Secretary an alternative basis for excepting a compliance officer from sequestration. However, at least one court has warned that where the government has already designated one investigative agent to be its representative under Rule 615(2), "demonstrating that an additional agent is, in fact, 'essential' is no easy task." *United States v. Phibbs*, 999 F.2d 1053, 1070 (6th Cir. 1993).

Both of these exceptions have generated interpretative issues in their application to particular circumstances. For instance, since the designated representative exception under Rule 615(2) is couched in the singular, is a party foreclosed from designating more than one representative? The majority rule permits a party only one designated representative. *See, e.g., United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir. 1991); *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986). *See generally* cases cited in Wright & Gold, § 6245, at 81 n.30. However, there is authority to the contrary, emphasizing that sequestration orders remain fundamentally an exercise of discretion by the judge. *See, e.g., Jackson*, 60 F.3d at 135 (district court must exercise discretion to exempt more than one witness under Rule 615); *United States v. Payan*, 992 F.2d 1387, 1394 (5th Cir. 1993) (district court's decision to exempt two government agents under Rule 615 reviewed for abuse of discretion); *Phibbs*, 999 F.2d at 1073 (where prosecution had two case agent-witnesses exempted from exclusion under Rule 615, trial court did not abuse its discretion in ordering one of them to leave courtroom while other one testified, based on "court's inherent powers of trial oversight"), *cert. denied*, 510 U.S. 1119 (1994); *United States v. Machor*, 879 F.2d 945, 954 (1st Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990) (whereas "discretion to exclude the government agent under Fed.R.Evid. 615 is limited," court has "ample discretion to control the order of interrogating witnesses."). Similarly, "[w]hether or not a witness is essential, and hence should be exempt from Rule 615 exclusion, is a matter soundly within the discretion of the trial court." *Polythane Systems v. Marina Ventures International*, 993 F.2d 1201, 1209 (5th Cir. 1993). *See also United States v. Green*, 293 F.3d 886, 892 (5th Cir. 2002) (trial court had discretion to determine that presence of three government investigators was essential in complex case

involving eight-year drug conspiracy in two states), *cert. denied*, 123 S. Ct. 1783 (2003).

In cases where a sequestration error is made, the aggrieved party bears the burden of showing prejudice before a remedy will be considered.[2] A few courts have held in criminal cases that a sequestration error is presumptively prejudicial, thereby imposing the burden on the opposing party to show that error was harmless.[3] The Commission has not directly spoken on this issue in the context of sequestration orders but has ruled in a related context that the aggrieved party has the burden of demonstrating that prejudice resulted to the presentation of its case. *See Williams Enterp.*, 13 BNA OSHC 1249, 1250-51, 1986-87 CCH OSHD ¶ 27,893, p. 36,582 (No. 85-355, 1987) (moving party carries burden of showing preclusion of expert testimony resulted in prejudice).[4]

In the event that a judge's sequestration error is considered prejudicial, one remedy is to order a new hearing at which the witnesses would testify again but be properly sequestered. *E.g., United States v. Brewer*, 947 F.2d 404, 412 (9th Cir. 1991); *Jackson*, 60

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[2]All of the circuits — including the First Circuit, the circuit to which this case could be appealed — have held that prejudice is the key consideration regarding whether the error warrants a remedy. *See, e.g., United States v. Lussier*, 929 F.2d 25 (1st Cir. 1991); *G. Rockett & Sons, Inc. v. Winter Harbor Fisherman's Coop, Inc.*, 53 F.3d 327 (1st Cir. 1995) (unpubl.); *Simone v. Worcester County Inst. for Savings*, 52 F.3d 309 (1st Cir. 1995) (unpubl.). *See also Trans World Metals, Inc. v. Southwire Co.*, 769 F.2d 902 (2d Cir. 1985); *Government of Virgin Islands v. Edinborough*, 625 F.2d 472 (3d Cir. 1980); *Woodson v. McGeorge Camping Ctr. Inc.*, 42 F.3d 1387 (4th Cir. 1994) (unpubl.), *cert. denied*, 514 U.S. 1126 (1995); *United States v. Green*, 293 F.3d 886 (5th Cir. 2002), *cert. denied*, 123 S.Ct. 1783 (2003); *United States v. Mohney*, 949 F.2d 1397, 1405 (6th Cir. 1991); *United States v. Gammon*, 961 F.2d 103 (7th Cir. 1992); *Hollman v. Liberty Mut. Ins. Co.*, 752 F.2d 311 (8th Cir. 1985); *Alexander Shokai, Inc. v. Commissioner*, 34 F.3d 1480 (9th Cir. 1994); *Medite of New Mexico, Inc. v. NLRB*, 72 F.3d 780 (10th Cir. 1995); *United States v. Eyster*, 948 F.2d 1196 (11th Cir. 1991); *Queen v. WMATA*, 842 F.2d 476 (D.C. Cir. 1988).

[3]*See Jackson*, 60 F.3d at 136-37 (2d Cir.); *United States v. Brewer*, 947 F.2d 404, 412 (9th Cir. 1991); *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986).

[4]As authority for its holding, *Williams* relied upon the harmless error rule of Fed. R. Civ. P. 61 (applicable to Commission proceedings, section 12(g) of the Act, 29 U.S.C. 661(g); Commission Rule 2(b) by 29 C.F.R. § 2200.2(b)) and *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943), which noted that the party seeking to have a judgment set aside because of an erroneous ruling carries the burden of showing prejudice.

F.3d at 134. *See generally* Wright & Gold, § 6244, pp. 73-74. However, courts are reluctant to take this rather draconian step. In jury trial cases, the offending testimony can be struck and the jury instructed to disregard it. *See, e.g.*, *United States v. Magana*, 127 F.3d 1 (1st Cir. 1997). In nonjury civil cases and cases before administrative tribunals, the problem is ameliorated by the fact that the judge is the trier of fact and is given broad discretion to admit testimony — even testimony that later is determined to be inadmissible.[5] *See generally* 11 Wright, Miller & Kane, *Federal Practice and Procedure*, § 2885, p. 454 (2d ed. 1995) ("In nonjury cases the district court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence.").

Proceedings before judge

At the hearing in this case, the participants did not seem entirely cognizant of the requirements of Rule 615. *See United States v. Williams*, 136 F.3d 1166, 1169 (7th Cir. 1998) ("It is not at all uncommon for trial attorneys to treat sequestration orders under Rule 615 in a nonchalant manner, but a cavalier approach is not advisable.").

Counsel for the Secretary was well into the direct examination of his first witness, CO Barletta, when he first raised a "question" regarding whether the judge "could sequester the witnesses." Counsel for Capeway initially *opposed* the motion. He noted that such a motion is normally made before the start of testimony and that CO Holiday, who was also slated to testify, had already been sitting in the courtroom listening to Barletta's testimony. The judge stated: "I have no problem with the other compliance officer [Holiday] sitting here." Capeway's counsel responded that he would "prefer that we have everyone sitting here" and that he did not "see any reason to sequester anyone."

The judge then ordered sequestration of the other witnesses, but at Capeway's request he allowed each party to have a representative of the client remain in the courtroom. For some reason, however, the judge failed to ask the parties on the record to

[5]Where evidence is admitted improperly in an administrative proceeding, the case may be decided without a rehearing by simply disregarding the tainted evidence. *See, e.g., Medite of New Mexico, Inc.*, 314 NLRB 1145 (1994) (judge may be required to rely only on evidence that was not tainted by presence of witnesses who should have been sequestered), *enforced on other grounds*, 72 F.3d 780 (10th Cir. 1995).

specifically identify the witness each counsel had actually designated as its client-representative. The judge simply stated:

> Let the record show that I am allowing the compliance officer to stay who performed the inspection. The objection by Mr. Wayne is that since I allowed the compliance officer to stay here, he wants everybody else to stay here. The objection is overruled and he has an exception.

When the Secretary's counsel noted that he would be presenting only one other witness, AD Gordon, who was present and scheduled to testify after Barletta on the issue of penalty assessment, the judge responded: "[Sh]e can remain. Let's move on." Thus, the judge excepted both Holiday and Gordon without having been requested to do so by the Secretary's counsel.

Instead of actually objecting to both Holiday and Gordon remaining in the courtroom, Capeway's counsel simply said, "I object to that for the same reason." That "same" reason, as just stated by the judge, was the desire of Capeway's counsel to have "everybody else … stay here." Thus, Capeway never actually raised at the hearing its current objection — that both Holiday and Gordon should have been sequestered. Again, the judge overruled Capeway's "same reason" objection and said: "Let's move on."

In a footnote in its post-hearing brief to the judge, Capeway argued for the first time: "The Court's decision to allow CO Holiday, as well as Area Director Gordon [to] remain in the courtroom while CO Barletta testified was inherently unfair, denied due process, and prejudiced Respondent. CO Holiday tailored his testimony to address the weaknesses in CO Barletta's testimony." Capeway made no specific allegations of prejudice and simply urged that Holiday's testimony be stricken from the record.

The judge addressed the sequestration issue in a footnote in his decision. He asserted that allowing Holiday and Gordon to remain in the courtroom was in accord with Rule 615(2), the designated representative exception. He also noted that Capeway "failed to identify even one instance where CO Holiday's testimony was suspect."

Analysis of judge's and parties' actions

On review, Capeway expands upon its post-hearing objections to the judge, arguing that: (1) the Secretary's motion to sequester was late; (2) the judge violated the mandatory nature of Rule 615 and thereby "destroyed the integrity" of the hearing by failing to sequester Holiday and Gordon; and (3) the judge's actions prejudiced Capeway's case, in that Holiday "tailored his testimony to fill gaps" in Barletta's testimony which were exposed by Capeway's counsel on cross-examination. As to the timeliness of the Secretary's motion, there is no formal time limit on when a sequestration motion may be made. *See, e.g., William L. Comer Family Equity Pure Trust v. C.I.R.*, 958 F.2d 136, 140-41 (6th Cir. 1992) (sequestration mandatory even where motion not made until after defense witnesses had testified). *See generally* Wright & Gold, § 6244, pp. 67-69. Further, Capeway cannot reasonably complain that the Secretary's motion should have been made earlier when Capeway itself could have moved to sequester the witnesses at any time. *See generally* Wright & Gold, § 6244, p. 68 and nn.2, 5.

As to Capeway's second argument, the judge did act in a manner inconsistent with Rule 615 by excepting both Holiday and Gordon from his sequestration order without a motion to that effect from the Secretary and without explaining his reasons for doing so.[6] However, despite the judge's deviation from the requirements of Rule 615, Capeway's counsel did not properly frame its objections at the hearing so as to take issue with the supposed designation of Holiday or the subsequent failure to sequester Gordon. A party must make a timely objection to an evidentiary ruling, "stating the specific ground of objection." Fed. R. Evid. 103(a)(1). *See generally* Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, *Federal Rules of Evidence Manual* § 103.02[9] & n.40 (Matthew Bender & Company, Inc. 2003) (citing *Angelo v. Armstrong World Indus.*, 11 F.3d 957, 960-61 (10th Cir. 1993) ("The objecting party must make its objection clear; the trial judge need not imagine all the possible grounds for an objection.")). As the judge noted in his decision, Capeway failed to identify any instances of prejudice in its post-hearing brief. In fact, though Capeway challenges the judge's decision to except Gordon from sequestration, Capeway has never suggested to the judge or even here on review that Gordon's presence was prejudicial.

In any event, whether the judge's actions in this case "destroyed the integrity" of the hearing, or violated Capeway's due process rights, depends upon whether Capeway has established prejudice. Thus, even if Capeway's objections to the judge's ruling could be considered proper, Capeway is not entitled to a rehearing absent a showing of prejudice.

Capeway's claims of prejudice as to Holiday's testimony

On review, Capeway argues that the judge's failure to sequester Holiday prejudiced its case in that Holiday "tailored his testimony to fill gaps" in Barletta's testimony. Capeway alleges four specific occurrences of "tailoring" by Holiday that it claims affect three citation items affirmed by the judge.

Capeway does not actually allege that Holiday's testimony was not truthful. Nor did Capeway offer any rebuttal witnesses as to any of the citation items that it claims were affected by Holiday's "tailored" testimony. Indeed, one of the citation items is based on conditions of which Capeway supervisor Dennis Mello and job foreman Manuel Araujo were also aware;[7] another citation item is based on admissions by Araujo to Holiday. Araujo, apparently designated by Capeway's counsel as its client-representative, remained in the courtroom and listened to all of the allegedly "tailored" testimony. Thus, if the two occurrences of Holiday's "tailored" testimony that pertain to these two citation items did, in fact, contain inaccuracies, Capeway had a knowledgeable witness already in

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[6]The judge did not direct the Secretary's counsel to designate a representative but apparently assumed that the Secretary would designate Holiday. The judge also failed to hear argument on whether, in the exercise of his discretion, there was any basis for allowing Gordon to remain, either under Rule 615(2) or (3). Upon a proper showing, it is not inconceivable that both Holiday and Gordon could have qualified as exceptions to Rule 615, either as two designated representatives or as a designated representative and an essential person, respectively.

[7]Compliance officer Barletta's testimony regarding this particular item came before the issue of sequestration was even raised to the judge. Thus, it cannot be relied upon as proof of any alleged prejudice resulting from the judge's rulings on this issue.

the courtroom available for rebuttal. However, Araujo never testified. Nor did supervisor Mello, and there was no indication that he was unavailable to testify. Because Capeway offered no rebuttal evidence as to these two citation items, Holiday's sworn testimony stands unimpeached and establishes violations of both items.

1 citation item was affected by two other occurrences of "tailoring" by

Holiday. Under this citation item, Capeway was cited for a violation of the general fall protection provision at section 1926.501(b)(11)[8] regarding its work on the pitched roof of the firehouse under construction. Capeway argues that the item should be vacated because there is a more specifically applicable standard, section 1926.501(b)(13), which addresses "residential construction." According to Capeway, the firehouse should be considered "residential construction" because it was designed to blend into the surrounding residential neighborhood and had components typical of such construction such as asphalt shingles. To support its argument, Capeway does not rely on the actual language of section 1926.501(b)(13) because it imposes essentially the same requirements as the cited standard. Rather, Capeway relies on an OSHA directive that states the agency's internal enforcement policy under section 1926.501(b)(13): OSHA Instruction STD 3-0.1A, *Interim Fall Protection Compliance Guidelines for Residential Construction* (June 18, 1999) ("RC Guidelines").

ay's testimony is inconsistent with Barletta's as to whether, and how,

OSHA considered the RC Guidelines before citing Capeway under the general fall protection provision. Specifically, Capeway claims Barletta testified that OSHA did not consider the RC Guidelines before issuing the citation, while Holiday testified that OSHA did. Capeway also claims Barletta testified that OSHA generally looks only at the type of building being constructed in determining whether the RC Guidelines apply, while Holiday testified that OSHA also looks at the type of materials used.

Capeway has misrepresented Barletta's testimony on these points. With regard to both issues, Barletta testified only as to what *he*, not OSHA, personally considered regarding the application of the RC Guidelines.[9] According to Holiday, it was he, not Barletta, who was responsible for the citations in this case — including the decision to cite the violation in question under the general construction provision — and Holiday did

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[8]That provision states: "Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems." (Emphasis added.) ("Steep roof means a roof having a slope greater than 4 in 12 (vertical to horizontal)." Section 1926.500(b).)

[9]Based on testimony from Barletta alone, the judge concluded that there were instances where Capeway's employees were working on the firehouse roof with no monitor and no other form of fall protection. Thus, the record supports a finding that Capeway was not in compliance with *any* of the potentially applicable provisions regardless of whether Barletta or Holiday has correctly characterized OSHA's consideration of the RC Guidelines.

not recall ever speaking to Barletta about the RC Guidelines. In this respect, Barletta's testimony on these two points was not inconsistent with Holiday's. Thus, Capeway has not demonstrated that there were any "gaps" in Barletta's testimony for Holiday to fill. Moreover, Capeway has failed to explain how consideration of Barletta's testimony alone, without the "benefit" of Holiday's "gap-filling" testimony, would lead to the conclusion which Capeway urges here – that the general fall protection standard cited in this case did not apply.

Under these circumstances, I find that Capeway has failed to establish prejudice with regard to Holiday's testimony. Accordingly, any sequestration error resulting from the judge's actions was harmless and a remand is not warranted.[10]

Chairman Railton

The Commission has not previously addressed the applicability of Rule 615 to its proceedings, and I believe that the record in this case is such that it is inappropriate to lay down a general rule for Commission cases. In particular, I do not join my colleague insofar as he concludes that the burden is on the party claiming prejudice to prove it was in fact prejudiced. In reviewing the Federal Rule 615 cases that deal with prejudice, I come to the conclusion that largely they do not establish a rule of decision in close cases where the burden of persuasion might matter. Rather, statements in these decisions that the petitioners "have not established prejudice" are best understood as a statement about the paucity of any indication of prejudice in the record, not as a rule of decision regarding the burden of persuasion in cases of equipoise.

As my colleague points out, draconian solutions are required in cases where prejudice is shown. I agree that such a solution is not required in this case. There is substantial evidence in the record as a whole to support the judge's findings and conclusions. Assuming he committed error with regard to Rule 615, I agree that it was harmless.

It is worth noting, however, that the question of error in this case is close. Counsel for Capeway seemed unaware that his objections at trial were not well taken and were not explained. It is incumbent on counsel having objections to articulate them to the judge. A

[10]The conclusion reached here does not mean Commission judges should assume that a failure to comply with the rule of sequestration in any future case will likewise be considered harmless error. Where a proper objection is timely urged with sufficient specificity to the judge, a failure to abide by the provisions of Rule 615 may well be found prejudicial, warranting sterner measures on review including a remand for further proceedings and an order that tainted testimony must be disregarded and the evidence reevaluated by the judge.

general objection to sequestration by itself does not inform the judge of the reasons for or against sequestration. Thus, counsel for Capeway failed to demonstrate any need for sequestering Compliance Officer Holiday ("Holiday") or Area Director Gordon (the "AD"). Indeed, counsel's objection could have been, and likely was, understood by the judge to mean that Holiday and the AD should remain in the hearing room. As my colleague states, a request to sequester is not untimely merely because it is made while testimony is being taken. Rule 615 is mandatory and sequestration must be performed when requested.

Capeway knew or should have known before the hearing commenced that the testimony given by Holiday might overlap that given by Compliance Officer Barletta. If Capeway had any concern at all in that regard, it should have voiced that concern. It did not. As my colleague points out, Capeway thought it only worth a footnote in its post-hearing brief. Capeway's arguments, however, have grown at length on appellate review. Like my colleague, however, I too deem it significant that Capeway fails to indicate that Holiday's testimony was false. It is also significant that Capeway had the ability to rebut Holiday's testimony but failed to offer rebuttal witnesses.

I would also briefly comment regarding the exceptions to sequestration as addressed by my colleague. Like my colleague, I think that it is important to preserve the integrity of the process. In this case, the highest-ranking local representative for OSHA, *i.e.*, the AD was present in the courtroom. Why she was not selected as the client representative is a mystery. Normally, one expects the client's representative to be a person who can make binding decisions for the client. A compliance officer cannot make those decisions for OSHA unless specifically empowered. As is apparent from hindsight, the sequestration issue would not be before us had she been the designated client representative or had the judge required the Secretary to make the designation as to her client representative.

As for persons "shown to be essential to the presentation of a party's cause," *i.e.*, exception (3) to Rule 615 – usually, in Commission cases, they are expert witnesses. It promotes efficiency for experts to hear the facts rather than be presented with

hypothetical questions in which counsel recite the facts of record. This is not to say that the presence of a second or even a third compliance officer cannot come under the exception. In the usual case, it is preferable to exclude such persons from the courtroom when their testimony will overlap that of other compliance officers. I say preferable because the appearance of fairness in Commission proceedings requires the avoidance of the appearance of collusion. In this case, however, I believe that we can say with fair assurance that any error committed was harmless and does not require reversal.

Citation 1, item 1.

The first item on review alleges a serious violation of the standard at 29 C.F.R. § 1926.100(a), which provides, "Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets." The record shows that none of Capeway's employees working on the various roof levels was wearing a hardhat when the COs arrived, and these employees were exposed to the hazard of falling objects when they approached and climbed the ladder to access the roof. The judge found a violation based on these exposures. Although, as Capeway argues, the employees' exposure may have been comparatively brief, it is sufficient to support the finding of a violation. *Walker Towing Corp.*, 14 BNA OSHC 2072, 1991-93 CCH OSHD ¶ 29,239 (No. 87-1359, 1991); *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1987-90 CCH OSHD ¶ 28,501 (No. 87-1238, 1989); *see also, A.J. McNulty & Co.*, 283 F.3d 328 (D.C. Cir. 2002). Capeway also argues that the employees were not performing any work in these areas. The Commission has held, however, that travel to and from the work station - including via ladder - is an integral part of "work." *Gelco Bldrs., Inc.*, 6 BNA OSHC 1104, 1106, 1977-78 CCH OSHD ¶ 22,353, p. 26,941 (No. 14505, 1977). *See also North Berry Concrete Corp.*, 13 BNA OSHC 2055, 2055-56, 1987-90 CCH OSHD ¶ 28,444, p. 37,643 (No. 86-163, 1989). We therefore affirm the judge s disposition of this item.

Citation 1, item 3.

Item 3 of citation 1 alleges a serious violation of the standard at 29 C.F.R. § 1926.502(h)(1).[11] Subsection (iii) of that standard requires the safety monitor to be on

[11]The cited standard provides:

> **§ 1926.502 Fall protection systems criteria and practices.**
>
> . . . .
>
> (h) *Safety monitoring systems.* Safety monitoring systems [See §§

the same level as the employees being monitored. As the judge correctly found in affirming this item, the person Capeway identified as the monitor was not on the same level as the employees he was supposed to be monitoring. Capeway's argument on review is essentially an attack on the wisdom of the standard: "It strains logic . . . to apply the standard in such a way to require a safety monitor to stand on the upper roof, leaning backwards at 30˚ rather than stand on a flat roof, a foot and a half below the sloped roof." However, we are not permitted to assess the wisdom of the standard. *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1640, 1991-93 CCH OSHD ¶ 29,689, p. 40,258 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994). Moreover, the Commission has previously held that section 1926.502(h)(1)(iii)'s unambiguous requirement must be met even in a case where the cited employer argued that positioning the safety monitor six feet above the employee being monitored gave the monitor a better vantage point. *Pete Miller, Inc.*, 19 BNA 1257, 1258, 2000 CCH OSHD ¶ 32,254, p. 49,102 (No. 99-947, 2000).

Capeway also argues that in addition to superintendent Mello and foreman Araujo, there was another, unidentified individual acting as a monitor. The record establishes, however, that this individual did not act as a monitor at the same time as Araujo, and that Araujo gave this person his vest and told him to act as monitor while Araujo was speaking with the OSHA inspectors. The individual assigned apparently left the area at

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> 1926.501(b)(10) and 1926.502(k)] and their use shall comply with the following provisions:
> (1) The employer shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:
> (i) The safety monitor shall be competent to recognize fall hazards;
> (ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;
> (iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored;
> (iv) The safety monitor shall be close enough to communicate orally with the employee; and
> (v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

some point, leaving the roofers unmonitored. Even if we found that the unidentified individual and Araujo were monitoring at the same time, two monitors could not have monitored all of Capeway's employees, who were observed on all four roofs. We therefore affirm the judge's disposition of this item.

Citation 2, item 1.

Item 1 of citation 2 alleges that Capeway committed a willful violation of the standard at 29 C.F.R. § 1926.501(b)(11) by failing to provide its employees on the steep roof with any of the means of fall protection specified in that standard.[12] Capeway argues that the standard does not apply to the work it was doing at the firehouse because its roofing operation was residential construction that, as previously noted, is governed by OSHA's RC Guidelines. If, as Capeway argues, the roofing work on the firehouse was residential construction, it would normally be governed by section 1926.501(b)(13).[13] The RC Guidelines, however, permit employers engaged in some residential construction

[12]The cited standard provides:

> **§ 1926.501 Duty to have fall protection.**
> . . . .
> (11) *Steep roofs.* Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

[13]That standard provides:

> (13) *Residential construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.
>
> NOTE: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with §1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

activities to use alternative procedures instead of conventional fall protection if they develop an alternative fall protection plan. Under these guidelines, "residential construction" is defined as follows:

> 1. For purposes of this instruction, an employer is engaged in residential construction where the working environment, materials, methods, and procedures are essentially the same as those used in building a typical single-family home or townhouse.
> 2. Residential construction is characterized by:
> Materials: Wood framing (not steel or concrete); wooden floor joists and roof structures.
> Methods: Traditional wood frame construction techniques.
> 3. In addition, the construction of a discrete part of a large commercial building (not the entire building), such as a wood frame, shingled entranceway to a mall, may fit within the definition of residential construction. Such discrete parts of a commercial building would qualify as residential construction where the characteristics listed above are present.

The judge rejected Capeway's argument. He found that the firehouse was a commercial structure and that neither the RC Guidelines nor the preamble to the standards in question supported Capeway's argument. We agree with the judge.

The record shows that the firehouse does not meet the criteria for residential construction. The characteristics of residential construction set out in the RC Guidelines were not present in Capeway's roofing operation. It is clear from the record that the firehouse was not a wood frame structure but was made of concrete and steel. The roof was not supported by wood trusses and joists but by metal supports. The roof also included metal decking covered by plywood and asphalt shingles. Although the shingles on the exterior of the roof may have resembled the residential buildings in the neighborhood, the building remained a concrete and steel structure with metal roof supports. We also find no support in the record for Capeway's claim that the roof was a discrete part of the building that alone should be considered residential construction.

Section 1926.501(b)(11) therefore governed the roofing operation on the steep roof.[14] That standard requires that employees be protected by one of the specified forms of fall protection. The record shows that Capeway was not in compliance with this requirement.[15] We therefore agree with the judge that a violation has been established.

We also agree with the judge that the violation was willful. The Commission has described a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety" and held that a willful violation is differentiated from others by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *Falcon Steel Co.*, 16 BNA 1179, 1181, 1993-95 CCH OSHD ¶ 30,059, p. 41,330 (No. 89-2883, 1993) (consolidated). The record supports the judge's finding that Capeway had a heightened awareness of the illegality of its conduct because of its long history of fall

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[14]Capeway cites decisions of administrative law judges to support its position that the RC Guidelines governed its roofing operation. Because those decisions were not reviewed by the Commission, they have no precedential value and are not binding on the Commission. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1158, 1993-95 CCH OSHD ¶ 30,042, p. 41,224 (No. 90-1620, 1993) (consolidated). We also note that the holdings in those decisions were based on a different set of guidelines than those at issue here. OSHA's STD 3.1, which was addressed in those decisions, was substantially revised and reissued as STD 3-0.1A, which took effect on June 18, 1999 and is in issue here. Because the operative language of the two directives is different, the cases decided under the earlier directive would not govern this case.

[15]We find little in the record to indicate that Capeway was even using alternative fall protection procedures as required under the RC Guidelines. These guidelines place roofing work in Group 4 and set out specific alternative procedures for Group 4. One requirement of those procedures is that only trained workers shall be allowed onto the roof, but, as discussed below, one of Capeway's roofers had no such training. Another requirement is that if ladders and scaffolds are used, they must comply with the applicable standards in Part 1926. Capeway was cited in this case for both a ladder violation and a scaffold violation, both of which were affirmed by the judge, and neither of which is on review (items 2 and 4 of citation 1). Capeway did not petition to have those determinations reviewed, and those violations are therefore established. As we have already found, even the monitoring which Capeway claims to have been using was not performed adequately. Taken together, these factors persuade us that Capeway was not complying with OSHA's RC Guidelines despite its claim here that they applied to its work.

protection violations and fall-related accidents. The record also supports his finding that Capeway acted with indifference to employee safety.

An employer's good faith reasonable belief that it was not required to comply with the cited standard may negate willfulness provided the employer's belief was objectively reasonable under the circumstances. *General Motors Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991). However, we do not find that Capeway's failure to comply with section 1926.501(h)(11) was based on an objectively reasonable belief that it was not required to comply. The RC Guidelines are sufficiently clear such that Capeway should have known that the metal trusses and decking disqualified the firehouse roof from treatment as residential construction. In addition, the record as a whole supports our conclusion that Capeway was not complying with any OSHA fall protection requirements at the firehouse. Accordingly, we affirm the judge's finding that this violation was willful.

Citation 3, item 1.

Item 1 of citation 3 alleges that Capeway employees working on the lower flat roof and on the two intermediate roofs on either side of the steep roof were not protected from fall hazards, in violation of the standard at 29 C.F.R. § 1926.501(b)(10).[16] This item was alleged to be repeated. The record shows that the lower roof was greater than 50 feet in

[16]The cited standard provides:

> **§ 1926.501 Duty to have fall protection.**
> . . . .
> (b)(10) *Roofing work on Low-slope roofs.* Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on lowslope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

width, and the two intermediate roofs were less than 50 feet in width, so a safety monitoring system alone was permitted on the intermediate roofs but not on the lower roof.

The judge found a violation based on testimony from CO Holiday that foreman Araujo told him on the day of the inspection that Capeway had done roofing work on the lower roof without using fall protection on the previous day. Capeway argues on review that it was error for the judge to ignore conflicting testimony by CO Barletta that Mello, Capeway's superintendent, had told him that roofing work on the lower roof had been completed two weeks earlier. According to Capeway, the judge did not adequately explain why he credited the testimony of one CO over that of the other. Capeway also points to that testimony as an example of how it was prejudiced by CO Holiday's presence in the courtroom during CO Barletta's testimony, because it afforded Holiday the opportunity to tailor his testimony to "fill in the gaps" in the Secretary's case left by Barletta.

Capeway's argument that Holiday tailored his testimony to fill in the gaps implies either that Holiday fabricated evidence that he would not otherwise have given or that counsel for the Secretary could not discern the gaps and ask appropriate questions to elicit the evidence to complete his case. In his testimony, however, Barletta made it clear that although the two compliance officers both initially spoke to Mello and Araujo as a group, they subsequently separated, with Barletta interviewing Mello and Holiday interviewing Araujo. When asked what Araujo had told them, Barletta consistently replied that he had not interviewed Araujo and that the question should be addressed to Holiday. We therefore find no inherent conflict between the testimony of the two compliance officers such that the judge would have had to make a credibility finding as to which of them was telling the truth.

In this regard, any credibility determination to be made was between the two Capeway supervisors, neither of whom testified at the hearing. In relying on Araujo's statements over Mello's, the judge noted that Mello was at the site only intermittently and for short periods, because he had ten projects to supervise, while Araujo was at the site full-time and was in a better position to know what work was being done. Araujo's

statement to CO Holiday was also admissible as an admission under Rule 801(d)(2)(D) of the Federal Rules of Evidence. Thus, the judge may have determined that it was entitled to greater weight than the statement of Mello, which could be characterized as self-serving.

Furthermore, Capeway's brief states that Araujo was in the courtroom, yet he was not called to testify. If he had not made the admission to which CO Holiday testified, we would expect that he would have taken the witness stand to deny or explain it. The fact that he did not lends weight to Holiday's testimony, because Capeway had the opportunity to rebut it but did not. *See Regina Constr. Co.*, 15 BNA OSHC 1044, 1049, 1991-93 CCH OSHD ¶ 29,354, p. 39,468-69 (No. 87-1309, 1991). It is well established that when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party. *Graves v. United States*, 150 U.S. 118, 121 (1893). The Commission has also noted that when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party's case. *CCI, Inc.*, 9 BNA 1169, 1174, 1981 CCH OSHD ¶ 25,091, pp. 30,994-95 (No. 76-1228, 1980), *aff'd*, 688 F.2d 88 (10th Cir. 1982); *see also Woolston Constr. Co.*, 15 BNA OSHC 1114, 1122 n.9, 1991-93 CCH OSHD ¶ 29,394, p. 39,573 n.9 (No. 88-1877, 1991) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976)), *aff'd without published opinion*, No. 91-1413 (D.C. Cir. May 22, 1992).

We deem such an inference to be appropriate here. Capeway's failure to present testimony from either of the two supervisory employees who were present during the inspection suggests that neither of them would have been able to contradict the testimony of either of the compliance officers. We therefore find that on the day before the inspection, Capeway performed roofing work on the lower roof without using fall protection.[17] The record also shows that the two intermediate roofs were located on either

[17]Capeway asserts that no "work" was being done on the lower roof on the day of the inspection. The record establishes, however, that employees were traversing the roof areas in question on their way to work areas. As we have already noted, the Commission has held

side of the steep roof and that employees were observed on all four roof surfaces. It is clear that the single monitor could not see all the employees on both intermediate roofs, much less be on the same surface with them. A violation is established on that basis as well.

We also agree with the judge's finding that this violation was repeated. Under Commission precedent, a violation is properly classified as repeated under section 17(a) of the Act, 29 U.S.C. § 666(a), if, when it is committed, there was a Commission final order against the employer for a substantially similar violation. *E.g., Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167-68, 1993 CCH OSHD ¶ 30,041, p. 41,219 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). Capeway argues that the Secretary has not established substantial similarity because OSHA area director Gordon, who testified to the existence of prior violations relied on to support the Secretary's allegation that the violation was repeated, had no personal knowledge of those violations. However, the area director's personal knowledge plays no part in determining whether the violations are substantially similar.

Unless the violation involves a general standard, the Secretary may establish a *prima facie* case of substantial similarity by showing that the employer has received a prior citation for failing to comply with the same standard and that the citation has become a final order of the Commission. The burden then shifts to the employer to rebut that showing. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994). The record includes two documents, a settlement agreement and an administrative law judge's decision, which establish that Capeway has been the subject of two final orders affirming prior citations for violating section 1926.501(b)(10). Because the standard in issue here is not a general standard, Capeway had the burden of rebutting the Secretary's *prima facie* showing of substantial similarity. Capeway has introduced no evidence to rebut that showing. Consequently, we find that the violation was repeated.

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that travel to and from the work station is an integral part of "work." *Gelco Bldrs.*, 6 BNA OSHC at 1106, 1977-78 CCH OSHD at p. 26,941; *North Berry Concrete*, 13 BNA OSHC at 2055-56, 1987-90 CCH OSHD at p. 37,643.

Citation 3, item 2.

Item 2 of citation 3 alleges a repeated violation of the standard at 29 C.F.R. § 1926.502(j)(7)(i)[18] because construction materials were stored within six feet of a roof edge that was not protected by a guardrail. The judge found a violation based on testimony and photographic evidence that there was insulation, a cylinder and other debris at both ends of both intermediate roofs where there were no guardrails, and that construction workers were working below the stored roofing materials.

On review, Capeway argues that the standard applies "during the performance of roofing work" and that no roofing work was being performed on the two intermediate roofs because work there had been completed. Despite Capeway's claim, the cited standard does not specify that roofing work must be taking place in the same area or on the same level as the materials stored. Although Capeway argues that no "work" was being done on the roof on the day of the inspection, employees were in fact traversing the roofs in question.[19] *See Gelco Bldrs., supra*; *North Berry Concrete., supra*.

Capeway also asserts that the materials were placed on the roofs temporarily until a "lull," described as a piece of equipment similar to a forklift truck, could be obtained to

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[18]The cited standard provides:

> **§ 1926.502 Fall protection systems criteria and practices.**
> . . . .
> (j) *Protection from fall objects.* Falling object protection shall comply with the following provisions:
> . . . .
> (7) During the performance with roofing work:
> (i) Materials and equipment shall not be stored within 6 feet (1.8 m) of a roof edge unless guardrails are erected at the edge.

[19]We further note that section 1926.500(b) contains the definition: "*Roofing work* means the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." In other words, the storage of roofing materials is considered to be roofing work. If Capeway had placed the materials on the roof that morning, it would negate the claim that no work was being done on the roof that day, because that action alone would constitute "roofing work."

move the materials. However, the lull belonged to the masonry subcontractor and was not present at the site that day.

Although the Commission has not determined precisely what constitutes "stored" under section 1926.502(j)(7)(i) or its predecessor, former section 1926.500(g)(5)(vi), it has addressed the question of whether an object is "stored" or "in storage" in a number of cases involving other standards. In *R. Zoppo Co.*, 9 BNA OSHC 1392, 1394-95, 1981 CCH OSHD ¶ 25,230, p. 31,183 (No. 14,884, 1981), the Commission rejected the employer's argument that temporary placement of dynamite in a shed on a jobsite did not mean the dynamite was "stored." In *Hackney/Brighton Corp.*, 15 BNA OSHC 1884, 1888, 1991-93 CCH OSHD ¶ 29,815, 40619 (No. 88-610), the Commission held that gas cylinders that remained in one location overnight were in storage. *See also Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1672, 1981 CCH OSHD ¶ 25,359, p. 31,519 (No. 13,401, 1981) (cylinders covered with dust which had not been used in "quite a while" in storage);*Whitcomb Logging Co.*, 2 BNA OSHC 1419, 1974-75 CCH OSHD ¶ 19,128 (No. 1323, 1974) (leaving blasting caps and explosives together for three to four hours while attending to other duties violated a standard that prohibited storing blasting caps or detonators together with explosives). By contrast, in *Armour Food Co.*, 14 BNA OSHC 1817, 1827, 1987-90 CCH OSHD ¶ 29,088, p. 38,889 (No. 86-247, 1990), cylinders that were to be used in fifteen minutes were found not to be in storage. *See also MCC of Florida*, 9 BNA OSHC 1895, 1897, 1981 CCH OSHD ¶ 25,420, p. 31,681 (No. 15,757, 1981) (cylinders not in storage when they were available for immediate use in the area where they would be used).

While the record here does not indicate when the materials were placed on the intermediate roofs, it is clear that they could not be removed until the lull arrived. Under these circumstances, removal of the materials was not imminent. Accordingly, we find that the materials were "stored" within the meaning of the standard and that a violation has been established.

The Secretary alleged that this violation was repeated, and the judge found that the repeated characterization had been proved. Because the record shows that Capeway had a prior final order for a violation of section 1926.502(j)(7)(i), Capeway had the burden of

rebutting the Secretary's *prima facie* showing of substantial similarity. Again, Capeway introduced no evidence to rebut that showing. We therefore find that the violation was repeated.

Citation 3, item 3.

Item 3 of citation 3 alleged a repeated violation of 29 C.F.R. § 1926.503(a)(1),[20] which requires employers to train each employee who might be exposed to fall hazards how to recognize and minimize those hazards. The judge found a violation because a Capeway roofer told CO Barletta that he had not received any training in fall protection from Capeway. Furthermore, Capeway superintendent Mello told OSHA that he did not know whether the company had a written safety program and did not know what Capeway's safety consultant had taught the employees.

Capeway argues that the judge ignored evidence that it had implemented a comprehensive training program in fall protection. Capeway's safety consultant testified that he had created a fall protection program for the company to satisfy a requirement in a settlement agreement resolving a prior OSHA citation and had given fall protection training to Capeway's foremen. The safety consultant also developed a written fall protection program for one particular contract and trained all Capeway's employees on that site. In addition, he made occasional visits to Capeway worksites and held safety meetings for its employees. Finally, Capeway points to Mello's statement to one of the

[20]The cited standard provides:

> **§ 1926.503 Training requirements.**
> . . . .
> (a) *Training Program*. (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

COs that Capeway's employees are given an orientation when they are hired. None of this testimony, however, negates the fact that one of Capeway's roofers had not been given fall protection training. Accordingly, we affirm the judge's finding of a violation of section 1926.503(a)(1).

The judge upheld the Secretary's characterization of this violation as repeated based on a prior final order for a violation of 29 C.F.R. § 1926.21(b)(2), a different training standard from the one cited here. We must therefore consider both violations to determine if they are substantially similar. The first sentence in section 1926.503, states, "The following training provisions supplement and clarify the requirements of § 1926.21(b) regarding the hazards addressed in subpart M of this part." It is clear, therefore, that OSHA contemplated a considerable degree of overlap between the two standards. In the final order on which the Secretary relies for the prior violation, the judge found a violation of § 1926.21(b)(2) because a Capeway roofer had not been trained to recognize and avoid hazards he would encounter during roofing, including fall hazards. Our review of that decision persuades us that the hazards the two roofers were not trained to recognize and avoid were largely the same. We therefore affirm the citation for a repeated violation. *See Monitor Constr. Co.*, 16 BNA OSHC at 1594, 1993-95 CCH OSHD at p. 41,825.

Citation 4, item 1.

Item 1 of citation 4 alleges an other-than-serious violation of the standard at 29 C.F.R. § 1926.502(d)(21) because safety harnesses with allegedly defective clips were not removed from service as required.[21] While the two COs were inspecting the worksite,

[21]The cited standard provides:

> **§ 1926.502 Fall protection systems criteria and practices.**
> . . . .
> (d) *Personal fall arrest systems.* Personal fall arrest systems and their use shall comply with the provisions set forth below. Effective January 1, 1998, body belts are not acceptable as part of a personal fall arrest system. Note: The use of a body belt in a positioning device system is acceptable and is regulated under paragraph (e) of this section.
> . . . .
> (21) Personal fall arrest systems shall be inspected prior to each use for wear, damage and other deterioration, and defective components shall be removed

they observed a number of Capeway roofers who were exposed to fall hazards and working without fall protection. The COs made it clear to Capeway that the employees had to have fall protection, and Capeway then used safety harnesses that were present at the site. However, the harnesses were in a deteriorated condition. The judge found a violation based on the fact that the harnesses were not removed from service, as the standard requires.

Capeway argues on review that the citation cannot be upheld because it was induced to violate the standard by OSHA when the COs made employees use the defective harnesses. We find that the record does not support Capeway's claim. The only means of fall protection available on site were safety harnesses with clips that were sufficiently rusted to affect their operation. Instead of waiting until sound harnesses could be obtained or an alternative means of fall protection provided, Capeway elected to work without fall protection. There is nothing in the record to suggest that the defective harnesses were not being used because Capeway had taken them out of service. We therefore affirm an other-than-serious violation of section 1926.502(d)(21).[22]

Penalties

The judge assessed a penalty of $2,800 for item 1 of citation 1 and $4,000 for item 3 of that citation. He assessed a penalty of $63,000 for the willful violation in citation 2, and penalties of $28,000, $8,000, and $6,000 respectively for items 1, 2, and 3 of citation 3. No penalty was assessed for the other-than-serious violation in citation 4.

Section 17(j) of the Act provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. 29 U.S.C. § 666(j). These factors are not accorded equal weight; normally, the most significant consideration in assessing a penalty is the gravity of the violation. Gravity includes a number of factors, including the number of employees

[22]The fact that the COs allowed the defective harnesses to be used at the time of the inspection does not change our conclusion that a violation exists. As CO Barletta explained, he viewed the protection afforded by these harnesses to be better than no protection at all.

exposed to the hazard, the duration of their exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1007, 1993-95 CCH OSHD ¶ 30,635, p. 42,444 (No. 92-424, 1994). Capeway argues that the judge merely recited that he had given the statutory factors "due consideration" but did not specifically address them. Capeway asserts that it should have been given more credit for its small size and more credit for its good faith in hiring a safety consultant who developed a safety and health program for the company and trained its employees in safety.

The record indicates that Capeway had a maximum of 111 employees on its payroll at any point in the year preceding this inspection and that OSHA did give credit for size for all of the items cited, although less for the willful item. The judge reduced by 25% the penalty proposed by the Secretary for the training item because he determined that only one employee was not trained, demonstrating that he did consider the statutory factors.

Although Capeway seeks credit for hiring a safety consultant, the record shows that this was done to satisfy the requirements of a prior settlement agreement with OSHA rather than because of any inherent concern about safety. The record also persuades us that Capeway did not in fact follow any of the training given by its consultant, and superintendent Mello, who was in charge of safety at the site, did not even know what the consultant had taught the roofers. In all, we deem the penalties assessed by the judge to be appropriate.

Conclusion

For the foregoing reasons, we affirm the judge's decision finding the seven violations reviewed and his characterizations of those violations. We also find the penalties assessed by the judge to be appropriate.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

Dated: August 26, 2003