SECRETARY OF LABOR, Complainant, v. FABI CONSTRUCTION COMPANY, INC., Respondent.	OSHRC Docket No. 96-0097

DECISION

Before: RAILTON, Chairman; STEPHENS, Commissioner.

BY THE COMMISSION:

Fabi Construction Co., Inc. ("Fabi") performed demolition and concrete construction work at the TropWorld West Tower Expansion Project in Atlantic City, New Jersey, pursuant to a subcontract with general contractor Keating Building Corporation. On June 10, 1995, a Fabi employee was killed when a 10,000-pound concrete slab located on the tenth floor of a parking garage collapsed as he and a co-worker were attempting to demolish the slab while standing on its surface. As a result of several subsequent inspections, the Occupational Safety and Health Administration issued three citations to Fabi alleging violations of various standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), and proposing a total penalty of $105,000. Administrative Law Judge Covette Rooney issued a decision on April 6, 1998, in which she affirmed most of the citation items, affirmed the alleged willful item as serious, and assessed a total penalty of $31,500.

The Commission directed review of all of the affirmed citation items, including one item that was cited as a violation of two standards and affirmed only as to one. We have examined the record in its entirety, considered the arguments of the parties, and conclude that Judge Rooney's decision finding that Fabi violated the Act with respect to the citations at issue on review is supported by the evidence and applicable legal precedent. Accordingly, we affirm the following violations and penalty amounts, as assessed by the judge whose decision is attached hereto.

Serious Citation 1, Item 1(a): 29 C.F.R. § 1926.20(b)(1)
Penalty - $5,000

Serious Citation 1, Item 2: 29 C.F.R. § 1926.503(a)(1)
Penalty - $5,000

Serious Citation 2, Item 1: 29 C.F.R. § 1926.21(b)(2)
Penalty - $7,000[1]

Serious Citation 1, Item 3(a): 29 C.F.R. § 1926.501(a)(2)
Penalty - $7,000[2]

Serious Citation 1, Item 4: § 1926.501(b)(1)
Penalty - $2,500

Serious Citation 1, Item 5(a): § 1926.501(b)(4)(i)

---

[1]Fabi contends for the first time on review that this citation covers "exactly the same circumstances" as the citation for its violation of 29 C.F.R. § 1926.503(a)(1), and therefore should be vacated. The Commission ordinarily will not review issues that the judge did not have the opportunity to pass upon. Commission Rule 92(c), 29 C.F.R. § 2200.92(c). In addition, the record supports the conclusion that Fabi violated § 1926.503(a)(1) for its failure to provide sufficient fall protection training and violated § 1926.21(b)(2) for its failure to provide training related to other hazards to which its employees were exposed.

[2]The Secretary alleged in Citation 1, Item 3 that Fabi violated 29 C.F.R. § 1926.501(a)(2) and/or 29 C.F.R. § 1926.850(a). While we uphold the judge's conclusion that Fabi did not violate § 1926.850(a), we do so only to the extent that her finding is based on the specific actions taken by Fabi's superintendent prior to demolition, *i.e.* his review of the demolition plans and structural drawings — including his notations regarding the presence of rebar — as well as his visual examination of the condition of the slabs to be removed.

Penalty - $2,500

Serious Citation 1, Item 6(a), § 1926.1052(b)(2) and Item 6(b), § 1926.1052(c)(1)
Penalty - $2,500

Other-Than-Serious Citation 3, Items 1(a), § 1926.502(i)(3) and 1(b), § 1926.502(i)(4)
No penalty

SO ORDERED.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

Dated: May 30, 2003

SECRETARY OF LABOR,

Complainant,

v.

FABI CONSTRUCTION COMPANY,

Respondent.

DOCKET NO. 96-0097

Appearances: For Complainant: William Staton, Esq., and Stephen D. Dubnoff, Esq., Office of the Solicitor, U. S. Department of Labor, New York, NY.; For Respondent: Joseph P. Paranac, Jr., Esq., Jasinski and Paranac, Ten Park Place, Newark, NJ.

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, Fabi Construction Company ("Fabi"), at all times relevant to this action maintained a worksite at the TropWorld West Tower Expansion, Brighton & Pacific Avenues, Atlantic City, NJ., where is was engaged in the business concrete installation and demolition work. Respondent admits that it an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

Respondent was a subcontractor on the subject worksite which involved the construction of a 21-story hotel on top of an existing 10-story parking garage. In December 1994, Respondent was hired to perform concrete work. Respondent's laborers also performed demolition work on the existing parking garage. This work involved the demolition of ramps, stairs, stairway panels, knockout slabs/panels, and caps on existing columns. All of these structures were made of reinforced concrete containing steel reinforcing rods or rebar (Tr. 77,82-83, 987-88; Exh. G-4).[1]

On June 10, 1995, Respondent's employees were scheduled to demolish the first elevator knockout panel on the roof of the parking garage. While two laborers were in the initial stages of demolition the slab collapsed. One of the two employees was fatally injured. As a result of this accident, OSHA commenced an investigation on June 10, 1995. The investigation continued until December 8, 1995. Compliance Safety and Health Officers ("CO") William DuComb and Dolores Soss commenced the fatality inspection. During the course of this inspection, on June 14-15, 1995, CO Bernard DeZalia and CO Peter Kurtz commenced a complaint inspection in response to an "imminent danger" complaint. Additionally, on July 6, 1995, a second complaint inspection was

[1] The term "Tr" refers to trial transcript. The term "Exh." refers to exhibits introduced into evidence at trial.

conducted by CO Kenneth Steinberg. As a result of these inspections, on December 8, 1995, Respondent was issued three citations, alleging serious, willful, and other-than-serious violations. By timely Notice of Contest Respondent brought this proceeding before the Review Commission. These citations have been the subject of several amendments. The contested items, as amended, with a proposed penalty of $105,000.00 were the subject of the hearing held before the undersigned. The hearing was held on September 22 through 26, 1997 and September 29 to October 2, 1997. At the commencement of this matter, counsel for the Secretary made an unopposed motion that portions of a deposition of Linda Forsyth, former Area Director of the Marlton Area Office, designated at the deposition as "sealed", be sealed. The undersigned granted the Secretary's motion for the sealing of the designated portions of the deposition (Tr. 13-14). Counsel for the parties have submitted Post-Hearing Briefs and Reply Briefs. This matter is ready for disposition.

BACKGROUND

During the original construction of the garage, knockout panels had been poured in place after the surrounding deck had been completed (Tr. 33; Exh G-2). A knock out panel is a temporary panel that is intended to be removed at a later date for future construction. The knockout panels at the subject worksite covered shafts in the existing garage which were to be used for the future construction of elevators and stairwells (Tr. 30). These knockout panels were made of reinforced concrete. A "bond breaker" made of plastic or some other material, and a water sealant were placed around the perimeter of the knockout panel in the ½″ gap that existed between the panel and the surrounding deck (Tr. 37, 49, 333, 550, 552, 605). All of the knockout panels contained steel reinforcing rods or rebar (Tr. 63, 115, 170, 240). The panels were approximately 16 feet long and 9 feet wide and 8 inches thick (Tr. 34). The original structural drawings for the garage, the Walker Drawings, show that the rebar went continuously through the slab and ended when the slab ended. i.e., it was not doweled into the floor (Tr. 61, 170, 544)[2]. The rebars were on 12-inch centers and those going north to south were 5/8" in diameter, and the rebar going east to west was 1/2 in diameter (Tr. 175-76). According to the plans the rebar was not doweled into or tied into any other part of the deck, the panel rested on the lip of the deck(Tr. 41-42, 341).

The record reveals that Fabi's demolition work commenced in late December 1994. On February 5, 1995, Fabi demolished three knockout panels on the ground floor of the garage that covered the elevator pits. These panels were flush to the slab on grade with the surrounding area. All of the panels on the ground floor were supported from below by resting upon four-inch wide ledges located on all four sides of the panels and a metal deck below. The panels were broken up with a jackhammer and the debris fell onto the metal pans below. Prior to the removal of each of these slabs, a pilot hole was first created to find out the composition of the material, and to see what was underneath the slab in terms of reinforcement or rebar (Tr. 49,107-110, 320-324). The pilot hole for each panel revealed that the rebar was in place and the metal pan was underneath(Tr. 321-24). The employees worked standing on top of the panel (Tr. 111). On February 9, 1995, Fabi demolished two knockout panels on the second floor. These panels covered elevator shafts and were resting on parapet walls elevated four feet above the surrounding floor. These panels were also

[2] "Doweling" means the rebar would have run continuously through the slab into the permanent floor so that it would have been tied into the floor (Tr. 42, 251). A dowel is an individual piece that is slipped into one side and slipped into the other side and could be 6" to 1 foot long (Tr. 544).

removed by first creating a pilot hole and the use of a jackhammer. The pilot holes revealed that the rebar was running properly - north\south and east\west directions. There were also metal pans under these panels. The removal of these panels revealed that each panel was doweled on one side into that wall (Tr. 325-328, 330). The structural drawings, i.e., Walker Drawings, did not indicate the presence of dowels for these panels (Tr. 339).

On the roof of the garage, one stairway knockout panel and two elevator knockout panels were scheduled for demolition. The Walker Drawing for the roof - S3.10, indicated that the panels sat on a 4- inch ledge on the east and west ends (Tr. 38; Exh. G-2). The north and south ends sat on no support (Tr. 33, 39). The stairway panel was the first panel on the roof to be removed. This panel differed from the previously demolished panels in that it was not supported from below by a metal deck. In order to prevent debris from falling into the stairway, a deck made of aluminum beams and plywood was built approximately 3 feet below the bottom of the panel (Tr. 114). The Walker Drawings indicated that the supporting ledges, i.e., lips, were along the east and west sides of the panel, which were the longer dimensions of the stairway panel (Tr. 40-41; Exh G-2). During the course of the demolition of the stairway panel it was discovered that the four of the rebars were doweled into two sides of the shaft. The dowels were only embedded a couple of inches according to the Project Superintendent, Ray Apice (Tr. 115). The Walker Drawings did not indicate that these rebars were doweled into the shaft (Tr. 170, 357, 1040, 1046; Exh. R-30).

On Saturday, June 10, 1995, the first of the elevator knockout panels on the roof was scheduled to be demolished. This work was being done on a Saturday to accommodate the schedule of other subcontractors scheduled to work in the area later in the week (Tr. 223). This pane was to be removed in the same manner as the other knockout panels. The panel was over a shaft 110 feet above the ground floor. It was resting on four-inch wide ledges along the shorter, east-west dimensions of the panel (Tr. 38, 41). The ledges were visible from below the panel (Tr. 40). The plan indicated that the panel contained rebar #5- 5/8"in diameter extending lengthwise in the north/south direction and was 12 inches apart; then a # 4- 1/2 inch in diameter extending east/west, was perpendicular to it (Tr. 41; Exh G-2). According to the plan, the rebar was not tied in or going into other part of the deck. The panel rested on the lip/edge (Tr. 42). There was no metal deck beneath the bottom of the panel. The day before, the carpenters had built a platform directly below the slab about 3-4 feet from the bottom of the panel, to keep debris from falling into the shaft (Tr. 239, 492-93).[3] A sheer wall was along the east side of the panel (Tr. 227). Along the south and west sides of the panel, a 30- to 36-inch crawl space existed below the interstitial floor that would support the new hotel under construction (Tr. 227, 235: Exh G-6). The north side was the only open access to the panel (Tr. 230; Exh G-6).

THE FATALITY

Respondent's labor foreman, Charles "Bobby" Cincotti, and two laborers, Thomas Kane and Frank Caucci were assigned to do the demolition that day. Mr. Kane had not been previously involved in the removal of any other knockout panel at the site (Tr. 221). Mr. Caucci had been hired the week before and he was paired with Mr. Kane for on-the -job training in what was referred to as a "partner deal" (Tr. 224). Upon their arrival on the job, between 6:30 A.M. and 7:00 A.M., Messrs.

[3] The parties stipulated at trial that the platform had not been built for the purpose of supporting the knockout panel (Tr. 492).

Kane and Caucci first went into a shop with Mr. Cincotti to discuss what they were going to need and to gathered the equipment needed for the job (Tr. 225). Once they got to the roof and were actually at the slab area, they discussed how they would begin the slab removal - where they would start, the direction that they would go in, and how to remove and where to put the wasted concrete. They discussed opening up a pilot hole in the left-hand corner to expose the rebar to see if it was on the keyway (lip or ledge); or if it was doweled, where the rods would be tied into the existing concrete around the knockout panel (Tr. 226-28). The purpose of the pilot hole was to expose the rebar that was supposed to be in the slab, and determine how far apart the rebar was and to find the location of the keyway (Tr. 231). They began to chip a hole with a sledge hammer through it. Mr. Kane, while standing on top of the panel, began jack hammering a pilot hole in the southeast corner. Mr. Caucci would periodically step onto the panel to strike the area with a sledgehammer. Mr. Cincotti was there in the beginning - he was not there when the hole was open. Once they hit the hole open, the head of the hammer broke off and Mr. Kane sent Mr. Caucci down to the shop to repair it (Tr. 233). Fabi Superintendent, Troy Bleven, came over about 8:30 A.M. to make sure they had everything they needed for the job. At that point, they had the hole opened up about 4 inches (Tr. 232). After about 15-20 minutes, Mr. Bleven left to help Mr. Caucci in repairing the sledgehammer. Mr. Kane made a 1 by 2 foot hole, and at that time he saw two rods going into the south end of the wall. There was no movement in the rods when jack hammering around them, so he assumed that they were tied in (Tr. 240). He then started moving along the east side of the panel going north, to find the first cross bar (Tr. 241). The hole was approximately 2 feet by 4 feet when he the ran into another rod, about 2 feet back from the south end, which was not tied in. By this time Mr. Caucci had returned. Mr. Kane relayed his observations to him, and said "[l]et's keep an eye on things and I will continue to work back that way and see where the next rod falls" (Tr. 241,245, 253). He then continued along the east wall to see if the next rod was tied in. As he was jack hammering, he observed two to three stress cracks developing in the panel which extended west from the opening he had created. The longest crack was about 5 feet(Tr. 243- 244). After they cleaned up the area of debris, Mr. Kane asked Mr. Caucci to take a little more concrete out with the hammer along the south edge so that he could get the rods exposed and determine if they were doweled in. At the point, Mr. Caucci hit the pilot hole in the southeast corner, and the northwest corner of the slab lifted. The entire slab moved and fell down the open shaft (Tr. 245-49). Mr. Kane was able to grab a knee-wall on the floor below. Mr. Caucci fell to his death (Tr. 249).

THE SECRETARY'S BURDEN OF PROOF

The Secretary has the burden proving her case by a preponderance of the evidence. In order to establish of violation of an occupational safety or health standard, the Secretary had the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.* the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).[4]

---

[4] To satisfy the element of knowledge, the Secretary must prove that a cited employer either knew, or with the exercise of reasonable diligence could have known of the presence of the violative condition. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, (continued...)

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No, 90-1747, 1994).

The undersigned finds that Fabi's demolition operations were subject to the requirements of the construction standards. A review of the record reveals that all of the cited violative conditions were conditions which the cited standards were effectuated to prevent. Accordingly, the cited standards are applicable.

JUNE 10, 1995 FATALITY
SERIOUS VIOLATIONS
CITATION 1, ITEM 1a

§1926.20(b)(1) "Accident prevention responsibilities": It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

a) TropWorld West Tower Expansion (Transportation Center Garage) Brighton & Pacific Aves., Atlantic City, N.J.

This standard requires employers to initiate and maintain programs as necessary to comply with the Section 1926 construction standards. It is the Secretary's position that although the respondent did maintain a written safety at the TropWorld site, the program was generic and not site-specific. The program did not contain any information about demolition and demolition was not addressed at safety meetings conducted by the general contractor (Tr. 780). The Secretary also argues that all of Respondent's employees had not viewed the demolition video that had been shown, and those employees who viewed the video demonstrated little, if any, knowledge of demolition requirements (Secretary's Post-Hearing Brief, p. 36-37).

Respondent contends that the record establishes that it maintained a detailed written safety and health program on site, and it was accessible to all employees, and had been fully implemented through employee orientations, weekly and daily safety meetings, safety inspections and employee training. Furthermore, Respondent contends it provided safety training on site, which included

---

[4](...continued)
1991); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1320-1321 (No. 86-351, 1991). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corporation*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). *See also Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer's foreman can be imputed to the employer). In *Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 87-692, 1992), the Review Commission set forth criteria to be considered when evaluating reasonable diligence.

> Reasonable diligence involves several factors, including an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981) . . . Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe. (citations omitted).

Id. at 1814.

lectures, discussions, videos, handouts and one-on-one instruction. It maintains its program extensively covered fall hazards, excavations, hazard communication, airborne contaminants, and other hazards employees might encounter on the TropWorld job.

Review Commission precedent established that under this standard, "an employer may reasonably be expected to conform its safety program to any known duties and that a safety program must included those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt" *Northwood Stone & Asphalt, Inc.,* 16 BNA OSHC 20097, 2099 (Docket No. 91-3409); *J. A. Jones Co.,* 15 BNA OSHC 2201, 1106 (No. 87-2059, 1993). The undersigned finds that a review of the written program reveals no a section specifically addressing "demolition", an activity which took place on this worksite and which is addressed in the construction standards(Exh. R-2). Furthermore, a review of the myriad of topics discussed at tool box meetings contained in Respondent's Weekly Jobsite Safety Meeting Reports did not include the topic of demolition and its associated hazards (Exh. R-1). The record is also void of any evidence that Mr. Kane and Mr. Caucci participated in any tool box meetings which addressed the topic of demolition. The record does contain evidence that a demolition video was shown to employees, however, it was not shown to all employees involved in demolition. The record contains unrefuted evidence that the demolition video, which Respondent presented to its employees, was shown in late winter/early spring, and those hired thereafter did not view the video. Accordingly, Mr. Kane who started on the job in May 1995, and Mr. Caucci who had been on the job for four days prior to June 10, did not view this video. Furthermore, Mr. Bleven's testimony with regard to the orientation for new hires and the written safety program revealed that new hires were presented with "brief guidelines of it", and were told that the program was available for discussion and for their review (Tr. 375). The undersigned finds that this testimony does not demonstrate that the contents of the written safety program were effectively communicated to employees and certainly does not establish that demolition and its hazards were communicated. The undersigned finds that a reasonably prudent employer engaged in demolition would certainly ensure that its program included the demolitions requirements contained in Part 1926. Additionally, a review of the testimony of the Safety Director, Kim Kules' is unpersuasive in defending this violation. The undersigned finds that her testimony fails to establish that she had any meaningful involvement in ensuring the program conformed to the duties and hazards associated with demolition (Tr. 402-23). The undersigned found it odd that she could not independently recall the specifics on the topic of demolition and identified no specific measures for detecting and correcting demolition hazards (Tr. 430-32).

Furthermore, the inadequate initiation and maintenance of the safety program was also evident from the testimony of the employees at trial. Frances Palmieri, a carpenter hired around May or June, testified that he had seen no videos about safety and did not know the safety director (Tr. 484). Mr. Kane testified that the only video he had ever seen was one on fall protection (Tr. 871). Dennis DiAngelis, a carpenter foreman, testified that he had viewed two safety videos - fall protection and demolition. However, he could not recall if he had seen the video before or after the accident. He could not recall if the video contained information concerning an engineering survey (Tr. 889-90). Douglass Garner, a laborer, testified that he had seen the demolition early in the job. He could not recall if OSHA was mentioned in the video and he was not familiar with the OSHA demolition standards. He also testified that he may not have been paying attention during the video (Tr. 900-01). John Shepard, a laborer foreman, testified he recalled that when he first started at Fabi

- the safety manual was pointed out to him and he was told that it was kept in the shanty (Tr. 904). He testified that he was given basic instruction on demolition- safety equipment and working with someone, however, he was not involved in any demolition work at TropWorld.

The undersigned finds that the preponderance of evidence established noncompliance with the cited standard. Fabi failed to fully implement and maintain a safety program with specific instructions about what precautions to take when performing demolition. The undersigned also finds that all employees involved in demolition were exposed to the hazards created by inadequate demolition training. The evidence and testimony reflect that Fabi had knowledge of its obligation to provide demolition training to its employee - it showed a demolition video to some of its employees. Fabi failed to exercise reasonable diligence in the initiation and maintenance of its safety program.

Classification

The undersigned finds that a preponderance of the evidence establishes serious violations. In order to prove a serious violation, the Secretary must show that there is a substantial probability that death or serious physical harm could result from the condition in question. 29 U.S.C.§ 666(k). The undersigned finds that the evidence in this case shows that falls resulting in death due could result from the cited violation. Accordingly, the Complainant properly classified these violations as serious.

Penalty

Once a contested case is before the Review Commission, the amount of the penalties proposed by the Secretary in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties "due consideration" must be give to the four criteria under Section 17(j) of the Act, 29 C.F.A., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHA 2201, 2213-14 (No. 87-2059, 1993).

The record establishes that the gravity of the subject violation was high. The severity of injury was high due to the omission of demolition activities from Respondent's safety program. The greater probability of the occurrence of death or serious injury serious injury was evident by the accident. These findings resulted in a gravity-based penalty of $5,000.00. The Secretary did not apply any adjustment factors to this penalty. The Secretary presented unrebutted testimony that the Respondent had a history of violations within the past 3 years. No good faith was applied because of the high gravity of the violation. No adjustment was applied for size because the total number of employees was between 100 and 250 (Tr. 432, 633). The undersigned finds that based upon the aforementioned factors the Secretary's proposed penalty is appropriate

CITATION 1, ITEM 2

§1926.503 (a) (1) "Training Program.": 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.

a) TropWorld West Tower Expansion (Transportation Center Garage), Brighton & Pacific Aves., Atlantic City, NJ. Employees demolishing concrete knockout panel

for the service elevator shaft were not trained in fall protection procedures. On or about 6/10/95.

b) Employees throughout the site were not provided with a comprehensive fall protection training program meeting the requirements of this standard.

The Secretary argues that there were two instances of the cited violation: the failure to provide fall protection training to employees engaged in demolition operations, and the failure to provide such training to employees in general at the work site (Secretary's Post-Trail Brief, p. 37). CO Dolores Soss testified that during the interviews of Labor Foreman Cincotti and Carpenter Foreman McCarron, neither recalled having been given a copy of the fall protection standard (Tr. 799). The Secretary argues that Mr. Cincotti supervised laborers who were directly involved with demolition operations; and Mr. McCarron supervised carpenters who were not involved in demolition, however, they were involved in stripping forms near building perimeters and floor openings(Secretary's Post-Trail Brief, p. 38). CO Soss also testified that there were no documents or information that Mr. Kane or Mr. Caucci had received fall protection training (Tr. 801).

The Respondent asserts that fall protection training was provided at a number of forums. Respondent argues that it provided: (1) handouts on fall protection were distributed and discussed at weekly safety meetings; (2) verbal and written instructions on the use of safety belts, safety nets, lanyards, body harnesses and guardrail systems; (3) orientation sessions with new hires where instructions on the use of fall protection equipment such as safety harnesses; (4) provided one-on-one on the job fall protection training for new employees; (1) presented a video on fall protection; (conducted daily safety meetings where site-specific fall protection training was presented; and (7) had its foreman regularly demonstrate the proper use of fall protection equipment.

The introductory text to this section states that this section supplements and clarifies the requirements of §1926.21 regarding the hazards addressed in subpart M. Paragraph (a) requires employers to provide a training program for each employee exposed to fall hazards so that each employee can recognize fall hazards and know how to avoid them. This section identifies components of the requisite training, but does not specify the details of the training program. When promulgating this section, OSHA recognized that much of the information covered by training would be site-specific, so the Agency framed this provision in performance-oriented terms. 59 Fed. Reg. 40672, 40720-22 (1994).

The Secretary presented the testimony of Frances Palmieri, a carpenter hired around June 1, 1995, and Eugene Kabbeko, carpenter and shop steward hired in February 1995. Both testified that they had not seen any video on safety (Tr. 464, 485). Mr. Palmeri, who is no longer employed with Fabi, testified that there were weekly safety meetings that were for the most part conducted by Eugene Kabbeko(Tr. 483). He testified that there was perimeter protection on the edge of the building which was put there to keep one away from the edge of the building (Tr. 494). Mr. Kabbeko testified that he had built perimeter protection on the site, and the message which was always relayed to the men was that if you saw an unsafe area, before you work make its safe (Tr. 478). A review of their testimony and the topics discussed at Respondent's weekly safety meeting (Exh. R-2) reveals that fall protection was discussed in terms of floor openings and the types of all protection to be used. Respondent also presented the testimony of several employees, hired on various dates. The undersigned having observed their demeanor at trial, finds that their testimony was very credible and reliable. These witnesses provided very equivocal and forthcoming responses to questions.

Douglass Gardner testified that he was one of the first laborers hired on the job. He testified that fall protection - the different types of fall protection and where you would hook up the cables and fall protection around elevator shafts - was discussed. Cincotti was his foreman, and he met with the crew every morning to assign the job and told them what they needed to do the job. For example, if your were working high he would tell them to grab a safety harness. He had seen Cincotti demonstrate use of safety equipment to employees on more than one occasion (Tr. 897). He further testified that when employees came on the job, either Kane or Cincotti would show them how to use safety equipment (Tr. 896). He testified that he had seen the fall protection video early in the job (Tr. 898). On cross examination, he testified that he did not know the fall protection standard, and he did not recall if it was addressed in the video (Tr. 901). John Shepard, a laborer foreman, began working at Trop World April 1995. He testified that there were tool box safety talks every Friday, and safety harnesses was one of the topics (Tr. 904-05). The discussion included making sure they were hooked up at the edge of the building. He testified that he would talk to his crew every day about safety and tell them what they had to do that day. He talked to them about making sure that they were hooked off when they were at the edge of the building. He did not review the specifics of the OSHA fall protection with his crew (Tr. 910-11). Matt Zappone (son of the owner) began work at TropWorld in the spring of 1995, testified that fall protection was one of the topics discussed at tool box meetings, and that he had been provided with a full body harness which had been assigned to him his first day of work (Tr. 963, 965). He also testified that he had seen a video on fall protection during the early stages of the project (Tr. 968).

Mr. Kane testified in both the Secretary's case and the Respondent's case. He testified that he began working at TropWorld in May 1995, and that there were other laborers hired after May 1995 (Tr. 865). He testified that they learned to use equipment on the site during early-morning meetings -"if they had never used anything before or they had not done this work before, they were instructed by the foreman as to what they would need safety wise and equipment wise" (Tr. 869). He had seen Cincottti demonstrate to employees the use of safety equipment, such as ear plugs, tying off, etc. He testified that Cincotti showed him how to use a harness (Tr. 869). He also testified that he had seen a video on fall protection on the TropWorld site, and that all employees were required to attend this presentation (Tr. 871,875). Dennis DiAngelis, a carpenter foreman on TropWorld started in mid-April 1995, testified that there were toolbox meetings once a week and among the topics discussed were safety belts and lanyards (Tr. 880-882). He testified that he met with workers every morning to tell them what they would be doing that day and he gave the crew instructions on safety equipment and its use for the job. He also stated that when a new man came on the job, he would physically help him try on the belts if he was not familiar with belts (Tr. 883). He viewed a safety video on fall protection at which all trades including Fabi were present (Tr. 884-85). He further testified that his men wore safety belts and life lines which were mandatory when they stripped the reshore forms on the edge of the floors (Tr. 885). Safety Director Kules testified that she presented a video on fall protection prior to the accident (Tr. 429). Troy Bleven testified that on two occasions, she had shown videos (Tr. 373). He also testified that new hires were given orientation which included a review of the written safety program which included fall protection (Tr. 373; Exh R-2).

The undersigned finds that there were Fabi employees who were provided training with regard to floor hole openings, perimeter protection, and personal protective equipment during various

phases of the job. However, a review of the aforementioned testimony does not demonstrate that Fabi instructed all of their employees in the recognition and avoidance of fall hazards while engaged in demolition, a component of their work activity. It is not clear from the record that the fall protection or demolition videos specifically addressed these issues, however, it is clear that all employees did not benefit from the video-either they had not been hired at the time they were shown, or if present, did not appear to comprehend their contents. Furthermore, the testimony of Messrs. Kane and Cincotti describing the activities and instructions provided prior to demolition activities on June 10, contains no evidence that employees were provided any training which specifically addressed the procedures to be followed in order minimize fall hazards while engaged in demolition activities (Tr. 223-28, 282-84). The undersigned finds that Fabi did not instruct their employees in the recognition and avoidance of fall hazards relating to their working environment. Accordingly, the undersigned finds that the Secretary has proven by a preponderance of evidence that there was noncompliance with this standard. The record establishes that an accident occurred on June 10 which exposed Messrs. Kane and Caucci to fall hazards while engaged in demolition activities. The record establishes that Respondent had knowledge of this violation. Fabi addressed fall protection during various aspects of its safety program and had they exercised reasonable diligence would have implemented adequate training programs regarding recognition and avoidance of fall hazards during demolition.

Classification

The undersigned finds that a preponderance of the evidence establishes serious violations. The undersigned finds that the evidence in this case shows that death or serious physical harm due to the failure to each employee in the recognition and avoidance of unsafe conditions during demolition work. In this case Mr. Kane fell and Mr. Caucci fell to his death as a result of this violation.

Penalty

The record establishes that the gravity of the subject violation was high. The high severity of injury was death, and the occurrence of the falling and death of an employee established a finding of a greater probability. Again, no adjustment factors were applied to the Secretary's gravity-based. In light of the fact that Fabi did provide some fall protection training applicable to the work area, e.g., perimeter protection, the undersigned believes that the maximum penalty for a serious violation is not warranted here, and as with the previous violation a penalty in the amount of $5,000.00 would be appropriate in order to achieve a deterrent effect.

CITATION 1, ITEM 3a

§1926.501(a)(2) "General.": The employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.

> *a)* TropWorld West Tower Expansion (Transportation Center Garage), Interstitial Level/Roof Level)Brighton & Pacific Aves., Atlantic City, NJ. - Employees (2) were standing and working on a concrete knockout panel/slab (for the service elevator shaft) that they were demolishing. That slab broke apart and collapsed while the employees were standing on it, on or about 6/10/95.

It is the Secretary's position that Fabi did nothing to confirm that its employees could safely stand and work on the knockout panel while they proceeded to hammer a sizeable opening into the panel that caused its structural integrity to rapidly deteriorate (Secretary's Post -Trial Brief, p. 21). The Secretary argues that Fabi made no reasonable inquiries and took no measures to determine whether the slab would have the strength and structural integrity to safely support its employees while they worked. Fabi should have contacted one of the consultant's available at the work site regarding the effect that the jack hammering would have on the structural integrity of the slab, as well as the effect of creating a substantial opening in the slab and/or cutting pieces from the slab (Secretary's Reply-Brief, p. 20-21).

Respondent asserts that Fabi went far beyond the requirement of the standard by conducting numerous inspections, reviewing structural plans and creating pilot holes (Respondent's Reply Brief, p. 38). Respondent relies upon the daily visual inspections made by Mr. Bleven and his discussions with employees, as well as Mr. Cincotti's visual inspection prior to the commencement of demolition. Respondent also relies upon the pre-demolition inspections of Mr. Bleven and the engineer- in- charge, Borys Hayda - both noted no problems with the slab. Respondent also asserts that Mr. Bleven's review of the structural drawings prior to demolition met the requirement of the standard.

The standard imposes an obligation on employers to inspect and make a determination as to the strength and structural integrity of the walking/working surfaces in the workplace. A walking/working surface is defined at s 1926.500(b) as any surface on which employees walk or work including floors, roofs, ramps, and form work and concrete reinforcing steel. The record reveals that the employees were assigned to create a pilot hole upon the working surface - the slab. Mr. Kane testified that it was his intention to jackhammer away a 2 foot wide channel down the length of the slab from the east side. Once the area was open and he could see what was exposed, he intended to use planks to put down and work off (Tr. 259-60). At the time of the accident, the hole was 2 feet by 3 feet and expanding in a northerly direction. The undersigned finds that this standard obliged Fabi to make a determination as to what the effect the pilot hole would have upon the strength and structural integrity of the slab. The record is clear that no such inquiries were made prior to the assignment.

The undersigned finds that the Secretary presented evidence from several witnesses which supports a finding that the strength and structural integrity of the slab was not maintained as the pilot hole was created.[5] The structural engineering on site, Mr. Hayda testified that in order for the slab to hold the weight it was constructed to hold (100 pounds per square foot), it must be in one piece. He stated that once you start cutting pieces off of it , it loses strength (Tr. 56, 66). Mr. Kane testified that as he was jack hammering, the concrete was cracking and 2 or 3 stress cracks appeared (Tr.

[5] Respondent presented the expert testimony of Louis Nacamuli, who testified that in his opinion the collapse was caused by a combination of defective concrete and insufficient reinforcement. He did not believe that a hole 2 feet by 3 feet would have caused the collapse of the slab(Tr. 1151-53, 1187). He also testified that you would not normally see cracks emanating from a small hole like the one created in this case with 5,000 psi concrete (Tr. 1190-91). The undersigned finds his testimony unpersuasive in view of the testimony presented the Secretary's witnesses who were on site or had first visited the site immediately after the accident.

244). Mohammad Ayub, Chief of Engineering for OSHA testified that rebar is put in concrete so that it can take the load. He testified that the concrete and rebar work together and if one is removed, then the integrity of the concrete is gone and it is no longer a reinforced concrete slab (Tr. 589-90). He stated that if a 2 by 3 feet or 2 by 4 feet hole is created, you destroy the integrity of the slab because you break the concrete. Cracks propagate from that hole and you have no control of the size, length and manner in which that crack propagates. Thus, you have lost t he load capacity and the slab's integrity has been compromised (Tr. 591). Accordingly, the record supports a finding that as the pilot hole was created, the strength and structural integrity was not maintained, and as the pilot hole created it became no longer suitable as a walking/working surface. *Peterson Construction Co.*, 17 BNA OSHC 2177 (No. 95-1275)(ALJ). In view of the above, the undersigned finds the Secretary has established by a preponderance of evidence noncompliance with the cited standard. The occurrence of the subject accident establishes employee exposure to the hazards created by the failure to determine whether the walking/working surface had the strength and structural integrity to safely support employees. The undersigned also finds that Respondent failed to exercise reasonable diligence in determining what effect, if any, the jack hammering and the creation of a hole would have on the strength and structural integrity of the slab. It's visual review of the slab and its structural drawings only revealed the integrity of the slab undisturbed.

Classification

The undersigned finds that a preponderance of the evidence establishes a serious violation. The undersigned finds that the evidence in this case shows that death or serious physical harm due to the failure to comply with the cited standard. In this case Mr. Kane fell and Mr. Caucci fell to his death as a result of this violation.

Penalty

The record establishes that the gravity of the subject violation was high. The high severity of injury was death, and the occurrence of the falling and death of an employee established a finding of a greater probability. Again, no adjustment factors were applied to the Secretary's gravity-based. The undersigned believes that the maximum penalty for a serious violation is warranted.. A penalty in the amount of $7,000.00 would be appropriate in order to achieve a deterrent effect.

CITATION 1, **ITEM 3b**

§1926.850 (a) "Demolition": Prior to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the condition of the framing, floors, and walls, and possibility of unplanned collapse of any portion of the structure. Any adjacent structure where employees may be exposed shall also be similarly checked. The employer shall have in writing evidence that such a survey has been performed.

a) TropWorld West Tower Expansion (Transportation Center Garage), Interstitial Level/Roof Level)Brighton & Pacific Aves., Atlantic City, NJ. - Service elevator roof slab. On or about June 10, 1995.

The Secretary charges that the Respondent failed to perform an appropriate engineering survey with respect to the knockout panel that was the subject of the collapse on June 10, or any other knockout panel on the worksite. The Secretary contends that Respondent failed to ascertain the pertinent facts with respect to the knockout panels(Secretary's Post-Trial Brief, p. 15, 19). Additionally, the Secretary charges that Troy Bleven was not competent to perform an engineering survey of the knockout panel and failed to present any written evidence that an appropriate pre-

demolition survey had been performed (Secretary's Reply Brief, p. 3). CO William DuComb testified that while being interviewed the night of the accident, Mr. Bleven admitted that no survey had been performed by him prior to the demolition of the slab(Tr. 733). CO Delores Soss testified that during the December 7, 1995 administrative deposition of Mr. Blevin, she asked him if he had performed a demolition survey. He responded that he had looked at the demolition plans, that he had physically looked at the slab, and that he had not looked at the Walker Drawing - S3.10 - Exh G-2 (Tr. 804-05).

The Respondent contends that Mr. Bleven had engaged in extensive pre-demolition survey activities, and drawn up a demolition plan. Mr. Bleven testified that prior to June 10, he had reviewed the OSHA demolition standards. He testified that his understanding of OSHA 's demolition standard was that " you review a set of demolition plans", and that the purpose of an engineering survey is to check the integrity of the structure. He testified that prior the accident, he had reviewed the plans (Tr. 341-43). He also testified that he was familiar with the term "engineering survey" - which required one to "physically review" what was going to be demolished. He testified that one would also review demolition plans, have a discussion with others, and report his findings in a log book. He testified that he had done this on this panel and all the demolition on this project (Tr. 343-44). Mr. Bleven also testified that the purpose of an engineering survey is to check the integrity of the structure- to look for hazards such as cracks, and anything that could fall from above or below (Tr. 367-68). He testified that prior to work commencing, he reviewed demolition plans and structural plans (Tr. 318). He testified that the purpose of the structural drawing review is to determine what was in the slab. These drawings revealed to him how the slabs were recessed into the floor and reinforced (Tr. 319). He further testified that he had reviewed the structural drawings ,Exh. G-2, S3-10, with Mr. Cincotti prior to the start of the job. He discussed his observations with regard to the slab sitting on a "chair or seat" and that rebar should be running continuously across in both directions . They had a discussed the fact that where the plan showed it is not doweled in, it had been doweled in (Tr. 319-20, 348, 355). He also discussed his observations with Ray Apice (Tr. 318, 355). He also testified that the procedure followed involve the shooting of a pilot hole to see what reinforcement was in the slab(Tr. 319).

The Respondent produced Mr. Bleven's survey - his "personal estimating sheet" covering the full scope of work to be done, including estimates of the time and number of laborers needed to do each part of the job (Exh. R-14). He testified that his document contained his "vision of what the job was going to entail" (Tr. 996). This document had been drafted approximately two months before the commencement of demolition (Tr. 992). This plan was created while he physically walked the entire TropWorld site and visualizing the areas that he was going to work on in accordance to the demolition plans he had received (Tr. 988). As he walked through, he made a series of notes, observations, and took pictures of the work to be done. His notes contained a reference to the applicable demolition plan, e.g., Plan A-105, the number of laborers, equipment and time for the work. This estimate included the removal of the elevator knockout panels (Tr. 989-91; Exh R-14, p.3 refers to Exh. G-1). He testified that he determined manual labor would be the safest method of demolition (Tr. 992). He acknowledged that this document was also prepared for purposes of the bid that was submitted by Fabi (Tr. 905). With respect to the knockouts for the elevators, he testified that he looked at them from the roof and from below. He noted that they appeared in good shape (Tr. 997). His photographs consisted of views of the parking garage as it

existed prior to demolition, and views as the job progressed (Tr. 998-1018 ; Exh. R-15-26) . He further testified that as part of his survey he reviewed the demolition plans and the Walker Drawings. He recalled having reviewed them in December 1994 (Tr. 1019-20, 1041; Exh. R-27, 28). He testified that prior to demolition of the slabs on the ground floor, he reviewed the demolition plans, Exhs. G-1 and G-2, as well as a plan showings a series of slab profiles - Exh . R-3. He also visually inspected the slabs which appeared to be in good shape (Tr. 1025-26; Exh R-29). Upon the plan, he made handwritten notations as the work proceeded and he had discussions with the general contractor and his men (Tr. 1030-31). He testified that prior to the demolition of the second floor slabs, he visually inspected them and they appeared structurally sound (Tr. 1034). He again made notations upon the applicable demolition plan as the work progressed and to show workers how to proceed (Tr. 1037-40; Exh R-30). He testified that he walked underneath the slabs to review them (Tr. 1041). He again had discussions with his men and the general contractor (Tr. 1042-43). He testified that prior to the demolition of the roof slabs he did a physical survey to inspect the condition from below and above (Tr. 1043). His inspection of the stairway slab and two elevator slabs indicated that they were structurally sound. He stated that he saw no cracks in the elevator slabs and they appeared structurally sound (Tr. 1043-44). He stated that he examined these slabs several times prior to June 10. He again stated that he had reviewed Exh. G-2, at the beginning of the job, as well as when the demolition was "going on", prior to June 10 (Tr. 1044-45). The demolition plan for the roof - A 105, contained his handwritten notes (Exh. R-31). He made notations of the four rebar in the stairway slab that were doweled in, and the rebar found on the knockout next to the service elevator, and other smaller knockouts which had rebar continuously doweled in (Tr. 1046-48). He noted discrepancies/changes upon his plans as the work progressed (Tr. 1049-50)

The record reveals that at a December 7, 1995 administrative deposition, Mr. Bleven was asked why an engineering survey had not been done prior to the accident. His response was that no survey had been taken prior to the accident because they had taken out numerous slabs with no problems, and he also stated that he did not recall if an engineering survey had been done (Tr. 344-46, 1135). At trial, Mr. Bleven explained that it was his belief at that the time of the deposition, he believed that he was being asked about an engineering having been supplied to him from the outside (Tr. 347). Mr. Bleven further explained that at the time of his deposition, when he heard the term "engineering survey" he thought he was being asked about a survey from an engineer (Tr. 1137-38). At trial, he testified that he now understood the term "engineering survey", which was what he had been doing all along - physically inspecting the integrity of the work area (Tr. 1138).

The Secretary presented the expert testimony of Donald Orr, who has worked in the demolition industry for 45 years as a laborer, foreman, superintendent, company president and past president of the National Association of Demolition Contractors ("NADC") (Tr. 514-17, 520, -523-24). He served on the NADC Committee that assisted OSHA in developing the demolition standards (Tr. 523). He has been involved with the demolition of all types of structures including the demolition of over 100 knockout panels that varied in size from 1-foot to 30-feet in length (Tr. 516, 519, 525). In the performance of this demolition work, he had conducted engineering surveys (Tr. 536). Mr. Orr testified that an engineering survey requires one to initially review the blueprints to determine the job to be done, and to visually examine the work to ascertain if any hazards would be encountered (Tr. 536-37). He stated that he would first look at the plans and determine if what he visually inspected were the same. He also noted that if any discrepancies were observed, as part of

his survey, he would refer to "as built" drawings if such drawings were available, and in their absence, he would consult an architect, He explained that on a construction job"as built drawings" are prepared whenever there is a deviation from the original plans (Tr. 538-39). If he was unable to consult an architect, he would conduct his own test to resolve the discrepancy. He testified that after performing his test to resolve the discrepancy he would communicate the results to personal who were supervising the operation (Tr. 542). He further testified that industry practice would require a separate engineering survey for each panel to be demolished (Tr. 547). He reviewed Exh. G-2, S3.10, and stated that it did not indicate the use of dowels for the rebar. He acknowledged that Exh. G-1, A-105, indicated what had to be removed (Tr. 543-45). He testified that he would have reviewed the prints to determine how the slabs were put into the "hatch"and then went into the field and viewed the slab from the top and bottom. In this case he would have assumed that the plans were correct with respect to the lack of dowels because of what the plans indicated (Tr. 546).

Mr. Hayda, the structural consultant on site, testified that Exh. G-1(A-105) was the demolition plan prepared by the architect showing the demolition required (Tr. 25). It indicates the removal of various items on the roof and nothing more (Tr. 26, 28). He testified that if someone looked at this document they would know what to knockout but not how to knock it out (Tr. 29). Mr. Hayda went on to testify that Exh. G-2 (S3.10) was the original structural drawing for the garage. This drawing specified the extent of demolition required for the future project, i.e., the instant project, and explains how the knockout panels were first constructed. (Tr. 32-33). It shows the ledge on the two ends that was four inches wide, the size of the slabs, the other two sides which had sealant - detail 2, the rebar measurements, it shows that the rebar was not tied in - it just rested on the ledge (Tr. 32-42). He stated that the purpose of these plans is to find out if there is anything different that he might have to do as the result of what his visual inspection revealed.

The undersigned finds that an examination of the aforementioned testimony, as well as her observation of Mr. Belevn's demeanor during his testimony, establishes that Mr. Bleven had conducted a pre-demolition survey. The fact that the written survey was used for bid purposes does not negate this finding. The testimony he provided at the hearing established that his examination and review of the demolition plans, which included Exh. G-1 and G-2, along with his visual examination establishes that he performed the survey to determine the condition of the slabs and his inspection included the use of structural plans which the experts in this matter testified were critical for a meaningful survey. His method of visual observations combined with his review of the demolition plans and structural plans were sufficient to met the intent of the standard, and followed the procedures which the Secretary's witnesses testified should be followed. The undersigned also finds that his survey took into the consideration of the possibility of unplanned collapse - his inspections led him to believe that manual demolition was the safest method to accomplish the project. Additionally, as he became aware of the fact that the rebar was doweled in several areas, he made such notations upon the plans indicated otherwise. He discussed his findings with Mr. Cincotti. In light of the fact that his testimony was truthful and reliable, the undersigned finds his explanation as to his belief of what the compliance officer was asking at the administrative deposition concerning the "engineering survey" was credible.[6]

---

[6] The undersigned notes that Mr. Bleven testified although he never indicated this on the record at (continued...)

The undersigned also finds that the record establishes that Mr. Bleven was competent to perform the survey.[7] His nineteen years experience in the field of construction has included several demolition projects - 14 years with his father's construction company, and 5 years with Fabi. He described several "big" jobs with Fabi, and testified that he had been Superintendent on all jobs except two, where he was Assistant Project Manager and Assistant Superintendent (Tr.302). He described approximately six to eight projects on which he had worked during his five year employment history with Fabi which involved demolition (Tr. 302,977). These projects involved manual demolition of reinforced concrete structures such as, the demolition of an emergency ward and a radiology ward, removal of oil tanks, 14-foot thick and 10-foot wide footers, doorways and walls, cutting into a floor and opening it up for elevators, massive columns, boardwalk ramps and stairs, and bridge slabs (Tr. 303-04, 977-87). He also described involvement with 3-4 bridges, wherein the bridge slabs had been demolished jack hammering and removing concrete from around the rebar. These slabs were 10 feet by 45 feet, and 9 inches thick, and 30 - 40 guys would work on a single slab (Tr. 378-80, 984-85). These slabs sat on concrete beams and were not doweled in. He also had demolished concrete slabs on encased concrete columns at different levels on a job for his father. These slabs were 12 by 25 feet and 9 inches thick and sat on concrete columns like a pedestal (Tr. 380-81, 386). He testified that the demolition on this project was similar to the TropWorld project in that they started with a jackhammer to expose rebar. He noted that these panels were not doweled in (Tr. 335, 383-86).

In light of the above, the undersigned finds that the Secretary has not proven by a preponderance of evidence that a pre-demolition survey had not been performed. Accordingly, this violation is Vacated.

---

[6](...continued)
the deposition, he indicated off the record that he was confused about the term "engineering survey". The Secretary did not rebut this statement. Additionally, CO DuComb acknowledged that at the time of the investigation he knew nothing of the definition of an "engineering survey" under the demolition standard (Tr. 738). CO Soss' testified that when shown S3.10, Mr. Bleven stated that he had many drawings and he did not respond directly to here question as to whether he had reviewed it. In response to the next question counsel asked her, she testified that when questioned about having performed an engineering survey, he responded that he did look at demolition plans and had looked at the physical drawing and again he did not look at the Walker Drawing S3.10 (Tr. 804-05). The undersigned finds that her responses to this line of inquiry confusing, and in view of the weight of the contrary evidence, finds that these responses do not met the Secretary's burden of proof.

[7]. The standard requires that a "competent person" perform the required survey. There is no requirement that this person be a licensed architect or engineer. Part 1926's definitions - which are the only definitions the undersigned finds applicable, define "competent person" as "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. §1926.32(f). Mr. Bleven position and background qualified him as competent within the meaning of Part 1926.

WILLFUL
CITATION 2, ITEM 1

§1926.21(b) (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

a) TropWorld West Tower Expansion (Transportation Center Garage), Brighton & Pacific Aves., Atlantic City, NJ - Employees were not trained in site specific hazards, and applicable regulations.

It is the Secretary's position that Respondent's laborers, as well as its management personnel, had not been properly instructed as to the recognition and avoidance of unsafe conditions during the demolition operation on June 10. Furthermore, Mr. Kane had not been involved with the demolition of any of the previous knockout panels on the TropWorld site and Mr. Caucci had only been on the worksite for four workdays. Caucci' name did not appear on any of the sign-in sheets for site safety meetings, and other than the orientation which consisted of finding out his past experience when he was initially hired, the record contains no evidence of any specific safety training or attendance at any tool box talks (Exh. R-1). On June 10, Caucci was assigned to work with Kane pursuant to the one-on-one on- the- job training Fabi provided its new employees. Additionally, the record reveals that neither of these employees were employed at TropWorld in late winter/early spring 1995, when the demolition video was shown.

The record establishes that the employees received the following instruction prior to the removal of the knockout panel on June 10. Mr. Kane testified that in accordance with normal procedure the first thing that occurred on June 10, was that Cincotti talked to him about safety equipment and manpower for the job that day (Tr. 223-24). He had not worked with Frank Caucci before in "partner deal" and he knew he had been hired the week before (Tr. 224). Once they got to the roof and were actually at the slab area, they discussed how they would remove the slab(Tr. 226). He, Cincotti and Caucci discussed how they would begin the slab removal, where they would start the direction that they would go in and how to remove - where they were going to put the wasted concrete, how they were going to take it down the dumpster on the garage roof , etc. This was the first knockout panel he had been involved with at the site. They discussed opening up a pilot hole to see what type of tie-in or rebar - to see if it was doweled and where the rods would be tied into the existing concrete around the knockout panel (Tr. 227-28). No other instructions given to him at that time (Tr. 228). He testified that on the morning of the accident once he observed that the first rods in the east/west direction were not tied in as he had believed they would be, and he told Frank. He told him "[L]et's keep an eye on things and I will continue to work back that way and see where the next rod falls" (Tr. 241-42).

Mr. Cincotti testified that on the morning of June 10, he discussed with Kane and Caucci how what they were going to do the job (Tr. 280). He described to them the way they were going to shoot the pilot hole and work back (Tr. 281). He told them to shoot the pilot hole, look for rebar, if anything did not look ,where it should be, you stop the job. And we call it a day. Until we could discuss it." (Tr. 282).

The Review Commission in *Superior Custom Cabinet Company, Inc.*, 18 BNA OSHC 1019, 1020-21(No. 94-200, 1997) recently reviewed the subject standard and held that "Section 1926.21(b)(2) requires instructions to employees on (1) how to recognize and

avoid unsafe conditions they may encounter on the job, and (2) the regulations applicable to those hazardous conditions. *Concrete Construction Co.*, 15 BNA OSHC 1614, 1619, (No. 89-2019, 1992)[citation omitted]. . . An employer's instructions are adequate under section 1926.21(b) if they are 'specific enough to advise employees of the hazards associated with their work and the ways to avoid them' and are modeled on the applicable standards. *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419,1425 n. 6 & 7." The Commission also recognized that rules that give employees too much discretion in identifying unsafe conditions have been found too general to be effective. See, e.g., *Bechtel Power Corp.*, 10 BNA OSHC 2003, 2008 (No. 77-3222, 1982)(instructions to report "any unsafe practice"); *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075,1076 (No. 12354, 1977) (warning to "avoid unsafe areas").

The undersigned finds that a review of the testimony provided by the employees involved in the demolition and Commission precedent establishes Fabi's noncompliance with the cited standard. Their testimony reveals that the instruction provided did not specify what unsafe conditions they may encounter on the job and how to recognize unsafe conditions. Mr. Cincotti's instruction that "if anything did not look, where it should be" provides no advice as to what condition he was referring and provides no guidance or precautions as to what conditions would be hazardous. This instruction provided no measures for detecting and correcting hazards, and gives the employees the discretion to determine what was unsafe. This instruction contained no training in how to recognize when "it might not look, where it should be" and how to handle that and prevent an unplanned collapse. Supervisory personnel must advise employees, especially new employees, of the hazards associated with the actual dangerous conduct in which they are presently engaging. *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1390, citing *National Industrial Constructors, Inc. V. OSHRC* , 583 f.2D 1048, 1056 [6 OSHC 1914] (8th Cir. 1978).

The Respondent argues that Mr. Kane had 20 years of experience in demolishing reinforced concrete (Respondent's Reply-Brief, p. 4). In *Ford Development Corporation*, 15 BNA OSHC 2003, 2009(No. 90-1505) the Commission relying upon Commission precedent held that while this standard does not limit the employer in the method by which it may impart the necessary training, an employer that places too much trust in the quality of experience and training an employee has already acquired elsewhere runs the risk of violating the standard. The record reveals that Mr. Kane's only recollection of previous experience with regard to a knockout panel involved the removal of a hatch grate. This removal was done by shoring it up from below and then cutting panels of it out - one chunk at a time. The record reveals that the roof was concrete and they cut through rebars (Tr. 206). The undersigned finds that this experience was limited in quantity and scope and Respondent's reliance upon this experience did not negate its obligation to properly train Mr. Kane on the instant job. As indicated by his testimony, although he did not like the fact that the first set of rods in the east/west direction were not tied in, his experience did not lead him to discuss this finding with someone from management prior to continuing with the jack hammering. Additionally, he acknowledged that he had never been told by anyone at Fabi what to do if he saw that a rod was not doweled in or saw something that he would not have expected to see (Tr. 254).

Furthermore, the undersigned finds that Fabi's instructions did not meet the other prong of the two-part test for adequate instructions under section 1926.21(b)(2) - instructions should be modeled on applicable regulations. Respondent presented no evidence which established that its

instructions imparted to Messrs. Kane and Caucci were modeled after any applicable regulations.

In light of the above the, the undersigned finds that the standard applies to the cited working condition , the Secretary has established noncompliance with the cited standard, and that Messrs. Kane and Caucci were exposed to the violative condition. The record establishes that Fabi did not exercise reasonable diligence in training its employees about the recognition of unsafe conditions and preventative measures associated with demolition, and the regulations applicable to this work

Classification

Willful violations require a "heightened awareness" of the relevant standard or duty that demonstrates a voluntary or conscious disregard for the Act's requirements or a plain indifference to employee *safety. Williams Enterp., Inc*., 13 BNA OSHC 1249, 1256-7, (No. 85-355, 1987). *Williams* further provides:

> A violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of an employer's good faith for these purposes is an objective one -- whether the employer's belief concerning a factual matter or concerning the interpretation of a standard was reasonable under the circumstances.

13 BNA OSHC at 1259.

The Secretary argues that in the instant matter the totality of the circumstances demonstrate that respondent was plainly indifferent to the safety of its employees. The Secretary argues that the Respondent failed to acquaint its employees with the regulations applicable to the demolition operation on June 10; it failed to perform an appropriate engineering survey of the knockout panel in question; it failed to determine whether the walking/working surface had the strength and structural integrity to safely support the employees; it failed to address demolition activities in its written safety program contributed to the totality of the circumstances (Secretary's Post-Trial Brief, p. 34). In support of this argument the Secretary cites the Review Commission's decision in *Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254(8th Cir., 1997)[18 BNA OSHC 1113]. In *Anderson*, a demolition contractor was cited for a willful violation of OSHA'S fall protection standard [§1926.105(a)], and serious violations of the training standard [§1926.21(b)(2)] and the safety program [§1926.20(b)(2)]. The Commission found that Anderson did not act with malice or clear intent to violate the fall protection standard. However, a "totality of the circumstances"consisting of multiple factors - particularly, Anderson's failure to provide the training and equipment that were predicates for compliance with the cited fall protection standard, established that Anderson was so indifferent to employee safety. The Commission found that respondent's employees were working at a height of 35 feet above ground without fall protection despite the company's knowledge of the fall protection requirements, that the safety program contained only vague advice about fall protection instead of the requisite specifics, and that the company only issued cursory instructions to employees regarding fall protection. Accordingly, the Commission found that by "substituting weak admonitions for safety training and hazard recognition and not even providing fall protection equipment, Anderson failed to give its employees the opportunity to protect themselves. This failure coupled with the involvement of supervisory

personnel in the violation and Anderson's apparent failure to take remedial steps after its recent receipt of two other OSHA citations for violations of the same standard at other worksites, compel a finding of willfulness in this case. 17 BNA OSHC at 1892. The Secretary argues that like the employees in *Anderson*, Messrs. Kane and Caucci had not been given enough information to protect there own safety, and that Respondent acted with plain indifference to employee safety.

The undersigned finds that the Secretary has not established a willful violation. The evidence does not establish that Fabi acted with malice or clear intent to violate this standard. Additionally, totality of the circumstances does not indicate that Fabi was so indifferent to employee safety. The record establishes that at the time these employees were directed t o demolish this knockout panel, five other knockout panels had been demolished by the same procedures which they were instructed to use. Mr. Cincotti had directed or observed the removal of these knockout panels (Tr. 267, 273, 277). The method of creating a pilot hole to determine the presence of rebar , and the use of a jackhammer , and the use of planking to create a safe work area as they removed concrete and eventually cut the rebar of the panel away. This procedure had been discussed among Cincotti, Apice, Bleven and McCarron (Tr. 251-52, 269 272). Mr. Cincotti had made a visual inspection of the knockout panel and based the experience with the other knockout panels he fully expected this panel to have been doweled into the surrounding deck. The record also reveals that Superintendent Bleven also advised Mr. Cincotti to stay with the procedure that they had been following all along which included making a pilot hole. He had discussed with Mr. Cincotti to expect the rebar to have been doweled in , although the structural plans indicated otherwise (Tr. 348-49). Mr. Cincotti's instruction to Mr. Kane conveyed this belief (Tr. 251, 287). Prior to the job, he discussed the method to be employed in the removal of the panel. During this discussion, Kane and Cincotti were provided planking, a saw, dust masks, safety glasses, ear plugs, and a hose. (Tr. 226). The purpose of making the pilot hole was to see if the rebar was doweled in. Mr. Cincotti gave the warning that if things did not look where it should be to stop the job. This instruction was given with the expectation that the rebar was doweled in based upon the removal of the other knockout panels. The undersigned finds that under the circumstances presented by the removal of the other panels, the Respondent had a good faith belief that the panel could be removed safely with these instructions, albeit they were inadequate. The undersigned finds that the record does not support a finding that the Respondent demonstrated a plain indifference to employee safety.

The undersigned finds that a preponderance of the evidence establishes a serious violation. The undersigned finds that the evidence in this case shows that death or serious physical harm due to the failure to each employee in the recognition and avoidance of unsafe conditions during demolition work. In this case Mr. Kane fell and Mr. Caucci fell to his death as a result of this violation.

Penalty

The record establishes that the gravity of the subject violation was high. The high severity of injury was death and the occurrence of the falling and death of an employee established a finding of a greater probability. Again, no adjustment factors were applied to the Secretary's gravity-based penalty. In light of the aforementioned finding a penalty of $7,000.00 would be appropriate in order to achieve a deterrent effect.

June 14, 1995 Imminent Danger Complaint Inspection

SERIOUS
CITATION 1, ITEM 4

§1926. 501 (b) (1) "Unprotected sides and edges." Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

a) TropWorld West Tower Expansion (Transportation Center Garage), 36th Floor, Brighton & Pacific Aves., Atlantic City, NJ - Employees (4) stripping reshore forms were exposed to a fall hazard along a 28' section on each side of the structure. Fall potential to east side was (6) stories, approximately 54'. The fall potential on the west side was (16) stories, approximately 150'. On or about June 14, 1995.

b) TropWorld West Tower Expansion (Transportation Center Garage), 39th Floor, Northeast corner, Brighton & Pacific Aves., Atlantic City, NJ. - Employees were working (9) floors above the adjacent roof top was exposed to a fall hazard where a 65" gap existed in the guardrail system. Fall potential was approximately 72'. On or about June 14, 1995.

On June 14, 1995, CO Bernard DeZalia responded to a formal complaint regarding fall protection. He testified that upon his arrival at the worksite, he looked up at the structure with binoculars to see what was going on. He observed a gentleman at the top of the structure between a gap in the perimeter fencing and pointed that out to the other compliance officer (Tr. 614-15). They spent 15 minutes videotaping and then went to the office where he spoke with Superintendent Ray Apice, Assistant Superintendent Mr. Tessing, Troy Bleven, and Eugene Kabbeko, carpenter steward (Tr. 618). He gave them a copy of the complaint and they proceeded to the top of the structure -39th floor, to commence complaint inspection (Tr. 619). At that time, Carpenter Foreman, Mike McCarron joined them as well as one other Keating employee. They proceeded to look at that floor and they went to the 38th and 37th to 30th floor (Tr. 619-20). He recommended two instances of the instant violation - one, for employees stripping reshore forms, and the second, on the northeast corner of the 39th floor an employee standing near a 65" gap in the guardrail system (Tr. 622).

Instance a : CO DeZalia testified that there were four gentlemen working on the 36th floor stripping reshoring forms. These employees wore no fall protection and were working in close proximity to an elevator shaft and the unguarded perimeter of the building. The potential fall distance through the elevator shaft to the floor below was 10 feet. The potential fall distance from the perimeter of the building was 6 stories (Tr. 623-26; Exh. G-10). He testified that he pointed out this condition to Mr. Apice, who immediately pulled the men off the job(Tr. 625). He determined that theses employees worked for Fabi because one of the employees (not depicted in the photo he took) identified himself as a Fabi employee and told him that he was part of that crew that was involved in the stripping operation(Tr. 630, 687, 688). At the time CO DeZalia arrived on the floor, the employees were walking away from the edge of the building and were 10-15 feet way from the edge (Tr. 689).

Mr. Bleven testified that his men had started stripping reshore forms on the 36th floor on June 14th, and by the time CO DeZalia arrived on the floor they were just stacking so that a crane could remove the materials from the area (Tr. 1106-08). He identified two of the employees in Exh. G-10 as Fabi employees, and he estimated that they were at least 16-21 feet from the edge of the

building and 14 feet from the elevator shaft (Tr. 1110). He testified that when they started removing the shoring that morning, they wore safety equipment. However, they wore none at the time the photograph was taken because they were done stripping and were stacking - the edge was no longer their work area (Tr. 1112).

The record discloses no dispute to the fact that the cited areas were unprotected sides/edges and the cited areas were not protected by use of a guardrail system, safety net system, or personal fall protection as required by the standard. The Secretary has also proven employee exposure by a preponderance of evidence. The testimony and photographic evidence establish that Fabi's employees had access to the unprotected edges of the floor and elevator shaft. There was nothing in the photograph or the testimony presented by the Secretary or the Respondent which indicates that Fabi's employees, depicted in the photograph - Exh G-10 - were in any way protected from or prohibited from the unprotected edges. The fact that they were not engaged in the work of stripping floors does not negate the exposure they had access to while stacking materials. During their stacking duties they had access to the unprotected edges. Furthermore, the Secretary presented unrefuted testimony that these employees were walking away from the edges upon the arrival of the OSHA inspector. Thus, it one could reasonably assume that immediately prior to his arrival they were closer to the edges than depicted in Exh. G-10 as they performed their assigned duties (Tr. 689). In *RGM Construction Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995), the Review Commission set forth precedent which has established that "[t]he Secretary may prove employee exposure to a hazard by showing that during the course of [employees'] assigned duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be a zone of danger. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521 (No. 90-2866, 1993); *Armour Food Co.*, 14 BNA OSHC 1817, 1824 (No. 86-247, 1990). The zone of danger is determined by the hazard presented by the violative condition and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976).

The record also establishes that Respondent had knowledge of the requirement for protection around unprotected edges. Mr. Bleven testified that there was a cable strung from column line to column line onto which Fabi employees attached retractable lines from their harnesses (which they were not wearing at the time the violation was observed). He testified that they had used them first thing that morning (Tr. 1112). The undersigned also finds that had Fabi exercised reasonable diligence, the instant violative condition would have been anticipated. Thus, employer knowledge has been established.

Instance b: CO DeZalia recommended the second instance because of his observation of a gentleman on the 39th floor, standing in a 65" gap of the perimeter protection exposed to a 10 story fall hazard to the top of an existing structure. His photograph of this violation was taken from the ground (Tr. 627; Exh. G-11) 7). He testified that the gentlemen wore a white hat, red shirt, and carried a radio (Tr. 629). When he arrived on the 39th floor, the steward, Mr. Kabbeko later identified the individual to him (Tr. 628). The gentleman walked right past the inspection party, while they were on the 39th floor. He asked the steward to identify him. Mr. Kabbeko identified the gentleman as Michael McCarron. CO DeZalia testified that he was able to determine which gentleman it because he had not seen anyone with similar clothing during his inspection and he wore

a white foreman's hat (Tr. 629, 679). The Respondent presented an enlarged photograph of Exh. G-11. This enlarged photograph Exh. R-8 presented contradictory evidence with respect to the color of the hard hat worn by the observed employee - the employee was not wearing a white hard hat, his hard hat was yellow. Exh. R-8 shows that the employees on the floor below were also wearing yellow hard hats. These employees worked for another subcontractor, Calvie Electric, they were performing work on the 38th floor. CO DeZalia acknowledged that it appears in Exh. R-8 that the employee on the 39th floor was helping the person depicted on the 38th floor. He acknowledged that he was not aware that Calvie Electric was on site (Tr. 691-92). He also acknowledged that although Mr. McCarron accompanied him on the inspection he never asked him if he was the employee whom he had observed (Tr. 712-713).

Mr. Bleven confirmed that Calvie employees wore yellow hard hats. He also testified that he had no men working in the area of the cited violation - on the western side of the 39th floor. He testified that Fabi had poured concrete over three -quarters of the floor the day before. That area commenced from the western end of the floor going east. On June 14th, his crew was preparing the remainder of the floor for pouring - the eastern end. His crew was erecting the balance of the filigree on June 14th on the eastern end (Tr. 1072-77). To corroborate Mr. Bleven's testimony, Respondent presented evidence from Mr. Apice's daily report for June 14 indicated that Calvie was on the 39th floor as well as Fabi (Tr. 940-42; Exh. R-12.

The Secretary argues that in spite of the aforementioned testimony, one of Fabi's employees may have temporarily donned a yellow hard hat for some reason (Secretary's Post-Trial Brief, p 44). However, the undersigned finds that the weight of the evidence does not establish employee exposure. The Mr. Kabbecko's identification of Mr. McCarron does not establish the identity of the employee actually observed prior to going onto the worksite. He was not present when the observation was made, and could only identify the employee, CO DeZalia assumed had been on the 39th floor. At the time of the issuance of the violation it was assumed the exposed employee wore a white hard hat. Exh. R-8 establishes that the hat was yellow and not white. The Secretary has not proven by a preponderance of evidence that Respondent's employee was exposed to the cited violation. Accordingly, this violation is Vacated.

Classification

The undersigned finds that a preponderance of the evidence establishes a serious violation in Instance a. The undersigned finds that the evidence in this case shows that death or serious physical harm as a result of their proximity to unprotected edges and the fall potential of the cited areas.

Penalty

CO DeZalia determined that the gravity reflected a high severity and greater probability. He found that in both instances, employees would die falling from the height and the probability of falling was immediate because employees were adjacent to the edge rather than on the floor (Tr. 631). The undersigned finds that in view of the fact the instance where the employee was observed on the edge of the building, Instance b has been deleted, - the probability of falling was not immediate. Additionally, there is testimony that when employees were right at the edge stripping forms they wore personal protective equipment. Accordingly, the undersigned finds the probability of falling was lesser and a gravity based penalty of $2,500.00. The undersigned finds no adjustment for good faith in view of the failure to properly maintain its health and safety program, and failure

to adequately train employees. Again, no adjustment factors for size or history are appropriate. In light of the aforementioned finding a penalty of $2,500.00 would be appropriate.

CITATION 1 , ITEM 5a

§ 1926.501 (b) (4) (I) Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

a) TropWorld West Tower Expansion (Transportation Center Garage), Brighton & Pacific Aves., Atlantic City, NJ.- Employees working on the 34th through 41st floor (amended to 34th through 39th floor) were exposed to numerous instances of unprotected floor holes. On or about June 14, 1995.

CO DeZalia testified that at the time of the inspection he observed open floor holes of various sizes (Tr. 634). He testified that there was also the opening in which a gentleman had come up in order to work on the floor which was approximately 3 feet by 4 feet. There was also two open elevator shafts. There was also a pipe run open on the top floor which measured 15 inches by 8 feet and was not protected on one side. He stated that these were all on the 39th floor (Tr. 635). He testified that Exh G-12 depicts one of the elevator shaft openings (Tr. 636). The fall distance to the floor was 10 feet (Tr. 636). Exh. G-13 depicts is the second elevator shaft. The fall distance again was 10 feet (Tr. 637). There were about 10-15 feet between the two shafts. He testified that numerous employees were going moving about the 39th floor who would have been exposed to these holes(Tr. 644). He testified that the employees were involved in carpentry work, such as going to get tools and lumber. He testified that they walked within 3-5 feet of these holes (Tr. 645). He was informed by Mr. Kabbeko that all of the employees on that floor were employed by Fabi (Tr. 644).

Respondent contends that within the two elevator shafts there was peri-form scaffolding - a self-contained form system consisting of a solid platform attached to an accordion-like mechanism which enables the platform to be moved up and down (Tr 1092-93). Mr. Bleven testified that the presence of the peri-form limited the fall distance to 4 feet in one shaft and 5 feet to 5 feet 6" in the other shaft (Tr. 1095, 1102-03). The Secretary presented no evidence to rebut Mr. Bleven's testimony. CO DeZalia testified that although he did not remember seeing the peri-form scaffolding in the shafts, he did see it on the site (Tr. 704-05, 708). Accordingly, the Secretary has not established by a preponderance of evidence noncompliance with the cited standard with regard to the elevator shafts.

CO DeZalia also testified that a shaft way was being used as an access way. Ladders had been placed in the access way. They were not adequately guarded on one side, exposing employees to a potential fall distance of 10 feet to the floor below (Tr. 638-39, 641; Exh. G-14). The ladder depicted in the photo was on the 38th floor, however, the ladder way went from the 34th to the 39th floors. CO DeZalia testified that Mr. Kabbeko informed him that Fabi employees used the ladder in combination with the stairway. He also observed several men, whom Mr. Kabbeko informed him worked for Fabi, come out of the ladder way from the 38th floor onto the 39th floor.(Tr. 642, 696-98). He testified that there was an elevator that went to the 35th floor, however, the ladder ways would have to be used for the higher level floors (Tr. 643). Thus, the exposure existed from the 34th to the 39th floors (Tr. 647). He acknowledged that Fabi employees were working on the 36th and 39th floors (Tr. 699)

The undersigned finds that the Secretary has established the existence of falling hazard created by the unprotected ladder way. Furthermore, Respondent presented no evidence that the condition did not exist.

Respondent contends that there was no employee exposure. Respondent argues that the Secretary's assertion of employee exposure is "mere speculation". Mr. Bleven testified that Fabi employees did not use the cited ladder ways (Tr. 1080). He testified that at the time of the inspection, Fabi employees were only located on the eastern side of the 38th and 39th floor where they were setting filigree. The cited ladder way was located in the western quadrant of the 38th and 39th floors. He testified that Fabi employees had erected and used another ladder way on the eastern portion of the floor where they were working (Tr. 1080-83; Exh. R-34). CO DeZalia admittedly based his identification of the employees seen coming out of the ladder way on the 39th floor, on information Mr. Kabbeko supplied to him. He conducted no personal interview of the employees (Tr. 696-698).

Respondent argues that Mr. Kabbeko's testimony revealed a deep-seated animosity and obvious bias toward Fabi. The record reveals that during his employment there had been a number of disagreements with Fabi management. Mr. Bleven testified that Kabbeko had been fired by Fabi for refusing to install safety protection at TropWorld. The undersigned also notes that during the trial Mr. Kabbeko expressed an obvious displeasure at Mr. Bleven's presence in the courtroom during his testimony (Tr. 463). The undersigned having observed his demeanor at trial, recognizes that he was upset with Mr. Bleven's presence in the courtroom. However, the undersigned finds that in light of the fact his firing occurred after the inspection, the undersigned does not automatically discredit his identification of Fabi employees during the inspection.

The undersigned finds that the record establishes employee exposure to the ladder ways. The record discloses that the cited ladder way on the 39th floor was located at Exh. R-34-T-83 right side (Tr.1079). The parallel location of the 36th floor, Exh R-35 - T-83 right side was in the proximity of the violation depicted in Exh G-10, where an employee engaged in stacking forms identified himself as a Fabi employee. The drawing indicates that employees would have had access to the cited ladder way on the 36th floor, thus, it was reasonably predictable they would be in the zone of danger of the unguarded ladder way.. Additionally, although Fabi had erected a second ladder way on the 39th floor, the undersigned does not discredit Mr. Kabbeko's identification of the employees observed coming from the cited ladder way. Additionally, although the ladder way was on the western side of the 39th floor, the undersigned finds that it was accessible for use by all employees, and thus, it was reasonably predictable that they would be in the zone of danger of the unguarded ladder way on the 39th floor. There is no evidence that Fabi did not authorize use or prohibited its employees from using this ladder way.

The undersigned finds that with the exercise of reasonable diligence Fabi could have known of the presence of the violative condition. Furthermore, the violation was in plain view and supervisory personnel were present throughout the work operation. *American Airlines, Inc.*, 17 BNA OSHC 1552, 1555 (Nos. 93-1817 and 1965), 1996).

Classification

CO DeZalia recommended a serious classification because if some fell 10 feet they could end up with bruises to contusions to broken bones or even die (Tr. 646).The undersigned finds that a preponderance of the evidence establishes a serious violation.

Penalty

CO DeZalia determined that the gravity reflected a high severity because the injuries could be severe or lead to death, and a greater probability because of the proximity of the holes presenting a possible tripping hazard (Tr. 647). In light of the above findings the undersigned finds that the probability was lesser. Fabi employees were only working on the 36th and 39th floors and they had erected a second ladder way on the 39th floor. A gravity based penalty of $2,500.00 is assessed. The undersigned finds no adjustment for good faith in view of the failure to properly maintain its health and safety program, and failure to adequately train employees. Again, no adjustment factors for size or history are appropriate. In light of the aforementioned finding a penalty of $2,5000.00 would be appropriate. This penalty is appropriate without the grouping of Item 5b, *infra.*

CITATION 1, ITEM 5b

§1926.501 (b) (4) (ii) Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

a) TropWorld West Tower Expansion (Transportation Center Garage), 39th Floor, Northwest corner, Brighton & Pacific Aves., Atlantic City, NJ.- Floor holes (2) measuring 15" x 5.5" were not covered. On or about June 14, 1995.

b) TropWorld West Tower Expansion (Transportation Center Garage), 39th Floor, Southeast corner, Brighton & Pacific Aves., Atlantic City, NJ.- Floor holes (2) measuring 15" x 5.5" were not covered. On or about June 14, 1995.

c) TropWorld West Tower Expansion (Transportation Center Garage), 39th Floor, South corner, Brighton & Pacific Aves., Atlantic City, NJ.- Floor holes (2) measuring 8' x 15" was not covered. On or about June 14, 1995.

CO DeZalia testified that these three violative conditions all on the 39th floor presented a tripping hazard. He observed two small shaft holes of 5" by 15" wide, one set in the northeast corner and one set on the southwest corner (Tr. 648-49; Exh. G-15, northwest corner). There was also a hole that was 15" by 8 foot long and was open to one side - guarding was on one side of the hole (Tr. 649, 652; Exh. G-16). With regard to the holes in the northeast corner, he testified that he observed no one in the area, however, he testified that carpentry work was going on throughout the floor and there was a possibility that any employee could walk in there and trip(Tr. 650-51). He testified that he observed two or three employees performing carpentry work within 5 to 10 feet of the holes depicted in Exh G-16 (Tr. 652). He did not have any photographs of the holes cited in the southeast corner. However, he testified that they were identical to the holes in Exh. G-15. He testified that the same employees working near Exh. G-16 were working the set of holes in the southeast corner (Tr. 655). However, when asked to describe the carpentry type activity he had observed, he responded that there were " a lot of guys milling around handling a lot of stuff, but he couldn't tell [us] what they were doing" (Tr. 710).

Respondent contends that it did not create or control the cited hazards, and that its employees were not working anywhere near the holes (Respondent's Post-Trial Brief, p. 61). Mr. Bleven presented unrefuted testimony that on June 13, 1995, Fabi had covered and secured the holes in preparation for the pouring of the floor. The holes were all located on the western side of the 39th floor (Tr. 1083-86). He testified that in accordance with the normal progression of work, Fabi moved away from the area where the holes were to the eastern side of the floor to allow the floor to cure, and to allow subcontractors to install gas lines and ductwork (Tr. 1085, 1088-89). He testified

that at the time Fabi moved out the cited holes were covered and secured (Tr. 1084-86, 1089). Mr. Apice's records of the work being performed on June 14th corroborate the fact that the installation of sleeves was being done by another subcontractor on the 39th floor (Tr. 939-40; Exh R-12).

The undersigned finds that the Secretary has not proven by a preponderance of the evidence that Fabi was responsible for the cited noncompliance. Mr. Bleven provided unrefuted evidence that Fabi had covered and secured these holes in the normal progression of work (Tr. 1084-87). The undersigned finds that the Secretary also has not established by a preponderance of employee exposure. The undersigned's review of Exh R-34- which shows the location of the holes, and Mr. Bleven's testimony indicates Respondent's employees had no reason to travel by these holes during the course of their work on June 14. These holes were not located by any access way or work area. Accordingly, the cited violation is Vacated.

CITATION 1, ITEM 6a

§1926.1052 (b) (2) Except during stairway construction, foot traffic is prohibited on skeleton metal stairs where permanent treads and/or landings are to be installed at a later date, unless the stairs are fitted with secured temporary treads and landings long enough to cover the entire tread and/or landing area.

> *a)* TropWorld West Tower Expansion (Transportation Center Garage), 35th Floor, Brighton & Pacific Aves., Atlantic City, NJ. - From the 31st through the 35th floors employees were observed utilizing stairs where the treads and landings were not filled with concrete or another solid material, thus exposing the employees to a tripping hazard. The approximate fall potential to the outside was between 9' and 45'. On or about June 14, 1995.

CITATION 1, ITEM 6b

§1926 1052 (c) (1) Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with: (I) -- At least one handrail; and (ii) One stairrail system along each unprotected side or edge.

> *a)* TropWorld West Tower Expansion (Transportation Center Garage), 31st - 35th Floor, Brighton & Pacific Aves., Atlantic City, NJ. - Employees were observed using stairs that were not equipped with handrails on either side of the staircaseing. The fall potential to the landing and/or from the landing to the floor below was approximately 4.5' while the fall potential to the outside was approximately between 9' and 45'.

CO DeZalia testified that he cited Item 6(a) because the stairs that were being used to gain access to the upper floors - 31st to 35th floors - were skeletal metal pan stairs in which the pans had not been filled, and the stair landings had not been filled with concrete. The stairways handrails(Tr. 658; Exhs. G-17, G-18, and G-19). He testified that the fact that the pan had not been filled at the landing presented a tripping hazard at the lip. The pans should be filled with something - wood or Styrofoam - so as not to create a tripping hazard until cement is poured (Tr. 661-662). He cited Item 6(b) because the cited stairs lacked handrails to prevent employees from falling to the outside of the structure or onto landings (Tr. 664). CO DeZalia testified that he observed no barriers to these stairways. He testified that he observed two individuals access the stairs in one instance, and Mr. Kabbeko identified the individuals as Fabi employees. He was also told by one of the carpenters on the job - Mr. Lebator- that employees had used the stairways to access from the upper floors down

to the bottom (Tr. 663). He testified that he had seen the two employees on the stairway between the 34th and 35th floors, and once they headed in the opposite direction from him once they reached the 35th floor. He acknowledged that Fabi employees were working on the 36th and 39th floors, however, he maintained that the use of the stairs was easier than using the ladder way or waiting for the elevator on the outside of the structure (Tr. 700).

Respondent does not dispute the existence of the cited conditions. Respondent maintains that the Secretary cannot prove employee exposure because its employees did not use these stairs. Mr. Bleven testified that Fabi employees were working on the 36th and 39th floors, and thus, would not have used the stairway which only extended to the 35th floor. (Tr. 1114-15). He testified that during the early morning on June 14th Fabi employees gained access to their work area by the use of a hoist which placed the workers on the 39th floor and which was used latter in the afternoon to bring them down from their work areas (Tr. 1118-19).

The record establishes that another subcontractor installed the stairway (Tr. 936). The record is void of any evidence which demonstrates that there was any type of barrier around said stairs to prevent their use by all subcontractors on the site. The undersigned finds that preponderance of evidence establishes that Fabi employees had access to the zone of danger created by this violative condition. Respondent argues in its Post-Trial Brief that employees were restricted to areas only accessed by the use of a hoist, which Mr. Bleven testified took employees to the 39th floor. In spite of this argument, CO DeZalia observed Fabi employees using these stairs. His conclusions as to Fabi employee's use of the stairs were confirmed not only by Mr. Kabbeko but also by another carpenter on site. Additionally, the record is void of any evidence that Respondent took any action to restrict Fabi employees from using the stairs. The hoist was only an alternative means to the 39th floor.. Review Commission precedent requires an employer who did not create or control the violative condition to establish that alternative measures were used or unavailable. *Capform, Inc.*, 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994)(multi-employer work site defense). Accordingly, the undersigned finds that the Secretary has met her burden of proof with regard to noncompliance and employee exposure with regard to Items 6a and 6b.

The undersigned finds that with the exercise of reasonable diligence Fabi could have known of the presence of the violative condition. Furthermore, the violation was in plain view and supervisory personnel were present throughout the work operation.

Classification

CO DeZalia recommended a serious classification because an employee could fall to the floor below or to the landing which was a 4½ foot fall to a landing or 10 foot fall to the next floor determined employees used these steps. The undersigned finds that a preponderance of the evidence establishes a serious violation.

Penalty

These items were appropriately grouped because they involve similar or related hazards. CO DeZalia determined that the gravity reflected a high severity because the potential to fall either off the stairs or to the outside of the structure which would mean death because of the height, and a greater probability because of the number of Fabi employees on site that day(Tr. 664-66). The undersigned finds that the record establishes a lesser probability - there were other means, such as the hoist, to reach the upper floors. Thus, a gravity based penalty of $2,500.00 is assessed. The undersigned finds no adjustment for good faith in view of the failure to properly maintain its health

and safety program, and failure to adequately train employees. Again, no adjustment factors for size or history are appropriate. In light of the aforementioned finding a penalty of $2,5000.00 would be appropriate.

Complaint Inspection (2nd) JULY 6, 1995

OTHER-THAN-SERIOUS

CITATION 3, ITEM 1a

§1926.502 (I) (3)(I)(3) All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.

a) TropWorld West Tower Expansion (Transportation Center Garage), Brighton & Pacific Aves., Atlantic City, NJ. - 41st floor at the temporary passenger elevator. On or about July 6, 1995.

CITATION 3, ITEM 1b

§1926.504 (I)(4) All covers shall be color coded or they shall be marked with the word "HOLE" or "COVER" to provide warning of the hazard.

a) TropWorld West Tower Expansion (Transportation Center Garage), Brighton & Pacific Aves., Atlantic City, NJ. - 41st floor, outside the temporary passenger elevator: There was a floor hole approximately 3 feet by 3 feet that was covered by a wooden cover. On or about July 6, 1995.

CO Steinburg visited jobsite on July 6, 1995. He testified that as he waited on the 41st floor for the elevator, he observed an unsecured and unmarked hole cover a couple of feet from the elevator. He kicked the cover and it moved. He discovered that there was a hole under the covers. There was no marking on the plywood cover, measuring 3 feet by 3 feet, to indicate there was a hole. The elevator could have been used by all personnel on the job. He determined that this condition presented a tripping hazard where one could have scraped a knee to falling through hole (Tr. 759-60). The fall distance was to next floor 10-12 feet (Tr. 760). He recommended no penalty for this violation.

Mr. Bleven testified that there were two holes measuring 5 inches by 14 inches near the elevator on the 41st floor. There was no other elevator on site (Tr. 1120; Exh. R-36). Mr. Bleven testified that he had employees working on the 41st floor that day working, who could have used a ladder or the elevator to have accessed that the floor (Tr. 1121, 1133).

The undersigned finds that it is undisputed that the unsecured and unmarked cover existed on the 41st floor. The record establishes that the elevator which was in proximity to the cited area, was used by Respondent's employees as a means of access to the 41st floor. Thus, Respondent's employees were exposed to the cited condition. The undersigned finds that these violations had a direct and immediate relationship to safety and health, however, they did not present the probability of death or serious injury. Accordingly, these violations were appropriately classified as other-than-serious. The undersigned finds that there was a lesser probability of the occurrence of an injury in view of the location of the violation, and thus, a penalty of $0.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

Citation 1, Item 1a, alleging a serious violation of §1926.20(b)(1), is AFFIRMED with a penalty of $5,000.00.

Citation 1, Item 2, alleging a serious violation of §1926.503(a)(1), is AFFIRMED with a penalty of $5,000.00.

Citation 1, Item 3a , alleging a serious violation of §1926.501(a)(2), alleging a serious violation of §1926.501(a)(2) is AFFIRMED with a penalty of $7,000.00.

Citation 1, Item 3b, alleging a serious violation of §1926.850(a) is VACATED.

Citation 2, Item 1, alleging a willful violations of §1926.21(b)(2), is AFFIRMED as a SERIOUS violation with a penalty of $7,000.00.

Citation 1, Item 4, Instance a, alleging a serious violation of §1926.501(b)(1), is AFFIRMED with a penalty of $2,500.00. Instance b is VACATED.

Citation 1, Item 5a, alleging a serious violation of §1926.501(b)(4)(I), is AFFIRMED with a penalty of $2,500.00.

Citation 1, Item 5b, alleging a serious violation of §1926.501(b)(4)(ii) is VACATED.

Citation 1, Item 6a, alleging a serious violation of §1926.1052(b)(2) and Item 6b alleging a serious violation of §1926.1052(c)(1) are AFFIRMED with a grouped penalty of $2,500.00.

Citation 3, Item 1a, alleging an other-than-serious violation of §1926.502(I)(3) and Item 1b alleging an other-than-serious violation of §1926.502(I)(4) are AFFIRMED with a penalty of $0.00.

/s/
Covette Rooney
Judge, OSHRC

Dated: April 6, 1998
Washington, D.C.