United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. LJC DISMANTLING CORP., Respondent.	OSHRC Docket No. 08-1318

ON BRIEFS:

Heather Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Thomas Bianco, Esq.; Meltzer, Lippe, Goldstein & Breitstone, Mineola, NY
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Following an inspection, the Occupational Safety and Health Administration issued LJC Dismantling Corporation a nine-item citation alleging serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, with a total proposed penalty of $16,800. The Secretary withdrew one of the citation items, and Administrative Law Judge Dennis L. Phillips issued a decision affirming the remaining eight items. At issue on review are three of the affirmed items—Citation 1, Items 5, 7 and 8—all of which involve an LJC employee's use of a scaffold, from which he fell when struck from overhead by a falling object. For the reasons discussed below, we vacate Items 5 and 8, and affirm Item 7.

BACKGROUND

As part of a multi-building dismantling project in New York City, LJC employees were taking apart a large rooftop water tank that rested on an elevated platform. The tank was made of wooden boards, joined in a tongue and groove manner, and horizontally bound with several metal straps. Dismantling the tank involved cutting the straps and prying apart the boards. As one group of workers dismantled the tank, another employee (Employee A) worked on removing a small house-like structure near the base of the tank's platform. On the day of the accident, Employee A built a small scaffold so that he could reach the upper portion of the structure. Shortly after climbing onto his scaffold, he felt something strike him in the neck and back shoulder, and he fell off the scaffold to the roof. A co-worker told Employee A that someone had cut one of the tank's straps, causing it to swing around the tank and hit him.

DISCUSSION

I. Item 5 - Improper Scaffold Planking

Under this item, the Secretary alleges a violation of 29 C.F.R. § 1926.451(b)(1), which requires scaffolds to be "fully planked or decked between the front uprights and the guardrail supports." Employee A acknowledged at the hearing that he did not fully plank the scaffold from which he was working on the day of the accident.[1] The judge concluded that the Secretary met his burden of proving knowledge. On review, we consider whether LJC knew or should have known that the scaffold's planking was deficient. *See e.g., Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) (Secretary bears burden of establishing "that the employer had actual or constructive knowledge of the cited conditions").

LJC argues that its supervisors were unaware of the violative condition and did not have reason to know that Employee A would plank the scaffold incorrectly. The Secretary responds that LJC's foreman testified that he saw the non-compliant scaffold and, even if he did not, it was in plain view and LJC failed to exercise reasonable diligence to discover the violation. We find that the record does not establish the Secretary's assertions.

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[1] The parties stipulated that "the space between adjacent planks of the [scaffold platform] exceeded one inch," which is generally the maximum space permitted by the standard. *See* 29 C.F.R. § 1926.451(b)(1)(i). In addition, the record establishes that there was a 36-inch gap from the planking to the uprights.

To establish actual knowledge, the Secretary relies on testimony from the foreman, who described being on the roof only once before the accident—at the beginning of the work day. The foreman testified that, when he saw Employee A at that time, he "was on scaffold":

> Q: Was he on a – [w]hen you saw him, was he on a scaffold, or was he on –
>
> A: No. He working on – [h]e wasn't on roof. He was on scaffold, because – [t]hat scaffold was necessary.

But this testimony was immediately followed by a confusing colloquy about why the scaffold was necessary, in which the foreman stated that Employee A could not reach high enough to do his work because "[h]e's standing on roof." In addition, other evidence indicates that Employee A had not finished building or started using the scaffold until after the foreman had left the roof. As the record shows, the accident occurred about two hours after the workday began, when the foreman was on another floor, and Employee A testified that he had been on the scaffold for just a brief time before the accident.[2] *See Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052-53, 1991 CCH OSHD ¶ 29,344, p. 39,451 (No. 86-1087, 1991) (finding employer lacked actual knowledge where supervisor left work area prior to employee exposure to violative condition). In short, the foreman's testimony is unclear, appears to conflict with other evidence, and was not clarified by the Secretary in further questioning. Thus, we find this testimony insufficient to establish actual knowledge of the violative condition. *Cf. Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2085-86, 2009-2012 CCH OSHD ¶ 33,200, p. 55,700 (No. 06-1542, 2012) (declining to find actual knowledge where foreman only suspected a violation).

With respect to constructive knowledge, we agree with the judge's finding that LJC instructed Employee A to work near the water tank and knew he would need a scaffold to complete the assigned tasks. But the Secretary must also demonstrate that LJC, knowing Employee A would construct and use a scaffold, failed to exercise reasonable diligence to prevent and discover the non-compliant planking. *See, e.g., N.Y. State Elec. & Gas Corp. v.*

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[2] The foreman's testimony regarding whether he saw Employee A build the scaffold is equally unclear, as he seems to give contradictory answers:

> Q: [Y]ou didn't see him build that scaffold, did you?
>
> A: No. I don't see.
>
> * * *
>
> Q: So, you never saw him build a scaffold.
>
> A: No. *Just one frames* [*sic*] [emphasis added].

Sec'y of Labor, 88 F.3d 98, 105 (2d Cir. 1996) *citing Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1992 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992) ("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.") (internal quotation marks and citation omitted). In this regard, we find the record lacking.

First, the Secretary asserts that under *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575 (D.C. Cir. 1985), he satisfied his burden by showing that the condition was in plain view and visible from a distance. However, in *Simplex*, the court found constructive knowledge where the non-compliant conditions and everyday practices of the employees were readily visible "*and* indisputably should have been known to management." 766 F.2d at 589 (emphasis added). Although in the instant case the 36-inch gap from the planking to the uprights was in plain view, the record does not establish that this condition existed while the foreman or any other LJC supervisor was in the area prior to the accident. Employee A completed his scaffold, climbed up, and was struck before he even finished making preparations to do his work. At that time, about two hours after the beginning of the work day, the foreman and superintendent—who were the only LJC supervisors on the project—were on another floor and unable to see the scaffold. And as discussed below, the Secretary has failed to establish a lack of reasonable diligence by LJC in not discovering or preventing the condition, *i.e.*, that the condition "should have been known to [LJC]." *Id.* In these circumstances, we find that there is insufficient evidence to show that the condition was present for a long enough time that the employer should have known about it. *See Major Constr. Corp., Inc.*, 20 BNA OSHC 2109, 2111, 2004-2009 CCH OSHD ¶ 32,860, p. 53,042 (No. 99-0943, 2005) (constructive knowledge not established where violation might only have been capable of being observed for a short period); *see also Cranesville Block Co.*, 23 BNA OSHC 1977, 1986, 2009-2012 CCH OSHD ¶ 33,227, p. 56,017 (No. 08-0316, 2012) (consolidated) (knowledge not established where violative condition was in plain view but evidence did not establish how long it existed or that supervisors were in area); *Williams Enters., Inc.*, 10 BNA OSHC 1260, 1263, 1982 CCH OSHD ¶ 25,830, p. 32,306 (No. 16184, 1981) (knowledge not established absent evidence that violative condition existed "for a sufficient period of time that [the employer] should have discovered it").

Second, the Secretary alleges, with little elaboration, that LJC failed to take adequate measures to prevent the occurrence of violations—that it "failed to fulfill" its obligations to

inspect for existing or potential hazards and give appropriate instructions. We find the evidence does not support these allegations, and that the Secretary, therefore, has failed to establish a lack of reasonable diligence by LJC. As for inspections, the record establishes that LJC's superintendent inspected the worksite multiple times a day and directed the shop steward to check that employees were "being safe." The Secretary argues that such inspections were inadequate but does not identify what would have been appropriate under the circumstances, especially considering the brief amount of time the violative condition existed. *See Trinity Marine Nashville, Inc.*, 19 BNA OSHC 1015, 1017, 2000 CCH OSHD ¶ 32,158, p. 48,527 (No. 98-0144, 2000) (no constructive knowledge where employer conducted inspections and "the Secretary has not suggested any reasonable additional measures that [the employer] could have taken to detect the [violative condition]"), *rev'd on other grounds*, 275 F.3d 423 (5th Cir. 2001); *Tex. A.C.A., Inc*., 17 BNA OSHC 1048, 1050, 1993-1995 CCH OSHD ¶ 30,652, p. 42,525-526 (No. 91-3467, 1995) (no constructive knowledge of scaffold violation based on inadequate inspections where Secretary failed to demonstrate inspections were not reasonably diligent). Moreover, there is no evidence showing that Employee A had ever previously violated safety requirements. *Compare N. Y. State Elec. & Gas, Corp*., 19 BNA OSHC 1227, 1231, 2000 CCH OSHD ¶ 32,217, p. 48,847 (No. 91-2897, 2000) (Commission finding no constructive knowledge where there were no circumstances alerting the employer to a need for more intensive monitoring) *with N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2124, 2000 CCH OSHD ¶ 32,101, p. 48,329 (No. 96-0606, 2000) (constructive knowledge where employer knew that employees routinely violated its work rule), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

As for instructions, LJC's superintendent hired Employee A knowing he had extensive training and experience, including two courses specifically addressing scaffolds, as well as annual renewal training. The superintendent also went through LJC's safety policies with Employee A and had him review a copy of its safety plan, which requires "scaffold planking" to be inspected daily. Apart from a general assertion that LJC did not give "appropriate instructions," the Secretary faults LJC for failing to prove that it had "every reason to believe that [Employee A] was properly trained."

We agree that the adequacy of Employee A's prior training is relevant to assessing whether LJC's instructions were sufficient. *See Gary Concrete,* 15 BNA OSHC at 1054-55, 1991 CCH OSHD at p. 39,451 (adequacy of instructions, training and supervision assessed in

light of employee's work history and extent of judgment involved in assigned task). But to the extent the Secretary is asserting that LJC should have discounted Employee A's prior scaffold training (along with his extensive construction experience) and given more specific instructions, it is the Secretary's burden to identify and establish that LJC should have been aware at the time that Employee A's training was deficient, and what additional instructions would have been necessary under those circumstances.[3] *See N.Y. State Elec. & Gas,* 88 F.3d at 108 (Secretary has burden of proving inadequacy of safety program where that is asserted basis for constructive knowledge); *Precision Concrete Constr*., 19 BNA OSHC 1404, 1407, 2001 CCH OSHD ¶ 32,331, p. 49,552 (No. 99-0707, 2001) (Secretary has burden of identifying what reasonable diligence required). The record, however, contains no such assertions or evidence. And, as noted above, there is no evidence that LJC had previously experienced any problems with Employee A's compliance with safety requirements, including those related to scaffolds. Thus, the record fails to demonstrate that the company should have anticipated that the cited provision would be violated in these circumstances.[4]

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[3] The Secretary argues that by asserting that Employee A was properly trained, LJC has, in effect, raised the affirmative defense of unpreventable employee misconduct, and thus has the burden of proof on this point. But whether LJC could establish that defense is not relevant unless the Secretary has first met his burden to show knowledge of the violation. *See N.Y. State Elec. & Gas,* 88 F.3d at 108.

[4] To support his claims, the Secretary relies on *Automatic Sprinkler Corp. of Am*., 8 BNA OSHC 1384, 1980 CCH OSHD ¶ 24,495 (No. 76-5089, 1980) and *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 2005 CCH OSHC ¶ 32,803 (No. 00-0553, 2005). But the circumstances here are not similar to those in either case. In *Automatic Sprinkler*, the Commission found the instructions inadequate because they did not address what the employee should do if it was impractical to follow them—a condition the employer would have discovered had it inspected the site beforehand. 8 BNA OSHC at 1387-88, 1980 CCH OSHD at p. 29,926. Here, as discussed above, LJC did inspect the worksite and the Secretary has not shown LJC had any indication that the instructions it provided Employee A would be inadequate or disregarded.

In *Active Oil*, the Commission found constructive knowledge based in part on the fact that the company's president had made clear his belief that safety was not important, and that workers felt free to disregard safety procedures. 21 BNA OSHC at 1187-88, 2005 CCH OSHD at p. 52,499. But here, Employee A testified that he thought LJC wanted him to be safe and he felt free to talk about any safety issue; indeed, the shop steward acknowledged that LJC's superintendent was concerned about safety and had directed him to check on safety issues. Also, unlike *Active Oil*, there is no evidence LJC had a history of employees disregarding safety requirements.

Accordingly, we find that the Secretary has not established knowledge of the violative condition and therefore vacate Item 5.

II. Item 7 - Overhead Hazards

Under this item, the Secretary alleges a violation of 29 C.F.R. § 1926.451(h)(1), which requires employees working on a scaffold to be protected from falling hand tools, debris, and other small objects. The judge determined that workers cut one of the metal straps holding the tank together while Employee A was on his scaffold, exposing him to a hazard to which the cited standard applies. He then concluded that LJC had knowledge of the violation because it failed to exercise reasonable diligence to protect Employee A from overhead hazards associated with the tank dismantling work.[5]

On review, LJC does not deny that on the day of the accident, a tank strap was cut, the cutting process created a falling object hazard,[6] and Employee A worked without overhead protection while on his scaffold. Rather, it argues that it lacked knowledge of the violative condition because it was unaware that the tank workers were cutting straps that day. The Secretary responds that LJC nonetheless had constructive knowledge because it should have been aware Employee A would be subjected to the overhead hazard posed by the cutting of the straps while he performed his assigned work.[7]

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[5] We agree with the judge's determination that the cited standard applied, there was non-compliance, and Employee A was exposed to the hazard. We therefore discuss only the issue of LJC's knowledge of the violative condition. *See Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p. 31,899-900 (No. 78-6247, 1981) ("In order to prove a violation . . . the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence"), *aff'd*, *in relevant part,* 681 F.2d 69 (1st Cir. 1982).

[6] The compliance officer determined that one of the straps, if cut, was long enough to strike Employee A.

[7] As with Item 5, the Secretary also argues that an LJC supervisor either saw, or could have seen, Employee A working from the scaffold without overhead protection. For the same reasons discussed above, we find that the record does not establish that a supervisor actually saw Employee A on the scaffold, and the visibility of the condition alone is not sufficient to establish knowledge here. *See Thomas Indus.*, 23 BNA OSHC at 2085-86, 2009-2012 CCH OSHD at p. 55,770; *Major Constr.*, 20 BNA OSHC at 2111, 2004-2009 CCH OSHD at p. 53,042.

We agree with the Secretary. Even if LJC lacked actual knowledge that straps were being cut that day, it knew that the tank workers were to continue the tank dismantling process, and that there were straps remaining that would have to be cut to complete that process.[8] And LJC does not deny that it knew Employee A was to work adjacent to (and at a level below) the base of the water tank—an area that, as the compliance officer described, was one of "competing operations" at the time of the accident. While Employee A had training about overhead hazards, he could not see from his position on the scaffold that the workers were cutting a strap, nor could they see him. *See Ormet Corp.*, 14 BNA OSHC 2134, 2137-38, 1991-1993 CCH OSHD ¶ 29,254, p. 39,201 (No. 85-531, 1991) (finding knowledge where it was reasonably foreseeable that employee could have been injured by crane load approaching employee's work area); *see also Halmar Corp.*, 18 BNA OSHC 1014, 1016, 1995-1997 CCH OSHD ¶ 31,419, p. 44,410 (No. 94-2043, 1997) (had employer exercised reasonable diligence, it would have anticipated that crane might contact power lines), *aff'd, without reported opinion,* 152 F.3d 918 (Table) (2d Cir. 1998). Despite this, LJC failed to implement any instructions or other measures to either coordinate this work or otherwise provide protection from the overhead hazard. This was in contrast to the previous day, when LJC did take preventive steps: as Employee A testified, on that day, "[w]hen they were about to cut the straps on the tower [the superintendent] ordered everybody out of the area so that nobody would get hurt in case the straps fly." LJC thus failed to exercise reasonable diligence to prevent the violation. *See Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079, 1995 CCH OSHD ¶ 30,699, p. 42,606 (No. 90-2148, 1995) (finding failure to instruct employees to avoid dangerous condition evidence of lack of reasonable diligence), *aff'd, without reported opinion*, 79 F.3d 1146 (Table) (5th Cir. 1996); *Deep South Crane & Rigging Co.*, 23 BNA OSHC 2099, 2102-03, 2012 CCH OSHD ¶ 33,232, p. 56,804 (No. 09-0240, 2012) (violation foreseeable where employer gave insufficient instructions), *aff'd,* 24 BNA OSHC 1089 (5th Cir. 2013). We therefore affirm Item 7.

[8] Below, LJC argued that the superintendent instructed workers not to cut the straps on the morning of the accident. The judge rejected this argument in part because the superintendent also testified that he intended to have the last straps cut *before* the remaining boards were removed. LJC does not rely on this argument on review and, like the judge, we conclude that the record does not establish that such an instruction was given.

LJC does not challenge the characterization or penalty of this citation item on review. The judge characterized the violation as serious and assessed the Secretary's proposed penalty of $3,000. We find no reason to disturb his findings or the assessed penalty amount. *See, e.g., KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2004-2009 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (affirming alleged characterization and assessing proposed penalty where characterization and penalty were not in dispute), *aff'd*, 703 F.3d 367 (7th Cir. 2012). Accordingly, we affirm the violation as serious and assess the proposed penalty of $3,000.

III. Item 8 - Retraining

Under this item, the Secretary alleges that, "on or about" May 8, 2008—the day after the accident—LJC failed to retrain employees on overhead hazards in violation of 29 C.F.R. § 1926.454(c). This provision requires retraining when "the employer has reason to believe that an employee lacks the skill or understanding needed for safe work involving the erection, use or dismantling of scaffolds." The judge found that LJC had reason to believe from the actions of the tank workers, who cut the metal straps, and of Employee A, who was working within reach of the straps on the day of the accident, that these employees needed retraining. As it is undisputed that no retraining was provided subsequent to the accident, he affirmed the violation. On review, LJC asserts that this was error because the tank workers did not use a scaffold on the day of the accident and thus the retraining requirement is inapplicable to them, and Employee A's mere presence beneath the tank dismantling operation on that day did not suggest a need for retraining as he was unaware that straps were going to be cut then.

We find that the Secretary failed to prove LJC violated the provision because the record does not show that the actions of either the tank workers or Employee A signaled a need for retraining. The Secretary relies on testimony from the shop steward, who asserted that, "right from when [the tank workers] began [cutting]" the straps—which he indicated was "several days" before the accident—he complained to the foreman about the overhead hazard.[9] But the cited requirement addresses such a hazard only if it pertains to "work involving" scaffolds, and

[9] We note that the foreman denied that the shop steward made this complaint.

the shop steward also testified that the tank workers were not using a scaffold.[10] The record also fails to establish that Employee A or any other worker in the area was erecting, dismantling, or using a scaffold at that point.[11] Moreover, Employee A, the foreman, and the superintendent all testified that before LJC first started cutting straps—which, in contrast with the shop steward, they indicated was on the day prior to the accident—LJC cleared the area below. Consequently, we find the weight of the evidence to be inconsistent with the shop steward's testimony.

The Secretary also argues that a need to retrain was manifested by the accident itself—that the tank workers cut a strap even though Employee A was working below, and Employee A worked on a scaffold even though dismantling operations were taking place above. But the record does not establish whether the tank workers were even aware that Employee A was on his scaffold when they cut the strap. And Employee A testified that he could not see what the tank workers were doing when they cut the strap, was unaware that they would be cutting straps, and if he had known he would have avoided the area—as he had done the day before when he was instructed to stay clear of the area when straps were to be cut.[12] In sum, the evidence does not establish that LJC had "reason to believe" that the tank workers or Employee A needed retraining. *Compare Gen. Motors Corp.*, 22 BNA OSHC 1019, 1037, 2004-2009 CCH OSHD

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[10] Three other witnesses addressed the presence of a scaffold adjacent to the water tank on the day before the accident. The foreman and site supervisor both referred to a scaffold that was erected on one side of the platform structure that provided access to the tank platform, but neither stated whether the tank workers were on it or, as the shop steward testified, were on the tank platform itself, when they were working with the straps that day. Employee A testified, contrary to the shop steward, that on the day before the accident, workers were cutting straps while on the scaffold adjacent to the water tank. But unlike the shop steward, Employee A did not say that LJC had reason to believe that the tank workers were creating an overhead hazard; in fact, as discussed *supra*, Employee A testified that the area below was cleared before the straps were cut that day.

[11] In response to LJC's inapplicability argument, the Secretary asserts that the standard also applies to workers who are not on a scaffold but whose actions pose an overhead hazard to a worker who is on a scaffold. Because we find that the record fails to establish that LJC had reason to believe that the tank workers needed retraining on overhead hazards pertaining to scaffolds, we need not reach this issue.

[12] The Secretary claims that the circumstances of the accident show LJC had reason to believe retraining was needed. However, he does not explain how "on or about" the day after the accident—the time specified in the citation—LJC could have obtained that information and provided the retraining, since at that point work had ceased at the site, Employee A was at home recovering from his injury, and LJC was still investigating the cause of the accident.

¶ 32,928, p. 53,612 (No. 91-2834E, 2007) (consolidated) (finding similar retraining requirement in lockout/tagout standard violated where supervisors had observed employees failing to follow required safety procedures).

Accordingly, we find that the Secretary failed to establish a violation of the standard and therefore vacate Item 8.

ORDER

We vacate Citation 1, Items 5 and 8, and affirm Item 7, assessing a penalty of $3,000.

SO ORDERED.

/s/ ______________________________
Thomasina V. Rogers
Chairman

/s/ ______________________________
Cynthia L. Attwood
Commissioner

Dated: March 28, 2014

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET NO. 08-1318
LJC DISMANTLING CORP., Respondent.	:	

Appearances:

U.S. Department of Labor
New York, New York
For the Complainant.

Daniel Hennefeld, Esquire
Thomas Bianco, Esquire
Metzer, Lippe, Goldstein & Breitstone
Minealoa, New York
For the Respondent.

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, LJC Dismantling Corp. ("Respondent" or "LJC"), on May 8, 2008. The work site was located in New York, New York. OSHA conducted the inspection after learning of an accident that had occurred at the site on May 7, 2008. As a result of the inspection, on August 5, 2008, OSHA issued a citation to LJC alleging various serious violations of the Act. LJC contested

the citation, and the hearing in this matter took place on June 9 and 10, 2009, in New York, New York. Both parties have filed post-hearing briefs. The Secretary has filed a reply brief.

BACKGROUND

LJC is a building demolition and dismantling contractor operating in the greater New York City metropolitan area. In early 2008, a demolition project began in New York City that involved four connected buildings that had been the site of the Sony Music Company ("the project") at 460 West 54th Street, New York, New York (the "work site", "job site" or "site"). The first part of the project consisted of asbestos abatement by another company. Then, after electric, gas and water service was disconnected, LJC began its dismantling work.[1] The main building, which had four stories, had a steel tower with a water tank on its roof. The tower and tank together were about 30 feet high. The tower's base was about 25 feet square, and the water tank's diameter was about 20 feet. The water tank was made of wood pieces fitted together, and a number of steel straps encircled the tank. The steel straps were approximately 1 inch thick and 45 feet long.

[1]LJC had temporary electric and water service to do its work at the site. (Tr. 382-84).

On May 6, 2008, Eric Roberts, a construction laborer and LJC employee, spent six to seven hours working on dismantling the machine room.[2] The machine room (also referred to as the "mechanical room") was also on the roof of the main building, and it was adjacent to and below the water tank. Mr. Roberts' work that day involved using a torch cutter to burn through and remove parts of the machine room, including beams. Late in the day on May 6, 2008, three other LJC employees, a fire watcher, burner and helper, began removing the steel straps from the water tank by burning through them with a torch cutter. Because it could not be predicted where or how the straps might fall, Brian Wilhelm, LJC's superintendent on the project, told employees to clear the area below the water tower before the strap removal work began. Yellow caution tape was also put up around that part of the roof to prevent any persons, who were not LJC employees, from entering that area. The LJC employees who were removing the straps from the water tank left two of them in place in order to keep the tank intact. (Tr. 21-41, 57-60, 71, 151, 185, 225-26, 346-49, 375-81, 386, 401-05; Exhibits (Exh) J-I, p. 5, 12-16).

[2]Mr. Roberts worked as a "burner" for LJC from about February, 2008 through August, 2008. He was responsible for cutting metal beams at the work site. (Tr. 22-23).

On May 7, 2008, Mr. Roberts continued his work of the day before. Since the beams that he had to cut that day were higher up, he set up a scaffold to reach those beams. The scaffold he put up was a 6-foot-high pipe scaffold, with cross-bracing, that was 8 feet long and 5 feet wide. The steel tower interfered with planking the scaffold correctly, so Mr. Roberts used only three sheet rock planks, each of which was 9 inches wide, to plank the scaffold. Before he started his burning work, Mr. Roberts saw that LJC employees were removing wood pieces from the water tank and lowering them to the roof with rope.[3] He did not see anyone cutting or burning the metal straps, and, as no warnings had been given about clearing the area, he did not believe that any straps would be removed that day. Between 9 and 9:30 a.m., Mr. Roberts was on the scaffold and in the process of heating a beam he planned to cut when he felt something strike him. He grabbed the scaffold with his hand and then fell off the scaffold and onto the roof. He blacked out for a few seconds and then felt someone touch him and ask him if he was all right. Mr. Roberts opened his eyes and saw Gershan Williams. He asked what had happened, and Mr. Williams said that a strap had been cut and it had swung around and hit him. Emergency help was summoned, and an ambulance arrived shortly to take Mr. Roberts to the hospital. Ernesto Castillo, the union steward, accompanied Mr. Roberts to the hospital. Although Mr. Roberts suffered a blunt force trauma from being struck on the neck and shoulder, for which he received physical therapy, he was released from the hospital the day after the accident. He was off work for about six weeks following the accident, after which he resumed working on the project. Mr. Wilhelm wrote up reports of the

[3]The employees removing the wood were Enrique Bahamanda, John Dcaizara and Gershan Williams. They performed this work from a 24-foot-high scaffold that had been set up next to the steel tower and water tank before the dismantling of the tank began. They were as much as twenty feet away from Mr. Roberts and could not be seen by Mr. Roberts when he was on his scaffold. Mr. Williams had worked with Mr. Roberts previously as his burning partner.(Tr. 24, 35-36, 58, 60-61, 71, 399-402, 447).

accident on the same day it occurred. (Tr. 24-26, 38-43, 46, 50-52, 55-56, 61-65, 71-72, 129, 187, 350, 395-97, 405-11; Exhs. 22-23).

OSHA Compliance Officer ("CO") Peter Steinke arrived at the site at 12:30 p.m. on May 8, 2008. He met with Mr. Wilhelm and held an opening conference. The New York City Department of Buildings had stopped the job due to the accident. LJC was the only contractor at the site. Mr. Wilhelm told him that LJC had a skeleton crew making corrections and "buttoning up" the site. The CO and Mr. Wilhelm viewed the scene of the accident and then walked through the rest of the site. The CO spoke to Mr. Castillo and other employees who were at the site. He also spoke to Mr. Roberts by telephone on May 8, 2008. The CO saw a number of conditions he considered violations. One was a sprinkler connection that was covered with plywood. Other conditions were temporary light bulbs without protective cages, damaged electrical cords, a scaffold without a mid-rail, and a jackhammer machine that had been used on the roof of another building without a curb or "stop-log." CO Steinke concluded that Mr. Roberts had not fully planked the scaffold he was on and had not been protected from objects falling from above. He also concluded that employees should have been retrained in the OSHA standard requiring protection from overhead hazards. After the inspection, which took two to three hours, the CO held a closing conference with Mr. Wilhelm and Wojtek Tudek, LJC's main foreman at the site.[4] The citation was issued on August 5, 2008.[5] (Tr. 68, 150-56, 161-63, 166-67, 170-72, 174-81, 183-89, 192-96, 211-12, 346).

JURISDICTION

[4]Mr. Tudek's supervisor on the job was Mr. Wilhelm. (Tr. 346).

[5]The Secretary's complaint, dated November 4, 2008, withdrew Item 1b, a second instance of the alleged violation of 29 C.F.R. § 1926.150(a)(2), and Item 2, which alleged a violation of 29 C.F.R. § 1926.350(h). On May 29, 2009, the Secretary also withdrew Item 9b, a second instance of the alleged violation of 29 C.F.R. § 1926.856(b). (Tr. 7-11).

The parties have stipulated that LJC, at all relevant times, was engaged in construction work at the site. They have also stipulated that LJC was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and that LJC was an employer within the meaning of section 3(5) of the Act. The parties further have stipulated that the Commission has jurisdiction of this matter under section 10(c) of the Act. I find, therefore, that the Commission has jurisdiction of the parties and the subject matter in this case. *See* Exh. J-I, p. 6.

THE SECRETARY'S BURDEN OF PROOF

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The Secretary contends she has met her burden of proof as to all of the cited conditions. LJC contends the Secretary has not proved any of the alleged violations. Alternatively, LJC contends that any violations that existed were not serious.

Citation 1, Item 1a

Item 1a alleges a violation of 29 C.F.R. § 1926.150(a)(2), which states that "Access to all available firefighting equipment shall be maintained at all times." This item was issued because the building's fire sprinkler inlet pipes, called "Siamese connections," were covered by plywood at the sidewalk in front of the building. CO Steinke testified that he saw this condition as he arrived at the

site.[6] A blue plywood fence surrounded the site, and a green piece of plywood, about 2 feet square, covered the Siamese connections. The CO identified Exhibit A-1 as his photograph of the condition. He said the plywood prevented the fire department from readily accessing the connections and that any delay in access was a hazard for the employees at the site and the firemen themselves. He also said that the sign stating “Siamese Sprinkler Connection” above the green plywood cover did not change the fact that the connections were not readily accessible. The CO noted that when he arrived, he saw employees prying off the cover with a crowbar. The cover was nailed down. The CO further noted that when he asked about the condition, Mr. Wilhelm told him that when the fire department or building department had been at the site the day before it had cited LJC for the cover and asked LJC to remove it. (Tr. 155-58, 215, 242-45, 248, 332).

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[6]Mr. Steinke has served as an OSHA CO for nineteen years. He has conducted about 980 inspections, of which, about 80 percent involved the construction industry. (Tr. 147).

Mr. Wilhelm testified he had employees put the cover over the connections because, during his daily morning inspections of the site, he had found that people were accessing the opening where the connections were to sleep and to store items. He also testified he instructed his laborers how to cover the opening and watched as they did so. Nails were put in only the top two corners, and the nails were not driven in all the way, such that the cover could be removed by prying it up at the bottom. Mr. Wilhelm agreed that the fire department had been at the site the day of the accident. He denied that LJC had been told to remove the cover. (Tr. 411-415).

The parties have stipulated that the Siamese connections at the site were covered with plywood that LJC had placed the plywood over the connections, and that a sign above the plywood cover stated "Siamese Sprinkler Connection." *See* Exh. J-I, p. 5, ¶¶ 5-7. Given these stipulations and the testimony above, the Secretary has met all elements of her burden of proof, except for whether the plywood cover over the connections violated the terms of the standard. I find that it did. As the Secretary points out, a similar situation existed in *Bechtel Power Co.*, 7 BNA OSHC 1361, 1366 (No. 13832, 1979) ("*Bechtel*"). The Commission there affirmed an alleged violation of 29 C.F.R. § 1926.150(a)(2), as access to a fire extinguisher was "obstructed" by panels and pipes leaning against it. Based on the facts of this case and *Bechtel*, I conclude the plywood cover over the connections violated the standard. My conclusion is supported by the CO's testimony that Mr. Wilhelm told him that the fire department had cited LJC for the cover and had asked LJC to remove it. (Tr. 157). Mr. Wilhelm denied this was so, but the Court credits the CO's testimony. If the opening was the nuisance Mr. Wilhelm indicated it was, he most likely would not have removed the cover unless a government official required him to do so. (Tr. 412). Item 1 is affirmed.

In assessing penalties, the Commission is required to give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* section 17(j) of the Act. The CO testified that this item was a serious violation because it was a fire hazard that could have caused serious injury, burns or smoke inhalation. The hazard had high severity, but low probability. The proposed penalty, after LJC received a 40 percent credit due to its small size, was $1,500.00. LJC received no credit for history, as it had an OSHA violation in the previous three years, or for good faith, as it had no records showing it had safety inspections or safety training at the site.[7] (Tr. 158-61; Exhibit 24).[8] Based on the CO's testimony, Item 1a is affirmed as a serious violation. I find the proposed penalty appropriate. A penalty of $1,500.00 is assessed.

Citation 1, Item 3

Item 3 alleges a violation of 29 C.F.R. § 1926.405(a)(2)(ii)(E), which provides in relevant part that "All lamps for general illumination shall be protected from accidental contact or breakage." This item was issued as there were temporary light bulbs at the site that were not protected. CO Steinke testified that he saw at least ten temporary light bulbs in hallways and stairwells in the main building that did not have protective covers or cages. He testified that none of the bulbs that he saw in the stairway were covered. He identified Exhibits 2 and 3 as his photographs of two such bulbs in the stairwells that led to the roof and Exhibits 6 and 7 as his

[7]OSHA used the same formula, that is, a 40 percent credit for size and no credit for history or good faith, to arrive at the proposed penalties for all the items in this case. (Tr. 166).

[8]Respondent was unable to locate and produce any records of safety meeting sign-in sheets or safety inspections for the job site. (Tr. 458-59; Exh 24, at pp. 2, 4). The absence of a record of an event that would ordinarily be documented in company records is probative of the fact that the event(s) did not occur. *See Wiley v. United States*, 20 F.3d 222, 227 (6th Cir. 1994). As such, the Court finds that Respondent conducted only one safety meeting with employees during the course of the project and no safety inspections.

photographs of three more such bulbs in hallways, one of which was near the entrance.[9] The CO said employees carrying items like pipes in the hallways and stairwells could have struck the unprotected bulbs and broken them, creating shattered glass and electric shock hazards. (Tr. 161-65, 253-56).

[9]The CO noted that Exhibits 4 through 6 were duplicates of the same view and that Exhibits 4 and 5 were taken without a flash to light up the scene. (Tr. 269).

The CO agreed that he did not see all the temporary lighting in the building and that he saw no broken bulbs. He also agreed that he did not know how long the bulbs had been uncovered and if employees had been carrying items through areas with uncovered bulbs. He further agreed that some of the bulbs were above head level. The CO noted, however, that Mr. Wilhelm told him that employees had been carrying out building contents, including windows, during the previous week. He did not recall Mr. Wilhelm saying that he tried to correct the condition regularly or that the bulbs were recently unprotected. He did recall Mr. Wilhelm saying that some of the cages he had did not fit the bulbs. (Tr. 253-62, 332-33).

Mr. Wilhelm testified that he began each workday by walking through the site and correcting any safety hazards he saw. This included putting covers or cages on light bulbs. He noted that the box shown in Exhibit 7 contained covers that he could use for any bulbs lacking covers. He also noted that there were probably 300 to 400 lights in the main building and that, when the OSHA inspection took place, he had not seen the bulbs that were missing covers. Mr. Wilhelm further testified that LJC employees did not carry items down hallways or stairwells, except for equipment such as small hand tools. He explained that there was a designated dumping area for debris from the demolition work at the back of the building on each floor. (Tr. 387-88, 415-419, 448-49, 454).

The parties have stipulated that at least four temporary light bulbs at the site were not protected by a cage or similar device.[10] They have also stipulated that the four temporary light bulbs were installed by LJC. *See Exh.* J-I, p. 5, ¶¶ 8-9. In view of these stipulations and the testimony above, the Secretary has shown the standard applies and that its terms were violated. As

[10]Mr. Wilhelm also admitted that the light bulb shown in Exhibit 2 was "supposed to have a plastic cover on it, a cage." (Tr. 416).

to employee access to the hazard and LJC's knowledge of the violation, the testimony of the CO conflicts with that of Mr. Wilhelm. I observed the demeanor of these witnesses as they testified, including their facial expressions and body language. I found the CO to be a credible and convincing witness, and, while Mr. Wilhelm was credible in some respects, I found certain aspects of his testimony unreliable. The Court will thus credit the CO's testimony over that of Mr. Wilhelm to the extent their testimony differs. I credit the CO's testimony that Mr. Wilhelm told him that employees had been carrying out contents of the building, including windows, during the week before the inspection. I also credit his testimony that Mr. Wilhelm said nothing about attempting to correct the condition regularly or the bulbs being recently unprotected. Finally, I credit the CO's testimony that Mr. Wilhelm told him that some of the covers he had did not fit the bulbs. (Tr. 255-62, 332-33). Based on this evidence, the Secretary has shown employee access to the cited condition. She has also shown that LJC either knew or should have known of the violation. Item 3 is affirmed.

CO Steinke testified that this item was classified as serious, despite its low gravity and lesser probability, because if a bulb broke and shattered an employee could get glass in his eyes. The CO further testified that the proposed penalty for this item was $900.00. (Tr. 164-66, 253). In light of the record, this item is affirmed as a serious violation. I find the proposed penalty to be appropriate. A penalty of $900.00 is assessed for this item.

Citation 1, Item 4

Item 4 alleges two instances of violation of 29 C.F.R. § 1926.416(e)(1), which provides that "Worn or frayed electric cords or cables shall not be used." Item 4a was issued as there was a damaged extension cord at the site. CO Steinke testified that on the ground floor, near the entrance of the building, there was an orange extension cord hanging about 5 feet from the floor. The CO

identified Exhibits 7 and 8 as his photographs of the cord, Exhibit 8 being a closeup. He said the cord was tied into a kind of “figure 8” knot. He circled the cord on Exhibit 7 and its damaged portion on Exhibit 8. The CO noted that the cord’s insulation was torn and its wiring exposed. He stated that there was copper showing where the cord was nicked. He also stated that the ground wire was visible. He also noted that he tested the cord with a Santronics current AC Tester, which has a tip that lights up if a cord is live.[11] He touched the sensor to the exposed wiring, the tip lit up, and he showed it to Mr. Wilhelm. The CO said employees walking through the doorway shown in Exhibit 7 could have contacted the cord and been shocked. He also said LJC should have removed the cord. (Tr. 166-70, 281-82, 333-34).

Mr. Wilhelm testified that Exhibit 7 showed a hallway and a doorway that led to the three-story building and auditorium at the site. He said this location was where Sony shot movies and that the whole area was covered with wires, cables, cords and other equipment. He also said the area was de-energized, that the cords in Exhibit 7 were not LJC’s, and that the only way to have powered the cords was through LJC’s temporary electrical source. Mr. Wilhelm had no reason to think the cords were energized. He never plugged them into LJC’s temporary source. No one from LJC would have done so. He looked at the temporary electrical source every day. Mr. Wilhelm recalled the CO testing the cord with a sensor, but he did not see it light up and the CO never said anything to him about the cord. Mr. Wilhelm stated he had not seen the hazard depicted in Exhibit 8. (Tr. 420-24, 452).

[11]The CO agreed the Santronics AC Tester shown in Exhibit J was what he used. He also agreed his worksheet from the inspection stated he used a Sure Test, a different tester. He said that the worksheet entry was a mistake, as he had used the Santronics tester. (Tr. 267-72; Exh. I, p. I-9).

The parties have stipulated that an extension cord near the entrance of the work site was damaged with torn insulation. *See* Exh. J-I, p. 5, ¶ 10. This stipulation and the CO's testimony establish that the standard applies, that its terms were violated, and that employees had access to the cited condition. Although Mr. Wilhelm's testimony was contrary to that of the CO in regard to this item, the credibility of these two witnesses was determined in the discussion relating to Item 3, *supra*. The CO's testimony is thus credited over that of Mr. Wilhelm.

Ernesto Castillo was the union shop steward who worked for LJC on the Sony project.[12] He stated that work safety is one of the main reasons unions send a shop steward to a project. Mr. Castillo testified that his number one job as the steward is to make sure that workers are safe. He also testified about the cords at the site. Mr. Castillo said there were many orange extension cords on the project, and he recognized the cord in Exhibit 7 as one of those used at the site. He testified that the cord had "the potential to be able to hurt people." Mr. Castillo testified that when he reported the defective cord to an LJC foreman, either Mr. Tudek or a man identified as "Richard," he was told by both to go ahead and use the cord anyway.[13] The exposed extension cord was plugged in over water. He testified that no one was aware when electricity was running because there was no electrician on site to take charge of the connection. He also said that both Mr.

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[12]Mr. Castillo worked in the construction field for ten years. He has been a union shop steward for eight years. He has worked for LJC several times. He has twenty-one different work certifications, including scaffolding, OSHA training, fire watch, and first aid, as well as a license to be a shop steward. He has helped demolish between 13 to 14 different buildings with different companies. On the work site, he performed various jobs for LJC, including fire watch and checking trucks for materials. (Tr. 78-82).

[13]Mr. Castillo testified that there were two foreman at the job site, "Walter" and "Richard.". When referring to "Walter," Mr. Castillo was referring to Mr. Tudek. Mr. Wilhelm testified that Richard (also referred to as "Richie" or "Richey") was a lead man at the job site who exercised supervisory responsibilities for LJC on other jobs. He may also have supervised activities at the work site after May 7, 2008. (Tr. 85-86, 95, 392, 445-46).

Wilhelm and an LJC foreman had told him to use the cord shown in Exhibit 7, despite its damaged condition. (Tr. 78-89, 112, 124-126, 132, 140, 170).

LJC disputes this testimony, asserting Mr. Castillo was a biased witness.[14] R. Brief, pp. 7-10. Mr. Castillo testified, however, that he had nothing in particular against LJC, especially since it had "given [him] a lot of work." (Tr. 131). Mr. Roberts also testified that he did not believe that Mr. Castillo was hostile to LJC. (Tr. 53-54). I observed Mr. Castillo's demeanor as he testified, and I found him to be a sincere and reliable witness. Although LJC points to a number of claimed inconsistencies in his testimony, I do not find the examples LJC has pointed out to be of any great moment. R. Brief, pp. 8-10. Mr. Castillo's testimony is credited. I also find that the orange extension cord was damaged, live with exposed electric, and used near the building's entrance on May 8, 2008 by Respondent. The Secretary has shown the element of knowledge. Item 4a is affirmed.

Item 4b was issued due to a welding machine at the site that had a damaged power cord. CO Steinke testified that there was a repair shop on the ground floor at the site. In the repair shop, he saw a welding machine with a damaged power cord. He identified Exhibit 9 as his photograph of the machine, and he circled the cord's damaged area. The CO said the cord had already been repaired once, in that there was a spliced area on the end that was a different color than the rest of the cord. He also said the spliced area had pulled apart, leaving the inner wires with just a little insulation on them. The CO noted that the machine was useable in that condition. If the cord ripped further, however, anyone using the machine could receive an electric shock when welding where there was water on the floor. (Tr. 170-73, 336).

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[14]Mr. Tudek did not testify whether or not he told Mr. Castillo to use the defective cord.

The parties have stipulated that the cord on the welding machine in the repair shop was damaged with cuts to the outer insulation. *See* Exh. J-I, p. 5, ¶11. This stipulation, together with the CO's testimony, establishes that the standard applies and that the cord's condition violated the terms of the standard. As to employee access, the CO agreed that he did not see the machine being used and that no one told him it had been used in that condition. He agreed that the proper way to abate the use of the welding machine was to take it out of service. The CO testified that he did not know the welding machine was out of service. He conceded that if he had been told that the welding machine was in the repair shop to be repaired that "might change things." (Tr. 264-65). He also admitted that no one told him that the welding machine had been used since the prior repair had come undone. The CO further admitted that Mr. Wilhelm did not tell him the welding machine was in the repair shop not to be repaired. He conceded that Mr. Wilhelm did not tell him that the welding machine was being used in an unrepaired condition. The CO believed the machine was not out of service because no one told him it was in the repair shop to be repaired. He also believed it could have been used to repair other equipment in the shop. He conceded that all he said to Mr. Wilhelm was that the cord needed to be fixed. Mr. Wilhelm agreed to do so. (Tr. 172-73, 263-66, 337).

Mr. Wilhelm testified that the CO did not ask about the machine being used with the damaged cord. He also testified that he himself had not seen it used in that condition. Mr. Wilhelm surmised that since the welding machine was in the repair room, the mechanic was going to repair it. (Tr. 424-25). The repair shop was locked with the welding machine in it. Only the repair shop mechanic had access to the welding machine. (Tr. 450). Respondent had no reason to believe that its employees would have access to the welding machine, which was kept in an area secured "with a chain and lock." In fact, it was reasonable for LJC to predict that its employees would not have

access to the welding machine secured in the repair shop. (Tr. 450). *See Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996)(Access to unguarded rebars exists if there is "reasonable predictability" that employees "will be, are, or have been in" the "zone of danger.")("Kokosing")(citing *Capform, Inc.,* 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994). In view of the evidence, I find that the Secretary has not shown that employees had access to the cited condition. I also find that she has not shown the knowledge element. Item 4b is vacated.

The CO testified that Item 4a was classified as serious as the electrical shock hazard could have caused serious injury. The condition had high gravity but lesser probability. (Tr. 173). This item is affirmed as serious, and the proposed penalty of $1,500.00 is assessed.[15]

<u>Citation 1, Item 5</u>

Item 5 alleges a violation of 29 C.F.R. § 1926.451(b)(1), which states as follows:

> Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports....

Section 1926.451(b)(1)(I)-(ii) states what is required for a scaffold platform to be "fully planked" under the standard, as follows:

> (I) Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary....
>
> (ii) Where the employer makes the demonstration provided for in paragraph (b)(1)(I) of this section, the platform shall be planked or decked as fully as possible and the remaining open space between the platform and the uprights shall not exceed 9 ½ inches (24.1cm).

[15]The CO testified the proposed penalty was $2,500.00. (Tr. 174). The citation shows it as $1,500.00. I conclude that the CO was mistaken about the proposed penalty.

This item was issued because Mr. Roberts used only three planks for a platform when he set up the scaffold he used at the site. Mr. Roberts testified he used three planks, each of which was 9 inches wide, as the adjacent steel tower interfered with planking the scaffold correctly. Mr. Roberts also testified the scaffold was 5 feet, or 60 inches, wide. (Tr. 38-39, 46). CO Steinke testified that six planks were needed to cover the scaffold's width.[16] (Tr. 174-75). Based on the testimony of Mr. Roberts and the CO, the scaffold was only half planked, leaving an open space of approximately 2.5 feet through which Mr. Roberts could have fallen.

The parties have stipulated that the scaffold platform at the site was planked such that the space between adjacent planks of the platform was more than 1 inch wide. *See* Exh. J-I, p. 6, ¶ 18. I find that the cited standard applies and that LJC was in violation of the standard's terms. I also find that Mr. Roberts' explanation for why he used only three planks does not meet the exception set out in section 1926.451(b)(1)(i), *i.e.*, that of demonstrating that a wider space was necessary. Even if his explanation did meet the exception, the remaining open space was over twice the 9 ½ inches allowed in section 1926.451(b)(1)(ii). As to access to the hazard, the Court finds that Mr. Roberts was exposed to falling through the 2.5-foot space that was created by the three-plank platform.

[16]The CO did not observe the scaffolding. Mr. Wilhelm testified that it had been taken down to facilitate the Emergency Medical Services' removal of Mr. Roberts from under the scaffold after he fell. (Tr. 222, 370, 395-97). Mr. Roberts told the CO, however, that he had used only three planks on the scaffold. (Tr. 174-175).

The remaining element of the Secretary's burden is that of employer knowledge. LJC contends that it had no knowledge of the condition because neither Messrs. Wilhelm nor Tudek had instructed Mr. Roberts to build the scaffold or knew that he was building one. Messrs. Wilhelm and Tudek both testified that they did not see the accident, ran up to the roof as soon as they learned of it, and saw Mr. Roberts laying under the scaffold on the roof. (Tr. 349, 352-53, 367, 370, 394-97). They also testified they did not see Mr. Roberts building the scaffold.[17] (Tr. 370-72, 406). Mr. Tudek, however, said he had been up on the roof earlier that day and had seen Mr. Roberts working then. (Tr. 370). He also said that he discussed with employees every morning what they would be doing that day.[18] (Tr. 351, 358). Mr. Tudek's testimony makes it clear that he knew where Mr. Roberts had been working and the work he had been doing the day before and day of the accident. (Tr. 356-67, 370). In addition, Mr. Roberts testified that it was Mr. Wilhelm who told him, the day before the accident, to "take apart what [he] could take apart" of the machine room. (Tr. 34-35).

[17]Mr. Roberts agreed that Mr. Wilhelm did not see him building the scaffold. (Tr. 65-66).

[18]Mr. Roberts also indicated that such discussions took place. (Tr. 54-55).

Based on the record, I find that LJC had either actual or constructive knowledge of the work Mr. Roberts was doing and his use of the scaffold on the day of the accident.[19] In so finding, I have noted the testimony of Messrs. Tudek and Wilhelm that they did not see a torch in the area of the scaffold when they went up to the roof after the accident. (Tr. 371-72, 398). This testimony would appear to be an attempt to show that Mr. Roberts was still building the scaffold and had not yet started his cutting or burning work when the accident occurred. Mr. Roberts, however, testified that he was heating the metal of a beam he was planning to cut when the accident took place. (Tr. 24-25, 55-56). His testimony is consistent with the reports Mr. Wilhelm prepared after the accident. (Tr. 410-11). Those reports state that Mr. Roberts was using a torch to cut and burn steel beams from a 6-foot-high scaffold on the roof level. *See* Exhibits 22-23. I conclude that the Secretary has met her burden of proving the alleged violation.

LJC next suggests that Roberts' use of only three planks was a result of isolated employee misconduct. R. Brief at pp. 5, 28. The Commission has long held that, to prove the affirmative defense of unpreventable employee misconduct, the employer must show that: (1) it has established work rules designed to prevent the violation, (2) it has adequately communicated the rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations were detected. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). LJC has not met its burden of proving that the violation was caused by unpreventable employee misconduct.

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[19]Mr. Wilhelm said he did not notice how many planks were on the scaffold. (Tr. 406). This testimony does not change the fact that Messrs. Wilhelm and Tudek either knew, or should have known in the exercise of reasonable diligence, that Mr. Roberts would have to use a scaffold to do his cutting work on the day of the accident. *See, e.g.*, Tr. 370.

First, while LJC had a safety plan for the project that addressed some aspects of scaffold safety, the plan did not cover the issue of fully planking a scaffold. *See* Exhibit E, pp. 21, 36, 39. Second, Mr. Roberts testified that he never received any instructions from LJC about scaffold platform planking. He also testified that he recalled no discussion of scaffold safety during the only toolbox safety meeting that was held at the site while he was there. (Tr. 46-47). Third, although Mr. Wilhelm testified that he conducted toolbox meetings and safety inspections at the site, the record shows that LJC had no documentation of such meetings or inspections when the Secretary requested them during discovery. *See* footnote 8, *supra*. Fourth, Mr. Roberts testified that LJC neither retrained him nor disciplined him in any way after the accident. (Tr. 43-44). LJC's claimed defense is rejected, and this item is affirmed.

LJC disputes the serious classification of this item, pointing out that CO Steinke stated in his notes that Mr. Roberts "was not seriously injured." *See* Exhibit I, p. I-11. Mr. Roberts also indicated that he was not seriously injured. (Tr. 42-43). The CO, however, testified the classification was proper because Mr. Roberts could have been seriously injured from falling off a 6-foot-high scaffold. He also testified that the severity of the violation was high and the probability greater due to the size of the opening and the fact that Mr. Roberts was wearing a helmet and holding a torch and it would not have been easy for him to watch his footing as he was working. (Tr. 175-76). The Court agrees with the CO's testimony about the serious classification. The Court also agrees that the proposed penalty of $3,000.00 is appropriate for this item. (Tr. 176-77). This item is affirmed as serious, and the proposed penalty of $3,000.00 is assessed.

Citation 1, Item 6

Item 6 alleges a violation of 29 C.F.R. § 1926.451(g)(1). That standard provides that:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold.

This item was issued because scaffolding that was set up around the main building did not have mid-rails meeting the standard. CO Steinke testified that roof-level scaffolding on the perimeter of the building did not have mid-rails that were 20 to 30 inches above the scaffold's work platform. He identified Exhibit 11 as his photograph of that scaffolding. He marked a "B" and an "A" on Exhibit 11 to show, in turn, the cross-point of the cross-bracing and the guardrail that ran along the scaffold's exterior just under the cross-point. The CO determined the bottom of "A" was 36 inches above the platform and that "B" was about 46 inches above the platform.[20] He noted that although "B" was a compliant top rail, it was not a compliant mid-rail since it was 42 inches above the platform. He also testified that "A" was not a compliant mid-rail as it was more than 30 inches above the platform. He noted that while the scaffolding's exterior had debris netting, that was to prevent objects from falling off the scaffolding. The CO said the netting was not a substitute for a mid-rail since it was attached to the scaffold's uprights and not to the work platform. The CO also said that not having a proper mid-rail left a 36-inch space through which employees could fall, and the distance to the ground level below was 35 feet.[21] (Tr. 177-82, 299-308, 338-39).

The parties have stipulated that the scaffold on the top perimeter of the building did not have a guardrail that was 30 inches or less above the scaffold's work platform. They have also

[20]The CO first indicated he measured the "A" and "B" shown in Exhibit 11. He later indicated he measured other identical scaffolding at the site. (Tr. 177-78, 297-98, 305, 308-13).

[21]The CO indicated that no one had yet worked from the scaffolding shown in Exhibit 11. Mr. Wilhelm told him, however, that work had been done from the scaffolding depicted in Exhibit 10, a view from the other direction of the roof-level perimeter scaffolding on the building. (Tr. 182).

stipulated that the crossing point of the scaffold's cross-bracing was over 30 inches above the work platform. *See Exh.* J-I, p. 5, ¶¶ 13-14. Based on the stipulations and the CO's testimony, I find the Secretary has proved the alleged violation. As she notes, the cited scaffold was pipe frame scaffolding and was not covered by paragraphs (g)(1)(i) through (vi). The scaffold was thus subject to the guardrail system requirements of 29 C.F.R. § 1926.451(g)(4). *See* 29 C.F.R. § 1926.451(g)(1)(vii). As she also notes, the term "guardrail system" is defined as "a vertical barrier, consisting of, but not limited to, toprails, midrails, and posts, erected to prevent employees from falling off a scaffold platform or walkway to lower levels." *See* 29 C.F.R. § 1926.450(b). The standard requires that "[w]hen midrails are used, they shall be installed at a height approximately midway between the top edge of the guardrail system and the platform surface." *See* 29 C.F.R. § 1926.451(g)(4)(iv). *See also* S. Brief, pp. 15-17.

The CO's testimony establishes that while either the cross-bracing or the guardrail just under the cross-bracing cross-point met the requirements for a top rail, neither was a compliant mid-rail. (Tr. 178-79, 310-13). Paragraph (g)(4)(xv) states as follows:

> Crossbracing is acceptable in place of a midrail when the crossing point of two braces is between 20 inches (0.5 m) and 30 inches (0.8 m) above the work platform or as a toprail when the crossing point of two braces is between 38 inches (0.97 m) and 48 inches (1.3 m) above the work platform.

Respondent has argued that the debris mesh netting along the cited scaffold constituted a compliant midrail and/or guardrail system. As the CO explained, the purpose of that mesh netting is to prevent small objects, such as debris, from being blown or falling off of the scaffold onto the sidewalk below. It does not provide fall protection for employees. (Tr. 338). The CO testified that the netting was attached only to the uprights of the scaffold, not to the guardrails or along the length of the scaffold platform. (Tr. 180-181). The CO's testimony as to the attachment points

of the netting was unrebutted.[22] The CO testified that because the netting was not attached at all to the guardrails, or along the length of the scaffold platform, the netting did not form an effective barrier that would prevent a person from rolling over the edge of the scaffold. (Tr. 180-181, 333, 338-339). The Court finds that the mesh netting at the job site was inadequate to serve as fall protection in compliance with the OSHA scaffold standard. The Court also finds that the mesh netting was not a compliant guardrail.[23] The debris netting here did not constitute a compliant midrail and/or guardrail system.

[22] Mr. Wilhelm testified that, running horizontally, there was a distance of eight feet between each attachment point of the netting. (Tr. 450-451). This was the distance between the scaffold uprights. Mr. Wilhelm further testified that the netting was attached to the scaffold frame "every two feet." (Tr. 428). He later admitted he was referring to the vertical distances between attachment points along the scaffold uprights. (Tr. 450-451).

[23] The scaffold guardrail standard requires a mesh/screen midrail to be "capable of withstanding, without failure, a force applied in any downward or horizontal direction at any point ... of at least 75 pounds (333 n) for guardrail systems with a minimum 100 pound toprail capacity, and at least 150 pounds (666 n) for guardrail systems with a minimum 200 pound toprail capacity." 29 C.F.R. § 1926.451(g)(4)(ix). The Court is not persuaded that the netting used by Respondent here was capable of withstanding, without failure, at any point the weight identified in the standard. The netting was not attached along the scaffold platform. A distance of eight feet separated each attachment point of the netting. (Tr. 450-451). *See Big Apple Wrecking & Constr. Corp.*, 19 BNA OSHC 1290 (No. 99-0313, 2000)(CALJ decision)(violation of the scaffold guardrail standard affirmed where wire mesh observed by CO along the sides of the scaffolding did not meet the standard at 29 C.F.R. § 1926.451(g)(4)(xv).).

The Secretary has shown that the cited standard applies and that its terms were not met. She has also shown that employees were exposed to the cited hazard. Mr. Wilhelm told the CO that work had been done on the scaffolding depicted in Exhibit 10, which shows the roof-level perimeter scaffolding from the other direction than that in Exhibit 11. (Tr. 182). The CO testified that the fall distance from the scaffold platform to the ground below was 35 feet. (Tr. 180). Finally, the Secretary has shown that LJC had knowledge of the cited condition. Mr. Wilhelm testified that he oversaw the scaffolding's erection, which LJC subcontracted to Skyline Scaffold. (Tr. 297, 379). This item is affirmed.[24]

CO Steinke testified this item was a serious violation due to the fall distance involved. He rated the condition as having high gravity and lesser probability. (Tr. 183). I agree with the CO's classification of this item, and Item 6 is affirmed as a serious violation. I also agree with the proposed penalty for this item and find it appropriate. (Tr. 184). A penalty of $1,500.00 is assessed.

[24]In affirming this item, I have noted LJC's argument that the netting was a substitute for a mid-rail. *See* R. Brief, pp. 29-30. The CO testified it was not, as it was not attached to the work platform and an employee could fall through it. (Tr. 180-81, 299-308, 338-39). Mr. Wilhelm agreed the netting was not attached to the platform. He admitted that the netting had "a couple of inches at the most of give at the bottom." Mr. Wilhelm did not believe a body could fall through it. (Tr. 428-29, 450-51). The CO's testimony is credited, and LJC's argument is rejected.

Citation 1, Item 7

Item 7 alleges a violation of 29 C.F.R. § 1926.451(h)(1), which states that:

> In addition to wearing hardhats each employee on a scaffold shall be provided with additional protection from falling hand tools, debris, and other small objects through the installation of toeboards, screens, or guardrail systems, or though the erection of debris nets, catch platforms, or canopy structures that contain or deflect the falling objects. When the falling objects are too large, heavy or massive to be contained or deflected by any of the above-listed measures, the employer shall place such potential falling objects away from the edge of the surface from which they could fall and shall secure those materials as necessary to prevent their falling.

This item was issued because Mr. Roberts was exposed to being struck by metal straps falling from the roof-top water tank as he worked on the welded frame pipe scaffold. Mr. Roberts testified that he was beginning to perform work from the 6-foot-high scaffold he had set up next to the base of the water tank tower when the accident occurred. He also testified that, at that same time, other LJC employees were working on demolition of the water tank.[25] (Tr. 24-28, 39-40). The Secretary asserts the standard applied and that LJC was required to protect Mr. Roberts from objects falling from the water tank, including the straps holding the tank together. The CO testified that LJC should not have allowed Mr. Roberts to work on the scaffold in close proximity to the water tank where dismantling work was being done without any overhead protection because of the straps. The Secretary also asserts that Mr. Roberts was struck by one of the straps. S. Brief, pp. 18-21. LJC disputes this assertion, arguing that the Secretary has not shown this occurred. R. Brief, pp. 31-32. I agree with the Secretary.

[25]Mr. Roberts said the workers were removing wood pieces and lowering them down with rope. They also had tools for this work. (Tr. 25-26, 39-40). Mr. Roberts stated that this work was being done on the other side of the tank from where he was working. (Tr. 25-26, 60).

First, Mr. Roberts testified that Mr. Williams told him, when he came to and asked what had happened, that a strap had been cut and it swung down and hit him. (Tr. 41-42, 233, 237-38). Mr. Williams had previously been Mr. Roberts' burning partner and served as a reference when Mr. Roberts was hired by LJC. When the accident occurred, he was one of the employees working on dismantling the tank. (Tr. 58, 61, 71-72, 396, 447-48). As the Secretary notes, in the heat of the moment, Mr. Williams was most likely telling Mr. Roberts the truth.[26] Mr. Wilhelm testified that when he got to the roof and asked what had happened, Mr. Roberts told him "he felt a strap hit [him]." (Tr. 395). This response was most likely based on what Mr. Williams had said, as Mr. Roberts agreed he did not actually know what hit him. (Tr. 63). Mr. Wilhelm investigated the accident and prepared two handwritten reports that very same day.[27] One was an internal "Accident Report," and the other was a report required by the State of New York Workers' Compensation Board. Both reports stated that a steel band from the water tower fell and struck Mr. Roberts on the neck and shoulder. (Tr. 410-11; C-22-23).[28] Mr. Wilhelm testified that a strap

[26]I also conclude that Mr. Roberts was telling the truth about what Mr. Williams told him. I observed his demeanor on the stand, and I found him to be a reliable and credible witness.

[27]Mr. Wilhelm said the reports were based on what Mr. Roberts told him and what he could "put together," in that no one saw the accident. He also said he talked to the workers who had been dismantling the tank. Mr. Williams stated he did not cut anything and was helping the other two lower down wood. The other two stated that they had not seen anything happen. (Tr. 410-11, 440-41, 447-48, 453). These statements, in my view, do not detract from what Mr. Williams told Mr. Roberts, as he may not have wanted to admit to a superior a strap was cut.

[28]The Accident Report, dated May 7, 2008, stated that "A steel band from Water Tower 15-20 feet away came loose as workers were dismantling tower. The steel band fell and struck employee on the neck and shoulder." (Exh. 23). At Exhibit 22, in the Report to New York's Workers' Compensation Board, dated May 7, 2008, Mr. Wilhelm stated the following in response to the question at block 23:

could not have struck Mr. Roberts because he had told the employees not to cut any straps that day.[29] (Tr. 439-40, 446-47). This testimony is unpersuasive based on his prior testimony that he intended to have the bands cut before the wood was taken out. (Tr. 404). The Court finds the reports to be the more reliable evidence as to the cause of the accident. Mr. Wilhelm admitted that he tried to insure that the information he provided on reports to government agencies and accident reports to LJC were accurate and truthful. He also conceded that he made no attempt to later correct either report. (Tr. 433-38).

Secondly, Mr. Castillo testified that when Mr. Robert's accident was first reported to him right after it happened, he was told that a piece of metal had knocked Mr. Robert's down. (Tr. 90-91). Mr. Castillo stated that he found Mr. Roberts unconscious at the base of the water tower. He stated that Mr. Roberts would have been killed if he had been on the other side of the water tower because he would have fallen directly down. (Tr. 93).

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23. HOW DID THE ACCIDENT OR EXPOSURE OCCUR? (Please describe fully the events that resulted in injury or occupational disease. Tell what happened and how it happened. Please use separate sheet if necessary.)

STEEL BAND FROM WATER TOWER WAS DROP[*SIC*] & HIT HIM IN THE SHOULDER & EMPLOYEE FELL FROM ON FRAME OF SCAFFOLD.

[29]He also testified the straps were too strong to come apart accidentally. (Tr. 439-41).

A third reason for finding that a strap hit Mr. Roberts is the photographic evidence in the record. Both the CO and Mr. Roberts identified cut straps hanging down from the tank, as shown in Exhibits 15-16, that were near the area where Mr. Roberts was working.[30] (Tr. 29, 188-90). Mr. Wilhelm testified, in addition, that on the day before the accident two straps were left on the tank to keep it intact. Mr. Wilhelm testified that he intended to have these two straps cut before wood was removed from the tank. He also stated that LJC was going to remove the wood on May 7, 2008. (Tr. 404-05, 438-39). Exhibit 13, depicting the water tank the day after the accident, appears to show only one strap still in place, at the point marked "A." (Tr. 60-61). As the Secretary notes, no straps would have been removed after the accident, as the job was shut down. The CO testified that when he visited the accident site on May 8, 2008, it looked to him like a tank strap had sprung around and hit Mr. Roberts. One of the straps was thus removed the day of the accident. The Secretary concludes that this strap was the one that struck Mr. Roberts. The CO stated that if a strap had sprung out it could easily have whipped around and reached Mr. Roberts. (Tr. 188-90). The Court agrees with the Secretary's conclusion.

A fourth reason for finding that a strap caused the accident is the testimony indicating it could not be predicted how a cut strap would fall. Mr. Roberts testified a strap could "fly any which way" when cut. (Tr. 27, 33, 35). Mr. Wilhelm testified that when a strap was cut there was a possibility that "it would go somewhere you don't want it to go." (Tr. 403). Mr. Castillo testified that a cut strap "would release with an incredible amount of force." (Tr. 97-98). Mr. Wilhelm agreed that the straps, when being cut, were a falling object hazard to anyone working below the water tank. (Tr. 442).

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[30]Exhibits 12-16 were taken by the CO on May 8, 2008. (Tr. 184-90; Exh. J-I, p. 2).

Fifth, OSHA's Inspection Narrative prepared by the CO, dated July 31, 2008, states at the Accident Investigation Summary & Findings that:

> Accident: LJC demolition (Burner) employee was struck on the back of the neck by a falling object while a team of co workers was working approx 20 feet higher nearby on the top of the water tower structure. He was knocked from his position to the ground and received contusions, 911 was called, he was taken to the hopsital treated and released. He is an experienced burner employee, was wearing a hardhat, was struck on the upper back and back of his neck, apparently (he didn't see what hit him) by one of the steel rods that were being cut off the water tank above him. The other crew was cutting the rods at the time of the accident. (Photos 431, 432) show the rods hanging from the water tank that were cut.

(Tr. 208-11, 227-28, 231-37; Exhibits 15, H, p. H-2). I find the Inspection Narrative to be factually correct and an accurate description of Mr. Roberts' accident.

The parties have stipulated that LJC employees removed straps of metal from the water tank and allowed them to fall to the ground below. The parties further stipulated that Mr. Roberts worked at the site without overhead protection from objects falling from above. *See* Exh. J-I, pp. 5-6, ¶¶ 16, 19. In light of these stipulations and the evidence set out above, the Court finds the cited standard applied, that its terms were not met, and that Mr. Roberts was exposed to the cited hazard.

In regard to knowledge, LJC plainly knew the cited condition was a hazard. The day before the accident, Mr. Wilhelm told employees to clear the area below the water tower before the strap removal work began. Yellow caution tape was also put up around that part of the roof to prevent any unauthorized persons from entering that area. (Tr. 27, 32-38, 41, 403-04). No such precautions were taken the day of the accident.[31] Mr. Wilhelm's testimony that he told employees to not cut any straps on May 7, 2008 has been rejected. (Tr. 39-41, 443-44). The discussion relating to Item

[31] Mr. Castillo testified that several LJC employees working at the water tank were exposed to falling straps on May 7, 2008. (Tr. 94-98).

5, *supra*, establishes that LJC knew or should have known where Mr. Roberts was working on the day of the accident. Mr. Castillo, furthermore, testified that he had told Foreman Tudek before the accident that how LJC was doing the strap removal work was dangerous.[32] Mr. Castillo also testified that several days before the accident he warned LJC employees not to work underneath the water tower because "one of the pieces of metal is going to come flying off."[33] (Tr. 99). He advised LJC employees working at the water tower to talk to the foreman and tell him "this is too dangerous." The workers told Mr. Castillo that, if they said something to the foreman, the foreman would send them home. (Tr. 100).[34] Mr. Castillo testified that he told Messrs. Tudek and Richey at the work site before Mr. Robert's accident that he had seen an accident before on a tank with a K-Span where long metal pieces were burnt during demolition. (Tr. 95-97). Mr. Tudek told Mr. Castillo to "get out of here" and "mind [his] own business" after Mr. Castillo asked him why he had cut the straps into small pieces. (Tr. 94-98). Mr. Castillo also testified that he spoke many times with the union area agent, John, and told him how the workers were cutting the water tank was unsafe. (Tr. 114, 133). I find Mr. Castillo's testimony to be entirely credible. Mr. Tudek's

[32] Brian Wilhelm presented Mr. Tudek to the CO as LJC's chief foreman. (Tr. 319). The OSHA-1B Worksheet prepared by the CO identified the "demo foreman" or "Foreman" on the work site as "Richard (Voitek) Tudek" or "Richard Tudek." (Exh. I, pp. I-1, 5-7, 11-12). Respondent's discovery responses identified Mr. Tudek's first name as "Wojcicech." The parties stipulated that "Wojciech Tudek" was LJC's foreman at the work site. (Exh. J-I, at p. 5, #4). At the trial, Mr. Tudek identified his first name as "Wojtek." (Tr. 343).

[33]The CO testified at trial that Mr. Castillo told him on May 8, 2008 that he (Mr. Castillo) had told LJC employees before the accident not to cut the water tank straps while employees were working down below. (Tr. 193-94).

[34]Mr. Castillo testified that Mr. Tudek overheard him telling his coworkers "[Y]ou guys shouldn't be here. [I]t's too dangerous here. [N]obody should be underneath here." Mr. Tudek told Mr. Castillo to leave and that it was none of his business. He further told Mr. Castillo that he (Mr. Tudek) was "in charge here. [T]hat's why I'm the foreman." (Tr. 101-102).

testimony that Mr. Castillo never complained to him about safety issues relating to the cutting of steel bands is rejected as not credible. (Tr.351-52).

Respondent had knowledge that its employee was not protected from falling object hazards on May 7, 2008 on the job site. Both Messrs. Wilhelm and Tudek had knowledge that Mr. Roberts was not protected from the falling object hazards related to the water tank demolition. Respondent either knew, or should have known, of the condition through the exercise of reasonable diligence. Respondent did not exercise reasonable diligence with respect to this issue.

Respondent's supervisors had actual knowledge of the work plans and instructions that they conveyed to the employees and the work that was to be performed by the employees on May 7, 2008. The supervisors knew that the water tank crew could be demolishing the tank at the same time that Mr. Roberts would be working on a scaffold right next to the tank tower. Respondent had a duty to protect Mr. Roberts from falling object hazards resulting from that scenario. Mr. Roberts testified that the day before the accident, when water tank demolition had already begun, Mr. Wilhelm directed him to cut (by burning) the steel on the mechanical room located (at Point C in Exhibit 14) adjacent to the water tank tower. (Tr. 29, 33-34). Mr. Wilhelm saw Mr. Roberts performing that work the day before the accident. (Tr. 35). Mr. Roberts did not finish that work the day before the accident, and so he continued it on the day of the accident. (Tr. 39). Because the mechanical room's steel beams that Mr. Roberts were directed to cut included overhead beams (Tr. 25, 38-39; Exh. 16 (Point A)), Mr. Wilhelm knew or should have known that Mr. Roberts would need to use a scaffold to reach the upper beams. Respondent's supervisors also knew that a steel strap could be removed from the water tank in the process of the tank demolition on the day of

the accident. As Mr. Wilhelm testified, on the day before the accident, two steel straps were left in place on the water tank. (Tr. 404). He also stated that he intended to have the remaining steel straps cut before all of the wood was removed from the tank. *Id.* Mr. Tudek testified that on the day of the accident he did not tell any employees not to cut the straps.[35] Based on their knowledge of the work plans and activities, Respondent's supervisors had actual knowledge of the violative condition. Alternatively, the supervisors clearly had at least constructive knowledge of the condition through LJC's failure to exercise reasonable diligence in that the condition was in plain view and Mr. Roberts was on his scaffold next to the water tank tower, without any overhead protection, while other employees were demolishing the water tank.[36] *See Kokosing, supra,* at 1871. Respondent failed to adequately supervise its employees and enforce safety rules on May 7, 2008 at the work site. At the time of the accident, LJC's supervisors were not present on the roof to exercise oversight when Mr. Roberts was working below the water tank while the tank was being demolished. (Tr. 349, 367, 394). Respondent's supervisors did not take steps or give instructions on the day of the accident to prevent employees from working in the area below the water tank

[35]Mr. Wilhelm claimed that, on the day of the accident, he told several employees not to cut the remaining steel straps that day (Tr. 446-447). However, this self-serving claim is contradicted by Mr. Wilhelm's aforementioned testimony that he intended to have the remaining steel straps cut before all the wood was removed from the tank. Furthermore, this claim is belied by Mr. Wilhelm having documented, in Respondent's accident reports, that a steel strap was removed from the water tank and caused the accident. If the employees on the tank – by cutting a strap on the day of the accident – had disobeyed a direct order that Mr. Wilhelm claims he gave, one would certainly expect that any employees who cut straps on May 7, 2008 would be disciplined. None of Respondent's employees were disciplined as a result of the accident. Mr. Wilhelm further testified that Respondent had no record of having ever disciplined any employees on this project. (Tr. 368-369, 452).

[36]*See Active Oil Service, Inc.*, 21 BNA OSHC 1184, 1187 (No. 00-0553, 2005) (constructive knowledge is shown by considering "the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.").

while the tank was being demolished. Mr. Wilhelm testified that there was no barricade, caution tape, or anything else to keep employees from working in that area on the day of the accident (Tr. 443).[37] Both Messrs. Tudek and Mr. Wilhelm testified that on that day they did not tell Mr. Roberts or any other employees not to work in that area. (Tr. 367, 444). Respondent's supervisors not only failed to provide adequate instructions and preventive measures. They also allowed employees to work below the water tank, and disregarded relevant employee safety concerns before the accident. Respondent's lack of reasonable diligence is demonstrated by the general laxity of its safety program, including lack of discipline, instruction, and compliance. (Tr. 368-369, 452). *See also* discussion set forth in Item 5, *supra*. The circumstances of the case show a lack of reasonable diligence, and thus constructive knowledge, on the part of Respondent.

I find that the Secretary has demonstrated the knowledge element.

The CO testified that this item was classified as serious because the condition could have caused serious injury. He also testified that this item had high severity and greater probability, due to the number of straps and the possibility of being struck by one, which in fact happened. (Tr. 191). I agree with the serious classification, and I find the proposed penalty of $3,000.00 to be appropriate. (Tr. 192). Item 7 is therefore affirmed as serious and the proposed penalty is assessed.

Citation 1, Item 8

Item 8 alleges a violation of 29 C.F.R. § 1926.454(c). That standard provides as follows:

> When the employer has reason to believe that an employee lacks the skill or understanding needed for safe work involving the erection, use or dismantling of

[37] Mr. Wilhelm claimed that, the day before the accident, LJC had put up caution tape around the area below the water tank to keep employees out of the area. (Tr. 403). Mr. Roberts testified that even when the caution tape was up on May 6, 2008, it was only intended to keep out unauthorized persons; *i.e.* non-LJC employees, not Respondent's employees. He also testified that he was never told not to work inside the taped area. (Tr. 38).

scaffolds, the employer shall retrain each such employee so that the requisite proficiency is regained.

This item was issued because LJC did not retrain its employees in safe scaffold use in regard to falling object hazards. CO Steinke testified that part of the problem at the site was the lack of training. He said the employees dismantling the tank should not have cut any straps when they were aware that Mr. Roberts was working below. Mr. Roberts, similarly, should have known not to work below the dismantling work. The CO knew that employees were trained through their union, but he believed they needed more training on the hazard of the straps on the tank and how to control that hazard. He also believed LJC should have known that employees needed retraining because the hazard was obvious and because of Mr. Castillo's complaints to the foreman. (Tr. 190-95, 314-18).

Mr. Wilhelm testified that he had seen nothing before the accident to make him think that employees needed retraining. He noted that the employees who were dismantling the water tank were "some of the best guys [h]e had" and that Gershan Williams had been doing dismantling work for 25 years. (Tr. 431-32). The accident, however, should have alerted Mr. Wilhelm to the need for retraining. Mr. Roberts testified that he received neither retraining nor any disciplinary action after the accident. (Tr. 43-44). He was also unaware of any workers at the work site being disciplined by LJC for any safety issues. Mr. Castillo, in addition, testified that he had spoken to Mr. Tudek before the accident occurred. He told Mr. Tudek that the manner in which LJC was performing the strap removal was dangerous. Mr. Tudek told him to "mind [his] own business." (Tr. 94-98). I also agree with the CO's testimony that the hazard was obvious. The employees doing the dismantling should have known to not cut a strap when Mr. Roberts was working below, and Mr. Roberts should have known not to work beneath the dismantling work. LJC thus had reason to

know both before and after the accident that employees required retraining.

Based on the foregoing and my conclusions in Item 7 above, I find retraining was required and that LJC violated the cited standard. I have considered Mr. Roberts' testimony that he had been trained through his union, including in scaffold safety, had yearly renewal training, and believed his training was adequate. I have also considered his testimony that he believed he was a safe worker and that if he had seen someone cutting up above he would have gotten out of the way. (Tr. 49-50, 61-64, 71). This testimony does not refute the evidence that LJC had reason to know that retraining was required. It is clear from the record that failing to train the employees as required could have caused serious injury. This item is affirmed as a serious violation. CO Steinke testified that this item had high gravity but lesser probability and that the proposed penalty was $1,500.00. (Tr. 194-95). The proposed penalty is appropriate. It is therefore assessed.

Citation 1, Item 9a

Item 9a alleges a violation of 29 C.F.R. § 1926.856(b), which states that "Floor openings shall have curbs or stop-logs to prevent equipment from running over the edge." This item was issued because a Takeuchi jackhammer machine was being used to open the roof of the auditorium building at the site without a curb or stop-log being utilized. CO Steinke testified he was on the roof of the main building when he observed the Takeuchi machine on the nearby roof of the auditorium. He identified Exhibit 21 as his photograph of the machine and an opening along one edge of that roof. The opening was about 10 feet wide and almost the full length of the edge, which was about 60 feet. The CO noted there was no curb or stop-log to prevent the operator, who sits in the machine, from inadvertently running the machine into the opening. He also noted a curb could be something like a 12-inch timber that would block the machine. CO Steinke said no one was operating the machine that day and that he was not able to see how it moved. (Tr. 195-97, 324-25,

340-41).

Mr. Wilhelm testified he was familiar with the Takeuchi machine and had seen it operate. He also testified that the arm on the cab, shown in Exhibit 21, was about 8 feet long when fully extended. The machine was hydraulic, and its hammering action caused it to rock back and forth. To prevent that, and to keep the machine from moving, the operator normally put down the stabilizer blade. Mr. Wilhelm noted the process started with two to three men ripping back the roofing material. That crew then left the roof and the machine operator would begin his work. The operator would open up one bay, stop, and then move down the line to the next bay. Mr. Wilhelm said the operator always stayed 8 to 10 feet from the opening with the blade down. He also said that the machine could not move at all when the stabilizer blade was down in place. He stated that when the machine moved, the blade was up. (Tr. 429-31, 451).

The parties have stipulated that LJC operated a jackhammer at the edge of the roof at the work site. *See* J-1, p. 6, ¶ 21. Mr. Castillo testified that there was no parapet wall or protection atop the building roof. (Tr. 127). LJC asserts the stabilizer blade was the equivalent of a curb or stop-log. R. Brief, p. 35.[38] The Secretary asserts the stabilizer blade did not provide the same protection because the operator had to engage it, unlike a curb or stop-log. She also asserts that the blade did not provide complete protection since it had to be up for the machine to move. S. Brief, pp. 26-28. The Court agrees with the Secretary. Mr. Wilhelm's testimony shows that the operator had to engage the stabilizer blade. It also shows the machine could not move unless the blade was

[38]"An employer that wishes to use a means of eliminating a hazard different from that provided in a standard must obtain a variance from the standard." *Sierra Construction Corp*., 6 BNA OSHC 1278, 1282 n.11 (No. 13638, 1978) (citing 29 U.S.C. § 655(d)). LJC offered no evidence that it had obtained a variance to use the blade of the Takeuchi machine in lieu of compliance with the cited standard.

in the “up” position. (Tr. 429-30, 451). The blade on the Takeuchi machine is used to “stabilize the machine” to prevent it from “rocking” while the machine’s hammer is operating. (Tr. 429-430). The blade serves as a stabilizer, not a barrier like a curb or stop-log.[39] The blade provided *no* protection while the machine was in motion, when the risk of running over the edge may be highest. Again, even assuming *arguendo* that the blade provided partial protection against the hazard of running over the edge, “[p]artial protection is not adequate when the required method of abatement can be accomplished.” *Boonville Division of Ethan Allen, Inc*., 6 BNA OSHC 2169, 2171 (No. 76-2419, 1978). Respondent offered no evidence that the required method of abatement – curbs or stop-logs at the floor openings – could not be accomplished at the work site.

As the CO testified, an operator who did not realize how close he was to an opening or was not paying attention could run the machine into the opening. (Tr. 195-96). The Secretary has met her burden of proving the alleged violation. This item is affirmed.

CO Steinke testified that this item was serious, as the operator was exposed to falling through the 40-foot-high auditorium roof.[40] He rated the severity as high and the probability as greater because there were four buildings, each with a large roof. (Tr. 198). I agree with the CO’s testimony that the violation was serious. I also agree that the proposed penalty of $3,000.00 is appropriate. (Tr. 199). Item 9a is affirmed as a serious violation, and a penalty of $3,000.00 is assessed.

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[39]Even assuming *arguendo* that the blade, when lowered, could stop the machine from moving forward into the floor opening, Mr. Wilhelm testified that the operator must take the step of lowering the blade into the necessary position. (Tr. 429) The purpose of curbs or stop-logs is in part “to protect the operator ... [who] is not paying attention.” (Tr. 196). Unlike the blade, curbs or stop-logs do not depend on the operator to engage the protective mechanism. The Court finds that the stabilizer blade is not the equivalent of a barrier curb or stop-log.

[40]Although the CO testified the auditorium had five stories, with an elevation of 40 feet, Mr. Wilhelm testified that the auditorium had three stories. (Tr. 198, 379). The citation states the building’s elevation was 35 feet. Regardless, I find that the violation was a serious fall hazard.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered that:

1. Serious Citation 1, Item 1a, alleging a violation of 29 C.F.R. § 1926.150(a)(2), is affirmed, and a penalty of $1,500.00 is assessed.

2. Serious Citation 1, Item 3, alleging a violation of 29 C.F.R. § 1926.405(a)(2)(ii)(E), is affirmed, and a penalty of $900.00 is assessed.

3. Serious Citation 1, Item 4a, alleging a violation of 29 C.F.R. § 1926.416(e)(1), is affirmed, and a penalty of $1,500.00 is assessed.

4. Serious Citation 1, Item 4b, alleging a violation of 29 C.F.R. § 1926.416(e)(1), is vacated.

5. Serious Citation 1, Item 5, alleging a violation of 29 C.F.R. § 1926.451(b)(1), is affirmed, and a penalty of $3,000.00 is assessed.

6. Serious Citation 1, Item 6, alleging a violation of 29 C.F.R. § 1926.451(g)(1), is affirmed, and a penalty of $1,500.00 is assessed.

7. Serious Citation 1, Item 7, alleging a violation of 29 C.F.R. § 1926.451(h)(1), is affirmed, and a penalty of $3,000.00 is assessed.

8. Serious Citation 1, Item 8, alleging a violation of 29 C.F.R. § 1926.454(c), is affirmed, and a penalty of $1,500.00 is assessed.

9. Serious Citation 1, Item 9a, alleging a violation of 29 CF.R. § 1926.856(b), is affirmed, and a penalty of $3,000.00 is assessed.

__/s/___________________________
The Honorable Dennis L. Phillips
U.S.OSHRC JUDGE

Date: 3/25/2010
Washington, D.C.