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.

CLEVELAND WRECKING COMPANY,

Respondent.

OSHRC Docket No. 07-0437

ON BRIEFS:

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

Ronald M. Gaswirth, Esq.; Gardere Wynne Sewell LLP, Dallas, TX
For the Respondent

DECISION AND REMAND

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Cleveland Wrecking Company ("CWC") was demolishing three buildings at a worksite in Dallas, Texas, when two workers were killed by falling debris. The Occupational Safety and Health Administration ("OSHA") inspected the worksite and issued CWC a citation under the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651-678, alleging a willful violation of a provision of the construction fall protection standard and a willful violation of a provision of the construction demolition standard, with a total proposed penalty of $126,000. Following a hearing, Administrative Law Judge John H. Schumacher affirmed both items as willful and assessed the total proposed penalty.

Our review of the record shows that the judge failed to address key issues, largely as a result of misinterpreting the cited standards, and erroneously excluded relevant evidence.

Accordingly, we set aside the judge's decision and remand this case for further proceedings consistent with this opinion.

BACKGROUND

General contractor Hensel Phelps hired CWC to demolish three buildings in the Dallas Mercantile Complex in downtown Dallas, Texas: the twenty-one-story Dallas Building, the eighteen-story Securities Building, and the five-story Annex Building. The three contiguous buildings occupied about half of a square block in downtown Dallas, with the Dallas Building on the south side of the block, bounded by St. Paul Street to the east and the Securities Building to the west; the Securities Building to the west of the Dallas and Annex Buildings, bounded by Main Street to the north and Commerce Street to the south; and the Annex Building on the north side of the block, bounded by St. Paul Street to the east and the Securities Building to the west. Another building was to the west of the Securities Building and took up the remainder of the square block.

CWC first demolished the Annex Building, the two-story basement of which became a "pit area" from which debris from the other two buildings could be collected and removed from the worksite. The pit area measured approximately 100 feet from the Dallas Building, its south boundary, to Main Street, its north boundary, and 200 feet from the Securities Building, its west boundary, to St. Paul Street, its east boundary. To allow trucks hauling debris to access the pit from outside the worksite, CWC created a ramp that ran from Commerce Street on the south side of the Dallas Building, through the building itself, and down into the pit. Two workers regularly worked in the pit. Clayton Marnell, an employee of Midwest Wrecking, operated a track loader to gather debris, and James Spillman, an employee of Hensel Phelps, operated a track hoe to load debris into the trucks. Another worker—an employee of U.S. Trades—also was in the pit area on occasion, because his duties as a "flagger" included letting the trucks in and out of the pit, and retrieving paperwork detailing the weight of debris loaded into the trucks.

After it created the pit area, CWC began demolishing the Dallas Building from the top down on a floor-by-floor basis. To keep debris from falling off the building during this work, CWC's plans called for the installation of scaffolding and a "box containment system"—which consisted of plywood-reinforced floors and exterior sides on the scaffolding—on at least the building's two upper levels. CWC installed this system around all but the north side of the Dallas Building. For that side, as it demolished each floor, it left standing the bottom portion of

the north, exterior wall—referred to by CWC as a "parapet wall"—to serve as a toeboard that would keep items from accidentally falling into the pit area.

Although its plans also called for using a crane to remove debris from each succeeding top floor, CWC was unable to secure one sufficient for the size of the work area, so it created what it termed an "interior chute" and an "exterior chute" for debris disposal. The "interior chute" was an empty elevator shaft inside the Dallas Building that CWC used to dispose of debris other than steel. The "exterior chute," also referred to as the "steel chute," was a designated area at the southwest corner of the pit, where the Dallas and Securities Buildings met, that was used to dispose of debris that contained steel. This "drop zone" was surrounded by walls on its west, south, and east sides, and was open to the rest of the pit on its north side. According to CWC's general superintendent, Keith Knudslien, CWC used this means to dispose of the steel debris because "[steel beams can] knock out interior beams of the building" if an interior chute is used, and so the company "thought it was safer to [dispose of steel debris] outside the building."

On Saturday, August 12, 2006, CWC demolished the walls on the Dallas Building's nineteenth floor and followed the company's procedure of leaving the parapet wall on the north side intact. This wall, consisting of cinderblock and sandstone, measured approximately nine and one-half to twelve inches high and nine inches wide. The next workday was Monday, August 14, 2006, and a video admitted into evidence and shown at the hearing depicts a bobcat on the nineteenth floor carrying a load of debris to the edge of the exterior steel chute and depositing it down the chute at around 9:00 a.m. that day. About an hour after this debris drop, a truck arrived at the site, and the driver backed it down the ramp into the pit area, so that it could be loaded with debris to be hauled away. At that point, the flagger approached the driver and began talking to him. Meanwhile, clean-up on the nineteenth floor continued, where a bobcat fitted with a front bucket attachment was used to move debris. While the bobcat operator was working near the floor's edge, he struck a twelve-foot steel beam that was buried under concrete rubble. The beam struck and went through the parapet wall, causing a twenty-foot-long section of the wall to fall into the pit and on top of the truck, killing both the driver and the flagger.

DISCUSSION

I. Employment Status of Allegedly Exposed Workers

Before the judge, the Secretary argued that the three workers assigned to the pit area—Marnell, Spillman and the flagger—were exposed to the cited conditions under both citation items.[1] Although all three workers were employed by other companies, the Secretary claimed that their daily work was both controlled and supervised by CWC, and therefore, all three were employees of CWC for the purposes of OSH Act liability. CWC did not address the Secretary's assertion in either of its post-hearing briefs, and the judge did not address this issue in his decision.

The Commission has long recognized that when "the manner and means of the . . . daily work" of loaned workers are controlled by an employer, even when the workers are principally employed by others, the workers are also "employees of [the borrowing employer] under the OSH Act." *Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1505-08, 2002-04 CCH OSHD ¶ 32,703, pp. 51,734-36 (No. 97-1839, 2004) (citing *Don Davis*, 19 BNA OSHC 1477, 1479-80, 2001 CCH OSHD ¶ 32,402, pp. 49,896-97 (No. 96-1378, 2001); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)). Thus, on remand, the judge must determine as a threshold matter whether the evidence establishes that any of the workers the Secretary alleges were exposed to the cited conditions were employees of CWC under the OSH Act. If he determines that one or more was, the judge must then turn to the merits of the citation items, as outlined below.

II. Citation 2, Item 1 (Fall Protection, Protection from Falling Objects)

Under this item, the Secretary alleges that CWC violated 29 C.F.R. § 1926.501(c) because the company failed to protect workers from "being struck[]by falling concrete and brick." The cited provision requires an employer to protect employees from falling objects as follows:

> (c) *Protection from falling objects.* When an employee is exposed to falling objects, the employer shall have each employee wear a hard hat and shall implement one of the following measures:

[1] In order to prove a violation, the Secretary must establish employee exposure, as well as applicability of the cited standard, noncompliance with its requirements, and knowledge of the cited condition. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

> (1) Erect toeboards, screens, or guardrail systems to prevent objects from falling from higher levels; or,
>
> (2) Erect a canopy structure and keep potential fall objects far enough from the edge of the higher level so that those objects would not go over the edge if they were accidentally displaced; or,
>
> (3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.

29 C.F.R. § 1926.501(c). CWC contends that it complied with the cited standard because the parapet wall on the north side of the Dallas Building served as a toeboard that provided the requisite protection under § 1926.501(c)(1).

In affirming this item, the judge first concluded that § 1926.501(c) is a performance rather than specification standard, and that "[i]t was incumbent upon [CWC] . . . to choose the protective devices most appropriate to protect workers." He found that the company failed to do so because it "acknowledged that the most effective method to protect employees from falling debris is the scaffold/box containment system," and it "made a knowing decision to eliminate the most effective protection and replace it with the least effective protection[—the parapet wall—] that resulted in the death of two workers."

On review, the Secretary acknowledges that the judge's ruling in this regard was error. Performance standards "require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them." *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287, 2004-09 CCH OSHD ¶ 32,937, p. 53,737 (No. 97-1073, 2007). Specification standards, in contrast, detail the precise equipment, materials, and work processes required to eliminate hazards. *See Lowe Constr. Co.*, 13 BNA OSHC 2182, 2185, 1987-90 CCH OSHD ¶ 28,509, p. 37,797 (No. 85-1388, 1989). Although § 1926.501(c) grants the employer the discretion to select a method to protect employees from falling objects, it is a specification standard because it requires that the employer choose from a list of specific enumerated methods. Here, CWC heeded one of the standard's specifications when the company chose the option in subsection (c)(1) and retained the parapet wall on the north side of the Dallas Building as a toeboard. Thus, we find that the judge erred in requiring CWC to use what he deemed to be "the most effective method" of protection.

Nonetheless, the Secretary contends—as he did before the judge—that CWC violated § 1926.501(c) because the parapet wall on the nineteenth floor did not meet the standard's requirements for a toeboard due to its inadequate stability. As the Secretary points out, the introductory portion of § 1926.501 states that "[a]ll fall protection required by this section shall conform to the criteria set forth in § 1926.502 of this subpart," 29 C.F.R. § 1926.501(a)(1), and § 1926.502 provides that "[t]oeboards shall be capable of withstanding, without failure, a force of at least 50 pounds (222 N) applied in any downward or outward direction at any point along the toeboard." 29 C.F.R. § 1926.502(j)(2). The Secretary maintains that the wall here failed to satisfy the strength requirement of § 1926.502(j)(2) because the testimony of four witnesses establishes that the wall was "loose."

We find the evidence insufficient to support the Secretary's contention. As an initial matter, the Secretary has given us no basis to conclude that evidence showing that the parapet wall was "loose" would necessarily support a conclusion that the wall was incapable of withstanding a force of at least fifty pounds. And even if we were to assume as much, the testimony relied upon by the Secretary fails to establish that the wall was, in fact, loose. Marnell testified that Randall Cook, CWC's site superintendent, advised him to stay away from the Dallas Building's north wall because the parapet wall on the nineteenth floor was loose. But when Marnell was presented at the hearing with a written statement he gave to OSHA, he changed his testimony under questioning from both parties. Marnell's written statement indicates that Cook told him that there was loose *debris* on the roof of the building, not a loose *wall*, and when confronted with that inconsistency, Marnell stated, "I feel like what I put in the statement is more accurate."

Another CWC employee claimed that Cook and CWC superintendent Knudslien announced at the safety meeting on the day in question that the parapet wall was loose. However, other workers who testified about the same meeting had different recollections of what was said. Spillman and Terry Lancaster, a CWC employee, both testified that no one at the meeting had said anything about the wall being loose. And although Lancaster testified that employees were instructed not to push against the parapet wall, he could not say with certainty why this command was given.

Finally, the Secretary contends that Cook himself acknowledged that blocks in the parapet wall were loose. However, when counsel for the Secretary read part of Cook's

deposition into the record at the hearing in an effort to prove this point, Cook was uncertain about whether he had been referencing the parapet wall on the north side of the Dallas Building, and during this exchange, Cook repeatedly denied that the parapet wall was loose. In fact, he later testified that when it came time to remove the wall that remained after the accident, he found it to be so secure that he "ended up having to get a machine to break it up." Taken together, we find the testimony relied upon by the Secretary does not establish that the parapet wall was loose, let alone incapable of supporting the requisite force under § 1926.502(j)(2).

The Secretary also contends, however, that CWC violated § 1926.501(c) by allowing debris *on top* of the parapet wall, essentially defeating the protection the wall afforded from falling objects.[2] According to the Secretary, an employer in this situation must use another protective measure in order to comply with the cited standard, and CWC failed to do so here. The Secretary made this argument at the hearing, shortly after conceding that CWC was "not . . . cited . . . for accumulation of materials piled higher than the toe board." Having taken that issue off the table, the Secretary's counsel began a line of questioning regarding whether debris was present *on top* of the parapet wall. CWC objected, claiming that this argument was the same as the one the Secretary had just conceded was not covered by the citation. The Secretary explained, however, that "this [was a] materially different [argument]" because "it flies in the face of common sense . . . to say that [CWC] want[s] to rely on this parapet wall as a toe board to protect against falling objects when there is the danger of falling objects on top of the toe board itself." The judge nonetheless sustained CWC's objection, ruling that the presence of materials

[2] The Secretary also contends on review that CWC violated § 1926.501(c) because, despite the presence of the parapet wall, employees were exposed to falling objects due to debris that was piled *higher than* the wall and thus could have fallen over it. But the Secretary explicitly abandoned this issue on the opening day of the hearing, stating that CWC had "not been cited under [§ 1926.]501(c) for accumulation of materials piled higher than the toe board."

Later in the hearing, the Secretary moved to amend the citation to include this allegation as a separate violation of a related standard, which provides that "[w]here . . . materials are piled higher than . . . a toeboard, paneling or screening shall be erected." 29 C.F.R. § 1926.502(j)(4). But the judge denied the motion, finding that the amendment would be "unfairly prejudicial to [CWC] and to . . . due process," given that "eight . . . witnesses ha[d] been released." He also noted that the amendment would have meant "reopen[ing] discovery in the interest [of] fair[ness] to [CWC]." The Secretary does not challenge the judge's ruling on review. In these circumstances, we deem this issue abandoned. *See Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1938, 1999 CCH OSHD ¶ 31,932, p. 47,371 (No. 97-1676, 1999) ("The Commission need not review an issue abandoned by a party.").

on top of the parapet wall was irrelevant to the citation item. However, he allowed the Secretary to make several offers of proof regarding the issue.

Based on our review of the record, including the Secretary's offers of proof, we find that the judge erred in precluding the Secretary from pursuing this argument. Section 1926.501(c)(1) permits the use of "toeboards . . . to prevent objects from falling from higher levels." 29 C.F.R. § 1926.501(c)(1). But if an employer erects a toeboard and then allows debris on top of it, the toeboard's purpose may be defeated. Thus, we agree that if the Secretary can show that CWC rendered the wall ineffective at preventing objects from falling by allowing debris on top of it, he will have established noncompliance with the cited standard. *Cf. N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2122, 2000 CCH OSHD ¶ 32,101, p. 48,238 (No. 96-0606, 2000) (affirming a violation of § 1926.501(b)(1)—which provides that "each employee on a walking/working surface . . . shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems"—because the employer's guardrail system did not extend the entire length of the surface), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

Therefore, on remand, the judge should admit any evidence excluded by his ruling at the hearing, allow the parties to further develop the record regarding whether and to what extent CWC allowed debris to accumulate on top of the parapet wall, and determine whether the presence of such debris, if shown, establishes a failure to comply with § 1926.501(c). The judge must then decide whether the Secretary has satisfied the exposure and knowledge elements of his case and, if the judge affirms the citation item, determine the characterization and penalty.

III. Citation 2, Item 2 (Demolition, Chutes)

Under this item, the Secretary alleges that CWC violated 29 C.F.R. § 1926.852(a) because "on or about August 14, 2006, . . . workers . . . were exposed to the hazards of being struck[]by demolition debris that was dropped to areas outside the exterior walls of the building." The cited provision states that "[n]o material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected." In affirming this item, the judge found that the Secretary "establish[ed] that [the decedents] were exposed to falling debris," and that the record was "devoid of any evidence . . . that [CWC] took affirmative steps to adequately maintain an effective safe area to which [the decedents] were required to retreat before any work was commenced on the floors overhead," or that "formal protective measures

were implemented that a reasonably prudent employer familiar with the industry should have provided."

As the Secretary notes, in ruling on this citation item the judge erroneously focused on the unintended debris drop involved in the accident. This alleged violation, however, is directed solely at CWC's deliberate drop of debris into the exterior steel chute area, which is depicted in the video shown at the hearing. Indeed, the standard at issue here, § 1926.852, contemplates deliberate drops of debris as part of demolition activities. *See, e.g.,* 29 C.F.R. § 1926.852(a) (addressing "material[s] be[ing] dropped"), (e) (referencing "workmen dump[ing] debris"), (f) (discussing "material [being] dumped from mechanical equipment"), & (g) (dealing with "debris [being] loaded" into chutes). Thus, the circumstances of the August 14 accident are not relevant to the § 1926.852(a) citation item.

Focusing on deliberate debris drops, the Secretary contends—as he did before the judge—that CWC violated § 1926.852(a) when, on the morning of August 14, 2006, the company dropped debris into the exterior chute without effectively protecting the area. Specifically, the Secretary argues that effective protection was lacking because the workers in the pit were not notified that any drop would occur so that they could move to a safe area. CWC argues that it complied with the cited standard because it took a number of measures to protect the drop zone.

Because the judge focused solely on the accident, he failed to consider evidence of industry practice concerning what constitutes effective protection of a drop zone. Such evidence is relevant here because § 1926.852(a), as a performance standard, does not direct the specific measures to be taken when a hazard arises, and so an employer is required to "determine the steps necessary to abate" such a hazard "in light of what is reasonable." *Thomas Indus. Coatings*, 21 BNA OSHC at 2287, 2004-09 CCH OSHD at p. 53,737. Under Commission precedent, "industry practice is relevant to this analysis," but it is not dispositive. *Associated Underwater Servs.*, 2012 CCH OSHD ¶ 33,198, p. 55,749, 2012 WL 762002, at *2 (No. 07-1851, 2012). However, the Fifth Circuit, to which this case could be appealed,[3] has held that to

[3] "Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000). This case arose in Dallas, and CWC has its regional offices in Houston.

prove a violation of a performance standard, "the Secretary bears the burden of proving either that the employer failed to provide [protection] to its employees under circumstances in which it is the general practice in the industry to do so or that the employer had clear actual knowledge that [protection] was necessary under the circumstances." *S&H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1285 (5th Cir. 1981).

Here, industry practice was established by the testimony of CWC's expert, James Knorpp, a safety consultant who was formerly an OSHA compliance officer and Area Director. Knorpp—who was qualified as an expert in industrial and safety engineering, demolition, and construction work—stated that the exterior chute "provide[d] a physical location for" drops of debris that had "the building structures . . . provid[ing] protection on three sides of it." Knorpp also testified that access to the pit area as a whole was "extremely restricted," given that the only entrance was a gate monitored by the flagger, and only two workers—Marnell and Spillman—regularly worked in the pit. Knorpp also lauded CWC's communication procedure, which required the foreman on the top floor to radio the workers in the pit to clear the area, wait for verbal confirmation from each one that they had done so, and then look over the side of the building to ensure that the workers were out of harm's way. Knorpp explained that this procedure was designed and implemented "so that there would not be any employees in this immediate area around the landing area" and "to be sure that the equipment that was in the pit would be safely located." All of this, according to Knorpp, put CWC in compliance with § 1926.852(a).

However, there is evidence in the record that the judge did not consider which we find bears directly on the issue of whether CWC complied with the standard. Specifically, Spillman testified that while CWC, in general, "us[ed] the radio to warn [him] when the company was going to dump steel using the exterior chute," he "never got a call that said, [m]ove to a safe area" on the morning of August 14. And Marnell testified that on that same morning, he did not "receive any call to leave the pit area because there was going to be dumping." Notwithstanding Knorpp's opinion that CWC's safety measures were sufficient to comply with the standard, CWC's apparent failure to follow these safety measures may establish that the company failed to comply with § 1926.852(a) when it dropped debris into the pit area on the morning of August 14.

In addition, we find that the judge erred in excluding other relevant evidence bearing on CWC's noncompliance. Specifically, the Secretary sought to introduce evidence of prior "near-

misses," or incidents in which debris fell into the pit while workers were nearby. One of these incidents occurred on August 1, 2006, about two weeks before the accident, and involved Marnell, who testified that while he was in the pit on his lunch hour, a piece of concrete "maybe eight inches, ten inches in diameter" went "through the window on [his] loader" and hit him "[o]n the top of [his] knee." He stated that when he informed CWC's safety supervisor about the incident, the supervisor "kind of laughed." Marnell further testified that he was not injured and went back to work about forty-five minutes later, but "[i]t almost seemed like every day was a near miss because you would see pieces of concrete come out of the building and, you know, steel was being dropped." Marnell stated that a "couple" of other times, he "had little pieces of concrete break the windows on [his] loader."

The judge excluded this "near-miss" evidence as irrelevant, finding that these events occurred outside the OSH Act's six-month limitations period, 29 U.S.C. § 658(c),[4] but he allowed the Secretary to make offers of proof, from which the foregoing testimony was derived. Based on our review of the record, including these offers of proof, we find that this "near-miss" evidence is relevant not only to whether the standard was violated, but also to whether the violation, if it occurred, was willful. *See* Fed. R. Evid. 401(a) ("Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence."). Although we agree with the judge that the incidents themselves would not support a violation of § 1926.852(a) because they occurred outside the limitations period, evidence establishing these "near-misses" could show that CWC had "actual knowledge that [additional or different protection] was necessary under the circumstances." *S&H Riggers*, 659 F.2d at 1285. Additionally, evidence of prior exposure to falling object hazards would be relevant to whether the company had a willful state of mind. *See, e.g., Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1868, 2004-09 CCH OSHD ¶ 32,877, p. 53,198 (No. 02-0865, 2007) ("Willful violations are characterized [in part] by . . . a heightened awareness that . . . the conditions at [an employer's] workplace present a hazard.") (internal quotation marks and citation omitted), *aff'd*, 296 F. App'x 211 (2d Cir. 2008). Because the judge erroneously excluded this "near-miss" evidence,

[4] This provision states that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c). The citation here was issued on February 12, 2007, two days shy of the expiration of the limitations period for the events of August 14, 2006, and eleven days after the expiration of the limitations period for the August 1 incident.

neither the Secretary nor CWC, in response, had an opportunity to fully develop the record on this issue.

As to the exposure element of the Secretary's *prima facie* case, we note that the current record may show that up to three employees were exposed to the alleged condition on the morning in question. Spillman testified that on August 14, he "went to the pit and . . . never left the pit," raising the possibility that he would have been in the zone of danger during the drop. And Marnell stated that on that morning, from 7:00 a.m. until the time of the accident, he was "[p]retty much all over [the pit]," in the course of his duties cleaning up debris. Finally, both Spillman and Marnell testified that the flagger walked across the pit area on the morning in question, potentially placing him in the zone of danger. *See Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, p. 44,506 (No. 93-1853, 1997) (holding that the Secretary establishes employee exposure to a hazard by showing "that it is reasonably predictable by operational necessity . . . that employees have been, are, or will be in the zone of danger").

With regard to the knowledge element, the record shows that Cook, CWC's site superintendent, was on the nineteenth floor of the Dallas Building all morning, acting as a "spotter" for the bobcat operator, making sure that he did not push any debris too close to the edge. His presence on the rooftop, and the fact that he had a CWC radio over which all communications were broadcast, raises the question of whether he, as a supervisory employee, knew or should have known that debris drops were being made without the proper warnings. *See N&N Contractors*, 18 BNA OSHC at 2122, 2000 CCH OSHD at p. 48,239 ("To . . . establish[] employer knowledge, the Secretary must show that the cited employer either knew or, with the exercise of reasonable diligence, could have known of the violative condition."); *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999) ("[K]nowledge can be imputed to the cited employer through its supervisory employee.").

Accordingly, on remand, the judge should determine whether CWC violated § 1926.852(a) by making a debris drop on August 14, 2006, without using its communication procedure. In so doing, he should allow the parties to develop the record regarding prior "near-miss" incidents, as they are relevant to whether CWC complied with the requirements of the standard. He should then determine whether the Secretary has established a violation by analyzing the exposure and knowledge elements of his *prima facie* case. And if a violation is

found, the judge should determine the characterization and penalty, again taking into account the "near-miss" evidence.

ORDER

We remand this case to the judge for further proceedings consistent with this opinion. As an initial matter, the judge shall determine the employment status of the workers the Secretary alleges were exposed to the hazards addressed in both citation items. If he determines that one or more of the workers was an employee of CWC under the OSH Act, the judge shall then decide whether CWC violated 29 C.F.R. § 1926.501(c) by having debris on top of the parapet wall it used as a toeboard, and whether the company violated 29 C.F.R. § 1926.852(a) by conducting a drop of debris on the morning of August 14, 2006, without notifying employees below that such a drop would occur. Finally, the judge shall rule on characterization and penalty if any violation is affirmed. Because this will require reopening the record on several issues as set forth herein, we order that the further proceedings in this case be expedited pursuant to Commission Rule 103, 29 C.F.R. § 2200.103.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: March 1, 2013

Occupational Safety and Health Review Commission
1120 20th Street N. W. Ninth Floor
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SECRETARY OF LABOR, Complainant, v. CLEVELAND WRECKING COMPANY, Respondent.	OSHRC Docket No 07-0437

Appearances:

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Before: John H. Schumacher
Administrative Law Judge

Decision and Order

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et. seq*. (2009); hereinafter called "the Act") to review a citation issued by the Secretary of Labor pursuant to section 9 (a) of the Act and a proposed assessment of penalty issued pursuant to section 10 (c) of the Act. By citation issued February 12, 2007 pursuant to an inspection of Respondent's worksite during the period August 14, 2006 to February 12, 2007, the Secretary cited Respondent for two willful violations of the Act and proposed a total penalty in the amount of $126,000. Respondent filed a timely notice of contest and The Complainant filed a complaint with the Review Commission. Respondent filed an answer to the complaint and, along with its

prehearing statement, admits the jurisdictional allegations of the complaint and generally denies the remaining allegations. A five-day hearing was conducted during the period September 9, 2009 to September 15, 2009, and the parties have submitted post hearing briefs and reply memoranda. The matter is now ripe for decision.

I. Introduction

On the morning of August 14, 2006, Mr. Omar Navarro, an employee of Mike's Trucking, arrived at Respondent's worksite known as the Dallas Mercantile Complex, which consisted of several buildings. This site was located in downtown Dallas, Texas, and was in the process of being demolished. Omar Navarro was driving a large eighteen-wheel dump trailer and cab which was to be loaded with demolition debris and hauled from the worksite. Omar Navarro backed his truck down an earthen debris ramp which had been constructed through the bottom floor of one of the buildings being demolished and into an area known as the pit.[1] The pit was two stories below ground level and immediately adjacent to the building. Omar Navarro brought the truck to a stop and awaited front-end bucket loaders in the pit to load his trailer with debris. Respondent's employee, Kevin Oliva, approached the truck and began conversing with Omar Navarro.

Meanwhile, on the 19th floor of the building being demolished (The Dallas Securities Building) Mr. Alvarro Navarro[2], Respondent's employee, was operating a bobcat with a front bucket attachment, and moving debris. The debris consisted of large chunks of concrete, steel beams and other debris which had accumulated as a result of the demolition of the next higher floor. While working near the edge of the building, Alvarro Navarro's bobcat struck a steel beam

[1] The pit was the former basement of the Annex Building and covered an area approximately 100 feet by 200 feet. The Dallas Building was originally 21 stories in height above street level, but the 20th and 21st stories had already been demolished without incident.

[2] Mr. Alvarro Navarro is not related to Mr. Omar Navarro.

approximately twelve feet in length which was buried under a pile of concrete rubble. The beam, in turn, struck a partial concrete block and sandstone wall approximately eight inches high and cemented at the outer perimeter of the floor. The momentum of the beam dislodged the concrete and sandstone blocks causing them to fall nineteen stories to street level, plus another two stories to the bottom of the pit area immediately adjacent to the building. The falling debris crashed through the roof of the truck cab driven by Mr. Omar Navarro and he sustained fatal injuries. Mr. Oliva, standing next to the truck, was also fatally injured by the falling debris.

After the ensuing investigation, the Complainant concluded that workers on Respondent's job site were exposed to falling objects, and that the Respondent had not implemented adequate protective measures. The Complainant also concluded that Respondent allowed materials to be dropped over the exterior walls of the structure, without taking measure to assure that the area would be effectively protected.

As a result of this occurrence, the Complainant issued the noted citation to Respondent alleging that Respondent willfully violated sections 29 C.F.R. § 1926.501(c) (2009) (failure to protect workers from falling objects) and § 1926.852(a) (failure to ensure that a debris drop area outside the exterior walls of a structure is effectively protected).

II. Background

Respondent, established in 1910, is the oldest demolition company in the country and has demolished over 90,000 structures. It specializes in demolishing large structures such as refineries, power plants, mining projects, bridges, and multiple story buildings throughout the country (TR 575) including floor-by-floor demolition which was being performed at the current worksite. The worksite consisted of the demolition of the 32-story Mercantile Building, the 18-story Dallas Securities Building and the five-story Annex Building. The general contractor, Hensel Phelps Construction Company, subcontracted the demolition work to Respondent. In preparation for the demolition, Respondent prepared a demolition plan, a health and safety plan,

an engineering plan and other preplanning documents that Respondent considered as necessary for such a large demolition project. *(See exhibits C-1 to C-10, C-27 and C-30).* The demolition commenced during early 2006 by demolishing the five-story Annex Building with the two-story basement of that building becoming the pit area. The remaining buildings were adjacent to the pit and to each other.

Pursuant to the demolition plan, each building was to be demolished floor-by-floor with debris dumped into interior "chutes" which were formerly elevator shafts. There were two types of demolition; the so called "soft demolition" which consisted of gutting the interior of the building and "hard demolition" which consisted of dismantling the skeleton of the building; that is, the structural steel and concrete. The demolition plan called for a scaffold to be erected completely around each building from ground floor to the top floor with a "box containment" constructed on the scaffold at the top two levels (TR 71 Ex. c-5). The box containment consisted of ¾ inch plywood placed as the floor of the scaffold and either ½ or ¾ inch plywood on the exterior side (TR 76) consisting of 4' x 8' sheets (TR 84 Ex. C-40) The purpose of the box containment system was to catch any debris or objects that might fall over the edge of the building during demolition (TR 76). The top scaffold level was the primary containment and the scaffold below was the secondary containment for debris that was not contained at the upper level. The box containment was to be constructed without any gaps, in order to prevent debris from falling over the side. In addition, a net was placed on the exterior side of the scaffold as further protection against falling debris. Respondent considers the box containment system and screen netting to be the most effective system for protecting employees from falling objects (TR 84, 85; Ex. C-5). On August 12, 2006, scaffolding, the box containment and screen netting were <u>not</u> in place on the side of the Dallas Securities Building (the Main Street side), where debris fell over the side of the building resulting in the death of two workers.

III. Witnesses

The Complainant called 13 witnesses to testify and Respondent called one witness. The relevant and material testimony of the witnesses is summarized below.

A. Keith Knudslien

Mr. Knudslien, at the time of the hearing, had been employed by Respondent for 18 years. He was a general superintendent responsible for overall supervision of multiple job sites including the Dallas Mercantile Complex site at the time of the accident. He visited the worksite approximately one or two times a month. His duties included oversight for the jobsite in terms of manpower and coordinating work activities with the individual job site superintendents. As general superintendent, he was Respondent's highest ranking employee at each site for which he was responsible (TR 38), and, in particular, he was Respondent's highest ranking supervisor at this worksite. [3] Although he was not present at this worksite on a full time basis, he was present at the site on August 14, 2006 on the 19th floor when the accident occurred (TR 90).

Mr. Knudslien acknowledged that Respondent's demolition plan required that scaffolding be erected completely around each building to be demolished with a "box containment" system constructed on the top two floors of the buildings. As each floor was demolished, the containment system was to be lowered one floor so that there were always two floors of "box containment" and netting which served as the primary means of protecting employees from falling objects and debris (TR 72 Ex. C-40).[4] According to Knudslien, the demolition plan called for a tower crane to be used to remove debris from each succeeding top floor of the buildings. The tower crane was to be erected in the pit area. However, the crane was not used and an exterior "chute" was designed to drop debris, especially steel debris and other large debris, over the edge of each floor being demolished (TR 87-88)

The decision to use an exterior chute in that manner was initiated by Knudslien and was a major departure from the demolition plan (TR 88, 175). This decision was made, according to

[3] At the time of the hearing Mr. Knudslien held the position of job site superintendent which is subordinate to the general superintendent.

[4] The demolition plan Ex. C-5 at page 6 states "Both the box containment system and screen netting are important parts of demolition procedure and have proven to be extremely effective on past floor-by-floor demolition projects that CWC (Respondent) has completed" (TR 85).

Knudslien, because the scaffold could not be erected on the Main Street side of the building because of the uneven ground at the ramp area (TR 187) and the span of the planned ramp entrance into the pit area, approximately twenty feet, which was too wide to erect scaffolding at that location (TR 211). However, Knudslien acknowledged that it would have been safer to place the scaffolding on either side of the ramp area and he could not recall why the scaffold was not erected in that manner (TR 213-214).

In his capacity as General Superintendent, approximately one month before the accident Mr. Knudslien approved the use of the exterior chute for dumping steel. He left the task of developing safety procedures relating to the use of the chute to the site superintendent Randall Cook (TR 92). Mr. Cook did not tell Mr. Knudslien what, if any, safety procedures he (Cook) had established for using the so-called exterior chute (TR 92). Knudslien stated that because the box containment system was not installed as planned, a radio communication system was established to enable supervisors at the top level to notify personnel in the pit that debris was to be dumped over the side of the building (TR 105-107). However, there was no safe area in the pit that was designated as a retreat for employees when exterior dumping was to occur (TR 109-110).

In addition to the radio communication system, Knudslien was aware of a so-called "six-foot rule." In the absence of the scaffold and box containment system, employees were not allowed to work within six feet of the open edge of the building when personnel were in the pit area (TR 111-112). However, in the event that employees worked within six feet of the edge, a radio communication to the employees in the pit to that effect was to be initiated by the floor superintendent. (TR 112-113). This rule also applied to the multiple bobcats that were operated on the top floor (TR 93 Ex. C-69). This rule was never reduced to writing (TR 111) and there were no markings in the floor, nor were there flags, wires, tapes or other boundary markings delineating the six-foot area. (TR 157-158). Moreover, according to Knudslien, there was no requirement that work must stop on the top floor when employees were in the pit (TR 134). However, as a further safety measure, in addition to the radio communication protocol and the six foot rule, Mr. Knudslien made the decision to leave the bottom course of concrete block of

the demolished wall in place to serve as a toe board at the outer perimeter of the Main Street side of the building which did not have the scaffold and box containment system in place (TR 159, 161-162, 182-183). The so called "toe board" was approximately 12 inches high and 8 inches wide and consisted of concrete block and sandstone blocks cemented to the perimeter floor above the pit area (TR 181-185). Knudslien believed that leaving the bottom course of concrete block in place complied with the requirements of 29 C.F.R. §1926.501(c)(2009) (TR 192-193).[5]

Mr. Knudslien was on the 19th floor at the time of the accident; however, his back was turned when it occurred (TR 143). Mr. Randall Cook, the job superintendent, was responsible for supervising the work of employees and to ensure that they complied with the six foot rule. (TR 112-113). Although he had a radio, he did not hear any radio communications between anyone prior to the accident (TR 144, 150-151). He observed Alvarro Navarro operating a bobcat with a front-end loader attachment moving debris on the 19th floor (TR 153-154). Knudslien agreed that Alvarro Navarro caused the bobcat to strike a steel beam which, in turn, struck the concrete wall left in place, causing the concrete blocks and sandstone to fall into the pit area (TR 156-157).

B. Randall Cook

Mr. Randall Cook was the site superintendent at the Dallas Mercantile Complex demolition site. He was Respondent's highest ranking official at the site and, except for the occasions when the general superintendent Keith Knudslien was on site, was responsible for all work activities performed on behalf of Respondent (TR 229). The one exception was in the area of safety where the project safety officer, Kyle Coffman, who was on site, had the authority to overrule any decision if he believed it created unsafe working conditions (TR 229).

Mr. Cook stated that the demolition plan required that scaffolding and the box containment system be constructed on all sides of the Dallas Securities Building including the Main Street

[5] The so-called toe board wall was also left in place at the other three sides of the building where the box containment system and scaffold were in place (TR 194).

side and he agreed that the box containment system and netting were an extremely effective safety measure in the demolition industry as protection against falling objects (TR 252-253). The scaffolding was erected by subcontractor Patent Scaffolding (TR 233).

The demolition plan originally required that large pieces of steel, such as steel beams, were to be lowered from the top floor by crane. The crane to be used for this purpose, a "rubber tower crane," was unique and unusual (TR 326-327). However, at the last minute "it couldn't happen" (TR 327) and Cook looked for another crane as a replacement. Due to the busy construction business in the Dallas area at that time, a similar crane could not be obtained (TR 327). Cook also considered using a hydraulic crane, however, that option was not feasible (TR 328). Thus, instead of lowering the steel by crane, a decision was made to dump the steel over the side of the building (TR 328). A "steel chute" was designated on the Main Street side of the building for this purpose (TR 328).

The demolition plan also originally required that scaffolding and the box containment system were to be installed completely around the Dallas Securities Building, including the Main Street side (TR 238). Mr. Cook estimated that the width of the ramp accessed by trucks leading into the pit area was approximately 20 to 25 feet wide. He agreed that the width of the ramp area was important as to whether scaffolding could be erected in the Main Street side of the building (TR 241). He stated that the width of the ramp had to be extended to allow construction vehicles to enter the ground floor of the building to remove debris which had been dumped down an interior chute and place it in the pit area (TR 241-242, 247). The area accessing the interior chute was immediately adjacent to the ramp area (TR 247). He also stated that the ground was not sufficiently level to erect the scaffold (TR 246). Although Cook agreed that he was given no reason why scaffolding could not be erected on either side of the ramp (TR 250), on cross examination he agreed with Respondent's counsel that Patent Scaffolding told him that they could not put scaffolding in the pit area (TR 345). Although it would have been safer to erect the scaffold, (TR 214) the decision was made not to erect the scaffold and box containment system on the Main Street side of the building (TR 344).

On the day of the accident, Mr. Cook was on the 19th floor and had assigned himself as spotter for the bobcat operator, Alvarro Navarro. Cook had instituted the six foot rule which prohibited any work within six feet of the roof edge where box containment was not in place (TR 309-310). There were no markings, barriers or other means designating the prohibited six foot work area (TR 315). At the time of the accident, he had his back turned away from Navarro (TR 277). He had been notified that a truck had entered the pit (TR 276) but he allowed work to continue at the upper level and in the pit (TR 260). Navarro operated the bobcat for approximately two hours prior to the accident with employees working in the pit area (TR 354). He stated that the six foot rule had been instituted about one week before the accident but had not been put in writing (TR 261). Mr. Cook randomly picked six feet because he thought it was a safe distance (TR 262). The rule had not be established by Respondent at any of its other worksites and he knows of no other demolition company that uses the so called six foot rule as a safety device (TR 263). Navarro was within six feet of the edge of the building (TR 274) and the steel beam struck by the bobcat operated by Navarro pushed a portion of the toe board wall over the edge of the building (TR 343).

With respect to the radio communication system, Cook stated that all supervisors and spotters had radios set at the same frequency which allowed them to monitor all transmissions (TR 275-277). Mr. Kevin Oliva, Respondent's designated spotter in the pit, also had a radio. Mr. Oliva was standing by the truck in the pit when he was fatally injured (TR 275-276).

Mr. Cook acknowledged that he never referred to the first course of concrete block remaining at the building perimeter as a toe board prior to the accident. (TR 289-290) Moreover, in one instance Mr. Cook acknowledged that there were no areas designated in the pit to prevent employees from going into the area where debris was being dropped (TR 293); however, he later stated that such an area had been designated (TR 292-293).

Mr. Cook was somewhat lacking as witness and his demeanor was not that of a person who was completely thorough in his responses on direct examination. Moreover, on cross examination, most of his testimony was simply an affirmative response to Respondent's counsel's leading

questions. Although he was on cross examination and, of course, Respondent's counsel had the right to ask leading questions, it was difficult if not impossible to assess this witness's credibility on cross examination, particularly since the witness was a high ranking management official and clearly not hostile to Respondent's counsel. See Fed. R. Evid. 611(c) It would have been more helpful in assessing credibility to hear the witness testify rather than counsel. The same observations apply to the cross examinations of Mr. Knudslien and Mr. Marquez.

C. Albert Marquez

Mr. Marquez, at the time of the accident, had been Respondent's employee for approximately 25 years and a foreman for nine years. He was a foreman at this worksite since its inception and had authority to order a work stoppage if he saw "something unsafe" (TR 387-388, 440). He had extensive experience with "floor-by-floor" demolition similar to this worksite (TR 438). His work activities included attending daily safety meetings and acting as interpreter for non-English speaking employees. He also toured the worksite on a daily basis conducting visual inspection to make sure that "everything is safe" (TR 440-443). He considered himself to be a "competent person" within the meaning of OHSA standards (TR 388).

On August 12, 2006, the work crew was engaged in "hard demolition" of the 20th floor of the Dallas Securities Building, including pulling in the walls of the 19th floor (TR 444, 450). He was told by Knudslien and Cook that the bottom course of concrete block and sandstone wall on the 19th floor would remain in place as a toe board (TR 445-446) and he inspected the so called toe board and it appeared intact (TR 451-452). On August 14th, 2006, the day of the accident, he attended the morning safety meeting and he heard "Knudslien or Cook" tell the attendees that the concrete block and sandstone were left in place on the 19th floor to function as a toe board (TR 446). Employees working on the 19th floor were also told to stay away from the pit edge of the building (TR 405-406).

During the morning of August 14, 2006, he was proceeding to the Company trailer across the street from the worksite when he noticed the truck driven by Omar Navarro, of Mike's Trucking, approaching the work area (TR 423). By radio, he told Kevin Oliva that the truck was approaching and to let it enter the ramp. Mr. Oliva acknowledged the transmission (TR 423).

He also notified either Mr. Knudslien or Mr. Cook by radio of the presence of the truck in the ramp area (TR 424) and the pit area needed to be cleared. He received a call from Cook acknowledging the transmission (TR 425).

Mr. Marquez agreed that it was Company policy that all work must stop in the pit and on the 19th floor to allow the flagger (Oliva) to "let the truck in down the ramp" (TR 425, 428). He also stated that Cook, the supervisor, was required to notify workers on the 19th floor of the presence of the truck in the pit and to stop all work, both demolition and clean up, in that area (TR 427). Upon the work stoppage, the flagger was to be notified by Cook to let the truck into the pit. (TR 426). All radio transmissions were relayed on the same frequency and could be heard by all employees who had radios. Mr. Marquez did not hear Mr. Cook tell employees on the 19th floor to stop work (TR 426). Moreover, Marquez stated that Cook should not have allowed Alvarro Navarro to continue working with the bobcat while the truck was in the pit (TR 428).

D. Terry Lancaster [6]

Mr. Lancaster was employed by Patent Construction Company during the period of 1997 to August 12, 2006, as a field superintendent. His employer specialized in the erection of scaffold (TR 505). His employer had a subcontract to erect scaffolding completely around this worksite and he supervised that work activity (TR 464-468). The contract called for the erection of scaffolding from ground level to the top floor of each building and included the installation of netting on the exterior side of the scaffolding (TR 469-472). Cleveland Wrecking Company was to install the box containment system on the scaffold (TR 472). The purpose of the netting was to contain debris created by demolition (TR 472).

At some point prior to August 12, 2006 (TR 487), Mr. Knudslien and Mr. Cook asked Mr. Lancaster whether the scaffold ramp opening in the building leading to the pit area on the Main

[6] By his demeanor on the stand, Mr. Lancaster appeared to be an experienced and qualified specialist in his field and a highly credible witness.

Street side could be widened. The plans called for the opening to be 20 feet wide (TR 475, 477). Lancaster recalled that they wanted to increase the width to either 30 or 40 feet. He told them that in order to change the plans he had to consult with his employer's engineer (TR 479). Upon consultation with the engineer, he was told that the scaffold at the ramp area could be widened as requested by using larger and stronger steel beams (TR 483). Mr. Lancaster informed Knudslien and Cook the same day of their inquiry that he could comply with their request (TR 484). However, he would have to order the steel beams because he did not have them in stock (TR 484). He did not tell Knudslien or Cook that scaffolding could not be installed on the Main Street side of the Dallas Securities Building (TR 485). Nor did he or anyone from Patent Construction tell anyone at Cleveland Wrecking that scaffolding on the Main Street side of the building could not be installed because the ground was not level (TR 486). He was told not to erect the scaffold on the Main Street side of the building, except to put a section around the corner from the Commerce Street side (TR 488, Ex. C-52, C-55, C-74, C-75).

E. Andrew Varga

Mr. Varga is Respondent's Vice-President for Corporate Health and Safety and a Director of Business Development. He has been so employed since May 2000 and he reports directly to Respondent's president. His duties include monitoring the effectiveness of the safety program and supervising safety engineers and on-site safety officers employed by Respondent (TR 523). He is the highest ranking person responsible for overall safety and he works closely with superintendents on site (TR 577). Moreover, on-site safety officers reported directly to him, including Kyle Coffman and Steven Brighman who were safety officers at this worksite (TR 524).

Mr. Varga stated that Respondent had written safety standards for its demolition activities as well as safety management standards that controlled its demolition activities (TR 525, Ex. C-3). These plans were developed by Respondent's parent company, URS. Respondent also had a site specific demolition plan for this worksite (TR 526, Ex. C-5). This document describes the method of demolition (TR 529). Varga noted that the demolition plan and the safety plan are separate documents; however, the plans are "utilized jointly" (TR 528). Respondent's health and

safety plan for the Dallas site had been developed by his subordinate but approved by him (TR 537). He was also involved in the safe progression of the work (TR 539) and was a telephone resource for safety personnel on site (TR 541).

Mr. Varga stated that the box containment system complied with section J of Ex. C-3, the Code of Safety for Demolition Practices which "would have been the canopy portion" (TR 563-564) required by the document as it applied to this worksite. Mr. Varga acknowledged that the canopy was in place on all sides of the building except the Main Street side of the Dallas Securities Building (TR 564). According to Mr. Varga, he was informed by the site safety officer, Kyle Coffman, that the plan to remove steel beams from the building could not be accomplished because the desired crane was not available (TR 567). He discussed with Mr. Coffman the options available in the absence of the crane. Mr. Varga was concerned whether the suggested method of dropping steel over the side of the building violated any federal or state safety requirements. He recalls that Mr. Coffman assured him that the procedure did not violate any safety codes. Moreover, Mr. Varga has a recollection of personally checking the applicable safety codes (TR 569).

His discussion with Coffman also included his concerns that the operation was effectively protected. He was assured that it was and he approved the change in the demolition plan to eliminate the scaffold box containment system on the Main Street side of the Dallas Building and allow large steel items to be dropped over the side of the building into the pit area (TR 571). Mr. Varga expressed his opinion that he thought the change in the demolition plan to be "a fantastic option for us" Id.. He further stated "as I sit here today, I think it was – I feel very comfortable with the operation. I'd do it again" Id..

Mr. Varga was made aware of the radio communication system at the site but he was not aware of the six-foot rule (TR 572-573). He was not involved in the decision to use the so-called "toe board" (TR 582). However, notwithstanding the accident, he believes that it was a correct decision to use the bottom course of the wall as a toe board (TR 583-584). Moreover, he is aware of a "number of situations" where employees are working above and below at the same

time (TR 586). He could not recall other demolition projects involving 20 story buildings with over-the-side dump chutes and pit areas (TR 587).

By his demeanor and responses to certain questions, Mr. Varga exhibited a selective memory regarding critical events. See Fed. R. Evid. 608.

F. Alvarro G. Navarro

Mr. Navarro had been Respondent's employee for four years. He did not receive any training to become a bobcat operator but he was learning "little by little" by on-the-job-training (TR 597). He had seen a bobcat training manual and tried to read it but he does not understand English very well (TR 610). He attended a safety meeting conducted by the supervisors on the morning of August 14, 2006. Prior to the accident, he had been working on site for a week (TR 598-599). His supervisors had advised him at the safety meeting to stay three feet from the edge of the building (TR 602, 608, 621-622) (TR 604-605, 608). Mr. Cook told him that employees would be working in the pit area (TR 605-606, 622).

On August 14, 2006, Alvarro Navarro proceeded to the 19th floor after the safety meeting to begin work (TR 599). Navarro stated that the steel was supposed to be separated from the concrete by other employees (TR 599) and he was to move only "clean concrete without any steel attached to it" (TR 600). He was to place the concrete in a pile (TR 613). Navarro believed that the pile of concrete that he was working on was free of steel (TR 601). At that time he knew that people and trucks were in the pit area (TR 602). He followed his instructions to remain three feet from the edge of the building (TR 602). Mr. Cook also observed him working three or more feet from the edge (TR 603). The steel beam that Alvarro Navarro hit with the bobcat was covered with concrete and he was not aware that it was there (TR 604). He did not have a radio and he relied upon Mr. Cook to direct him (TR 605).

G. Seth Ackland

Mr. Ackland was employed by Hensel Phelps Construction Company as a project manager on August 14, 2006, at this worksite (TR 636). He described his work activities as "working with

the owner, working with the designer, doing the bidding, getting the subcontractors brought under contract, working through the pay applications, change orders, helping to support the superintendent to manage the job" (TR 636). He had daily interaction with Misters Knudslien and Cook (TR 639). It was his understanding that Respondent intended to place scaffolding, box containment and netting completely around the Dallas Securities Building (TR 641). He viewed the blueprints showing the scaffolding after the accident (TR 641-642).

He became aware that scaffolding would not be erected on the Main Street side during June or July of 2006. He was told that, as a safety measure, no one would work on the building edge, (Main Street) when someone was in the pit (TR 644). Neither Mr. Knudslien nor Mr. Cook told him about the parapet wall (the toe board) prior to the accident (TR 649). Although he requested an updated copy of the demolition plan, he never received one in writing (TR 650).

H. Robert Comer

Mr. Comer, an employee of Hensel Phelps, was the project superintendent at this worksite. His job duties were to oversee the work, maintain a schedule and communicate with subcontractors (TR 715).

Mr. Comer had a conversation with Mr. Cook during early August 2006, wherein he was informed that Respondent would not erect the scaffold on the Main Street side of the Dallas Securities Building as planned because of "footing in the bottom" and they could not get the truck entrance door height engineered with the type of scaffolding being used (TR 722, 791). He asked Cook to submit the modification to the original demolition plan in writing; however, the written revision was never received (TR 722, 725). Comer stated that Cook told him that in the absence of the scaffold, a work rule would be put in place prohibiting any work in the pit area if there was any work on the building (TR 723). Respondent would remove employees from the pit if there was any work above the pit (TR 723-724).

Comer was aware that the box containment system was protection against falling debris (TR 724) and he knew that it had been used successfully at another worksite (TR 726). Comer stated

that during a morning safety meeting he heard a discussion regarding the stoppage of work activities when a truck entered the pit area. He stated that all work activity on the Main Street side of the building was to stop. According to Comer, the work activity on the building and in the pit was controlled by the supervisor on top of the building (TR 728). All work on the top of the building on the Main Street side was supposed to stop when a truck was in the pit area (TR 727) and when the truck was being loaded with debris (TR 730).

Mr. Comer stated that he was informed by Mr. Cook (TR 736, 775) that no work was to be performed within 15 feet of the edge of the unscaffolded side of the building when employees were in the pit area (TR 738, 745, 775). On the morning of August 14, 2006, at the top floor of the Dallas Securities Building he observed eight bobcats operating and he did not see any cones or other visual warning system designating the 15 foot rule (TR 745). It was his understanding that the so called six foot rule applied to the work activity of "removing the walls and the glass prior to pulling the columns over" (TR 734, 777).

With respect to the exterior steel chute, Mr. Comer stated that it was formed by three exterior sides of the building and was used principally to dump steel into the pit (TR 771-778). The work rule established by Respondent prohibited any employees in the pit area when workers were dumping steel over the side (TR 772).

I. James Spellman

During August 2006, Mr. Spellman was employed by Hensel Phelps as a loaned employee under the supervision of Respondent (TR 801). Commencing August 1, 2006, he worked in the pit area of the demolition site loading debris into trucks with a track hoe machine owned by Respondent (TR 804-806). The debris included carpet, sheet rock, concrete and similar building materials (TR 807). He was working in the pit on August 14, 2006, and he observed debris being dumped into the pit area from the sixth floor of the building (TR 810, 812, 873, Ex. 56). A track loader was another machine operated in the pit which pushed the debris into a pile which he, in turn, loaded into the bed of the truck (TR 812-813). When trucks arrived at the site, Kevin Oliva guided the trucks down the ramp (TR 813, 815) and retrieved "weight tickets" from the

driver (TR 815). Oliva also assisted him by alerting him when he was overloading the truck (TR 816).

On August 14, 2006, he attended the morning safety meeting and does not recall receiving any warning that employees would be working overhead that day (TR 826, 828, 830). His supervisor that day was Alberto Marquez (TR 826). He commenced his work in the pit at approximately 7:00 AM and he had loaded three trucks before the accident occurred at 10:00 AM (TR 834). It was normal for the truck driver to stay in the truck while being loaded (TR 835). He observed the truck involved in the accident approach the worksite and he radioed Mr. Oliva of its presence. He did not hear any radio transmissions from Mr. Marquez or anyone else that day regarding trucks in the pit area (TR 837). He had placed two bucket loads into the truck when the accident occurred (TR 839). He observed the body of the truck driver and radioed Marquez to come to the pit (TR 845). He had not received any radio transmissions from the top of the building that work was being stopped on top (TR 848-849). Mr. Spellman stated that he normally received a radio transmission when steel was to be dropped over the side of the building and he moved to a safe area (TR 855-856). He was not instructed to move to a safe area on August 14, 2006 (TR 869).

J. Clayton Marnell

Mr. Marnell is an equipment operator and was working in the pit area of the demolition site. His job was to move debris into a pile which in turn was placed in a truck by another machine (TR 910-913). Randy Cook was his supervisor. He attended the safety meeting the morning of August 14, 2006 and after the meeting Randy Cook told him to stay away from the concrete chute where he normally parked his machine because there was a loose wall or loose debris on the top of the building (TR 946, 966). Cook wanted him to keep his machine from that area "in case the wall came over" (TR 946). He complied with Mr. Cook's instructions (TR 948). This area was the same location where Messrs Oliva and Navarro were fatally injured (TR 949).

Mr. Marnell viewed the video clips taken at 9:00 AM on August 14, 2006 at the worksite and stated that the video depicted a bobcat dropping "something off the side, maybe steel" ((TR 970)

into the pit (TR 971). He did not receive any notification that day that debris was to be dropped off the building (TR 971). Mr. Marnell assumed that he was in his machine at the time the video was taken (TR 975, 976). He agreed that he received a radio message that steel was going to be dumped and he believed that he was in a safe area (TR 976-978).

K. Kyle Coffman

Mr. Coffman was Respondent's on-site safety officer at this worksite. He was responsible for ensuring compliance with all applicable safety regulations. Respondent submitted a site-specific safety plan with the general contractor. Mr. Varga, the Safety Director, was responsible for creating and updating the safety plan (TR 993-995). The safety plan prohibited dropping materials outside the exterior wall of the building "unless the area is effectively protected" (TR 995-996). A demolition plan was also developed which was revised from time to time. All revisions were to be in writing and placed in a three ring binder with the demolition plan (TR 997-998).

Patent Construction Company erected the scaffold around the buildings to be demolished. The box containment system was constructed by Respondent (TR 1002) and was designed to catch anything that fell to the exterior of the building (TR 1001). The netting on the exterior of the scaffold was put in place by Patent Construction. As each floor was demolished, the scaffold, box containment and netting would be adjusted one floor down (TR 1002-1003). Based upon his experience in the demolition industry, the box containment and netting are extremely effective in controlling falling debris and dust containment (TR 1004).

The scaffolding was not erected around the entire Dallas Securities Building because a specific crane was not available. The plan required that crane to be placed in the pit, roughly where the steel dump pit was ultimately located, to accomplish its mission of lifting and lowering steel to the ground (TR 1006-1007). Mr. Cook told him that an exterior chute would be used to dump steel beams over the side (TR 1008-1009). Coffman expressed his concern to Mr. Varga about the distance between the chute and the street but Varga was satisfied that this distance was sufficient to protect the public (TR 1010-1011).

Mr. Coffman was informed by Mr. Cook that the bottom course of concrete block was to be used as a "toe board" (TR 1016). He tested the strength of the toe board after the accident by kicking it and he concluded that it was strong enough to serve as a toe board (TR 1019). He is not aware of any strength tests being performed on the toe board by anyone prior to the accident (TR 1020). He never heard that the first course of the wall was to serve as a toe board in any safety meetings he attended nor does he know when and how it was determined that the wall was to serve as a toe board (TR 1020).

With respect to the six-foot rule, it was Mr. Coffman's understanding that machines were suppose to move debris six feet back from the wall before other machines collected the debris (TR 1024). Coffman agreed that the six foot rule was a safety measure; however, it was not in the written safety plan (TR 1024-1025). On the day of the accident Mr. Cook was the "spotter" for bobcat operator Alvarro Navarro. It was Mr. Cook's responsibility to ensure that Mr. Navarro did not violate the six foot rule. He had observed employees work within six feet of the edge of the building; however, he never disciplined an employee for that violation (TR 1029).

L. Paul Tarango

Mr. Tarango is employed by Mike's Trucking Company and was employed as a dispatcher at the time of the accident (TR 1038). As part of his duties he visited this worksite to make sure his drivers "were doing what they were supposed to be doing" at the site (TR 1041). At a time prior to any hauling of debris by his trucks, he had a conversation with Mr. Cook regarding his safety concerns for his employees with respect to falling debris (TR 1042). He was aware that the trucks were to be backed into the pit area under the Dallas Securities Building (TR 1042-1043) and wanted assurance that debris would not fall on the trucks (TR 1047). He was told that no work would be performed on the upper floors when the truck was in the pit and no debris would fall from the building (TR 1048), 1059, 1066). Moreover, it was his understanding that the load area was to be twenty feet into the pit away from the exterior wall of the building (TR 1060-1061). However, Mr. Tarango acknowledged that in a statement given to OSHA investigators

during December, 2006, he stated that Mr. Cook did not tell him that work would not be performed at the upper levels of the building when trucks were in the pit (TR 1070, 1075).

M. Jack Rector

Mr. Rector is a compliance officer with the Occupational Safety and Health Administration and was assigned to investigate the accident which occurred at this worksite (TR 1079-1081). Mr. Rector was not at the site prior to or at the time of the accident and has no personal knowledge of the events prior to or at the time of the accident. As part of his investigation he took photographs of the worksite and interview statements. As a result of his investigation, two willful citations were issued to Respondent and the proposed penalty was reduced by 10% because Respondent had no history of previous violations in the three year period preceding the accident (TR 1097).

N. Oscar Chaparro

Mr. Chaparro has been employed by Respondent for eight years as a laborer and a bobcat operator (TR 1275). He was aware that he could not get closer than six feet to the side of the building that did not have scaffolding (TR 1275). At the safety meeting the morning of August 14, 2006, he was informed that there was a lot of debris on the top floor and to be careful along the edge. While working as a bobcat operator on the nineteenth floor on August 14, 2006, he noticed a large amount of concrete debris, steel beams and reinforcing bars (TR 1277). Both Mr. Knudslien and Mr. Cook stated at the safety meeting that morning that the leading edge wall was loose (TR 1278). Both men stated that the employees had to exercise a higher degree of safety (TR 1280).

O. James Knorpp

Mr. Knorpp was the only witness called by Respondent. He is a former OSHA official and is currently self-employed as a safety consultant. He was accepted as an expert witness. Mr. Knorpp testified that in his opinion Respondent did not violate any OSHA standards, particularly the standards cited, at the time of the accident.

IV. Discussion

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) the employer failed to comply with the terms of the standard; (3) employees had access to the violative conditions; and (4) the employer either knew or could have known with exercise of reasonable diligence of the violation. Astra Pharm. Prod., Inc. 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), aff'd 681 F.2d 69 (1st Cir. 1982); Atlas Roofing 430 U.S. 442 (1997). Preponderance of the evidence is defined as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by the proponent are more probably true than false". Ultimate Dist. Sys. 10 BNA OSHC 1568, 1570 (No. 79-1269, 1982)(internal quotations omitted). Moreover, reasonable presumptions and inferences may be drawn based upon the record evidence. See Fed Rules of Evidence Rule 301; Am. Iron and Steel Inst. v. OSHA, 557 F.d 825, 831 (3d Cir. 1978); Republic Steel Corp. v. OSHA 448 U.S. 917 (1980). [7]

Based upon its investigation, the Complainant issued the following citations upon Respondent:

Citation 2 Item 1

> **29 C.F.R. § 1926.501(c) (2009)**: When an employee is exposed to falling objects, the employer does not implement one of the following measures: (1) Erect toe boards, screens or guardrail systems to prevent objects from falling from higher levels; or (2) Erect a canopy structure and keep potential fall objects far enough from the edge of the higher level so that those objects would not go over the edge if they were accidentally displaced; or (3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far enough from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.
>
> This employer did not protect each employee from being struck by falling objects by erection of toe boards, screens, guardrail system, canopy, or

[7] In all civil actions and proceedings not otherwise provided for by Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. See Fed.R.Evid. 301.

effectively barricading the area to which the objects could fall. This violation was most recently observed at its workplace located at 1804 Commerce Street, Dallas, Texas, on or about August 14, 2006, and at times prior thereto, at least two workers, who were on the ground level at the northeast corner of the Dallas building during the clean-up of demolition debris on the 19th floor, were not protected from the hazards of being struck-by falling concrete and brick.

Citation 2 Item 2

29 C.F.R. § 1926.852(a) (2009): No material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected:

The employer does not protect each employee from being struck by materials that are dropped to areas outside of the exterior walls of the building by use of an enclosed chute. This violation was most recently observed at its workplace located at 1804 Commerce Street., Dallas, Texas on or about August 14, 2006, and at times prior thereto, where workers, who were both working on foot and operating mechanical equipment, were exposed to the hazards of being struck-by demolition debris that was dropped to areas outside the exterior walls of the building.

It is axiomatic that the objective of the Occupational Safety and Health Act is to eliminate dangerous conditions in the workplace. Cape and Vineyard Div. v. OSHRC 512 F.2d 1148, 1150; see 29 U.S.C. § 651 (2009). Safety standards have been promulgated by the Secretary to meet that objective. Standards such as those cited by the Secretary in this case are generally referred to as "performance" or "general" standards; that is, the standards indicate the degree of safety protection to be achieved, but are flexible and leave the method of achieving that protection to the employer; see Bratton Corp, 14 BNA OSHC 1893 (No. 83-132, 1991); L. R. Wellson and Sons 773 F.2d 1377 (D.C. Cir. 1985); Daniel Marr and Sons 763 F.2d 477 (1st Cir. 1985). An employer's duty to comply with a performance standard arises when a reasonably prudent employer familiar with the circumstances of the industry would recognize the need for effective protective measures Cape and Vineyard Div. v. OSHA; see also Gen. Dynamics Corp v. OSHRC 599 F.2d 453 (1st Cir. 1979) where the court stated that under a performance standard, knowledge of the existence of the hazards may be determined by experience in the industry and "the extent of precautions to take against a known hazard is that which a conscientious safety expert would take" Id. at 464-465. Moreover, to satisfy due process

requirements the secretary must prove feasibility of compliance Granite City Terminals Corp. 12 BNA OSHC 1741 (No. 83-8825, 1986). However, when the employer is aware of the hazard and the most appropriate method of employee protection against that hazard, a violation of a performance standard will be upheld Owens – Corning Fiber Glass Corp. 659 F.2d 1285 (5th Cir. 1981).

An employer's efforts at compliance may be used to demonstrate that the employer had notice of its obligations under the cited standard. J. A. Jones Constr. Co. 15 BNA OSHC 2201 (No. 87-2059, 1993) In Northwood Stone and Asphalt 16 OSHC 2097 (No. 91-3409, 1994), The Commission stated that "an employer may reasonably be expected to conform its safety program to any known duties and that a safety program must include those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt," Id. at 2099. The Court of Appeals for the District of Columbia in Fabi Constr. Co. 370 F.3d 29 (D.C. Cir. 2004) has cited with approval the Commission's observation that "a reasonably prudent employer should be aware of the dangers inherent in demolition," 370 F.3d at 32.

In this case, the evidence and all reasonable inferences and presumptions, establishes that Respondent is a national construction company and has been engaged in the demolition of large buildings and other large structures for almost 100 years. Based upon the documentary evidence, it is clear that, over that period of time, Respondent has developed a detailed set of safety standards tracking OSHA standards and directives governing inherently dangerous demolition activities. Based upon those documents, it is beyond dispute that Respondent knew that employees must be protected from falling debris and safe areas must be designated for employees when debris is thrown over the side of a building as required by the cited standards. To ensure a safe workplace, Respondent always prepares a site-specific demolition plan for each job. See Complainant's Ex. C-1 – C-11. Based upon its lengthy experience and institutional knowledge in the field of demolition, Respondent fits the definition of a reasonably prudent employer familiar with the industry. As a company familiar with the dangers inherent in demolition activities, Respondent, in its written demolition plan for this worksite required the installation of scaffolding and a box containment system completely around each building and

the removal of steel beams and other large debris from the top levels by crane. The scaffold and box containment system were designed to protect employees from falling debris and recognized by Respondent's managerial staff to be highly effective as protection again falling demolition debris. Respondent has established a hierarchy within its managerial team responsible for enforcing the site-specific documents and, when necessary, to alter the site-specific plans only to the extent that such alterations may be accomplished safely; that is, to comply with the "reasonably prudent employer familiar with the industry" test. That hierarchy included Respondent's management employees Andrew Varga, Vice President for Corporate Safety and Health; Keith Knudslien, General Superintendent of this worksite; Kyle Coffman, this worksite's safety officer; and Alberto Marquez, foreman of this site. All of these individuals had a responsibility for conducting work activities in a safe manner at the worksite.

Mr. Randall Cook, as site superintendent, was Respondent's highest ranking official at the worksite on a daily basis and was responsible for ensuring compliance with the demolition plan. It appears that he experienced no major problems in demolishing the Annex Building; however, the demolition of the taller Dallas Building required the use of a crane to remove steel beams and other large debris from the top levels of the building. Unfortunately, the crane for which Respondent had previously contracted became disabled and was not available when needed at the worksite. Cook attempted to obtain a replacement crane without success. Thus, he was faced with the problem of removing the steel without a crane. This was a major alteration to the demolition plan. Moreover, Cook realized that the planned opening in the scaffold allowing truck access to the pit area was too narrow. The opening needed to be widened to allow access to a dump chute at the interior of the building. There is disputed testimony as to whether the scaffold opening could be constructed to satisfy Cook's needs. Mr. Cook states that he was told that the scaffold opening could not be made wider than the plan requirements. Mr. Terry Lancaster, the subcontractor responsible for erecting the scaffold, testified that after conferring with his engineering department, he informed Mr. Cook that the scaffold opening could be widened as required; however, stronger steel support beams needed to be ordered.

Notwithstanding this information, Mr. Cook concluded that the cheapest, quickest and easiest way to dispose of the steel was to dump it over the side.[8]

There is a direct dispute between the testimony of Mr. Cook and Mr. Lancaster on this issue of the feasibility of scaffold erection over the planned opening to allow truck access. Based upon my direct observation of the demeanor of Mr. Cook and Mr. Lancaster as they testified, I find Mr. Lancaster to be the more reliable and believable witness. Additionally, neither Mr. Lancaster nor his company had any vested interest in the outcome of this case. The same may not be said of Mr. Cook or Respondent's other witnesses.

Mr. Cook realized that he could not dump scrap steel over the side of the building if the scaffold and box containment were in place. He conferred with Mr. Knudslien, Mr. Coffman and Mr. Varga and they all agreed that an exterior steel chute should be used to drop the steel into the pit and eliminate the scaffold/box containment. In lieu of the planned protection against falling debris, Cook, Knudslien, Varga, Coffman, and Marquez testified that one course of concrete block and sandstone at the outer edge of the building was a sufficient "toe board" to protect employees from falling debris. As the evidence has dramatically shown, the decision to forgo the scaffold box containment system, which has been recognized by Respondent as the most effective method for falling debris protection, ultimately resulted in the deaths of two workers. Indeed, the very instrument that Cook states he left in place to prevent falling debris, i.e., the block and sandstone wall, collapsed and became part of the falling debris that caused the instant fatalities. The facts of this case clearly demonstrate that the use of concrete block and sandstone wall in this manner is not what a "reasonably prudent employer familiar with the industry" would use to protect employees from falling debris of the type and nature created at this worksite.

[8] The scrap steel beams could not be dumped into the interior chutes (former elevator shafts) because the uncontrolled tumbling fall of the steel would damage the lower floors and, it is inferred, create hazards to employees working on the lower floors.

The standard cited, 29 C.F.R. § 1926.501(c) (2009), requires an employer to put in place protective devices commensurate with the hazards present at the site and to protect employees from those hazards. It was incumbent upon Respondent, as a reasonably prudent employer familiar with the demolition industry, to choose the protective devices most appropriate to protect workers against those hazards. Respondent acknowledged that the most effective method to protect employees from falling debris is the scaffold/box containment system (TR 74-75, 563-564). As a matter of expediency based upon unexpected problems at the site, Respondent's representatives made a knowing decision to eliminate the most effective protection and replace it with the least effective protection that resulted in the death of two workers. Moreover, a 1" x 4" strip of wood to be put in place at the roof edge, as suggested by Respondent's expert witness, would not constitute sufficient protection against steel beams and large chunks of concrete.[9]

There is evidence that Cook established a "six-foot rule," that is, no employees were to work within six feet of the edge of the upper level of the building on the pit side when employees were in the pit. However, other testimony suggested that there was also a three-foot rule or a fifteen-foot rule. There was additional testimony that no work at all was to be performed on the upper floor when a truck was in the pit. The record contains conflicting testimony regarding the use of radio transmissions to warn employees of the presence of trucks in the pit and whether such transmissions were made on the day of the fatal accident. Moreover, there is testimony by Cook and others that the bottom course of concrete block was not referred to as a toe board until after the accident. In view of these conflicts, I place no weight upon such testimony.

Thus, the evidence on this record supports the conclusion that Respondent violated the cited standard by removing its recognized effective method for preventing falling debris; that is, a canopy structure in the form of the scaffold/box containment/netting system, thereby creating the hazard of falling debris to which employees were exposed. By removing that protection,

[9] The testimony of Respondent's expert is at best disingenuous and, at worst, intellectually questionable. It is beyond comprehension that a safety expert would permit the installation of a 1" x 4" strip of lumber to prevent steel beams and other heavy debris, when propelled by a bobcat loader, from falling over the edge of the building. I find this opinion to be incredible and not worthy of any evidentiary weight.

Respondent, through its supervisory personnel, failed to act as a reasonably prudent employer familiar with the industry. For these reasons, Citation 2 Item 1 is affirmed.

With respect to Citation 2, Item 2, the evidence supports and tragically demonstrates that Mr. Omar Navarro and Mr. Kevin Oliva on August 14, 2006, were allowed to work in the pit area either on foot (Oliva) or by operating a truck (Navarro) and were exposed to and struck by debris dropped outside the exterior walls of the building. The record is devoid of any evidence to convince the trier of fact that Respondent took affirmative steps to adequately maintain an effective safe area to which these employees were required to retreat before any work was commenced on the floors overhead. Likewise, the record is devoid of any evidence to convince the trier of fact that Respondent took affirmative steps to assure that a formal warning system was in place to warn those employees on the ground of the work activity being performed at higher levels, or that any other formal protective measures were implemented that a reasonably prudent employer familiar with the industry should have provided. Accordingly, Item 2 of Citation 2 is affirmed.[10]

[10] There is disputed testimony and a video which allege that debris was dumped into the pit area on August 14, 2006, other than the debris which caused the deaths. While these events may be additional instances of violations, it is only necessary for the Secretary to establish that Omar Navarro and Kevin Oliva were exposed to falling debris.

A. Willfulness

The Secretary asserts that violations committed by Respondent were "willful." Although not defined in the Act, "willful" has been defined by the Courts as "conscious and intentional disregard of the conditions," "deliberate and intentional misconduct," "utter disregard of consequences," and other similar descriptions. See Brock v. Morello Bros. Constr. Inc., 809 F.2d 161 (1st Cir. 1987). In order to establish a willful violation, it is necessary to determine the "state of mind" of the employer at the time of the violations. The standard of proof requires that the Secretary adduce evidence establishing that the Respondent displayed an intentional disregard for the requirements of law and made a conscious, intentional, deliberate and voluntary decision to violate the law or was plainly indifferent to the requirements of the statute. A. Schenbek and Co. v. Donovan, 646 F.2d 799, 800 (2d Cir. 1981); Morello Bros. 809 F.2d at 164; Ga. Elec. Co. v. Marshall, 595 F.2d 309 (5th Cir. 1979). Willful violations are distinguished by a "heightened awareness --of the illegality of the conduct or conditions – and by a state of mind-- conscious disregard or plain indifference." Williams Enterprises, Inc., 13 BNA OSHC 1249, 1256-1257 (No. 85-355, 1987). The Tenth Circuit has determined that an employer's failure to comply with a safety standard under the Act is "willful" if done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to the requirements. U. S. v. Dye Constr. Co., 510 F.2d 78, 81 (10th Cir. 1975).

The Complainant's burden to establish a willful violation has been defined by the Commission as follows:

> To establish that a violation was willful, the Secretary bears the burden of proving that the violation was committed with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. Williams Enterprises, Inc., 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition, and consciously disregarded the standard. Hern Iron Works, Inc., 16 BNA OSHC 1206, 1215 (No. 89-433, 1993). A

> violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these purposes is an objective one – whether the employer's belief concerning the interpretation of a rule was reasonable under the circumstances. Gen. Motors Electro-Motive Div., 14 BNA OSHC 2064 (No. 82-630, 1991).

Sec'y of Labor v. S. G. Loewendich and Sons, 16 BNA OSHC 1954, 1958 (No. 91-2487, 1994).

However, an employer's belief that alternative protective measures are superior to the requirements of a safety standard will not relieve that employer of a finding of a willful violation. Sec'y of Labor v. Trinity Indus. Inc., 16 BNA OSHC 1670, 1673 (11th Cir. 1004).

The evidence in this case supports the conclusion that Respondent had a heightened awareness of the requirements of the standard cited. Respondent's long experience in the demolition industry and its institutional knowledge gained over that period of time has placed it in the unique position of being a leader in the demolition industry. Comprehensive and detailed written preplanning demolition and safety documents prepared for each job site are based upon that experience and institutional knowledge. It is undisputed that Respondent knew that the most effective method for protecting against falling debris was the scaffold/box containment system which complies with the canopy requirement of the standard, (29 C.F.R. § 1926.501(c) (2009). Respondent, by virtue of its detailed demolition documents, knew or should have known that a toe board was insufficient protection against falling debris during floor by floor demolition activities.

Because of unexpected problems faced by Cook, that is, the absence of the crane and the need to widen the ramp entrance through the scaffold, the protection recognized by Respondent as the most effective to protect employees from falling debris was eliminated. Cook also conferred with his superior, Knudslien, who agreed with the decision. Cook then conferred with the site safety officer, Coffman, who registered no objection to the decision. Moreover, foreman Marquez knew of the decision to eliminate the box containment and declined to object. Most

importantly, however, is the fact that the highest ranking safety official in the company, Vice President Varga, personally approved of the decision to remove the box containment system. Thus, it cannot be reasonably claimed by Respondent that the decision which directly led to the death of two workers was the unforeseeable act of only one supervisor. That decision was made at the highest safety management level of the company. Notwithstanding their heightened awareness of the requirements of the cited standard to protect employees from falling debris, five levels of supervisory personnel made the conscious decision to disregard those requirements.

Moreover, it has been established by a preponderance of the evidence that Respondent's management team was insufficiently concerned with employee safety, Williams Enterprises, *supra*. Unanticipated problems at the worksite and ineffective measures to solve those problems took precedence over prudent safety practices. The totality of the evidence proves that expediency and cost-avoidance took precedence over worker's health and safety. These problems included the unavailability of the contracted-for crane, the incomplete erection of the scaffolding system, and uneven ground at the ramp area. Thus, although fully aware of the safety measures that were required under the standards, Respondent's managerial employees were plainly indifferent to those measures and chose the most expedient method to complete the job. For these reasons Citation 2 Item 1 is affirmed as a willful violation.

With respect to Item 2, the decision to remove the box containment system dramatically increased the probability that demolition debris would likely fall into the pit area. This heightened danger was known to Respondent's management team because of Respondent's institutional knowledge and long experience in the demolition industry. When the decision was made to allow work to continue at the upper levels, Respondent, notwithstanding its heightened awareness of the potential for falling debris, failed to protect all workers on this site from that debris by requiring employees to leave the pit area where debris could potentially fall. The failure of management to protect employees against this danger when the decision was made to eliminate the box containment protection supports the conclusion that Respondent, through its supervisors, was plainly indifferent to the requirement to protect employees in the pit area from

falling debris. See Chao v. OSHRC, 401 F.3d 355 (5th Cir. 2006). For these reasons, Citation 2 Item 2 is affirmed as a willful violation.

B. Penalty

Section 17(j) of the Act requires that due consideration must be given to four criteria in assessing penalties: the size of the employer's business, gravity of the violation, good faith and prior history of violations. In J. A. Jones Constr. Co., 15 BNA OSHC at 2214, the Commission stated:

> These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. Trinity Indus., Inc., 15 BNA OSHC 1481, 1483, (No. 88-2681, 1992); Astra Pharm. Prod. Inc., 10 BNA OSHC 2070 (No. 78-6247, 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. Kus-Tum Builders, Inc., 10 BNA OSHC 1128, 1132 (No. 76-2644, 1981).

The Secretary proposes a $63,000 penalty for each item for a total proposed penalty of $126,000. The maximum penalty for willful violations is $70,000; thus, the Secretary has reduced the total proposed penalty for both items by $14,000 based upon the fact that Respondent had not been issued a citation with penalties for three years prior to the accident in this case.

As previously stated Respondent has a long history in the demolition industry and has developed a laudable set of written procedures to insure that the work is completed efficiently and safely. I credit Cleveland Wrecking Company for having not been issued a citation with penalties for three years prior to the accident in this case. I also take note that its supervisors conducted daily safety briefings on this work site. In this case, however, ultimately there was a failure by Respondent's management team to enforce those standards and procedures that may have averted this double fatality. The violations found above were not merely the result of

carelessness or inadequate efforts to achieve compliance. Rather, the violations were the result of management's inability to successfully grapple with unexpected logistical problems at the site in a safe and efficient manner. In order to complete the work, five levels of Respondent's management raised expediency above safety.

I have carefully considered the entire record of trial and extent to which raising the penalty may have a salutary effect upon the attitude of Respondent's management and would encourage them to place safety above expediency in the future. On balance, I have concluded that it would not be appropriate to raise any proposed penalty above that proposed by the Secretary. The findings and adjudged penalties in this case should be sufficient to impress upon Respondent and its senior staff the tragic consequences of short-circuiting safety standards.

V. Conclusion

All findings of fact relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). Respondent is an employer engaged in business affecting commerce within the meaning of section 3(5) of the Act and the Review Commission has jurisdiction over this proceeding. The Complainant's Motion for Reconsideration relating to the evidentiary rulings in this matter is Denied. All proposed findings of fact and conclusions of law inconsistent with this decision are Denied.

VI. Order

(a) Willful Citation 2, Item 1 is affirmed as a willful violation and a penalty in the amount of $63,000 is assessed thereto.
(b) Willful Citation 2, Item 2 is affirmed as a willful violation and a penalty in the amount of $63,000 is assessed thereto.

SO ORDERED

/s/
JOHN H. SCHUMACHER
Dated: June 28, 2010 Administrative Law Judge