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. NUPRECON LP dba NUPRECON ACQUISITION LP, Respondent.	OSHRC Docket No. 08-1037

ON BRIEFS:

Gary K. Stearman, Attorney; Scott Glabman, Senior Appellate Attorney; 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

Aaron K. Owada, Esq.; AMS Law, P.C., Lacey, WA
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

This case involves a citation issued to Nuprecon LP ("Nuprecon") under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, alleging that Nuprecon failed to protect employees from a fall hazard in violation of 29 C.F.R. § 1926.501(b)(1).[1] This matter is before the Commission for the second time. In our previous decision, the Commission reversed former Administrative Law Judge Benjamin R. Loye's determination that the cited

[1] Section 1926.501(b)(1) provides:

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

standard did not apply to the working conditions at issue,[2] and remanded the case to him to consider whether the Secretary had proven the remaining elements of the alleged violation.[3] *Nuprecon LP*, 22 BNA OSHC 1937, 1941, 2009 CCH OSHD ¶ 33,034, pp. 54,387-88 (No. 08-1037, 2009).

In his decision on remand, Judge Loye affirmed the fall protection violation and assessed the proposed $1,875 penalty. On review, Nuprecon now contends that the judge erred in affirming the citation, claiming that the Secretary failed to establish both employee exposure and noncompliance.[4] For the following reasons, we affirm the citation and assess a penalty of $1,875.

BACKGROUND

On April 21, 2008, the Occupational Safety and Health Administration ("OSHA") conducted a programmed inspection of the Whidbey Island Naval Air Station in Oak Harbor, Washington, where Nuprecon employees were demolishing hangars and other structures. At the time of the inspection, Nuprecon employees were working on the third floor of one of the hangars where the OSHA compliance officer ("CO") observed an unprotected twenty-one-foot-long, floor-to-ceiling opening. The CO learned that sometime prior to her arrival, a Nuprecon employee had been operating a Bobcat front-end loader ("Bobcat") pushing debris through the unprotected opening down to a lower level of the hangar, about thirty-six feet below. *Nuprecon*, 22 BNA OSHC at 1938, 2009 CCH OSHD at p. 54,385. During the inspection, the Bobcat operator was observed working elsewhere on the third floor and another Nuprecon employee was observed removing overhead ceiling pipes while standing in a mobile lift located to one side of

[2] In that decision, the judge also vacated a citation item alleging a violation of 29 C.F.R. § 1926.503(c) based on Nuprecon's failure to retrain its employees. This item was not on review before the Commission at the time of our first decision and it is not before us now.

[3] To prove a violation, 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 cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative 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).

[4] The parties do not address knowledge on review, and the record shows that Nuprecon knew of the physical conditions and the work its employees were performing. Moreover, as the judge found, Nuprecon's superintendent was "aware of the condition of [the] opening prior to the inspection."

the unprotected opening. Other Nuprecon employees passed by this work area to access their work on another floor.

Across the unprotected opening, Nuprecon had secured a "5/8-inch thick cable, hung several feet above the floor," to prevent the Bobcat from falling over the edge. *Id.* Nuprecon had also "hung red plastic . . . tape several feet above the floor from the walls near the open edge to and between stanchions" to create "a rectangular area in front of the open edge." *Id.* Nuprecon trained its employees that red tape signified "danger" and that they were to "stay out" of such taped-off areas. During the inspection, the CO did not observe any Nuprecon employees inside the taped-off area. However, the videotape taken by the CO and still photographs developed from that videotape show that the employee working from the lift was located just outside and to the right of the taped-off area. There is no video or photographic evidence of the Bobcat's location, and the CO testified only that it was being operated in an "adjacent" location somewhere outside the taped-off area. On the left side of the taped-off area Nuprecon had placed retractable fall protection equipment, referred to as a "yo-yo system."

DISCUSSION

I. Exposure

The Secretary establishes employee exposure to a violative condition "either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079, 1993-95 CCH OSHD ¶ 30,698, p. 42,605 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). In determining whether the Secretary has proven access to the hazard, the "inquiry is not simply into whether exposure is theoretically possible," but whether it is reasonably predictable "either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074, 1995-97 CCH OSHD ¶ 31,463, p. 44,506 (No. 93-1853, 1997).

Here, the judge concluded that exposure to a fall hazard was established based on his finding that the Bobcat operator came within 3 ½ feet of the unprotected edge while he was operating the Bobcat. But in her brief to the Commission, the Secretary concedes that Nuprecon was not required to provide fall protection to the Bobcat operator while he operated the vehicle. As the Secretary points out, the requirements of § 1926.501(b)(1) only apply to employees on a "walking/working surface" and the standard expressly omits vehicles, such as the Bobcat, from

the definition of "walking/working surface."[5] 29 C.F.R. § 1926.501(b)(1); 29 C.F.R. § 1926.500(b) (defining "walking/working surface" as "any surface, whether horizontal or vertical on which an employee walks or works, . . . but not including ladders, *vehicles*, or trailers, on which employees must be located in order to perform their job duties" (emphasis added)). Nonetheless, the Secretary contends that the Bobcat operator was exposed to the fall hazard because, in her view, it was "reasonably foreseeable that [he] might have to get out of his vehicle while in the taped-off area." But the record evidence does not indicate that the Bobcat operator's work would have entailed dismounting the vehicle while working inside the taped-off area, nor does it establish the Bobcat operator's proximity to the unprotected edge when he would dismount the Bobcat while working outside the taped-off area. In these circumstances, we cannot find that it was "reasonably predictable" the operator would be exposed to the unprotected edge. Accordingly, we conclude that the judge erred in basing his exposure finding on the Bobcat operator.[6]

However, there is evidence that the employee engaged in pipe removal work was exposed to the unprotected edge. Although the red tape strung parallel to the unprotected edge was positioned at a 15-foot distance from that edge, Nuprecon's field safety officer testified that his

[5] In conceding this point, we note that the Secretary relies on OSHA Standard Interpretation Letter #20070417-7634, Fall Protection Requirements for Employees on Construction Equipment (Mar. 16, 2009), in which OSHA announced that, based on the definition of "walking/working surface," it does not consider that § 1926.501(b)(1) requires "fall protection for an employee who is on a vehicle in order to perform his or her job duties . . . ." Given the Secretary's concession, we do not address any of the judge's findings as they relate to the Bobcat operator while he was on the vehicle.

[6] Although the record shows that other Nuprecon employees traversed this floor to access their work on another level of the hangar, there is no evidence establishing that it was reasonably predictable these employees had been, were, or would be in the zone of danger posed by the unprotected edge. A Nuprecon supervisor testified that the red warning tape was "set back 15 feet from the edge . . . ." And it appears from the video that this tape bisected the floor and, therefore, that the floor was approximately 30 feet wide. The passageway beyond the tape posed no apparent fall hazard, and the record reveals no work-related reason for employees using the passageway to walk near the unprotected edge. Nor is there any indication that these employees would otherwise engage in horseplay or any other activity that might bring them near the edge. *See RGM Constr. Co.*, 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶ 30,754, p. 42,730 (No. 91-2107, 1995) (finding that employees walking on narrow bridge were not exposed to fall hazard absent evidence they "walked close to the edge, ran along the surface, engaged in horseplay, or otherwise engaged in an activity that might endanger them"). Therefore, we find that the Secretary has not established that these employees were exposed to a fall hazard.

"most conservative guess" of the distance between the tape at the wall on the right side of the edge and the edge itself was six feet. The record provides no definitive distance between the employee while he was working from the lift and the unprotected edge, but the video and photographic evidence taken by the CO clearly demonstrate that he was positioned "closely adjacent" to both the red tape on the right side of the taped-off area and to the unprotected edge. *See Lancaster Enters.*, 19 BNA OSHC 1033, 1037, 2000 CCH OSHD ¶ 32,181, p. 48,635 (No. 97-0771, 2000) (finding employee access to unguarded glass skylight where "precise distance" between skylight and hatchway used by employees was "not clear" but sketch and photograph showed hatchway was "closely adjacent" to unguarded skylight).

Moreover, the record establishes that this employee was removing overhead ceiling pipes, and his work area near the base of the lift and right up against the wall containing the unprotected edge was strewn with pipes and debris. We find it reasonably predictable that such an employee actively engaged in this type of work would need to move about his entire work area. Nothing prevented him from dismounting the lift in that area and—given the distance between the edge and the red tape on that side—coming within six feet of the edge. In fact, based on the employer's own instructions that the red tape signified "danger" and employees were to "stay out" of such areas, this employee may have had the mistaken impression that as long as he remained outside of the taped-off area, he would not be exposed to a fall hazard. *Cf. Dic-Underhill*, 8 BNA OSHC 2223, 2229-30, 1980 CCH OSHD ¶ 24,959, p. 30,797 (No. 10798, 1980) (finding access to a fall hazard where two employees grinding ceiling seams 25 or more feet from unguarded edge had to move closer to edge to sand seams extending to that side of building). Additionally, the pipes and debris on the floor alongside the wall created a tripping hazard within approximately six feet of the unprotected edge. *Cf. Gallo Mech. Contractors, Inc.*, 9 BNA OSHC 1178, 1180, 1981 CCH OSHD ¶ 25,000, p. 30,899 (No. 76-4371, 1980) ("Hazards of tripping and falling . . . can occur if matter is scattered about working and walking areas."); *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2122, 2000 CCH OSHD ¶ 32,101, p. 48,238 (No. 96-0606, 2000) (stumbling near unprotected edge resulted in non-tied-off employee falling to his death), *aff'd*, 255 F.3d 122 (4th Cir. 2001). Under these circumstances, we find it reasonably predictable that this employee would dismount the lift in his work area and

come within the zone of danger.[7] *See Lancaster Enters.*, 19 BNA OSHC at 1037, 2000 CCH OSHD at p. 48,635 (finding exposure where employees used a hatchway and ladder "closely adjacent" to a fall hazard); *Phoenix Roofing*, 17 BNA OSHC at 1079, 1993-95 CCH OSHD at p. 42,605 ("about 12 feet" from unguarded skylights); *Dic-Underhill*, 8 BNA OSHC at 2229-30, 1980 CCH OSHD at p. 30,797 (25 or more feet from an unguarded edge, working towards that edge); *Cornell & Co.*, 5 BNA OSHC 1736, 1738, 1977-78 CCH OSHD ¶ 22,095, p. 26,608 (No. 8721, 1977) (ten feet from an elevator shaft); *see also Brennan v. OSHRC (Underhill Constr. Co.)*, 513 F.2d 1032, 1039 (2d Cir. 1975) (rejecting conjecture that exposure may only be found where an employee is "teetering on the edge of the floor"). Accordingly, we conclude the Secretary established that the employee engaged in pipe removal was exposed to the unprotected edge.

II. Noncompliance

Section 1926.501(b)(1) lists three methods of fall protection for use at an unprotected edge: "guardrail systems, safety net systems, or personal fall arrest systems." The parties agree that Nuprecon erected neither a guardrail nor a safety net system, and that the red tape Nuprecon placed around the unprotected edge does not serve as a method of fall protection. But the parties disagree as to whether the yo-yos provided the requisite personal fall arrest protection and whether they were even installed at the time of the inspection. There is no dispute, however, that the yo-yos were located at a distance of at least 21 feet across the taped-off area from where the employee was performing his pipe removal work. Thus, even if we assume that the yo-yos constituted an adequate personal fall arrest system under the cited standard that was both installed and available for use, this means of fall protection was not located within the immediate work area of the employee engaged in pipe removal on the right side of the taped-off area. As such, the yo-yos offered him no protection whatsoever once he was off the lift and exposed to the fall hazard. *See N&N Contractors, Inc.*, 18 BNA OSHC at 2122, 2000 CCH OSHD at p. 48,238 (finding noncompliance with § 1926.501(b)(1) where employee was "clearly in the zone of danger" and not tied off), *aff'd*, 255 F.3d at 126 ("[A] fall arrest system is useless unless it is properly secured as soon as the danger of falling arises."). Therefore, we find the Secretary

[7] The Secretary's exposure argument at this stage of the proceedings is confined to employee access to the danger zone while standing on the floor and our disposition is similarly limited.

established that Nuprecon failed to comply with the cited provision. Accordingly, we affirm the violation.[8]

ORDER

We affirm Citation 1 Item 1a as serious and assess a penalty of $1,875.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: February 7, 2012

[8] Based on the harm that would have resulted from an approximately 36-foot fall, the judge characterized the violation as serious and assessed a $1,875 penalty. Nuprecon challenges neither the characterization nor penalty on review. Thus, we find no reason to disturb these findings. *See, e.g.*, *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2004-09 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (affirming alleged characterization and assessing proposed penalty where neither issue was in dispute).

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Nuprecon, LP, Respondent.	OSHRC DOCKET NO. 08-1037

Appearances:

Abigail G. Daquiz, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington
For Complainant

Aaron K. Owada, Esq., AMS Law, P.C., Lacey, Washington
For Respondent

Before: Administrative Law Judge Benjamin R. Loye

DECISION AND ORDER

Procedural History

On May 21, 2009, the undersigned issued a *Decision and Order* in this case which vacated two alleged violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. ("the Act"). On July 2, 2009, the Occupational Safety and Health Review Commission ("the Commission") directed review of the decision. On November 20, 2009, the Commission issued a *Decision and Remand Order* reversing the undersigned with regard to the vacating of Citation 1 Item 1(a). The Commission concluded that the standard allegedly violated in Citation 1 Item 1(a) did apply to the work being performed by Respondent, and remanded the case for a determination of whether the Secretary established the remaining elements of the violation.

Factual Findings

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Nuprecon, LP ("Respondent") worksite at a naval air station near Seattle, Washington on April 21, 2008. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging two violations of the Act.[1] The violation at issue on remand, Citation 1 Item 1(a), alleged a serious violation of 29 C.F.R. §1926.501(b)(1) with a proposed penalty of $1,875.00.

On April 21, 2008, OSHA Compliance Safety and Health Officer ("CSHO") Kalah Goodman conducted an inspection of work activities at Whidbey Island Naval Air Station in Washington. (Tr. 14-15). The inspection was a programmed planned inspection of the site as a result of the location being listed on OSHA's Dodge Report. (Tr. 14). At the time of the inspection, Respondent had employees working on the third and fourth floors of Hangar Five. (Tr. 17, 26, 72). Respondent's employees were demolishing two hangar bays, two floors of another hangar, and a tunnel. (Tr. 73).

CSHO Goodman entered the third floor of Hangar Five and observed a 21-foot horizontal opening at one outer edge of the floor. (Tr. 20, 60; Ex. 2, 5). The floor opening had a 5/8-inch thick wire cable stretched across it, which was secured to the two columns on either side. (Tr. 20, 40, 74; Ex. 2, 4). There was also red plastic tape surrounding the floor opening in a rectangular pattern, approximately 15 feet from the edge. (Tr. 79-80). The distance from the edge of the third-floor opening to the ground below was approximately 36 feet. (Tr. 75-76; Ex. 5).

[1] The adjudication of Citation 1 Item 1(b) was not addressed in the Commission's *Decision and Remand Order*, and therefore, will not be addressed herein.

CSHO Goodman learned that the 21-foot opening was being used by a Nuprecon employee operating a Bobcat front-end loader to push debris off the edge as part of the building demolition. (Tr. 25). However, at the time of her inspection, the Bobcat operator was not working near the edge. (Tr. 25, 43-44). He was working in an adjacent area on the same floor, piling up piping which was being removed from the building. (Tr. 25). CSHO Goodman observed another Nuprecon employee working near the red tape barrier, but outside its boundaries, on a scissor lift. (Tr. 25, 29, 47; Ex. 4). There were also several Nuprecon employees who passed through the third floor of Hangar Five daily on their way up to the fourth floor. (Tr. 26, 47).

CSHO Goodman testified that the regulations, under these circumstances, provided for only three methods of acceptable fall protection for employees accessing the third floor: guardrail systems, safety net systems, or personal fall arrest systems. (Tr. 26, 28). She testified that the use of a wire rope and red tape to guard this open floor edge was not sufficient. (Tr. 26-29). The Secretary considered all employees working on the third floor of Hangar Five to be exposed to a fall hazard as a result of this condition. (Tr. 46, 48-49; Complainant's Post-Hearing Brief, p.6). The parties agree that a 36-foot fall would unquestionably result in serious injury or death. (Tr. 34, 115).

During the inspection, CSHO Goodman observed and video-recorded the floor opening while standing just outside the red-tape boundary. (Tr. 39). Although she testified that any employee who walked on the third floor was exposed to a fall hazard as a result of this condition, she did not consider herself personally exposed to the fall hazard while standing fifteen feet from the edge. (Tr. 39). She acknowledged that the red tape surrounding the edge indicated to her that she should stay out of that area. (Tr. 40).

She further acknowledged that she never saw any employees working within the boundaries of the red tape. (Tr. 43).

Prior to the inspection, Respondent had implemented and trained its employees on a color-coded system regarding plastic tape boundaries. (Tr. 77). Red tape is recognized as the highest danger level and employees are trained to stay out of any area demarcated with red tape. (Tr. 77). The lone exception in this instance was the Bobcat operator, who actually maneuvered his machine inside the area so that debris could be pushed off the floor opening to the ground below. (Tr. 76, 80, 83-84, 95).

Respondent presented evidence and argument on a multitude of alternative fall protection methods identified in the regulations. However, Aaron Tomaras, Respondent's Superintendent on the day of the inspection, conceded that the wire rope stretched across the opening did not constitute a guard rail system, that the Bobcat operator's use of a seat belt did not constitute fall protection, that the floor opening was not a leading edge, and that "warning line system" referenced in §1926.500 applies only to roof work. (Tr. 88, 90-91, 115). He also conceded that this location was not a roof. (Tr. 91). Avery Brown, Respondent's Field Safety Officer, maintained that the red-taped area surrounding the third floor opening was a "controlled access zone." (Tr. 101-102). However, I find that Respondent was not engaged in the type of activities referenced by the controlled access zone regulation [29 C.F.R. §1926.502(g)]: bricklaying, leading edge work, precast concrete erection work, or residential construction.

Citation 1 Item 1(a) alleges that Respondent failed to implement an acceptable fall protection system at the 21-foot opening in the demolition area on the third floor of Hangar Five. (Tr. 26; Ex. 7). In calculating the proposed $1,875 penalty, CSHO

Goodman concluded there was a high severity of injury, but a low probability of an actual accident. (Tr. 35). She also applied a 15% penalty reduction for the Respondent's good faith during the inspection, and an additional 10% reduction for Respondent's lack of violations in the past three years. (Tr. 36).

Discussion

To establish a prima facie violation of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Citation 1 Item 1(a)

The Secretary alleged in Citation 1 Item 1(a) that:

> *29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:*
>
> *(a) Third Floor Loading Zone, where the demolition work area and passageway were located adjacent to an unguarded open sided floor located 36½ feet above the lower level. Hazard: Fall from elevation.*

The cited standard provides:

> *Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet*

(1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

CSHO Goodman is correct that the cited standard provides for only three types of fall protection: guardrails, safety nets, or personal fall arrest systems. Other regulations recognize different types of acceptable fall protection methods if specific types of work activities are being performed. As discussed above, Respondent's own supervisors testified that the wire rope stretched across the opening did not constitute an adequate guard rail system, that the Bobcat operator's use of a seat belt did not constitute fall protection, that the floor opening was not a leading edge, and that "warning line systems" referenced in §1926.500 apply only to roof work. I also concluded above that Respondent was not engaged in the type of activities referenced by the controlled access zone regulation [29 C.F.R. §1926.502(g)]: bricklaying, leading edge work, precast concrete erection work, or residential construction. The record establishes that there was no safety net system at this location. There was some testimony about the presence of a fall restraint, or "yo-yo" system, available for employee working inside the red-taped area. However, the record indicates that the Bobcat operator was not required to use the fall restraint system while in the Bobcat pushing debris over the edge. (Tr. 75-76, 80, 83-84, 95). Furthermore, CSHO Goodman testified that there was no such fall restraint system installed at the time of her inspection. (Tr. 26-28, 47). The preponderance of the evidence establishes that Respondent failed to implement one of the three acceptable methods of fall protection at this location. The terms of the cited standard were violated.

To prove employee exposure to a violative condition, Complainant must establish that Respondent's employees were either actually exposed or that it was "reasonably

predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997). The record establishes that the Bobcat operator's responsibilities on this floor required him to cross the boundary of red tape and push debris over the inadequately protected edge. During this process, the Bobcat operator came within 3½ feet of the opening. (Tr. 96-97). Therefore, the Bobcat operator's activities alone establish employee exposure to the fall hazard.

Superintendent Tomaras was aware of the condition of this opening prior to the inspection. (Tr. 75-76). Knowledge of this violative condition is imputed through him to the Respondent. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991).

In order to establish a "serious" violation of the Act, the Secretary must establish that there was a substantial probability that death or serious physical harm could result from the cited condition if an accident occurred. "In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur." *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1989 CCH OSHD ¶28,501 (No. 87-1238, 1989). There is little doubt that a fall from a height of thirty-six feet would have resulted in serious physical harm or death. Citation 1 Item 1(a) was properly characterized as a serious violation. Accordingly, Citation 1 Item 1(a) will be affirmed.

Penalty

In calculating the appropriate penalty for the violation, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. *29 U.S.C. §666(j)*. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993). Based upon the facts and discussion above, the court finds that a penalty of $1,875.00 is appropriate for the violation.

Affirmative Defenses

Respondent did not argue the merits of any affirmative defenses in its post-hearing brief. Therefore, the affirmative defenses identified in Respondent's September 12, 2008 letter to the court are deemed abandoned.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1(a) is AFFIRMED and a penalty of $1,875.00 is ASSESSED.

/s/
BENJAMIN R. LOYE
Judge, OSHRC

Date: January 8, 2010
Denver, Colorado