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. MVM CONTRACTING CORP., Respondent.	OSHRC Docket No. 07-1350

APPEARANCES:

Lisa A. Wilson, Attorney; Scott Glabman, Senior Appellate Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Deborah Greenfield, Acting Deputy Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Charles T. Bistany, Esq., White Plains, NY
For the Respondent

DECISION

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

MVM Contracting Corp. ("MVM") was hired to perform construction and renovation work at a hotel located in Tarrytown, New York. After an inspection of MVM's worksite, the Occupational Safety and Health Administration ("OSHA") issued MVM a citation under the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678, alleging a willful violation of 29 C.F.R. § 1926.652(a)(1)[1] based on MVM's failure to protect employees

[1] Section 1926.652(a)(1) provides:

> (a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
>
> (i) Excavations are made entirely in stable rock; or

working in an excavation from a cave-in.[2] The Secretary proposed a penalty of $21,000.

Following a hearing, Chief Administrative Law Judge Irving Sommer issued a decision in which he found that the excavation was greater than 5 feet deep but was not shored, sloped or otherwise protected as required by the standard. He affirmed the citation as serious, rather than willful, and assessed a penalty of $2,100. According to the judge, the Secretary "explicitly base[d] the willful characterization" on statements allegedly made by the company's president directing that employees work in the unprotected excavation. However, the judge found that the Secretary failed to establish that these statements were made.

MVM did not seek review of the judge's affirmance of the citation, and the merits of the violation are not at issue here. The Secretary, however, challenges the judge's determination that the violation was not willful. She argues that MVM had a heightened awareness of the requirements of the excavation standard, but disregarded those requirements in allowing its employees to work in an excavation that did not comply with the standard. In response, MVM contends that the Secretary: (1) relies on "hearsay conversations" to support her willful characterization; (2) should not have been allowed to rely on deposition testimony when the witness was available to testify at the hearing; and (3) ignores a statement made by MVM's superintendent regarding abatement of the cited condition.

For the reasons that follow, we reverse the judge's decision to characterize the violation as serious, affirm the violation as willful, and assess the $21,000 proposed penalty.

BACKGROUND

On January 18, 2007,[3] an OSHA compliance officer ("CO") began an inspection of MVM's worksite. On that day, the CO observed a large excavation that he measured to be about 30 feet long, 30 feet wide, and from 5 feet 4 inches to 6 feet in depth. The CO testified that he did not see any employees in the excavation but noticed obvious signs that masonry work had been done. Additionally, the CO testified that MVM's onsite superintendent told him that employees had been performing masonry work in the excavation without cave-in protection.

(ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

[2] The Secretary also issued MVM a citation alleging a number of serious violations. Neither party petitioned for review of those items and that citation is not before us.

[3] Unless otherwise indicated, all dates referenced herein occurred in 2007.

It is undisputed that during the inspection the CO provided the superintendent with detailed information about the requirements of OSHA's excavation standards, and told him that MVM was in violation of those standards because its employees worked in the unprotected excavation. Specifically, the CO informed the superintendent that "a Competent Person needs to make a decision [when the excavation is] four and a half feet what type of cave-in protection is needed, if any. And then at five [feet] they need to ensure that they follow the Excavation Standard." As the judge found, the CO also "explained to [the superintendent] the different methods of protection based on soil type and depth."[4] According to the CO, the superintendent stated that MVM would slope the excavation in accordance with the requirements of the excavation standard.

Four days later, on January 22, the CO returned to the worksite and discovered that the excavation still lacked cave-in protection. The CO testified that on that day, the superintendent told him that MVM employees had worked in the excavation two days earlier, on January 20, without cave-in protection. The CO also testified that the superintendent informed him that following their discussion on January 18, the superintendent had relayed the substance of their conversation to MVM's president, including the fact that employees working in the excavation were exposed to a hazardous condition in violation of the excavation standard. According to the CO's account of his conversation with the superintendent, MVM's president told the superintendent to have the employees continue their work in the excavation without cave-in protection in order to complete the project before the CO returned.

Returning to the worksite once more on January 24, the CO held a brief meeting with the superintendent. In a video clip taken by the CO during his visit and introduced into evidence by MVM, the superintendent is heard saying that he "saw guys working in the excavation" but "prior to them jumping in the hole," an excavator was used to backfill the excavation to bring its depth under 5 feet. Also admitted into evidence at the hearing is the full transcript of a deposition that the superintendent—who did not testify at the hearing—gave about five months before the hearing commenced.

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[4] The CO obtained a soil sample from the excavation while the superintendent was present, which was sent to OSHA's Salt Lake City Technical Center laboratory for analysis. The lab's classification of the sample as Type B soil is not in dispute. *See* Soil Classifications, 29 C.F.R. pt. 1926 subpt. P app. A.

ANALYSIS

I. Evidentiary Issues

MVM argues that the Secretary improperly relies on the CO's testimony, which it describes as hearsay, and on the superintendent's deposition, which it asserts was erroneously admitted into evidence. We find no merit to either claim. First, the CO's testimony as to what the superintendent and other MVM employees told him is not hearsay. Under Fed. R. of Evid. 801(d)(2)(D), MVM employee statements made to the CO are admissions by a "party-opponent" that, when offered against it, are not hearsay. *See Manganas Painting Co.*, 21 BNA OSHC 1964, 1974 n.12, 2004-09 CCH OSHD ¶ 32,908, pp. 53,391-92 n.12 (No. 94-0588, 2007) (noting that "Commission has held that employee statements to compliance officers concerning work activities are admissible") (citing *Regina Constr. Co.*, 15 BNA OSHRC 1044, 1047, 1991-93 CCH OSHD ¶ 29,354, p. 39,469 (No. 87-1309, 1991) (discussing Rule 801(d)(2)(D) and admissibility of employee statements made to CO during OSHA inspection)). Even if the CO's testimony about the employee statements was hearsay, it would still be admissible because MVM failed to object to it. *See* Fed. R. Evid. 103(a)(1); *Regina Constr. Co.*, 15 BNA OSHC at 1049 n.7, 1991-93 CCH OSHD at p. 39,468 (holding that unless objected to at the hearing, hearsay evidence is admissible). Accordingly, we find the CO's testimony concerning statements made to him by MVM employees was admissible.

We also find the judge properly admitted the superintendent's deposition transcript in evidence. MVM initially objected to the Secretary's admission of portions of the deposition, claiming that it was prejudiced by not having had an opportunity to cross-examine the superintendent. But when the judge overruled its objection, MVM did not request a continuance in order to subpoena the superintendent which, if granted, would have cured any prejudice. *See United Cotton Goods, Inc.*, 10 BNA OSHC 1389, 1390, 1982 CCH OSHD ¶ 25,928, p. 32,454 (No. 77-1894, 1982) (finding any prejudice to employer could have been cured by requesting continuance). Moreover, at MVM's request, the judge later admitted the *entire* deposition transcript into the record. Accordingly, we find no error in the admission of the deposition into evidence.

II. Characterization

"The hallmark of a willful violation is the employer's state of mind at the time of the violation – an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . .

plain indifference to employee safety.'" *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181, 2000 CCH OSHD ¶ 32,134, p. 48,406 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference . . . ." *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, pp. 41,256-57 (No. 89-433, 1993). This state of mind is evident where "the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *AJP Constr. Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (emphasis and citations omitted). As articulated by the Second Circuit, to which this case could be appealed, "a 'willful' violation [is] one done either with an intentional disregard of, or plain indifference to, the statute." *A. Schonbek & Co. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981).

Here, we find that the judge erred in limiting his analysis of willfulness to the claim that MVM's president had directed the superintendent to complete the excavation work before abating the cave-in hazard. It is true that the Secretary argued to the judge in her post-hearing brief that the violation was willful because MVM's president "intentionally disregarded his obligation to provide cave-in protection in the excavation." However, the superintendent's knowledge of the excavation standard and his conscious failure to bring the excavation into compliance was fully tried at the hearing, and the Secretary highlighted evidence of his state of mind in her post-hearing brief to the judge. Thus, we reject the judge's narrow approach to the issue of characterization and assess the record as a whole to determine whether the evidence establishes that the violation was willful. *See P.A.F. Equip. Co.*, 7 BNA OSHC 1209, 1213 n.12, 1979 CCH OSHD ¶ 23,421, p. 28,341 n.12 (No. 14315, 1979) (noting that the Commission is "not precluded from making findings of fact or conclusions of law regarding the issue of willfulness as long as that issue was fully tried at the hearing"), *aff'd*, 637 F.2d 741 (10th Cir. 1980).

Based on our review of the record, we find that the Secretary properly characterized the violation as willful. First, the superintendent possessed a heightened awareness of the requirements of the excavation standard by virtue of his January 18 conversation with the CO about those requirements. *See MJP Constr. Co.*, 19 BNA OSHC 1638, 1647-48, 2001 CCH OSHD ¶ 32,484, pp. 50,306-07 (No. 98-0502, 2001) (finding CO's prior warnings to supervisor

established a heightened awareness of the requirements of the cited standard), *aff'd*, 56 Fed. App'x 1 (D.C. Cir. 2003) (unpublished); *Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1955, 1995-97 CCH OSHD ¶ 31,289, p. 43,965 (No. 92-3788, 1997) (finding Secretary established heightened awareness by CO's testimony that he reviewed the excavation standards with employer's supervisors). Indeed, the superintendent acknowledged in his deposition that the CO told him on the first day of the inspection that the excavation was in violation of OSHA standards and had to be "shelved" or shored differently.

Second, the CO's unrebutted testimony establishes that the superintendent consciously disregarded the standard's requirements when, as he told the CO, he observed employees working in the excavation on January 20 without cave-in protection, yet allowed them to continue working.[5] *See Calang Corp.*, 14 BNA OSHC 1789, 1791-92, 1987-90 CCH OSHD ¶ 29,080, pp. 38,870-71 (No. 85-0319, 1990) (finding conscious disregard where CO informed employer's supervisors of standard's requirements and those requirements were ignored). The CO's testimony is corroborated by his interviews with MVM employees, including its mason foreman, all of whom confirmed that work continued in the unprotected excavation after the CO's first visit on January 18. Also, a comparison of the photographs the CO took on January 18 with those he took on January 22 demonstrates that work had been performed in the excavation after January 18, and its depth remained the same on both days.

The evidence that MVM relies on to dispute the Secretary's willful allegation is the superintendent's statement in the January 24 video clip that an excavator was used to backfill the excavation prior to the men "jumping in the hole." While the judge mentioned this statement in his decision, he never explained its relevance to his findings regarding characterization. We have carefully reviewed the video clip, and find that it provides no support for MVM's position. *See Metro Steel Constr.*, 18 BNA OSHC 1705, 1707, 1999 CCH OSHD ¶ 31,802, p. 46,667 (No. 96-1459, 1999) (disagreeing with judge and finding "that the Secretary has failed to show by a preponderance of the evidence that the person who walked the exterior beam without fall protection in the second segment of the video was a Metro employee"). In the video, the superintendent never indicated *when* the excavation was backfilled. Moreover, the record

[5] When asked in his deposition whether he told the CO that employees were working in the excavation without cave-in protection, the superintendent stated that he could not recall such a conversation but that he probably did make such statements "if it's there on record."

establishes that the excavation had not been backfilled between January 18 and January 22—the period during which the judge specifically found that employees were exposed to the violative condition—as the CO personally observed the excavation's depth on those two days. Indeed, the judge found, "the [video] recording was made . . . two days after the January 22 inspection *when the excavation had yet to be filled in.*"

Therefore, we conclude that the superintendent's heightened awareness of the excavation standards and subsequent failure to take corrective action to bring the excavation into compliance to protect those working inside it constitutes a conscious disregard of the cited provision, which is imputed to MVM.[6] *See Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1393, 2002-2004 CCH OSHD ¶ 32,690, p. 51,557 (No. 97-0755, 2003) (finding conscious disregard established when record shows that foreman knew that decking was required and made a conscious decision to proceed without it); *see also Conie Constr. Co.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶ 30,474, p. 42,090 (No. 92-0264, 1994) (imputing foreman's knowledge of violative condition to the company), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995). Accordingly, we affirm the violation as willful.[7]

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[6] Because we base our conclusion on the evidence that the superintendent observed the employees working in the unprotected excavation and did not take action to comply with the standard, we find it unnecessary to address whether the Secretary established that MVM's president ordered the superintendent to finish the job before bringing the trench into compliance.

[7] Neither party disputes the penalty amount proposed by the Secretary in her citation. Based on our review of the record and the penalty factors set forth under § 17(j) of the Act, 29 U.S.C. § 666(j), we find that the $21,000 proposed penalty is appropriate here. *See e.g., KS Energy Servs. Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2008 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (assessing proposed penalty amount where issue not in dispute on review).

ORDER

We reverse the judge's decision to characterize the violation as serious, affirm the violation as willful, and assess a $21,000 penalty.

SO ORDERED.

_/s/_____
Thomasina V. Rogers
Chairman

_/s/_____
Horace A. Thompson III
Commissioner

_/s/_____
Cynthia L. Attwood
Commissioner

Dated: July 20, 2010

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

SECRETARY OF LABOR, Complainant, v. MVM CONTRACTING CORP., Respondent.	OSHRC Docket No. 07-1350

APPEARANCES:

Donyell M. Thompson, Esq.
U.S. Department of Labor
Office of the Solicitor
201 Varick Street, Room 983
New York, New York 10014
For the Department of Labor

Charles T. Bistany Esq.
399 Knollwood Road, Suite 311
White Plains, New York 10603
For the Respondent

BEFORE: Irving Sommer
Chief Judge

DECISION

This matter is before the Commission pursuant to a timely Notice of Contest filed by the employer pursuant to the Occupational Safety and Health Act of 1970; 29 U.S.C. §§651-678 ("the Act").

On January 18, 2007 an OSHA compliance officer (CO), John Phillips, began an inspection of respondent's construction worksite at 455 South Broadway, Tarrytown, New York. The compliance officer testified that he was met at the site by, and conducted an opening conference with Dennis Adorno, who identified himself as the superintendent of MVM. (Tr. 13-14) According to the compliance officer, Mr. Adorno told him that approximately 88 days prior to the inspection, MVM took over general contracting duties and that MVM was in total control of the site, including safety matters. (Tr. 15, 203)

The job involved a combination of new construction and renovation to an existing Doubletree Hotel. (Tr. 222) MVM's bid on the job included all of the side work, which included concrete curbs, concrete sidewalks, paving, some concrete work on the side of the hotel and masonry work. (Tr. 222) MVM neither hired nor paid any of the subcontractors. (Tr. 223-224)

As a result of the inspection, the Secretary issued two citations alleging several violations of the Act. In several of the violations, MVM employees were not exposed to the hazardous condition. Rather, employees of other subcontractors were exposed and MVM was cited because of its position as general contractor.

A hearing was held on January 21-22, 2009 in New York City. The parties have fully briefed this case and the matter is ready for decision.

Was MVM the General Contractor

Respondent contends that it was not the general contractor at the site. To the contrary, it alleges that it was just another subcontractor and did not have overall authority over safety at the site. Therefore, it was not responsible for violations created by and under the control of other subcontractors where MVM employees were not exposed.

The Secretary contends that, during the inspection, Dennis Adorno told the CO that MVM took over general contracting responsibilities 88 days earlier and confirmed that

MVM had overall responsibility over the site. (Tr. 15) The CO also stated that when he arrived at the site and asked to see the party in charge, he was directed to MVM. (Tr. 122) The CO could not recollect if he ever asked representatives of other subcontractors if MVM was the general contractor at the site. (Tr. 123)

Project Manager Carlos Garcia denied that MVM was operating as the general contractor. Rather, he testified that the general contractor was Larry Marks, a representative of the site owner, 455 Hospitality. (Tr. 224) According to Garcia, 455 Hospitality was running the site in conjunction with the East Coast Restoration. (Tr. 224) Moreover, in his deposition, Mr. Adorno, who's alleged statement to the CO was critical to the CO's determination, denied that MVM was the general contractor. Rather, he testified that the general contractor was the owners of the hotel and "two guys that hired subcontractors." (Adorno Depo. at 39-40)[1]

Per my request at the hearing, respondent submitted, with its post-hearing brief, a copy (unsigned) of its contract with 455 Hospitality, LLC. (Tr. 237) The submission lists the scope of work required from MVM. Nowhere is there any mention of MVM acting as a general contractor, or having responsibility for overall safety at the worksite. I find the contract to be of little probative value. This is not a signed contract, and has been submitted without the Secretary having had an opportunity to examine it. Also, while it purports to demonstrate that MVM was not originally hired as the general contractor, a fact not disputed by the Secretary, it is not relevant to whether MVM was subsequently "promoted" to general contractor status.

The basis for holding a general contractor responsible for hazards to which it has no employees exposed is that "typically a general contractor on a multiple employer project possesses sufficient control over the entire worksite to give rise to a duty under

[1]Although not a marked exhibit, at the hearing, the deposition was admitted into the record in its entirety. (Tr. 10)

[§654(a)(2)] of the Act either to comply fully with the standards or to take the necessary steps to assure compliance." *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199 (Nos 3694, 4409, 1976)[2]

The evidence fails to establish that MVM was the general contractor. Central to the CO's determination was the alleged statements of Mr. Adorno, which he denied at his deposition. Furthermore, even assuming that MVM took over general contractor duties, there is no evidence to indicate whether it became the actual general contractor with overall safety responsibility for the entire worksite, or whether it was acting as an informal general contractor. As such, it is possible that MVM was given a coordinating function for the worksite, sort of a "lead sub-contractor" without having any authority to make safety demands of other subcontractors. The burden is on the Secretary to establish each element of her case. *Trinity Industries Inc.*, 15 BNA OSHC 1579, 1590 (No.88-1545, 1992)(consolidated) The record simply does not contain sufficient evidence to establish that MVM was a general contractor that had the responsibility for safety over the entire worksite, or the authority to force subcontractors to abate hazards they created and/or controlled. Accordingly, all items based only on the exposure of employees of other subcontractors will be vacated.

The Violations

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the violation with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991)

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[2]I note that recently, the Commission re-examined the multiple employer doctrine. The majority found that there was no authority in the Act to hold a general contractor responsible for hazards that it did not create and had no employees exposed. However, that decision was reversed in U.S. Court of Appeals for the Eighth Circuit. *Summit Contractors, Inc.* 21 BNA OSHC 2020 (No. 03-1622, 2007); *rev'd* 558 F.3d 815 (8th Cir. 2009)

Citation 1 Item 1 alleges a serious violation of 29 CFR 1926.20(b)(1)[3] on the grounds that MVM "did not have a safety and health program. The employees were exposed to safety hazards, including but not limited to, falls and excavation cave-in." The Secretary proposes a penalty of $1050 for this alleged violation.

The CO testified that Mr. Adorno told him that MVM did not have a safety and health program. (Tr. 24) The CO further testified that employees told hm that they lacked safety training. (Tr. 24) However, MVM project manager, Carlos Garcia, testified that MVM maintained at the trailer on the site, a book containing all OSHA regulations, Rules and Safety Talks and Safety Manuals for the project. (Tr. 262, Ex. R-13) More specifically, the book contained the Project Safety Program, Toolbox Talks, lockout/tagout schedules, safety inspection checklist, excavation safety manual, scaffold rules, fall protection rules, Employee Training Verification Forms, MSDS (Material Safety Data Sheets) Transmission Forms and data sheets. However, Adorno could not say with any certainty who was responsible for implementing the written safety program and could not recall ever seeing it. (Adorno Depo. at 50, Depo. Ex. C-7)

Garcia also testified that he and Adorno would walk the site daily and hold informal safety talks with the employees. (Tr. 264-65) According to Garcia, he gave the safety talks, and sometimes the talks were given in Spanish. (Tr. 266) However, he also testified that the employees spoke "Brazilian" (Portuguese), that they didn't understand much English, but that when the talks were given in Spanish "they understood some of my words." (Tr. 228) Adorno was not designated to give safety talks. (Tr. 266)

The Secretary has established the violation. The evidence establishes that the employees understood very little English. (Tr. 228). Having a book containing OSHA regulations, safety talks, safety manuals, toolbox talks, and MSDS sheets, etc. does little

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[3]The standard provides:

"It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part."

good for employees who lack the ability to read them. Respondent also argues that it gave safety talks in Spanish. (Tr. 228) But, the employees had little knowledge of either English or Spanish. Having "some of my words" being understood hardly qualifies as a viable method of having an effective safety and health program.

The Secretary cited the violation as serious. The evidence establishes that the lack of an effective safety and health program resulted in employees being exposed to hazards including falls and cave-ins, all of which could have resulted in death or serious physical harm. In determining the proposed penalty, the Secretary initially arrived at a base penalty of $3500. (Tr. 25) After considering the statutory factors set forth in section 17(j) of the Act, 29 U.S.C. §666(j), including the size of the employer, the gravity of the violation, the good-faith of the employer and its history of previous violations, the Secretary reduced the penalty to $1050. I find the adjusted penalty to be consistent with the remedial purposes of the Act. Accordingly, I assess the proposed penalty of $1050.

Citation 1 Item 2a alleges a serious violation of 29 CFR 1926.21(b)(2)[4] on the grounds that "[e]mployees were not trained in the avoidance and recognition of unsafe conditions in their work environment, including but not limited to excavation safety." A combined penalty of $1050 is proposed for items 2a-2c.

The CO testified that, based on his discussions with employees and the lack of training on the job site, he determined that employees were not trained in the avoidance and recognition of unsafe conditions (Tr. 32) The CO stated that he observed employees working on ladders in an unsafe manner. (Tr. 32) He further testified that he did not receive any sort of training records during the course of the inspection. (Tr. 36)

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[4]The standard provides:

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

Garcia testified that he gave safety talks with employees in both English and Spanish. (Tr. 268) Again, however, the employees did not have a fluidity in either language. Moreover, Adorno testified in his deposition that safety was discussed in a "very informal" manner. (Adorno Depo. at 25) For reasons set forth in item 1, the items is affirmed. This lack of training resulted in employees being untrained in the avoidance and recognition of unsafe conditions which, on a construction site could result in injuries of a life threatening nature. Accordingly, the item was properly classified as serious.

Citation 1 Item 2b alleges a serious violation of 29 CFR 1926.454(a)[5] on the grounds that "[e]mployees were not provided with scaffold safety training."

The CO testified that he based this violation on the exposure of employees to scaffold hazards, such as lack of access and lack of base plates. Moreover, employees, including Adorno, told him that they did not receive scaffold training. (Tr. 38, Adorno Depo. at 15) The CO testified that he specifically asked Adorno if employees had received scaffold training and was told that they had not. (Tr. 39, Adorno Depo. at 15) According to the CO, Adorno was the only management person at site with whom he was allowed to speak. (Tr. 39) The CO admitted, however, that after the inspection, MVM submitted paperwork related to training and safety programs. (Tr. 39).

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[5]The standard provides:

"The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. The training shall include the following areas, as applicable:

(1) The nature of any electrical hazards, fall hazards and falling object hazards in the work area;

(2) The correct procedures for dealing with electrical hazards and for erecting, maintaining, and disassembling the fall protection systems and falling object protection systems being used;

(3) The proper use of the scaffold, and the proper handling of materials on the scaffold;

(4) The maximum intended load and the load-carrying capacities of the scaffolds used; and;

(5) Any other pertinent requirements of this subpart."

Mr. Garcia testified that employees were trained in how to construct a scaffold. (Tr. 268) He pointed out that they hire a scaffolding company for major projects, but that they have their own frames for use on small projects. He also testified out that, in the last five years, no MVM employees had any accidents from scaffolds. (Tr. 268) Finally, he pointed that the allegedly violative conditions on scaffolds, (e.g Ex-C-4) were on scaffolds that were being taken down and were not in use. (Tr. 269)

Although the CO did not actually observe employees working on the scaffolds, it is undisputed that employees did work on them[6]. Adorno told the CO that he was unaware of employees receiving scaffold related training. (Tr. 38) Although Mr. Garcia testified that employees were "told how to construct a scaffold," he did not testify that this included training on any of the hazards set forth in the standards. Moreover, as noted *supra*, the evidence demonstrated that any safety training was in a language not understood the employees. Accordingly, I find that the violation was established. I also find that the lack of proper safety training could lead to accidents that would likely result in death or serious physical harm and that the item was properly classified as serious.

Citation 1 Item 2c alleges that MVM seriously violated 29 CFR 1926.503(a)(1)[7] on the grounds that "[t]he employer did not provide employees with fall protection training."

This violation was based on the CO's observation that employees were working on the roof without fall protection. (Tr. 40) MVM employees told the CO that they did not receive fall protection training. (Tr. 41) These statements were confirmed by Adorno. (Tr.

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[6]In its brief, respondent does not contend that employees did not work on the scaffold. Rather, it takes the position that the lack of certain safety devices was the result of the scaffold being dismantled at the time of the inspection.

[7]The standard provides:

"The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards."

41) Adorno told the CO that they had been on the roof earlier installing kick plates and doing gypsum board work, and that they were performing these activities right at the edge of the roof. (Tr. 41)

Mr. Garcia testified that MVM provided safety harnesses to employees, which were kept in the storage trailer. He also testified that employees were instructed to use the harnesses when seen working without them. (Tr. 270)

The preponderance of the evidence establishes the violation. Both Adorno and employees told the CO that they were not provided with training on fall hazards. Garcia's testimony does not suggest a different result. Merely providing safety harnesses and instructing employees to put them on hardly qualifies as safety training, especially where, as here, those instructions were given in a language in which the employees had minimal proficiency.

For reasons stated *supra*, I find that the violation was properly characterized as serious. The Secretary proposed a combined penalty of $1050 for items 2a-2c. As noted, the Secretary considered the statutory factors when determining the penalty. I find the proposed penalty appropriate and assess a combined penalty of $1050.

Citation 1 Item 3 alleges a serious violation of 29 CFR 1926.451(b)(1)[8] on the grounds

[8]The standard provides:

"Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows:

(i) Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between the adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform);

(ii) Where the employer makes the demonstration provided for in paragraph (b)(1)(i) of this section, the platform shall be planked or decked as fully as possible and the remaining open space between the platform and the uprights shall not exceed 9 ½ inches (24.1 cm);

Exception to paragraph (b)(1): The requirement in paragraph (b)(1) to provide full

that "[e]mployees were engaged in masonry work from a tubular welded frame scaffold. The working level was not fully planked." The Secretary proposes a penalty of $750 for this alleged violation.

The CO testified that he observed the scaffold on the second day of his inspection and that the scaffold had only three planks and was not fully planked. (Tr. 43) The CO did not actually observe any employees on the scaffold at that time. However, in conversations with Adorno and mason foreman Jose Mendez, and other masons the CO determined that employees had worked on the scaffold. (Tr. 43-45, Ex. C-1) Mendez further told the CO that he had been on top of the scaffold in the condition observed during the inspection. (Tr. 44)

Project manager Garcia testified that the reason the scaffold was not fully plank was that it was being taken down. (Tr. 270) He testified that there was no reason why employees would leave gaps in the scaffold planking. (Tr. 270)

Clearly, at the time of the inspection, the scaffold was not fully planked. Had the CO observed employees on the scaffold in that condition, the violation would have been established. However, the evidence is undisputed that, at that time, the scaffold was in the process of being dismantled. Under those circumstances, it is not unexpected that some of the planks were removed. The only suggestion that the scaffold was not fully planked while employees worked on it comes from the alleged statement of Mendez to the effect that the scaffold was in the condition seen when employees were using it. At best, however, that statement is vague and subject to interpretation. For example, it is possible that Mendez was talking in general terms and did not intend to include the planking in his statement. Unfortunately, Mendez did not testify. As noted *supra*, the burden is on the Secretary to prove every element of her case by a preponderance of the evidence.

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planking or decking does not apply to platforms used solely as walkways or solely by employees performing scaffold erection or dismantling. In these situations, only the planking that the employer establishes is necessary to provide safe working conditions is required."

Employee exposure is a central element in any violation. Here, the record does not establish by that preponderance of the evidence that employees were exposed to an improperly planked scaffold. Accordingly, Citation 1, item 3 is vacated.

Citation 1 Item 4 alleges a serious violation of 29 CFR 1926.451(c)(2)[9] on the grounds that "[e]mployees were working up to 13'1" feet high, on tubular welded frame scaffolds. The scaffolding did not have any base plates." A penalty of $450 is proposed for this violation.

The CO observed and photographed two scaffolds with missing base plates[10]. (Exhs. C-2 to C-5). At the time of the inspection, there were no employees working on the scaffold. (Tr. 196) however, based on his conversations with mason foreman Jose Mendez, the CO determined that the people who worked on the scaffold were MVM employees. (Tr. 59). Moreover, employees told the CO that when they worked on the scaffold, they were in the condition depicted in the Exhibits (Tr. 55)

Project manager Carlos Garcia testified that at the time of the inspection, the cited scaffolds were in the process of being dismantled. (Tr. 269-272) According to Garcia, when the photos were taken, the masonry work that the scaffolds facilitated had been completed. (Tr. 271)

Although the evidence establishes that the scaffold was being dismantled at the time of the inspection, it also establishes that one of the reasons it was being taken down was because respondent was informed by the CO that the scaffold lacked base plates. (Tr. 71) The CO testified that, during the January 24 inspection, employees were not using the

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[9]The standard provides:

"Supported scaffold poles, legs, posts, frames, and uprights shall bear on base plates and mud sills or other adequate firm foundation."

[10]Base plates are metal plates on the bottom of scaffolds that distribute the load evenly and prevent sliding. (Tr. 55)

tubular frame scaffold, but rather were completing their work from an aerial lift. According to the CO, Adorno and Mendez told him that employees were performing their work from the aerial lift and the scaffold was being dismantled because of the CO's earlier observation that the scaffolding lacked the requisite base plates. (Tr. 71) These statements clearly indicate that the scaffolds lacked base plates while employees were working on them. Accordingly, Citation 1, item 4 is affirmed.

The evidence establishes that the base plates distribute the weight of the scaffold and increases its stability and helps keep it from sliding. (Tr. 56) If the scaffold collapsed due to the lack of base plates, employees would have fallen over thirteen feet and suffered death or serious physical harm. Therefore, I find that the violation was properly characterized as serious. The CO testified that the gravity of the violation was low (Tr. 60) and arrived an unadjusted penalty of $1500. After adjusting for the statutory factors, he arrived at a proposed penalty of $450. (Tr. 60) I find the penalty to be appropriate and the proposed penalty is assessed.

Citation 1 Item 5 alleges a serious violation of 29 CFR 1926.451(e)(1)[11] on the grounds that "[e]mployees were working from 2 tubular welded frame scaffolds, while doing masonry work. The employees were climbing the crossbraces and walkthrough frames." The Secretary proposes a penalty of $750.

Based on his interviews with employees and Jose Mendez, the CO determined that employees used crawl spaces and the walk-through frames to access the scaffold depicted in Ex. C-6. (Tr. 61) According to the CO, Mendez told him that employees routinely used

[11]The standard provides:

"When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (Scaffold stairways/towers), stairway type ladders (such as ladder stands,), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

the frames to climb up and then went onto the crawlspace at the end to get up to the planked out level. Indeed, Mendez told the CO that he did so himself. (Tr. 61) The CO testified that employees used this method to gain access even though there was a ladder on one side of the scaffold. (Tr. 62) Adorno told the CO that he was unaware how employees accessed the scaffold. (Tr. 63)

Although the CO did not actually observe employees using the craw spaces and frames to access the scaffold, his interviews with Mendez and other MVM employees were specific and established that they engaged in the violative behavior. Indeed, Mendez specifically stated that he engaged in the violative conduct himself. Accordingly, I find that the Secretary established the violation by a preponderance of the evidence.

According to the CO, the violation was serious based on the hazard of improperly accessing a scaffold 13 feet above the ground. (Tr. 63) I agree. Had an employee fallen, a 13 foot fall would likely result in death or serious physical harm. The Secretary, initially arrived at an unadjusted penalty of $2500 for the violation. After adjusting for the statutory factors set forth in section 17(j) of the Act, she proposed a penalty of $750. I find the penalty appropriate and I assess the proposed penalty.

Citation 1 Item 6a alleges a serious violation of 29 CFR 1926.451(g)(1)[12] on the grounds that, at three locations at the worksite "[e]mployees were engaged in masonry work from a tubular welded frame scaffold, without any means of fall protection." Employees were allegedly exposed to falls of 10'11'' to 13'1".

The CO testified that there were three instances where employees were working on scaffolds without fall protection. (Tr. 64) According to the CO, the first two instances occurred on a tubular welded frame scaffold located in the lobby area. (Tr. 65, Ex. C-2). The scaffold did not have guardrails. (Tr. 65) The CO testified that Adorno told him that

[12]The standard provides in pertinent part:
" Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level."

he observed employees working on the scaffold without fall protection. (Tr. 65-66) This was confirmed by Mendez who told the CO that he and his masons worked on the scaffold without fall protection. (Tr. 67). The CO testified that, in the first instance, employees were working on the scaffold 13 feet, 1 inch above the ground. (Tr. 67). In the second instance, the employees were working from an outrigger on the same scaffold that was approximately 10 feet, 11 inches high. (Tr. 68)

The CO testified that the third instance occurred in the lobby area and was discovered on his second visit to the site, on January 22. (Tr. 68-69, Ex. C-6) Although he did not actually see employees working on the scaffold, he was told by employees and foreman Mendez that they were using the scaffold without any fall protection. (Tr. 69, 185)

The Secretary has established the violation by a preponderance of the evidence. Information given to the CO by respondent's supervisory personnel, Adorno and Mendez, and not challenge by respondent, establishes that employees were working on the scaffold without fall protection. The evidence also demonstrates that the violation was serious. A fall from up to 13 feet is likely to cause death or serious physical harm. Accordingly, Citation 1, item 6a is affirmed.

Citation 1 Item 6b alleges a serious violation of 29 CFR 1926.453(b)(2)(v)[13] on the grounds that MVM "did not provide employees, working from a JLG aerial lift, with personal fall arrest or restraint systems."

The CO testified that he was told by employees that they had to cover wood pieces when doing their masonry work so that the wood would not be damaged. (Tr. 70) When the masonry work was completed, MVM removed the covering to reveal the wood. (Tr. 71) On January 24, after MVM was informed that the scaffolds lacked the required base

[13]The standard provides:

"A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift."

plates, the scaffolds were being removed and the work in the lobby area completed from an aerial lift. (Tr. 71, Ex. C-7) While in the company of Mr. Adorno, the CO observed an individual, identified as an MVM employee, working from the aerial lift at a height of 13 feet above the ground. (Tr. 71-72, 75-76, 186) According to the CO, employees could have been protected by use of a harness attached to a lanyard clipped off to the basket. (Tr. 73) Adorno told the CO that earlier, employees were working from the lift without any fall protection. (Tr. 76)

I find that the Secretary has established the violation by a preponderance of the evidence. Carlos Garcia testified that safety harnesses were provided and contained in the storage trailer and that employees were instructed to wear them when on the lift. (Tr. 270) Although it argued that there were safety harnesses at the site, respondent has not raised the affirmative defense of unpreventable employee misconduct. In any event, a critical element in this affirmative defense is that the employer had an effective safety program. *Danis Shook* 19 BNA OSHC 1497, 1502 (No. 98-1192, 2001), *aff'd* 319 F.3d 805 (6th Cir. 2003) As noted earlier, the evidence establishes that respondent's safety program, including scaffold and fall protection training was deficient.

I also find that the violation was properly characterized as serious, since a 13 foot fall would likely result in death or serious physical harm. A combined penalty of $1500 is proposed for items 6a and 6b. This was reduced from an unadjusted proposed penalty of $5000. I find that the Secretary properly considered the statutory factors when arriving at the proposed penalty of $1500 (Tr. 74), and that the proposed penalty is appropriate.

Citation 1 Item 7a alleges a serious violation of 29 CFR 1926.501(b)(1)[14] on the grounds

[14]The standard provides:

"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."

that MVM "did not provide fall protection to employees involved in carpentry work, including but not limited to putting in kick plates at the edge of the roof. The employees wee exposed to a hazard of falling between 17 and 26 feet.

During the inspection, Adorno acknowledged that MVM employees were working on the roof without fall protection. (Tr. 78, Ex. C-8) Depending on which spot on the roof they were standing, employees were exposed to a fall hazard of either 17 or 26 feet. (Tr. 79) The CO agreed that the roof contained stanchions, but noted that they did not have cables running through them which is necessary to provide fall protection. (Tr. 175) He admitted, however, that no work was being done at the time of the inspection. (Tr. 175-176)

Respondent argues that the item should be vacated because, according to the scope of work section of its contract, it was not responsible for roofing work. Rather, roofing work was the responsibility of another subcontractor. To establish the multi-employer worksite defense, the employer must prove that:

> (1) it did not create the violative condition to which its employees were exposed;
>
> (2) it did not control the violative condition, so that it could not itself have performed the action necessary to abate the condition as required by the standard; and
>
> (3) it took all reasonable alternative measures to protect its employees from the violative condition.

Rockwell International Corp., 17 BNA OSHC 1801, 1808 (No. 93-45, 1996)

The evidence establishes that respondent's employees were on the roof without fall protection. Even if MVM did not create or control the condition, to prevail under the multi-employer defense it still must demonstrate that it took all reasonable alternative measures to protect its employees. MVM introduced no such evidence. Accordingly, the defense fails and the violation was established.

Employees were exposed to a fall hazard of from 17 to 26 feet. A fall from that

height would likely result in death or serious physical harm. Accordingly, the violation was properly characterized as serious.

Accordingly, Citation 1, item 7a is affirmed.

Citation 1 Item 7b alleges that MVM committed a serious violation of 29 CFR 1926.501(b)(10)[15] on the grounds that MVM "did not provide fall protection to roofers who were working on a low sloped roof. The employees were exposed to a fall of up to 20 feet."

The CO testified that he saw IRV employees working on the low sloped roof without fall protection. (Tr. 81, 82, Ex. C-9) No MVM employees were exposed to this condition. (Tr. 273) He stated that he cited MVM for the violation on the grounds that, as the company in total control of the site, they were responsible for safety. (Tr. 81) The CO stressed that Adorno was aware that the IRV employees were on the roof without appropriate fall protection. (Tr. 81)

The basis of this violation was the conclusion of the CO that MVM was the general contractor and in control of overall safety at the site. As noted, *supra*, I find that the evidence fails to establish that MVM was the general contractor. No MVM employees were exposed to the hazard. Accordingly, Citation 1, item 7b is vacated.

Citation 1 Item 7c alleges a serious violation of 29 CFR 1926.501(b)(15)[16] on the grounds

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[15]The standard provides:

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

[16]The standard provides:

"Except as provided n §1926.500(a)(2) or in §1926.501(b)(1) through (b)(14), each

that "[t]he employer did not provide fall protection to employees who were installing wooden beams and bents. The employees were exposed to a fall of up to 26 feet.

The CO testified that he observed employees of Vermont Timber installing wooden beams while working on the top of an elevator surface without any means of fall protection. (Tr. 83-84, Ex. C-10) The employees were working 26 feet above the ground. (Tr. 86)

The CO testified that MVM was cited as the controlling contractor and that MVM employees were not exposed to the hazard. (Tr. 178-179). Again, however, the evidence fails to establish that MVM was the general contractor. No MVM employees were exposed to the hazard. Accordingly, Citation 1, item 7c is vacated.

The Secretary proposes a combined penalty of $1500 for items 7a-7c. The record demonstrates that the appropriate statutory factors were considered when arriving at the proposed penalty. (Tr. 80) However, because two of the three items are vacated, a reduction of the proposed penalty is required. I find that a penalty of $500 is appropriate.

Citation 1 Item 8 alleges that MVM committed a serious violation of 29 CFR 1926.651(k)(1)[17] on the grounds that a "competent person did not inspect the excavation before the employees started working." A penalty of $1500 is proposed.

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employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system."

[17]The standard provides:

"Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

The CO testified that, during his January 18th inspection with Dennis Adorno, they came across a couple of excavations. (Tr. 87) Adorno told the CO that MVM employees were working in the excavation, and that he had overall direction of their work. Adorno also stated that Jose Mendez was the intermediary person between himself and the workers. Moreover, Adornno indicated that he was aware that employees were working in the excavation. (Tr. 88). Adorno told the CO that he, company president Gino Secchiano and an operator named Mike were the competent people at the site. (Tr. 88) While discussing the excavation regulations, Adorno told the CO that cave-in protection was only required for excavations more than 6 feet in depth, rather than five feet (Tr. 88) Similarly, Mike believed that it no cave-in protection was needed for excavations unless they were more than six feet deep. (Tr. 89) The CO's attempts to talk to Gino Secchiano were rebuffed by Secchiano who stated that he had no time to talk to the CO. (Tr. 89) During the inspection, and prior to issuance of the citation, MVM provided the CO with no documentation to establish that there was a competent person at the site. (Tr. 90) Based on Adorno's and Mike's demonstrated lack of knowledge of the regulations, the CO concluded that MVM did not have a competent person at the site. (Tr. 88)

At 29 C.F.R. §650(a) a "competent person" is defined as "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures in eliminating them." General work experience is not sufficient to qualify an individual as a "competent person. Rather, a competent person must be familiar with the basic standards applicable to the worksite or otherwise be capable of identifying and correcting existing and predictable hazards. *R. Williams Constr. Co. v. OSHRC*, 464 F.3d 1060, 1064 (9th Cir. 2006)

Both Adorno and operator Mike did not know the most basic of requirements, i.e. that an excavation must be shored or sloped when five feet or more in depth. Clearly, neither was a "competent person" within the meaning of the standard. (Tr. 285) Indeed, in his

deposition, Adorno testified that he was not a "competent person" and did not know who if there was a "competent person" at the site. (Depo. at p. 8) Gino Secchiano refused to talk to the CO and therefore, failed to establish that he was a "competent person."

The Secretary established the violation by a preponderance of the evidence and Citation 1, item 8 is affirmed.

In its brief, respondent contends that the dimensions of the excavation was 30 feet X 30 feet and, therefore, that employees were not in danger of a cave-in, which would only effect employees working near the walls. However, employees are not static and move around. Accordingly, they either were or could reasonably be expected to come within the "zone of danger" posed by the excavation walls. In any event, the standard is triggered whenever employees enter an excavation. Furthermore, regardless of its dimensions, when employees work in an excavation, it must be inspected daily by a "competent person."

Had the failure to have a competent person daily inspect the excavation resulted in an employee being caught in a cave-in, the result would likely be death or serious physical harm. (Tr. 92) Therefore, the violation was properly characterized as serious.

The Secretary originally calculated an unadjusted penalty of $5000. (Tr. 92) After adjusting for the statutory factors, the Secretary proposed a penalty of $1500, which I consider appropriate. Accordingly, the proposed penalty is assessed.

Citation 1 Item 9a alleges a serious violation of 29 CFR 1926.1053(b)(1)[18] on the grounds

[18]The standard provides:

`When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

that (1) in the lobby, employees "were using a 24' portable metal extension ladder for access. The ladder extended approximately 6 inches above the landing surface" and (2) on the front roof, employees "were using a portable metal extension ladder to access the roof. Only one rung of the ladder extended above the roof."

In two instances, the CO observed a ladder that did not sufficiently extend above the upper landing. (Tr. 93) In both instances, employees were observed using the ladders when coming off the roof. (Tr. 93) In the first instance, the CO observed employees of Vermont Timber using a ladder with a top rung level with the spot that employees got off, and that extended only approximately 6 inches above the landing surface. (Tr. 94, Ex. C-12)

In the second instance, the CO observed IRV employees coming down a ladder with a top rung that did not extend the requisite distance above the upper landing. (Tr. 96) According to the CO, the ladder extended only 1.five feet above the roof. (Tr. 97)

In both instances, MVM was cited for the violation because, according to the CO, MVM had taken over as the general contractor and, therefore, was responsible for safety at the site. (Tr. 95-96) As noted, the evidence fails to establish that MVM was the general contractor and, therefore, that it was responsible for the safety of other subcontractors at the site. Accordingly, Citation 1, item 9a is vacated.

Citation 1 Item 9b alleges that MVM committed a serious violation of 29 CFR 1926.1053(b)(13)[19] because an "employee was standing on the top step of a 6 feet A-frame Husky step ladder."

During the walkaround inspection, the CO observed an employee doing ductwork near the ceiling while standing on a 6-foot ladder in the restaurant area. (Tr. 99-100) To reach the work area, the employee had to stand on the top step of the ladder. (Tr. 99) The employee told the CO that he worked for MVM, and this was confirmed by Adorno. (Tr.

[19]The standard provides:
The top or top step of a step-ladder shall not be used as a step.

100) Moreover, Adorno told the CO that he knew the employee had to work on the ceiling and that only the six-foot ladder was available. (Tr. 100)

The Secretary has established the violation by a preponderance of the evidence. The employee was standing on the top step of the ladder, in violation of the standard. Respondent, through its supervisory personnel, knew that the work had to be done and that only a six-foot ladder was available. Accordingly, respondent knew or should have known of the violation. *Jersey Steel Erectors,* 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd* No. 93-3306 (3d Cr. February 7, 1994). The Secretary also established that the violation was serious. A fall off a six-foot ladder is likely to cause serious injury.

The Secretary proposes a combined penalty of $750 for items 9a and 9b. In arriving at this proposed penalty, the Secretary properly considered the statutory factors. (Tr. 101) However, item 9a is vacated and a reduction in the penalty is in order. Accordingly, I find that a penalty of $375 is appropriate for item 9b. Accordingly, Citation 1, item 9b is affirmed and a penalty of $375 is assessed.

Citation 2 Item 1 alleges that MVM willfully violated 29 CFR 1926.652(a)(1)[20] on the grounds that on January 18, 2007 and again on January 20, 2007, [e]mployees were working in an unprotected excavation. The excavation was up to 6 feet deep." The Secretary proposes a penalty of $21,000 for this alleged violation.

Toward the end of the first day of the inspection, on January 18, the CO observed an unprotected excavation with obvious signs that masonry work was done within it. The

[20]The standard provides:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraphs (b) or (c) of this section except when:

(i) Excavations are made entirely in stable rock; or

(ii) Excavations are less than five feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

excavation measured about 30 feet long and 30 feet wide. (Tr. 151) Because it was near the end of the day, there was no work going on in the excavation. (Tr. 102) According to the CO, Adorno told him that he was aware that MVM employees were doing masonry work in the excavation and that the excavation was not protected against a cave-in. (Tr. 102-103) Measurements of the excavation taken at several locations demonstrated that it was between five feet 4 inches to six feet in depth. (Tr. 103, Ex. C-13)

The CO told Adorno that a competent person needed to make a decision about protecting the excavation from cave-in when it reached five feet in depth and explained to him the different methods of protection based on soil type and depth. (Tr. 104) Adorno told the CO that he would have the excavation sloped back at a 2 to 1 ratio. (Tr. 105)

Project Manager Garcia testified that, based on his review of the photo of the excavation (Ex. C-14), the excavation was only five feet deep. (Tr. 251) According to Garcia, the forms depicted in the photo were the industry standard four feet long. The footings added an additional 12 inches for a total of five feet. (Tr. 249-252, 258-259 Exs. R-11, R-12) Indeed, Garcia testified that there was no reason for the excavation to be greater than five feet deep. (Tr. 259) On further questioning, however, Garcia admitted that it was possible that the excavation was cut below the footings which would make the excavation greater than five feet deep. (Tr. 252-253) Garcia stated that he could not tell from the exhibit if the excavation was cut lower. (Tr. 253)

By January 24, the excavation was brought into compliance by partially filling it so that it was less than five feet deep. (Tr. 164, Ex. R-6)

Respondent contends that, based on Garcia's testimony, the Secretary failed to establish that the excavation was five feet or more in depth. I disagree. The CO's testimony was based on actual measurements of the trench taken during the inspection. In contrast, Garcia's estimates were based on estimates made on the basis of photographs. Although Garcia speculated that there was no reason for the trench to be no greater than five feet deep, he admitted that it was possible that the excavation was cut below the footings. In any event,

even accepting Garcia's testimony, the four foot forms plus the one foot footings would have resulted in a trench depth of a minimum five feet. The standard requires that protective measures be taken for any excavation unless it is *less* than five deep *and* an inspection conducted by a competent person provides no indication of a potential cave-in. Even by Garcia's estimates, the excavation was at least five feet in depth. Furthermore, as found in Citation 1, item 8, respondent did not have a "competent person" at the site. Accordingly, the excavation did not qualify for either exception and was required to be shored, sloped or otherwise protected as required by the standard.

Respondent also contends that because the trench was 30 feet X 30 feet, even if the excavation collapsed, it posed no hazard to employees working near the center. However, the standard does not provide an exception based on the width of the excavation. On cross-examination, the CO agreed that there was no hazard from collapsing side-walls for employees working near the middle of the 30 X 30 foot excavation. However, he noted that the hazard existed for employees working at or near the side-walls of the excavation (Tr. 152) Even if an employee works in the center of a 30 foot wide excavation, he or she still must enter and leave that excavation, requiring exposure to the unprotected excavation walls. The width of the excavation and employee work location within that excavation may effect the length of exposure and the gravity of the violation, but it does not excuse noncompliance. Accordingly, the violation was established.

The Secretary alleges that the violation was willful. A violation is "willful" if committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (no. 99-0018, 2003); *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995), *aff'd* 73 F.3d 1466 (8th Cir. 1996). A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. *Rawon Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (no. 99-0018, 2003); *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995), *aff'd* 73

F.3d 1466 (8th Cir. 1996)

In her brief, the Secretary explicitly bases the willful characterization on the assertion that on Saturday, January 20, Gino Secchiano directed Adorno to have employees complete their work in the excavation before the hazard was abated. This assertion is based on statements made by Adorno to the CO when the CO returned to the site, on January 22. On that date cave-in protection was still not provided. (Tr. 105-106, Ex. C-15) According to the CO, Adorno informed him that president Gino Secchiano told him to continue work in the excavation, but to provide the cave-in protection before the CO returned to the site. (Tr. 106) Adorno also told the CO, that he saw employees working on that Saturday (January 20) before any abatement took place. (Tr. 107) Adorno elaborated that when employees worked in the excavation on January 20, it was in the same condition as it was during the original inspection. (Tr. 107) This was confirmed by the CO's interviews with unnamed employees. (Tr. 108). The CO's safety narrative, dated July 17, 2007, indicates that Adorno only spoke about the excavation "in general terms" to Secchiano and was not sure if Secchiano sent in the workers personally himself or whether they entered on their own. However, Adorno "thought" they were in the excavation on Secchiano's orders and didn't order them out because he did not want to go over Secchiano's head." (Ex. R-1, pl. 46)

In his deposition, Adorno testified that "we corrected things" but also admitted that Secchiano told him to go back in the excavation and get the work done before the CO returned to the site. (Adorno Depo. at 29-30) Critically, however, neither the question nor Adorno's answer specifically stated that Secchiano directed employees to reenter the excavation before they abated the hazard. Trying to explain his answer, Adorno stated: "Get the work done before–well, it was a matter of get the work done. Yeah. It was just get the work done. *There–but we corrected things.* We didn't–it wasn't a matter of just--" (Adorno Depo. at 30) (emphasis added) In that deposition, Adorno also stated that he could not recall a conversation with the CO in which told the CO that Secchiano ordered employees into the

trench without protection. (Adorno Depo. at 36-37)

Respondent points to the recording (Ex. R-6) as evidence that, contrary to the willful allegation, the excavation was filled in quickly and employees not allowed to enter until the depth of the excavation was brought to under five feet. As noted, the recording was made during the CO's third visit to the site on January 24, four days after the alleged reentry of employees into the trench and two days after the January 22 inspection when the excavation had yet to be filled in. In the recording, the CO can be heard stating that the excavation was under five feet deep because MVM backfilled the excavation with soil to bring its depth under five feet. (Tr. 260-261, 283-284, Ex. R-6) Although nothing in the recording suggests when the excavation was filled in, in the recording Adorno specifically states that the excavation was backfilled before employees were allowed to reenter the excavation.

On this record, I cannot find that Secchiano directed employees into the excavation before the hazard was abated. Not only could Adorno not recollect making such a statement, but the CO's own notes indicate that he was unsure if Secchiano actually ordered employees into the unprotected excavation or whether they entered on their own volition. Accordingly, on this record, I conclude that the Secretary failed to establish by a preponderance of the evidence that the entry of employees into the excavation on January 20 was the result of a conscious disregard or plain indifference to employee safety sufficient.

The CO testified that the severity of the violation was high and the probability of an accident was "greater." (Tr. 110) The unadjusted penalty for the willful violation was $70,000. After adjusting for good-faith and the history of the company, the Secretary arrived at an adjusted proposed penalty of $21,000. (Tr. 110-111). Although the violation was not willful, I find that it was serious. Had an employee been near the excavation walls at the time of a collapse, the result would likely have been death or serious physical harm. I note that the size of the excavation did reduce the gravity of the violation since it reduced the likelihood that employees would be near the danger area posed by the excavation walls at any given time. Considering the seriousness of the violation, its gravity, together with the other

statutory factors, I find that a penalty of $2100 is appropriate.

ORDER

Based upon the foregoing findings of fact and conclusions of law it is **ORDERED** that

1. Citation 1, Item 1 for serious violation of 29 CFR 1926.20(b)(1) is AFFIRMED and a penalty of $1050 is assessed.

2. Citation 1 Item 2a for a serious violation of 29 CFR 1926.21(b)(2) is AFFIRMED.

Citation 1 item 2b for a serious violation of 29 CFR 1926,454(a) is AFFIRMED.

Citation 1 item 2c for a serious violation of 29 CFR 1926.503(a)(1) is AFFIRMED.

A total penalty of $1050 for Citation 1 items 2a-2c is assessed.

3. Citation 1 item 3 for a serious violation of 29 CFR 1926.451(b)(1) is VACATED.

4. Citation 1 item 4 for a serious violation of 29 CFR 1926.451(c)(2) is AFFIRMED and a penalty of $450 is assessed.

5. Citation 1 item 5 for a serious violation of 29 CFR 1926.451(e)(1) is AFFIRMED and a penalty of $750 is assessed.

6. Citation 1 item 6a for a serious violation of 29 CFR 1926.451(g)(1) is AFFIRMED.

Citation 1 item 6b for a serious violation of 29 CFR 1926.453(b)(2)(v) is AFFIRMED.

A total penalty of $1500 is assessed for Citation 1 items 6a and 6b.

7. Citation 1 item 7a for a serious violation of 29 CFR 1926.501(b)(1) is AFFIRMED.

Citation 1 item 7b for a serious violation of 29 CFR 1926.501(b)(10) is VACATED.

Citation 1 item 7c for a serious violation of 29 CFR 1926.501(b)(15) is VACATED.

A penalty of $500 is assessed for Citation 1 item 7a.

8. Citation 1 item 8 for a serious violation of 29 CFR 1926.651(k)(1) is AFFIRMED and a penalty of $1500 is assessed.

9. Citation 1 item 9a for a serious violation of 29 CFR 1926.1053(b)(1) is VACATED.

Citation 1 item 9b for a serious violation of 29 CFR 1926.1053(b)(13) is AFFIRMED and a penalty fo $375 is assessed.

10. Citation 2 item 1 for a willful violation of 29 CFR 1926.652(a)(1) is AFFIRMED as serious. The allegation that the violation was willful is VACATED. A penalty of $2100 is assessed.

Accordingly a total penalty of $9275 is ASSESSED for all violation.

SO ORDERED

/s/
Irving Sommer
Chief Judge

Dated: August 21, 2009
Washington, D.C.