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. MAJOR CONSTRUCTION CORP., INC. AND MICHAEL J. POLITES,[1] Respondent.	OSHRC Docket No. 99-0943

DECISION

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

Major Construction Corp., Inc. ("Major") was the concrete subcontractor hired by 30 River Court East Construction Corp., to construct a 32-story reinforced concrete structure in Jersey City, New Jersey. Following an inspection of the job site, the Occupational Safety and Health Administration ("OSHA") issued willful, serious and other-than-serious citations alleging multiple violations of various standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). A penalty of $244,900 was proposed. Administrative Law Judge Marvin Bober affirmed most of the citations and assessed a total penalty of $283,500, $38,600 more than that

[1] The Secretary of Labor also cited Michael J. Polites, the president of the company, in his individual capacity. The judge found that the Secretary failed to establish that Polites was an employer as defined by the Act. The Secretary did not petition for review of the judge's finding.

proposed by the Secretary.[2]

The Commission requested briefs on the following issues:

(1) Did the judge err in rejecting Major Construction Corp., Inc.'s allegation that compliance with the fall protection standards cited under Items 3 and 4 of Serious Citation 1, and Items 1a, 2a, 3a, 1b, 2b, 2c, 3b, 3c, 3d, and 4 of Willful Citation 2, was infeasible?
(2) Did the judge err in finding that Major Construction Corp., Inc. had either employed the employees exposed to the fall protection hazards or was otherwise properly cited for those hazards alleged under Items 3 and 4 of Serious Citation 1, and Items 1a, 2a, 3a, 1b, 2b, 2c, 3b, 3c, 3d, and 4 of Willful Citation 2?
(3) Did the judge err in finding that Items 3 and 4 of Serious Citation 1, were not duplicative of Items 2b and 3b, and Item 4, respectively, of Willful Citation 2?
(4) Did the judge err in regrouping the violations alleged under Willful Citation 2?
(5) Did the judge err in characterizing the violations alleged under Willful Citation 2 as willful?
(6) Did the judge err in affirming Items 1(b), 2, 5a, 5b, 13, and 14 of Serious Citation 1?

We have examined the record in its entirety and considered the arguments of the parties. We conclude that with three exceptions discussed below, the evidence and applicable legal precedent support the judge's findings and conclusions with regard to the issues in the briefing notice.

Willful Citation 2: Grouping of Violations and Penalty Assessment

Citation 2 contained four items, each of which the Secretary characterized as willful. For three of these items, the Secretary grouped willful violations of two or more fall protection standards based on whether the violations occurred before the posting of an imminent danger notice on the worksite and whether one method of fall protection, safety nets, could protect employees on more than one floor. The judge, however, found

[2] By vacating several serious items and instances, the judge effectively reduced the total proposed penalty for the serious violations by $20,200. This reduction was offset, however, by the judge's decision to 1) regroup four willful items and assess an additional penalty of $56,000, and 2) increase the penalty proposed for a grouped serious violation by $2,800, resulting in a net increase of $38,600 in the total penalty assessed over that proposed by the Secretary.

that the Secretary's method of citing the violations was at odds with Commission precedent. He regrouped the items in Citation 2 according to the specific fall protection standards the Secretary had cited. He affirmed five separate fall protection items instead of the four items alleged by the Secretary. As a result the judge assessed a penalty of $56,000 over that proposed by the Secretary.[3]

The judge misapprehended the Secretary's citation methodology. The Secretary cited by grouping citations according to the abatement methods required by the different standards. The Commission has also grouped violations in situations involving overlapping or duplicative abatement. *See Dec Tam Corp.*, 15 BNA OSHC 2072, 1991-93 CCH OSHD ¶ 29,942 (No. 88-523, 1993), *citing H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1981 CCH OSHD ¶ 25,712 (No. 76-4765, 1981); *Wright & Lopez, Inc.*, 10 BNA OSHC 1108, 1981 CCH OSHD ¶ 25,728 (No. 76-256, 1981), *citing H.H. Hall Constr. Co.* The judge apparently failed to recognize that the Secretary also cited multiple instances of violation of the same standard based on different times or different places of occurrence. The Commission has found this method of citation permissible as well. *MJP Constr. Co.*, 19 BNA OSHC 1638, 1647, 2001 CCH OSHD ¶ 32,484, p. 50,306 (No. 98-0502, 2001). Accordingly, we affirm the citations as issued by the Secretary. We note that on review Major does not argue that the penalty factors of section 17(j) of the Act were misapplied. Accordingly, we assess the penalties as proposed by the Secretary.

Serious Citation 1, Item 2

In this item, the Secretary alleged that an electrical panel was left open with live parts exposed, in violation of 29 C.F.R. § 1926.405(b)(1).[4] The judge affirmed the

[3] The Secretary proposed a total penalty of $200,000 for the four willful items – $56,000 for each of the first three items, and $32,000 for the fourth item. The total penalty assessed by the judge after regrouping these items was $256,000.

[4] The standard provides: "Conductors entering boxes, cabinets or fittings shall be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxed and fittings shall also be effectively closed."

violation, finding that Major had constructive knowledge of the violative condition because it controlled the area and the open panel was obvious in nature.[5] Major argues that the electric panel was not open long enough for it to have constructive knowledge of the violation. We find that the judge erred. To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the violative conditions. *Gary Concrete Prods, Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). Here, there is no evidence of how long the violative condition existed. We are unable, therefore, to evaluate whether Major could have known of the condition if it had been reasonably diligent. *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2196, 2000 CCH OSHD ¶ 32,134, p. 48,422 (No. 90-2775, 2000) (in the absence of evidence indicating how long the violative conditions had been in existence, knowledge is not established), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). Accordingly, we vacate Citation 1, Item 2, for the Secretary's failure to establish constructive knowledge.

Serious Citation 1, Items 5a and 5b

In this item, the Secretary proposed a single penalty for Major's numerous failures to provide adequate top and midrails in violation of 29 C.F.R. §§ 1926.502(b)(1) and 1926.502(b)(2). We find no error in the judge's affirmance of both items. We conclude, however, that the judge based his decision to assess a penalty of $7,000 rather than the $4,200 proposed by the Secretary on the incorrect belief that the Secretary had only intended the $4,200 amount to apply to Item 5a. The record is clear, however, that $7,000 was the initial penalty amount considered by the Secretary for Items 5a and 5b combined before she reduced it to $4,200, as proposed in the citation, based on Major's size. Therefore, we assess the Secretary's proposed penalty of $4,200 for grouped Items

[5] It is undisputed that the Secretary established the other elements of her burden of proving a violation, *e.g.* applicability, noncompliance with the terms of the standard, and exposure. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

5a and 5b of Citation 1.

Order

Accordingly, we affirm the judge's decision and the penalties he assessed with three exceptions. In Willful Citation 2, we affirm the items as cited by the Secretary and assess the total proposed penalty of $200,000. In Serious Citation 1, Items 5a and 5b, we assess the proposed penalty of $4,200. We vacate Serious Citation 1, Item 2. Accordingly, the total penalty assessed is $223,200.[6]

SO ORDERED.

/s/ _____
W. Scott Railton
Chairman

/s/ _____
James M. Stephens
Commissioner

/s/ _____
Thomasina V. Rogers
Commissioner

Dated: January 26, 2005

[6] This amount reflects the $283,500 total penalty assessed by the judge, less the extra $56,000 penalty for the regrouped willful items; the $2,800 increase in penalty for Serious Citation 1, Items 5a and 5b; and the $1,500 penalty assessed for Serious Citation 1, Item 2. *See* footnote 2, *supra*.

SECRETARY OF LABOR, **Complainant,** **- against -** **MAJOR CONSTRUCTION CORP., and M.J. POLITES,** **Respondents.**	**OSHRC Docket No.: 99-0943**

DECISION AND ORDER

APPEARANCES:

Susan B. Jacobs, Esquire
Stephen D. Dubnoff, Esquire
U.S. Department of Labor

For Complainants

Wayne E. Pinkstone, Esquire
Messrs. Jasinski and Paranac
Newark, NJ

For Respondents

BEFORE: **G. MARVIN BOBER**

PROCEDURAL HISTORY

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C.A. Sections 651-678 (1970) ("the Act") to review three citations issued by the Secretary of Labor pursuant to Section 9(a) of the Act and the penalties proposed pursuant to Section 10(a) of the Act. Respondent Major Construction Corp., ("Major"), was the concrete contractor for a 32 story, cast in place, reinforced structure built beginning in September,1998 in Jersey City, New Jersey, (the "job site"). Respondent Michael J. Polites, ("Polites"), undisputably the president and a 4% shareholder of Major, was also cited in his individual capacity.

The three citations, (classified as serious, wilful and other) were issued on April 24, 1999, following a three-month investigation conducted by the Department of Labor Occupational Safety and Health Administration ("OSHA") beginning on November 3, 1998. An imminent danger notice

was posted during the course of the investigation, on January 12, 1999, although no further efforts were made for injunctive relief when the work progress was not altered.

In 14 items, Citation One charges Major and Polites for serious violations of 29 C.F.R. Sections 1926.95(a), 1926.405(b)(1), 1926.501(b)(2)(I), 1926.501(b)(4), 1926.502(b)(1), 1926.502(b)(2), 1926.502(g)(1), 1926.502(h)(1), 1926.502(h)(3), 1926.502(k)(9), 1926.502(k)(3), 1926.502(K)(4), 1926.502(k)(7), 1926.503(a)(1), 1926.701(b), and 1926.703(a)(2). In four items, Citation Two charges Major and Polites for wilful violations of 29 C.F.R. 1926. 501(b)(1), 1926.501(b)(3), 1926.501(b)(1). Citation three, classified as "other," charges Major and Polites for a violation of 29 C.F.R. 1926.1053 (b)(4).

Polites submitted a motion for summary judgment on August 7, 2000, asserting that he should not have been named in his individual capacity. The motion was denied, by order dated August 9, 2000, as material questions of fact relating to Polites' control required stay of any such determination until the conclusion of the administrative trial. Respondent's subsequent petition for interlocutory appeal from this order was denied. The issue, nonetheless, was preserved for trial and is decided in accordance with this decision and order.

The trial was conducted over a three week period beginning August 14, 2000. Post-trial briefs were fully submitted on January 17, 2001. Respondent's reply submission, in letter format, was received on February 8, 2001, and Complainant's sur-reply submission in letter format was received on February 23, 2001. On March 1, 2001, Respondent served a sur-reply letter to Complainant's sur-reply submission. The matter is now ready for disposition.

Jurisdiction

Respondent Major's Answer admits that Major uses supplies and goods which are delivered across state lines. This Court therefore determines that Major is an employer engaged in interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. Section 652(5). The Occupational Safety and Health Review Commission ("The Commission") has jurisdiction over the

case.[1]

Stipulated Facts

None.

Background

30 River Court is a 32 story reinforced, cast in place, concrete structure. The construction on the project commenced in September 1998, (Tr. 1109-1110). The General Contractor, 30 River Court East Construction Corporation, retained Major as the concrete contractor for the job. Major's work included erection and demolition of the concrete forms. (*See,* Complainant's Exhibit 4, Schedule 1, "The subcontractor shall furnish all material, labor and equipment to perform all concrete work..."). The process of construction involved the erection of wooden forms, into which concrete would be poured. After Major constructed the forms, but before the pour, the ironworkers installed reinforcing steel bars, ("rebar"). (Tr. 1167). The day following each deck's pour, Major removed, or "stripped" the forms from the concrete, clamped the newly formed concrete columns, and braced the remaining concrete floor. (Tr. 1154-1157, 1166). The stripped forms were then hoisted to the upper deck by a separate contractor, and Major would erect the next floor on the recently poured concrete deck. Major maintained two sets of forms at the job, and was thus able to strip the forms from one level the same day concrete was poured two levels above. In this manner, Major was able to construct one floor every two days. (Tr. 1088-1090). During the course of the trial, Major's shop steward and carpentry foreman, Tony Buttino, ("Buttino")[2], prepared a diagram depicting Majors' work progress for this job site. The diagram, admitted as Exhibit 19 incidentally also depicts the deck areas which Major ultimately designated as controlled access zones, and therefore, were under

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[1] As is discussed below, the Secretary of Labor failed to meet her burden of establishing that Polites is an employer within the meaning of the Act.

[2] CO Jensen identified Tony Buttino as the "main foreman on the job", (Tr. 261) while Buttino identified himself as "foreman for the carpenters, and shop steward" (Tr. 1081). Major's Fall Protection Plan, (delivered in response to an OSHA subpoena), identifies Buttino as "Safety Coordinator Foreman for the carpenters" (Exhibit C-7).

Major's control.

The wooden forms were made up of legs which rested on the concrete deck, at four foot intervals, (Tr. 1159), stringers, (16 foot long four by fours), which ran horizontally on top of the legs, and ribs, (14 to 16 foot long three by fours), which rested on top of the stringers. (Tr. 1093). Sheets of four by eight plywood were then placed on top of the ribs to create the new deck. (Tr. 1158). Apparently, cement cure testing was performed at the site, (Page 57, lines 1- 11, transcript from the continued deposition of Polites, admitted into the record as C-29, and identified as Exhibit 4 of Complainant's binder 2), although there is no evidence that Major performed its own tests, or referred to these tests, before proceeding in each instance to strip the supporting forms from the concrete.

OSHA's Assistant Director for Safety Compliance for the area, Louis Ricca, ("AD Ricca"), testified that he first met Polites in the mid 1980s when AD Ricca was inspecting a construction site Polites was involved in.(Tr. 974-975). AD Ricca testified that he discussed the OSHA requirements for fall protection with Polites during this inspection (Tr. 975). AD Ricca also testified that he discussed OSHA's fall protection requirements with a man named Joseph Rufalo, ("Rufalo") in 1986 or 1987, during an investigation of the construction of a different building in the same complex, wherein M.J.P. was the concrete contractor, and for which Buttino was the concrete supervisor (Tr. 975-978). Major retained Rufalo as a safety consultant for work on 30 River Court job. (Tr. 759).

Of note, Politis Construction Co., Inc., a now defunct corporation for which Respondent Michael Polites was the president and sole shareholder, was specifically made aware of standards involving 29 CFR 1926.501(b)(1), (unprotected edges), 29 CFR 1926.501(b)(2), (failure to provide fall protection at leading edges), and 20 CFR 503 (a)(1), (failure to provide appropriate training programs for employees exposed to fall hazards). This occurred during and following a 1997 OSHA investigation of a poured in place concrete structure for which Politis Construction Co. Inc. was the concrete forms contractor. (Exhibit C-13, Tr. 1044-1050).

OSHA Inspection

OSHA Compliance Officer Richard Torre, ("CO Torre"), testified that he noticed multiple fall hazards occurring at the subject job site while he happened to be passing by it on November 3, 1998. This began the OSHA investigation. (Tr. 21). According to CO Torre's trial testimony, while he was still on the ground, he was able to observe and videotape employees working at the edge of the hoist barrier without fall protection, two employees working on the fifth floor clamping, without fall protection, and employees working on a top deck, also without fall protection. (Tr. 49-50). CO Torre testified that Polites was present at the job site and was speaking on his cell phone while looking at the employees working on the building. (Tr. 49-50, Tr. 138).

CO Torre then continued his inspection on the structure. He ascertained that each floor of the building was nine feet, one inch high. (Tr 57). According to his testimony, he observed and videotaped employees on the fourth floor, working in a hoist area within two feet from the edge of the building, who were not protected with personal fall arrest systems, or guardrail systems. (Tr. 75). He also testified that there were numerous floor holes on the fourth and sixth decks which were not protected, (Tr. 54, Tr. 79-80), employees working by open floor holes on the third deck, not covered by fall protection, (Tr. 77-78), and "multiple floor holes, on the third floor hoist area, ...which (were) unprotected." (Tr. 87-88). CO Torre also testified that a Major employee arrived and began to build a guardrail around one of the open holes, while CO Torre was present. (Tr. 188-189). CO Torre ascertained that all workers performing concrete form related work were Major employees. (Tr. 58).

CO Torre also testified that ironworkers were seen laying rebar on the sixth and fifth floors, on this first day, with no fall protection. (Tr. 71-74). CO Torre recommended issuance of a violation for these instances to Major, even though the individuals exposed were not directly Major employees. CO Torre testified that he believed that Major assumed the responsibility of constructing guardrails based on its contract for the job. (Tr. 74).

CO Torre also videotaped ironworkers at the job site exposed to rebar protruding through an open floor hole. (Tr. 81-82). He recommended that a citation be issued to Major because he believed that the ironworkers were subcontractors of Major. (Tr. 82). CO Torre admitted, however, that

ironworkers were responsible for placing the rebar at this site, and for capping the rebar, if they were working near it. (Tr. 204-205).

CO Torre returned to the site on November 4, 1998 with OSHA Compliance Officers Brian Donnelly, ("CO Donnelly") and Rich Brown, ("CO Brown"), (Tr. 90). The three officers discussed the situation with a representative of 30 River Court, David Jenkins, ("Jenkins"), and Rufalo. CO Torre testified that abatement recommendations were made to Rufalo and Jenkins during this meeting. (Tr. 90-91). CO Donnelly specifically testified that he discussed the use of safety nets and catch platforms with Rufalo. (Tr. 217, 226). CO Torre also testified that he noticed additional violations on November 4, 1998, which were recorded on videotape, such as an employee performing form work at the edge of the building without fall protection. (Tr. 94).

CO Donnelly, also, later discussed the issue of fall protection with Don Lee, (aka Dong Lee, "the current superintendent of Major", Tr. 46), and explained the requirements and the use of guardrails on the deck, including guardrail brackets, as well as the use of safety nets and other means of abatement. (Tr. 214-216, 226). CO Torre returned to the site on November 10, 1998 with OSHA Compliance Officer Gary Jensen, ("CO Jensen"), but they observed only minimal activity on the top deck, and did not observe any apparent violations. (Tr. 245).

CO Torre returned to the job site on November 16, 1998, accompanied by Jenkins. (Tr. 96). CO Torre testified that he observed further fall related violations while he was still on the ground floor, such as an unprotected employee installing reshoring six inches from the edge of the building on the eighth floor, (Tr. 96), and an unprotected employee stripping the exterior form away from the column. (Tr. 101). Additionally, he testified that he saw employees on the seventh floor working near open floor and stairway holes. (Tr. 103, Tr. 202-203). On his way to the top deck, Torre saw employees stripping the outside column without fall protection, (Tr. 106), and an open stairway hole. (Tr. 107). Notably, Torre observed catch platforms in use on the top deck, protecting employees who were erecting columns. However, Torre testified that the catch platforms were insufficient in that the plywood was not, "run out enough to the guardrails". (Tr. 106-107). Finally, CO Torre testified

that he also observed unprotected employees cleaning up and stacking plywood in a hoist area within a few feet of a stairway hole, on November 16, 1998. (Tr. 103-104).

CO Jensen reported additional violations on January 6, 1999, when he observed and videotaped employees working at and over the edge on the 25th and 26th floors without fall protection. (Tr. 246). Specifically, CO Jensen testified that there was no guardrail on the finished 26th floor, even though a stripping operation was ongoing. (Tr. 249-250). CO Jensen testified to telling Buttino that the two employees working near the edge of the building, (one removing clamps from a column and the other reaching over the edge of an unguarded floor, removing lumbar), needed a fall protection system, which could be safety nets, a personal fall arrest system, or guardrail systems. (Tr. 250-251). He also testified that he specifically suggested safety nets as an appropriate fall protection system. (Tr. 262).

Additional fall hazards were reportedly observed and videotaped by CO Jensen on January 6, 1999. These include an employee removing lumber on the 25th floor, at the edge, with no fall protection, (Tr. 256), an employee holding a reassure without proper fall protection, (Tr. 257), and an employee assisting another employee remove a column clamp at the edge without fall protection on the 26th floor, (Tr. 259 - 261).

CO Jensen continued the inspection on January 7, 1999, accompanied by Compliance Officer Ed Norton, ("CO Norton"). (Tr. 264). CO Jensen testified that he observed two workers performing leading edge work with no fall protection, even though they were only "a couple of feet" from the edge of the building. (Tr. 264). From the top deck on that day, CO Jensen observed an open and unguarded floor hole elevator shaft, and protruding, unguarded rebar. He also reported what he identified as an inadequate guardrail system, in that it was too low, was missing adequate mid-rail protection, and had inadequate top rail protection. (Tr. 265, 266 272, 283). He observed and videotaped two unprotected employees placing plywood at the perimeter edge, creating the last step in leading edge work, on the 27th deck. (Tr. 268) CO Jensen testified that he told Phil Miller, whom he identified as Major's carpentry foreman, that fall protection was required for employees doing

leading edge work. He suggested a fall arrest system, safety net, or a guardrail system. (Tr. 287-288). He also advised Miller that the top deck guardrail was inadequate, specifically telling him what the OSHA standards require in this regard. (Tr. 286).

Apparently on the same day, CO Jensen observed and videotaped employees preparing to rake out recently poured concrete on the 27th floor, protected by a guardrail with a top rail only as high as the employee's knee. (Tr. 274-276). Several employees, he testified, came right to the edge. (Tr. 277). The employees were not tied off, and there was no safety net. (Tr. 278).

On January 8, 1999, CO Norton returned to the job site, alone. (Tr. 744). According to his testimony, he observed open-sided floor hazards on the 25th and 26th floors, before he entered the site. (Tr. 744). Specifically, he testified to observing a worker at the southwest corner of the 25th floor working at a column without fall protection, even though the area was already stripped and they were right at the edge. (Tr. 746-749). He also testified that he saw an individual on the 26th floor working with plastic around the perimeter, within two to three feet of the edge, with no guard rail nor other form of fall protection. (Tr. 749-751). CO Norton admitted, however, that installing and removing plastic is ordinarily the general contractor's work, not Major's (Tr. 750-751).

CO Jensen and CO Norton returned to the site on January 11, 1999. (Tr. 752). CO Norton testified that he observed several unprotected employees walking through an area on the stripping deck, within three to four feet from the edge of the building. On that date, the stripping deck was located on the 28th floor. (Tr. 753-755). CO Jensen testified that he videotaped employees on the 28th floor, removing concrete forms with no fall protection system. (Tr. 293). According to his continued testimony, CO Jensen saw a guardrail installer actually build a guard rail behind an exposed employee on the 28th floor, (Tr. 295), another employee performing concrete forms related work, near the edge of the 27th floor, with no fall protection, (Tr. 298-300) , and employees performing concrete forms related work, exposed to three unprotected floor openings of an elevator shaft, and to unguarded rebar. (Tr. 307-308, Tr. 310-312). According to CO Jensen's testimony, he also witnessed additional instances of violations involving a failure to protect workers performing leading

edge work on this date, such as an unprotected employee adjusting ribs by the perimeter of the building, within one or two feet of the edge. (Tr. 300-302).

CO Jensen and CO Norton testified that they again expressed their concerns about the lack of fall protection and unguarded sides with Buttino on January 11, 1999.. (Tr. 313, 756). CO Jensen also discussed Major's failure to cap or guard against the exposed the rebar. (Tr. 312). According to CO Jensen's testimony, his observations caused him to contact his supervisors with respect to a "potential imminent danger" situation. (Tr. 302). He and CO Norton thereupon advised Major personnel that they were considering posting an imminent danger notice on the site. A meeting was scheduled for January 12, 1999 to discuss the perceived hazards. (Tr. 302).

CO Jensen testified that none of Respondent's employees initially attended the January 12, 1999 meeting, although Rufalo arrived late and participated, (Tr 318-319), acting as Major's representative at the meeting. (Tr 759). Compliance officers from OSHA and representatives for 30 River Court were present and discussed the perceived violations, and potential abatement methods. (Tr. 319). A request for a fall protection plan was made during the meeting, and CO Norton asked Jenkins directly if he ever received a fall protection plan from Major. No plan was provided. Ultimately, no agreement was reached and OSHA posted an imminent danger notice on the site. (Tr. 320-321).

The Notice of Imminent Danger states as follows:

> Employees are not being protected against falls from upper levels while engaged in the following activities at the structure's exterior edges: 1. Erection of forms, deck, stops and guardrails. 2. Stripping of forms and shoring supports. 3. Placing of forms and shoring supports in the hoist areas.

(C-10). CO Jensen testified that he and CO Norton posted the notice at the personnel hoist, on the outside of the hoist and near the entry way to the ladder the men were using to ascend and descend the structure. (Tr. 323-324). CO Norton testified that a copy was also handed directly to Rufalo. (Tr. 760).

CO Jensen stated that the endangerment posting did not cause Major to cease operations. He therefore continued his inspection, observing and videotaping a number of additional violations. According to his testimony, the additional violations included employees exposed to additional instances of unguarded floor holes, (Tr 328-330), employees exposed to inadequate guardrail protection on the 27th or 28th floor, (Tr. 331), employees exposed to inadequate top rail protection on the 28th floor, (Tr. 331-333), and employees performing leading edge work on the 29th floor, without fall protection. (Tr. 334-335). He testified that he also observed employees using powered equipment, such as a circular saw, without appropriate eye protection. (Tr. 326).

AD Ricca testified that he was on the job site on only one day, January 12, 1999. (Tr. 978). He testified that he had a lengthy meeting in the trailer about the feasibility of providing protection, and that he explained to Rufalo his belief about the various available abatement methods. (Tr. 979). CO Norton continued the inspection on January 13, 1999 on which date he discussed the imminent danger situation with Buttino. (Tr. 763). There was no leading edge work underway, and guardrails were in place. (Tr 764).

The inspection continued on January 19, 1999. CO Jensen testified that his continuing inspection on that day revealed a number of further violations, more, even, than ever before. (Tr. 338). According to his testimony, these included employees working near an unprotected edge, on the 27th floor, (Tr. 341-343), an unprotected employee performing leading edge work within one foot of the edge, on the 30th deck, (Tr. 344- 346), unprotected employees in a hoist area within five or six feet of the edge on the 27th floor, (Tr. 347-350), employees near open floor holes, (Tr. 350-352), employees exposed to unguarded rebar, (Tr. 362-363), and employees using power activated tools, such as a "hilty gun" and circular saws, without appropriate eye protection. (Tr. 355-357). CO Jensen testified that he also observed and videotaped employees ascending and descending a ladder near an open, live electrical panel. (Tr 360-362). CO Jensen testified that he told Buttino about the different violations he saw that day, specifically advising him that unprotected edges needed to be guarded (Tr. 338-340, 353, 366).

CO Norton continued the inspection the next day, January 20, 1999. (Tr. 765). According to his testimony, CO Norton identified an employee on the southwest corner of the top deck, within two or three feet in either direction of the edge, working on the actual columns without any fall protection. (Tr 765-767). His testimony also reports an exposed, unprotected employee on the 28th floor, reaching out over the edge of the building to retrieve material which had fallen onto catch fingers. (Tr. 769-771).

The OSHA officers conducted a further meeting with representatives of Major and 30 River Court on January 21, 1999, in order to discuss the perceived violations. (Tr. 373). Respondent's attorney, Mr. Paranac, was present, and it was at this meeting that Major first provided OSHA with a copy of their fall protection plan, dated September, 1998. (Tr. 774-775). Issues relating to fall protection, abatement procedures, and OSHA's interference with the work progress were discussed. (Tr. 374). According to AD Ricca, the compliance officers reiterated the numerous methods available to Major to abate the hazards, such as netting, anchorages, restraints and catch platforms. (Tr 988). According to CO Norton, suggestions were made to Major to consult with an expert in the field. (Tr. 775), and that his primary suggestion was to use perimeter nets. (Tr.814-816). Again, no consensus was reached. (Tr. 775). CO Jensen returned to the job site to continue the inspection. (Tr. 374).

CO Jensen testified that he observed and videotaped additional violations on January 21, 1999. For example, he saw unprotected employees performing leading edge work on the 31st deck, (Tr. 375-377), unprotected employees at the leading edge, but not performing leading edge work, (Tr. 379), and unprotected employees in a hoist area near the exterior edge. (Tr. 381).

CO Jensen returned to the site on January 22, 1999, with Mohammed Ayub, (OSHA's Director of Engineering) and CO Norton. (Tr. 906). They met with Buttino and, later, Polites on that date, with respect to the issue of fall protection. (Tr. 386-387). According to his trial testimony, Mr. Ayub told Mr. Rufalo and Polites to use safety nets or a lifeline to protect the employees. (Tr 907-910). Major did not accept any of Mr. Ayub's suggestions, and the inspection was continued. (Tr. 910-911).

Mr. Ayub testified that he spent some time walking around the 31st floor with Rufalo, Polites, and others, (Tr 911), and that he informed them not to anchor the lifeline to the rib of the floor unless an engineer has done computations to ensure that the rib can take a force of 5,000 pounds, or have a safety factor of two. (Tr. 913). CO Jensen testified that their continued inspection that day disclosed additional instances of unprotected employees performing leading edge work, (Tr. 387-388), employees exposed to open, unguarded floor holes, (Tr. 390-392), and at least one Major employee exposed to unguarded and uncapped rebar, on this date (Tr. 393-395).

CO Norton continued the inspection solo on January 25, 1999, which he described as a stormy, windy, snowy day. (Tr. 780). Despite the weather, CO Norton observed an employee within two to three feet of an open edge in a hoist area on the 28th floor without any means of fall arrest or fall protection. (Tr. 776-779). Co Norton also reported more than one employee working on the 32d deck, at the leading edge, within a foot or two of the edge with no fall protection. (Tr. 780-784).

CO Jensen and CO Norton returned to the site on January 26, 1999 with Rich Mendelson, a regional safety specialist. (Tr. 400). CO Jensen testified that again, he observed and videotaped further OSHA violations involving Major's failure to provide fall protection. According to his testimony, he observed and videotaped an unprotected employee performing concrete forms related work two to three feet from the edge of the building, in a hoist area, (Tr. 401-403), employees exposed to open-sided floors without fall protection, despite the presence of ice on the deck, (Tr. 403- 405), and employees performing leading edge work without fall protection. (Tr. 407-409). He also reported employees using step ladders in an improper, folded up manner. (Tr. 410). Similarly, CO Norton reported violations observed this day involving leading edges and floor holes. (Tr. 785-787). CO Jensen testified that he told Buttino, again, that the edge had to be guarded and that there were continuing violations involving fall protection. (Tr. 414). Buttino thereupon guarded up the icy section of the deck. (Tr. 416).

CO Jensen testified that he observed additional violations on January 27, 1999, such as a failure to provide fall protection to employees exposed to an open edge on the 30th floor, (Tr. 417-420), and

unprotected employees performing leading edge work. (Tr. 421). CO Jensen also reported violations involving the exposure of Major employees, ("carpenters") to unguarded rebar (Tr. 425). CO Jensen testified that he again told Buttino that fall protection needed to be provided, but no action was taken. (Tr. 426-427).

CO Jensen testified that he returned on January 28, 1999, but was denied entry onto the structure. (Tr. 429-432). CO Jensen therefore videotaped the ongoing construction work from the street, catching further violations from that vantage. (Tr. 432-433). CO Jensen reported, specifically, an employee performing the last stage of leading edge work without fall protection, and an unprotected employee on the 33rd deck installing an upright stanchion for a guardrail. (Tr. 434-438). CO Norton returned to the site on January 29, 1999, but was denied entry to floors 29, 30, 31 and 32. (Tr. 789). Nonetheless, he testified to additional violations dealing with open sided floor violations and Major's failure to provide appropriate fall protection. (Tr. 790-801).

CO Jensen returned to the site on February 1, 1999, and was again denied entry. (Tr 440). Once more, he videotaped what he perceived to be violations from plain view. According to his trial testimony, CO Jensen observed a worker walking two to three feet from the edge of a stripped floor, with no means of fall protection, (Tr 440-442), and a worker standing at an unguarded edge of the building on the 30th floor, with no form of fall protection. (Tr. 444-445). CO Jensen also testified that, from January 6, 1999 through February 1, 1999, he did not observe any steps taken by Major to correct any fall hazards addressed in the citations. (Tr. 447).

CO Jensen also testified that he never noticed any evidence of a controlled access zone, such as a sign connected to a guardrail, a rope or other physical means to denote the area, (Tr. 449, 491-492), nor was he ever told of a competent person assigned primarily to monitor job safety. (Tr. 451-452). Further, he observed no attempts to control access to any controlled access zone. (Tr. 453). CO Jensen testified that he suggested the issuance of citations based on these perceived failures following receipt of Major's Fall Protection Plan, which identifies use of a controlled access zone. (Tr. 449-450, 593). He admitted, however, that he did not receive a copy of Major's fall protection

plan until after his work site inspection was complete. (Tr. 575). CO Norton likewise testified that he could not identify a "competent person" with respect to monitoring any controlled access zone, and that conversations with Buttino indicated that Respondent did not in fact maintain a fall protection plan. (Tr. 809, 811, 821-822).

Testimony of Dong Lee

Dong Lee, is an engineer who was retained by Major construction to "coordinate" the job. (Tr. 1054). He worked for MJP before working for Major, and worked for Politis Construction before he worked for MJP. (Tr. 1053-1054). He testified that he prepared Major's Fall Protection Plan in September of 1998. He also drafted a fall protection plan for Politis Construction Co. for a Prospect Heights Care Center on May 8, 1997, and a fall protection plan for M.J.P. for the Tower of Amenia project on September 8, 1997. (Tr. 1055-1057, 1065-1068, Complainant's Exhibits 12 and 14, respectively). He testified that he consulted with Buttino and Rufalo before writing the MJP fall protection plan, (Tr. 1061-1062), which was largely based on the Politis Construction plan. (Tr. 1059-1064). Both job sites were similar, poured in place concrete structures. Of note, the fall protection plan for the Prospect Heights and the Amenia projects require that either a guardrail and/or a personal fall arrest system be used to protect workers performing leading edge work. The plan for the Amenia project was further modified on October 11 1997, to require that workers on perimeter areas wear personal fall protection systems.

Mr. Lee testified that he first learned that Major would be involved in the 30 River Court Project approximately six months prior to September, 1998. (Tr.1063). The fall protection plan he testified he drafted for this job states that conventional fall protection cannot be used during erection, stripping and movement of the deck form work, with various explanations.(Exhibit C-7).

Mr. Lee testified that he spoke with Rufalo and Buttino before creating the fall protection plan for Major. Mr. Rufalo told him that the prior M.J.P plan he had written was garbage, and that he therefore prepared the Major fall protection plan differently, based on Rufalo's suggestions. (Tr. 1065-1067). Interestingly, the fall protection plan drafted for Major's work at this job site is in a

different handwriting that the plans prepared for Politis and MJP.

Under questioning by the Court, Mr. Lee testified, in general, that concrete reaches up to 40 to 60 percent of its strength three days after is was poured. (Tr. 1076). After seven days, it is probably at 80 percent, and after 28 days, it is at full strength. (Tr. 1075-1076). Mr. Lee also testified that he believed Major put accelerates in the concrete, but that accelerates make the concrete cure only about an hour faster. (Tr 1077).

Testimony of Michael Polites

Polites testified that he is the President and a 4% shareholder of Major Corporation, and a 4 % shareholder of M.J.P. Construction Company. The remaining shares of Major are owned by his daughter and son. (Tr. 1120-1121, 1124). Polites receives mason foreman's wages for his work for Major. He testified that he has not received any dividends, as profits are funneled back into the business concern. (Tr. 1122-1123). Polites' responsibilities include estimating the job, working on the plans on the job, and acting as referee, if needed. (Tr. 1136-1138). Major's headquarters are located at the same address as Polites' home, but on a different floor. (Tr. 1121). Major also rents a storage space in Clifton, New Jersey for materials. (Tr. 1133).

Polites testified that Major Corporation, not Polites, paid union benefits, workers' compensation insurance, general liability insurance and employment taxes on the 30 River Court job. (Tr. 1143-1144). Major also maintained its own bank account for the 30 River court job site. (Tr 1144).

Polites also testified that decisions regarding day to day operations at the 30 River Court job site were made by the individual foremen and Mr. Lee. (Tr. 1128-1129). Mr. Lee was responsible for ordering materials.(Tr 1130). Polites also testified that the individual foremen, not Polites, had authority to hire and fire employees, through the union. (Tr 1130-1131). Nonetheless, Polites hired Mr. Lee, (Tr 1135), and had the power through Mr. Lee to fire the general foremen. (Tr. 1140-1141).

Polites testified that Politis Construction went bankrupt because its debtors did not pay money owed. (Tr. 1128-1129). M.J.P., however, is still in existence, and, in fact, leased one of its vehicles to Major for the 30 River Court project. (Tr. 1124).

Testimony of Anthony Buttino

Buttino testified that he was hired through his union to work for Major Construction Corporation as a foreman and shop steward at the 30 River Court construction job. He worked for Politis construction in August, 1996, and M.J.P. Construction in July, 1997. (Tr. 1079-1081), holding more or less the same positions. (Tr. 1085). Buttino also testified that he has been a carpenter foremen for more than 20 years, (Tr. 1148), and spent approximately 99 % of those years working on high rise concrete construction projects. (Tr. 1149). Buttino boasts to having been involved in the construction of more than 50 poured in place concrete buildings. (Tr. 1149-1150). He has not, however, read the OSHA standards. (Tr. 1285).

As a carpentry foreman, Buttino supervised the stripping floor and the forming deck, as well as the subsequent reshoring and clamping of concrete. (Tr. 1146-1147). As the individual responsible for "ensuring that the job was safe", (Tr. 1146), Buttino testified that he made sure that all penetration holes were covered, that there was a guardrail on the deck, and that shafts were covered over. (Tr. 1148). Preplanning the safety for the 30 River Court Job involved reviewing the fall protection plan when he first arrived on the job site, in early October, after construction had already commenced. (Tr. 1084).

Using Respondent's Exhibits 17 and 18, Buttino described the process of Major's work on the job as involving three or four floors at the same time. The top deck, just below the leading edge work, was described as the framing deck. (Tr. 1206, and see Exhibit R-18). The stripping level came immediately below the framing deck, and the stacking, or plywood level, came immediately below the framing level. (Tr. 1293).

With respect to the integrity of the forms structure as it existed before the concrete was poured,

Buttino testified that the high stringers were toe nailed to the low stringers, with just one nail per stringer. (Tr. 1156-1157). The ribs were not connected to the high stringers until after the plywood was placed on a joint rib. (Tr. 1157). Ribs located underneath, however, remain unattached. (Tr. 1157-1158). Each piece of four by eight plywood was attached with between four and six nails. (Tr 1165). Legs were not secured to the concrete deck below them. (Tr 1196). Thus, according to Buttino's testimony, if a lifeline became wrapped around one of the 30 legs on a deck, the leg could be pulled out, and cause a section of the deck above to drop. (Tr. 1197).

With respect to safety on the hoisting deck, (the deck below the stripping deck), Buttino testified that employees at that level worked "probably six to eight feet" from the edge of the structure. (Tr. 1202). Perimeter cabling, he testified, would not be possible because it would interfere with the operation of the material crane. (Tr. 1202-1203). Thus, Major did not install cabling until after all materials were hoisted. (Tr. 1203-1204).

Turning to issues relating to the safety of a worker working/walking on top of the frames, Buttino testified that there was no way to use fall protection because there is no place to attach a lanyard. (Tr. 1188). With respect to the safety of employees working on the framing deck, Buttino testified that the overhead forms are not strong enough to support a lifeline or lanyard. (Tr. 1189-1191). Despite this perceived difficulty with using fall protection in areas below the forms deck, employees performing clamping columns were tied off to stringers above, following a conversation between Buttino and the general contractor regarding fall safety. (Tr. 1190-1191). According to Buttino's testimony, this conversation occurred following recommendations made by OSHA officers. Nonetheless, attaching the lanyards to the stringers is not, in Buttino's opinion, a feasible way to provide fall protection because he had not seen it done in all the years he has been in the business. (Tr. 1192). He also testified that it is inadvisable to attach a lifeline or lanyard to an interior column, because, first, the column would not be structurally sound until it is poured, and second, the lifeline running to the interior column would create a tripping hazard. (Tr 1193).

Buttino testified that employees stripping the outside columns on the stripping floor were provided

with safety belts which were to be tied to the outside columns. Other employees, according to Buttino, did not come "that close to the edge", and he would not tie off to an interior column on the striping floor, again, because of the tripping hazard. (Tr. 1203). With respect to the installation of guardrails, Buttino testified that Major employees "came back" and installed the guardrail once they had 20 % of the deck solid. (Tr 1162 - 1163).

Further, Buttino testified that there was a fall protection plan for the 30 River Court Job site, written by Mr. Lee, for "people we could not protect", (Tr 1208-1209), which he states was in fact implemented and maintained at the job site. (Tr. 1094, 1215-1216). Buttino testified that the plan provided that fall protection could not be used to protect workers doing leading edge work, workers in the hoisting area, workers erecting outside columns, or workers clamping concrete or stripping forms. (Tr. 1209). He testified that, at one point, Major considered creating a catch place by extending the deck beyond the edge. This idea was rejected, however, as it was thought that the catch basin would interfere with operation of the crane. (Tr 1210).

The plan they ultimately developed directs employees to work from the inside of the building out, to work in teams of two, and to observe the controlled access zones, which Buttino defined as "the floors that we were occupying". (Tr. 1211-1212). He explained that Major identified different controlled access zones for the different types of workers. For example, only the five strippers and the stacking crew were allowed on the stripping floor. (Tr. 1212). Other trades, however, could access the areas. (Tr 1212). Buttino testified that it was his responsibility to ensure that workers abided by the fall protection plan on the framing deck. Phil Miller took over this responsibility on the deck, and Ed Craffey took over that responsibility on the stripping floor. (Tr. 1214).

Buttino conducted weekly safety meetings. Issues covered included "safety rules" such as hard hats, safety glasses, and floor openings . (Tr. 1218- 1220). The employees were instructed to use their safety glasses whenever they were cutting, and, according to Buttino's testimony, Major provided safety glasses to all carpenters. (Tr. 1218-1219). He testified that he also discussed issues relating to the two men assigned to the hoist, and the hoist's controlled access zone. (Tr. 1222) Buttino

testified that the issue of guardrails was specifically discussed during the November 16, 1998 meeting, when the workers were told to install the preliminary guardrail once the deck was 20% completed, and that the guardrail on the framing floor should stay up as long as it could, until they had to start stripping the floor below. (Tr. 1220). On other dates, the workers were told that if the guardrail is not up, Buttino would send out two guys with safety belts. (Tr. 1221). The men were also told to position railings around the elevator shaft after they passed the material up, and to cover the opening completely after the material was passed up. (Tr. 1221).

Buttino testified that he specifically discussed leading edge work and fall protection on December 15, 1998, when he told the workers about "working in pairs, working safe, working from the inside of the building out." Buttino testified that, by that time, Major was providing lanyards to the workers on the stripping floor. Therefore, he believed, he did not have to discuss the use of personal fall protection. (Tr. 1222-1223). Safety meetings also covered controlled access zones for the four floors where Major was working, (Tr. 1223), and the use of safety belts for certain employees. (Tr 1223). In addition to the weekly safety meetings, safety notices were mailed with the employees' paychecks. (Tr. 1225, 1226).

Buttino also testified that he knew of only one instance in which an employee who should have been using a safety belt failed to re-attach himself after taking a work break. (Tr. 1225-1226). (The instance was caught on videotape and became a basis for the issuance of Citation 2 Item 1a, discussed more fully below). The employee was only "yelled at a little bit" (Tr. 1234).

Testimony of Phil Miller

Phil Miller, Major's top deck carpentry foreman, testified that the fall protection plan for the 30 River Court project instructed employees to always work from the inside of the building out, to always face the edge of the building and to kneel down as one nears the edge. (Tr 1328-1329). Mr. Miller further testified, that, as foreman, he monitored the carpenters working on the top deck, working on the leading edge. (Tr. 1330-1331). He testified that there was a controlled access zone on the deck, which he described as "the whole working area". (Tr. 1329).

Testimony of Steven Koc

Respondent called to the stand Steven Koc, the Major employee assigned to clamping and stripping columns, who was caught on videotape clamping columns without a safety harness. (Tr.1337-1343). Mr. Koc testified that he usually wore his harness when working, but in only this one instance, had taken a break, and forgot to put it back on. (Tr 1339).

Respondent's Expert: Louis Nacamuli [3]

Respondent's engineering expert, Louis Nacamuli, ("Nacamuli"), issued a report, and testified with respect to the feasibility of conventional fall protection for Major's work at the job site. His report, (Exhibit R 19) defines the moving deck, being constructed out of form work as leading edge. His report identifies primary fall protection as guardrails, and secondary fall protection as a personal fall arrest system, or safety nets. (R19). Without differentiating between leading edge work and non-leading edge work, Nacamuli's report states, generally, that secondary fall protection is, "not a feasible method for fall protection of employees during the normal work activities in high rise concrete construction." (R19). Specifically, the report submits that guardrails cannot be installed until the leading edge work is concluded. Once the floor is placed, however, and the columns are stripped, the report indicates that the guardrail must be removed because it is attached to the supporting framework. (R. 19). It is also Nacamuli's opinion that personal fall arrest systems were not feasible for protection of any of employees in the fall protection related citations, because there was no reliable structure that could be used for attachment points. The deck structure, according to his report, could not be used because it is temporary in nature.

During his trial testimony, Nacamuli explained that form work is designed to support vertical loads of concrete, and not to withstand lateral challenges. (Tr. 1368). It is designed to come apart very easily, to enable the forms to be stripped with the least amount of damage to the integrity of the

[3] Louis Nacamuli is a structural engineer licensed in New York, Pennsylvania and New Jersey. He has a BS in Civil Engineering and he owns and operates Nacamuli Associates, a structural engineering firm. (Tr. 1357 - 1359).

wooden forms material. (Tr. 1368, 1399) Specifically, He opined that the stringers would be inappropriate as anchors, because they were only toe nailed as a temporary form for the concrete. (Tr. 1369). Legs likewise could not be used as anchors because they were merely wedged, designed to be readily removed with a sledge hammer. Any horizontal load, therefore, would pull them out. (Tr.1370 - 1371). In his view, there is likewise no appropriate place to anchor a personal fall protection system on the stripping floor. (Tr. 1372). The shores for the concrete could not be used as an anchor because they are not perpendicular. (R.19). Nacamuli admitted, however, that the ACI standard for lateral load is a very basic requirement that the form work has to stand up and hold its shape, (Tr 1392), and that form work can be designed to support a foreseeable load. (Tr 1394).

According to Nacamuli's report, the concrete decks could not be used as an anchorage support because the concrete would not have cured to the necessary strength at the time the employee working on the floor needed protection. (R.19). Nacamuli testified that the concrete floor below the framing deck would not be strong enough to support an attachment until it reached at approximately 2,200 pounds a square inch,[4] which he testified would not occur until after a minimum of one week following the pour. (Tr. 1370-1371, 1379). Because of the two day pour cycle at the 30 River Court job site, the cement floor below the framing deck would have been less than 24 hours old, and he testified, therefore would not have attained sufficient strength to support lanyard attachments. (Tr. 1370-1371). The concrete columns and deck on the stripping floor, one level below, could not be used for the same reason. (Tr 1372-1373). Similarly, the concrete on the stacking floor would not have sufficient strength as it was only four days old. (Tr. 1373). Mr. Nacamuli further testified that the concrete decks would, likewise not have reached the "required strength of 2,500 pounds" in one day, which he believes is necessary to support a net or other anchorage in one day. (Tr. 1378).

Mr. Nacamuli also testified that guardrails were a feasible means of fall protection on the top deck, but not until 10 to 20 percent of the floor was constructed. In his view, it would be impractical to

[4] Mr. Nacamuli testified that the concrete manufacturer's literature requires that the concrete attain a strength in the neighborhood of 2,200 pounds per square inch before any of their attachments may be used.

walk along the edge, and install a guard rail on a stringer. (Tr 1373-1374).

Nacamuli likewise opined that a guardrail is not a feasible means of fall protection on the stripping floor, until after the floor is stripped. First, he contends, concrete shores located at the edge of the structure would interfere with the placement of the guardrail. Second, the guardrail would interfere with the stripping of the exterior columns. (Tr. 1374-1475).

Nacamuli's report indicates that nets would not be a feasible means of fall protection for employees working at 30 River Court job because, "A net system relies on a stable secure anchorage point to secure the nets. Information provided by manufacturers of safety straps state that the safety straps can only be attached to a permanent, stable structure and, therefore, cannot be used in this type of construction." (R. 19). In explanation, he testified that workers could not access the floor to attach the nets until between five and seven days into the cycle. At that point, however the net would be lower than 30 feet from the floor the net was intended to protect. (Tr. 1378). Even then, he opined, the concrete might not have reached the necessary strength to support the nets. (Tr. 1376). Furthermore, in his opinion, a perimeter net would get in the way of the crane hoist. (Tr. 1377).

Complainant's Expert Witness, Mathew Burkart [5]

Engineer Mathew Burkhat, ("Burkart"), testified that fall protection was feasible on the Thirty River Court project. On the top deck, he suggested that the ribs could have been designed with a guardrail pre-attached, at the least to protect falls in the outer perimeter of the building. (Tr. 1410). Also, a fall restraint system could be anchored into the forms. This, Burkart testified, would act like a leash, preventing the workers from walking beyond the edge, as opposed to a fall arrest system, which is designed to hold the worker's body in a fall. (Tr. 1411-1412). He also testified that nets could be installed on the perimeter to protect any employees falling from the edge. (Tr 1412). With respect

[5] Mathew Burkart has a BSCE in Civil-structural engineering from the Missouri School of Mines and Metallurgy, and is a registered structural engineer in the State of Pennsylvania. He is a President of AEGIS Corporation, an engineering consulting firm specializing in providing engineering safety and loss control services to the construction and insurance industries.(C-24).

to attaching anchors to the concrete slabs to support perimeter nets, Burkart testified that if the concrete is strong enough to be stripped, it should be strong enough to support nets, as well as fall restraints and fall arrest systems, and that the engineer on site should have documented the strength of the concrete, in any event. (Tr. 1413). Burkart admitted that it is not practical to maintain a guardrail system while constructing leading edge. However, he testified that a guardrail should be constructed once the perimeter is reached. (Tr. 1427).

Turning to the framing deck, Burkart noted that a guard rail system supported by the forms below was in place. In any event, he testified that a guard rail system could be installed on the framing deck between the columns. (Tr. 1413-1414). Alternatively, a fall restraint system could be used on this floor, by tying back to either a floor opening, or to one of the columns on the framing floor, to restrain the person from the edge of the building, (Tr 1413-1414), or a perimeter net could be used. (Tr. 1413). Finally, according to Burkart's testimony, it was feasible to install a fall restraint system on this deck, by choosing specific locations where the rib and stringer would be secured sufficiently to support a fall restraint system. (Tr. 1439). In those locations, the contractor may have to add one or two nails to the forms, and use eight penny double nails instead of three-penny nails. (Tr. 1439).

Burkart also testified that fall protection was feasible on the stripping floor. (Tr 1414-1415). The types of fall protection he identified included nets, a fall restraint system tied to a stripped, interior column, or a wooden guard rail or wire rope system placed around the building to provide a guard rail. (Tr. 1415). The guard rail would not, he opined, interfere with the stacking of materials because one could let the materials project out underneath the guard rail, if necessary. When the material is going to be lifted out, one would disconnect that section of the guardrail and hoist the materials out. The workers disconnecting the guardrail and working in the hoist space could be protected by use of a personal fall restraint system. This same procedure could be used on the stacking floor, below the stripping floor. (Tr. 1415-1416).

Burkart also testified that perimeter nets could be placed three levels below the level being formed. If, however, the top deck were protected by a guardrail, one could move the perimeter net down to

open out the stacking floor, allowing the perimeter net to protect the three levels above it. (Tr 1418, Tr 1428).

With respect to the ability of concrete to support loads, Burkart testified that not all concrete manufacturers require a minimum of concrete strength in order to support a net. He indicated that the size of the nets and the type of anticipated loading is taken into consideration. Further, he testified that recent developments have all but eliminated the requirement that a specific minimum strength be established before the net is anchored. (Tr. 1428). Generally, 2,000 pound concrete is a reasonable number to look at for a standard of the strength of concrete. (Tr. 1429).

However, if the concrete is strong enough to support itself and the loads imposed by the form work installed above it, an anchorage imbedded in the concrete should be strong enough to support a safety strap. (Tr 1420). Burkart further testified that ACI Code Section 347 requires that concrete have 70 percent of its strength before the forms are stripped. However, an engineer on the project may approve earlier stripping, on a case by case basis. (Tr 1432-1433). With respect to the cure rate of concrete, generally, Burkart testified that under ideal conditions, 75 percent will cure in seven days or less. Additives, however, can speed that cure rate in one, two and three days. (Tr. 1434-1435). A determination in each case, as to whether concrete is strong enough to support removal of the forms and anchorages, can be made by conducting field cured samples, on-site testing, and impact or dynamic testing in the field. (Tr. 1436, 1437-1438). In any event, Burkart testified, it is important to consider what safety measures you will require before you bid for the job; indeed it is common industry practice to do so. In this way, the contractor considers the cost of safety in the terms of the contract. (Tr. 1419).

Complainant's Expert Daniel Paine [6]

Complainant's safety consultant expert, Daniel Paine, ("Paine") likewise testified that fall protection was feasible at the job site. (Tr 1449-1454). Like Burkart, Paine opined that guardrail posts could

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[6] Daniel Paine serves as President and CEO of Sinco Group, Inc., where he is responsible for designing and selling fall protection systems for the construction industry. His experience also includes operating a union Ironworker Construction Company. He has a BA from Union College. (C-24).

have been installed on the exterior portions of the stringers, for the placement of a guardrail on the outer perimeter of the top level. (Tr.1457). The leading edge workers could be protected by use of a fall restraint system anchored by nail to the plywood and into a rib or stringer. He testified that the contractor might have to beef up that particular area, in order to support the anchor. (Tr 1458-1459). He suggested, alternatively, that the contractor anchor fall arrest systems to the form work, but the forms would have to be designed differently than they were at this job site. (Tr. 1459).

Paine opined that perimeter nets are feasible alternatives to protect the workers on the top level, if preplanned. (Tr. 1459). Like Burkart, Paine testified that a dynamic load test should be performed once the net system is anchored to the building. Paine's suggested test would involve dropping a 400 pound sand bag into the net, at the weakest points. This would provide 10,000 foot pounds of force, which Paine felt is sufficient to catch a man falling 30 feet into the safety net. (Tr. 1460-1461). Paine claims to having installed hundreds of theses types of systems. (Tr. 1461).

Pain further testified that a guardrail system was certainly feasible on the framing floor. The guardrail could be "up from the floor stripping". Alternatively, perimeter nets or a fall restraint or fall arrest system are feasible. (Tr. 1462). A fall restraint system, his first choice of the two personal fall arrest systems for this deck, could be anchored into the framework of the forming deck, or anchored into the concrete floor at the perimeter. Anchors could be tested for strength. (Tr. 1463). He testified that a minimal number of anchors at the perimeter would be required. (Tr. 1463-1464).

Paine testified that workers on the exterior of the stripping floor could be protected in a number of ways, but that the contractor should pre-plan its safety program. If properly pre-planned, pour in place anchors could be attached over rebar in the columns, before the concrete pour. This would allow for the attachment of safety lines to these anchors, once the columns are stripped (Tr. 1465-1466). He further testified that, if the floor is stripped from the inside out, workers could tie off to a concrete column behind them, in order to strip the forms from the edge of the building. Interior workers, obviously, would not need to be tied off. (Tr. 1465-1466) Alternatively, Paine suggested that inserts could be installed into the columns to anchor the safety lines. Paine identified at least one

company which uses this latter method. (Tr. 1466). Tie off points at the perimeter could also become one of the points to use for a guardrail system. (Tr. 1467).

A guardrail is similarly feasible on the stripping and stacking decks, and would not interfere with stacking material because the contractor could stack the material below the guardrail in the hoist area, or stack the material in an area where a portion of the guardrail has been removed. (Tr. 1467). Workers in the hoist area with a removed guardrail could then be attached to a personal fall arrest or restraint system. (Tr. 1467).

As a "rule of thumb", Paine testified, once the forms in a pour in place structure are stripped, the concrete should be strong enough to anchor fall restraint or arrest systems. (Tr 1467-1468). Again, he stressed that dynamic testing should alleviate any fears about the strength of the concrete. (Tr. 1468). Safety net systems can be anchored by a C-clamp onto the concrete slab or anchored to the columns. It would take approximately six man hours per post to install the whole safety net system. (Tr.1487).

Likening the plywood floor to a storage floor, Paine testified that a guardrail , in place at this level, would provide appropriate fall protection. (Tr. 1470). The stacked material could be placed under the guardrail. Alternatively, the section of the guardrail where the material is stacked could be removed. Necessary workers in that area could then use a personal fall restraint system. (Tr. 1470).

Paine also testified as to ways to avoid having a perimeter safety net interfere with the material crane. First, the safety net could be cantilevered out in the hoist area. Planning would be required at this point so that the workers working in the hoist area on this floor, as well as the workers working in the area but on higher floors are protected by personal fall arrest systems. Alternatively, the workers could be removed from the area while the material is being removed. (Tr. 1471).

Under cross-examination, Paine testified that he was involved in a similar construction job in Virginia wherein a safety determination was made that personal fall protection systems were

infeasible for the workers performing leading edge work on the interior of the building. Paine testified that such a system would be difficult because the employees performing leading edge work would constantly have to tie off as each portion of the edge progresses. (Tr 1474). Paine therefore instituted a controlled deck zone for the leading edge work on the interior of the building. (Tr. 1475). Once the work reached the perimeter, however, he testified that the contractor needed a fall protection system. At the Virginia site, safety straps were used by the workers performing leading edge work once they reached the perimeter. (Tr. 1477-1478).

Discussion

Polites as a named Respondent

First, I address the propriety of citing Michael Polites individually. In this instance, I find that the Secretary failed to submit evidence during the trial sufficient to prove that Polites was an employer, as that term is defined by Commission precedent.

It is clear that only an employer may be held liable for violations that effect the safety and health of its employees. Van-Buren-Madawaska Corp. 13 BNA OSHC 2157, 2158, (Nos. 87-214, 87-217, and 87-450 through 459, 1989). In this regard, the Commission has formulated an "economic realities test" to determine whether an employment relationship exists. The test requires an inquiry into factors specifically enunciated in Griffen & Brand of McAllen 6 BNA OSHC 1702, (No.14801, 1978). These include, "(1) Whom do the workers consider their employer? (2) Who pays the workers' wages? (3) Who has the responsibility to control the workers? (4) Does the alleged employer have the power to control the workers? (5) Does the alleged employer have the power to hire, fire, or modify the employment condition of the workers? (6) Does the workers' ability to increase their income depend on efficience rather than initiative, judgment and foresight?, (and), (7) How are the workers' wages established?"*Id*, at 1703. (See also, Sinisgalli 17 BNA OSHC 1849 (No.94-2981, 1996), allowing for the citation of an individual where the workers believed their employer was the individual Respondent who had hired them directly, *Id* at 1851).[7]

[7] In any event, the Secretary's reliance on Sinisgalli as well as Avcon Inc., et al., 2000 W.L. 1466090, (Nos. 98-0755 & 98-1168, 2000) is otherwise misplaced.

It is not disputed that Polites is a 4% shareholder and President of Major Construction, (Tr. 1120), and drives a vehicle owned by the corporation. (Tr. 113, 1123). As President, Polites hired Mr. Lee. (Tr. 1135). Polites testified that his responsibilities included estimating and bidding for the job, acting as a referee, and working on the plans in the office. (Tr. 1125-1126). He did not have the ability to hire or fire any individual workers at the job site, as only the individual foremen had that power through the union. (Tr. 1130-1132). Polites testified that decisions regarding day to day operations at the job site were made by Mr. Lee or the individual foremen. (Tr. 1129)

There was no testimony that any of the workers considered Polites to be their employer. Major paid the union benefits, worker's compensation insurance, general liability insurance and employment taxes for the job site. (Tr. 1143-1444). There was no evidence that Polites had any input into how much the workers were paid and what factors would influence the amount of their salaries. Not one employee statement was offered to establish that any worker believed that he was employed by Polites. Further, the evidence adduced at trial depicted Buttino and Rufalo, rather than Polites, as making decisions regarding safety and fall protection. (Tr. 1146-1158) For example, Rufalo directed and controlled Mr. Lee's preparation of the fall protection plan, (Tr. 1061-1062).

It cannot be argued that Polites did not have some control of the job site. It is undisputed that he could fire Mr. Lee, and he held himself out as having the authority to deny access to the job site to various compliance officers during the course of the investigation. This type of control, however, does make him an employer, under the Act.

The Secretary argues that Polites' control over Major Corporation and the job site at issue herein were sufficiently strong so as to warrant a determination that Polites was an employer, and that any

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These cases would not be controlling, even if they were factually similar. *See*, Leone Constr. Co. 3 BNA OSHC 1979,(No. 4090, 1976), "the portion of Review Commission judge's decision not reviewed by the full Commission does not constitute precedent binding upon the Commission".*Id,* at 1981. As of the issuance of this decision, the Commission has not issued a decision either affirming or reversing Avcon.

protections from personal liability Polites may have by virtue of the incorporation of Major should be overlooked. In support of her argument, the Secretary refers to testimony taken during party and witness depositions, (admitted into the trial record as Exhibits 26 through 31, Tr. 950, but marked as Binder two, Exhibits 1 - 6). However, there is insufficient evidence to identify Polites as an employer under the criterion set forth in Griffen & Brand of McAllen *supra*. Polites deposition testimony is more to the effect that the various foremen controlled the workers, (Complainant's Binder 2, Exhibit 3, p. 21), and that Polites, alone did not make the decision to continue working following the posting of imminent danger, [Complainant's Binder 2, Exhibit 3, p. 38, line 18, "Yes *we* did..." (emphasis supplied)], Polites was not on site every day, (Complainant's Binder two, exhibit 4, page 49, lines 14-18), and remained in the trailer when he was on site. (Complainant's Binder two, exhibit 4, page 51, lines 20-24). While Polites himself signed the contract for 30 River Court, his son, another officer, also had authority to do so. (Complainant's Binder two, Exhibit 4, page 64, lines 11 - 16). Each foreman made decisions about day to day operations, (Complainant's Binder two, exhibit 4, page 71, lines 13 - 20).

Buttino identified his employer as Major, not Polites, when questioned on this issue during his deposition. (Complainant's Binder two, Exhibit 5, Page 5, lines 20 - 22). Buttino further affirmed that he reported to either Don Lee or Polites, (Complainant's Binder Two, Exhibit 5, Page 8, lines 3 - 5). Buttino, however, was in charge of the day to day operations. (Complainant's Binder Two, Exhibit 5, Page 9, lines 1- 3), and he and Mr. Lee worked on the fall protection plan. (Complainant's Binder Two, Exhibit 5, Page 30, lines 7 - 13). There is no testimony that Polites paid the workers, or that any of the workers believed they were employed by Polites, rather than Major. There is thus insufficient evidence to establish Polites as an employer, either in the trial transcript or in the trial exhibits.

Given that there is insufficient evidence to identify Polites as an employer in his own right, it is questionable whether OSHA may nonetheless assert jurisdiction over Polites under the theory that facts may be presented which would support a decision to disregard the personal liability protections afforded Polites by the State of New Jersey through the incorporation of the business concern. In

other words, where an individual is not an employer, but is an officer of a corporation which is an employer, may OSHA assert jurisdiction to inquire whether there are sufficient facts to warrant piercing the corporate veil and holding the individual officer responsible ?[8]

In this case, however, the question is moot. Even if such an inquiry were appropriate, the evidence in this case does not disclose sufficient facts which would warrant a piercing of the corporate veil. It is well settled that a Court will generally not pierce the corporate veil to hold an individual shareholder liable for the acts of a corporation, absent fraud or injustice. In this case, the evidence is insufficient in this regard. There is no evidence that Polites received any proceeds beyond his salary. Indeed, the evidence indicates rather that any proceeds were funneled back into the business concern. It does appear that no dividends to the shareholders were paid, however, the corporation was newly formed, and had undertaken only one job as of the date of the OSHA investigation. Polites himself was a minor shareholder, and had given authority to at least one other officer, his son, to execute contracts on behalf of the corporation. The corporate office was maintained on a separate floor of Polites' house, and a warehouse was leased for the purposes of storing supplies. There was no siphoning off of funds, and Complainant presented no evidence that the corporation is insolvent. Further, Complainant failed to submit evidence that Polites had such control of the corporation as to be its alter ego. Rather, it appears that decisions regarding safety and day to day operations were made by the foremen at the site, and the engineer, Mr. Lee. It is also clear that the other officers performed valuable functions for the corporation.

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[8] This issue has not been directly addressed by the Review Commission. With respect to whether it is appropriate to pierce the corporate veil in an action brought under CERCLA, the Third Circuit distinguishes between owner liability and operator liability. While the corporate veil may be pierced to find owner liability, traditional rules relating to the limited liability of corporations do not apply in determining operator liability. Lansford-Coaldale Water Authority v Tonolli Corp. 4 F 3d. 1209 (3rd Cir. 1993). *See also* United States of America v Dell'Aquilla Enterprises and Subsidiaries, et al. 150 F3rd 329, (3rd. Cir. 1998), applying an actual control standard to determine operator status for alleged violations of the Clean Air Act and the National Emission Standard for Hazardous Air Pollutants established for asbestos. *Id*.

In support of its argument, Complainant relies heavily on United States of America v Pisani 646 F.2d 83, (3rd. Cir., 1981). The evidence in Pisani, established that the sole shareholder had siphoned off $184,000 from the corporation over the course of two years, and that his withdrawal of the bulk of the money was made at a time when he knew the business concern was on the verge of bankruptcy. Major Corporation is an ongoing concern, as is Polites' earlier corporation, M.J.P. In fact, it is clear that the latter corporation maintains assets of some kind as it leased a construction truck to Major for use during the 30 River Court job. The evidence would not, therefore, support a determination that Major Corporation was a mere facade created for the personal gain of Polites.

Duplication of Items in Citation 2

OSHA cited Respondent three times in Citation 2 for a violation of 29 CFR 1926.501(b)(1), (Citation 2 Item 1 a; Citation 2, Item 2a; and Citation 2 Item 3a), three times in Citation 2 for a violation of 19 CFR 1926.501(b)(3), (Citation 2, Item 1b; Citation 2 Item 2c; and Citation 2, Item 3d), one time in Citation 1 and two times in Citation two for violations of 501(b)(2)(I), (Citation 1, Item 3; Citation 2, Item 2b; and Citation 2 Item 3b), and one time in Citation 1 and one time in citation 2 for a violation of 29 CFR 1926.501(b)(4), (Citation 1, item 4; Citation 2, Item 4). All Citation 2 violations are classified as willful citations, and each bears a separate proposed penalty.

As is discussed below, it was appropriate to classify Citation 1, Item 3 and Citation 1, Item 4, as serious citations. Following the instances which resulted in the identification of these items, OSHA compliance officers told Major personnel about the instances, advised them of the standards, and suggested various abatement methods. Major, however, continued to fail to provide appropriate fall protection, and, as is discussed relative to each violation, it was suitable, therefore, to issue later, citations classified as willful, even though the violations involved the same standard. *See, e.g.* Hoffman Constr. Co 6 BNA OSHC 1274, (No. 4182, 1978), where the Commission allowed for duplicate penalties for violation of the same standard where the hazards to which the employees were exposed resulted in the classification of one violative instance as non-serious, and the other as serious. *Id,* at 1275.

The duplication of the citation items within Citation Two is a different matter. Arguing that the standards violated allow for instance by instance treatment, the Secretary grouped the instances charged in Citation Two, by, first, all those which occurred prior to the posting of imminent danger, for each standard. [Thus, Citation 2, Item 1a involves instances of violations of 29 CFR 1926.501(b)(1) which occurred prior to the posting of endangerment, and Citation 2, Item 1b involves all instances of violations of 29 CFR 1926.501(b)(3)] Second, the Secretary grouped instances which were observed after the posting of imminent danger on floors 27 through 30 as Items 2a through 2c, for each standard violated. Finally, the Secretary grouped instances observed on the "30th floor through the 33rd floor", as items 3a through 3c. (*See*, Secretary's brief, p. 108).

At issue is, first, whether it is suitable to assess separate penalties for the violation of the exact same standard, involving the same form of possible abatement. In this case, the Secretary issued up to three separate items per standard requiring the use of appropriate fall protection. The Secretary presumably issued the citations in this fashion under the "egregious willful doctrine", (see, e.g. The Secretary's post-hearing brief at pp 106-107). As enunciated in Caterpillar 15 BNA OSHC 2153, (No. 87-0922, 1993) and explained in A.S Haley Co. 17 BNA OSHC 1145, *at* 1151, (No.89-1508, 1995), the Act does not prohibit instance by instance treatment in willful egregious cases where the "unit of prosecution" is an individual act, as opposed to an overall course of conduct. *Id,* at 1151. The Commission has also held that separate penalties for violations of the same standard may be assessed where the regulation allegedly violated prohibits individual acts, as opposed to a single course of action. Caterpillar, *Supra*, at 2172.

The standard at issue in Caterpillar , 29 CFR 19042 (a), directed employers to maintain a log of all "recordable" occupational injuries. It was determined that the employer failed to record 194 separate recordable injuries. Each failure to record an injury was deemed a separate and distinct act in violation of the standard. One entry, or one course of conduct, would not have effected the 193 other instances. Therefore, each failure warranted separate treatment and a separate penalty. *Id.*. The Commission has further allowed instance by instance treatment for violations involving a failure to provide appropriate fall protection. See J.A.Jones 15 BNA OSHC 2201, (No. 87-2059, 1993).

The Commission further elucidated the application of instance by instance treatment when dealing with a specific standard in Sanders Lead Co, 17 BNA OSHC 1197, (No. 87-260, 1995). In determining whether violations involve individual acts or one course of conduct, Sanders Lead Co requires reference to the terms of the standard allegedly violated. *Id,* at 1203. The standard at issue at issue in Sanders Lead, for example, prohibited individual acts, because the language directed employers to "perform either quantitative or qualitative face fit tests at the time of the initial fitting and at least every six months thereafter for each employee wearing negative pressure respirators". *Id,* at 1203. The Commission ultimately determined that the language of the standard permitted instance by instance assessment because it required "an evaluation of the individual employees' respirators under certain unique circumstances peculiar to each employee". *Id,* at 1203.

The first standard at issue in this case, 29 CFR 1926.501(b)(1), (cited in Citation 2 Item 1 a, Citation 2, Item 2a and Citation 2 Item 3a), provides that , "... Each employee on a walking/working surface, (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) 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"*Id*. The standard mandates that an employer provide certain appropriate fall protection for each employee. The language of this specific standard does not, however, require an evaluation of each individual employee's protection needs under circumstances unique to each employee, as did the standard in Sanders Lead, *supra.* Likewise, 29 CFR 1926, 501 (b)(3), ("Each employee in a hoist area shall be protected from falling 6 feet or more to lower levels by guardrail systems or personal fall arrest system....") looks to the safety protection which should be provided, rather than calling for an individual employee evaluation in each instance. (This standard is cited three times, in Citation 2, Item 1b, Citation 2 Item 2c, and Citation 2 Item 3d). The language of 29 CFR 1926.501(b)(2)(i), (the standard cited in Citation 2 Item 2b, and Citation 2 Item 3b), likewise does not require an individual determination for each individual employee. (The standard provides, in pertinent part, that "Each employee who is constructing a leading edge 6 feet (1.6m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems or personal fall arrest systems..." *Id.*

The conduct in Caterpillar required that a separate decision be made as to whether each claimed injury or illness was recordable. It thus required an evaluation which differed with each new employee involved. Unlike the conduct in Caterpillar, the conduct in question in this matter involves Respondent's failure to provide fall protection to workers at or near the edge. The standard does not require that a separate evaluation be made as to each exposed employee. Two of the standards cited allow for any one of three options, including safety nets, guardrails or a personal fall arrest system. One standard, [29 CFR 1926. 501(b)(3)] allows for any one of two safety measures.

The course of conduct at issue is Major's failure to provide fall protection to its employees working at the edge, on the leading edge or in a hoist area at 30 River Court. The standards do not require that an individual determination be made based on each employee. Under this evaluation, I find that these items in Citation 2 are not appropriate for instance by instance treatment. Under the precedent set in Cleveland Consolidated Inc. 13 BNA OSHC 1114, (No. 84-696, 1987), Capform Inc. 13 BNA OSHC 2219, (No. 84-0556, 1989), .and General Electric Co. 10 BNA OSHC 1687 (No. 77-4476, 1982), therefore, I group all the items in Citation 2 according to the standards violated.

In any event, the grouping proposed by the Secretary appears arbitrary, given the standards cited. The posting of imminent danger does not in this instance support a separation of two willful instances of violation of one standard. While the endangerment notice bears on a heightened sense of awareness and may, if necessary, support a finding of wilful behavior, or support duplicate failure to abate citations, it does not effect whether actions comprise one or more course of conduct, and has no bearing on the type of abatement.

The Secretary explained that the instances comprising Item 2a to 2c were separated from the instances comprising Item 3a to 3d, because one perimeter net would have abated the hazards for the Item 2 instances, as those involved floors 27 - 30. Under the Secretary's reasoning, a second perimeter net would be required to protect employees exposed in the instances comprising Item 3, because they occurred on decks which were more than three floor over the first floor identified in Item 2. I find the Secretary's argument in this regard also unpersuasive. First, the instances involve

one building which was constructed at the rate of one floor every two days. It was not disputed that Major worked only on the top three or four floors at any one time. Floor 31 was not in existence at the time Major was at work on floor 27. Therefore, at no one time was there ever an instance when two separate safety nets were required at the job site. Second, the Secretary's grouping makes no logical sense when applied to the separation of the instances involving the observed violations of 29 CFR 1926. 501(b)(3), ("Hoist Areas"), because the applicable standard does not specify perimeter net as an acceptable method to protect employees in a hoist area.

Rather, separate consideration should have been given as to the safety measures provided for employees based on whether the employees were in the hoist area, working on the leading edge, or merely at an edge. The regulations already provide separate standards for each of these areas. It is therefore appropriate in this instance to group the items according to the standards violated.

The Serious Citations

Citation 1, Item 1

This item was charged for three instances of violations of 29 CFR 1926.95 (a). The standard requires that,

> Protective equipment, including personal protective equipment for eyes...shall be provided, used and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards...or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The citation identifies three instances in which employees performing forms related work were observed using power activated tools without appropriate eye protective gear. Instance a occurred on January 12, 1999, when CO Jensen saw and videotaped two employees cutting plywood with a power saw, with no eye protection. (Tr. 326-327). The corresponding video depicts one employee using the saw, and another holding the plywood. Instance b occurred on January 19, 1999, when

CO Jensen videotaped an employee placing fasteners into the shoring and into the concrete with the use of a power activated tool he identified as a "hilty gun". (Tr. 355-357). Apparently, this employee did not know he was required to wear eye protection under these circumstances. (Tr. 665). Instance c was observed the same day as instance b, when CO Jensen testified to observing an employee using a power tool without eye protection, and that the exposed employee was seen on earlier days using power tools without eye protection. (Tr. 357). The corresponding videotape depicts two employees using power saws, while two more employees look on. It is impossible to tell from the video whether the employees were wearing eye protection while they were using the saw. After they stopped sawing, however, it appears that one is wearing sunglasses,[9] and the other is wearing what appears to be eye protection. CO Jensen testified that Major was present on the floor. (Tr. 664).

To prove a violation, the Secretary has an initial burden of establishing that "(1) the standard applies, (2), the employer violated the terms of the standard, (3) Respondent's employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition." Gary Concrete Prids., Inc 15 BNA OSHC 1051, 1052 (No. 86-1087, 1991). The Secretary met her burden of proving that the standard applied, as the identified employees were not using personal protective equipment to protect their eyes from form work particles or other irritants. It is clear that the employees in instance a and b were not wearing eye protection. Instance c is more difficult, as it is not clear from the video that the workers were not initially wearing eye protection. However, CO Jensen testified unequivocally that one worker was not wearing eye protection while using the power activated tool, and Respondent submitted no evidence to the contrary. Thus, I find, in all instances, that the standard applied. The evidence also indicates that the standard was violated in each instance, as an employee was exposed to the possibility of eye injury from, in instances a and c, sawdust. In instance b, the employee is exposed to the danger of splinters of plywood and concrete shards, chips, flakes or even a misdirected fastener that may be shot out of the structure by the application of the hilty gun. The evidence further demonstrates that Respondent's employees had access to the violative condition. The workers exposed in each instance were performing concrete

[9] Respondent was not cited under 29 CFR 1926.102(a)(2). The adequacy of the sunglasses as appropriate eye protection is therefore not considered.

forms work, and were within arm's length from the hazard.

I find, however, that Respondent had knowledge of only instance b. Knowledge will be imputed if the employer "knew, or with the exercise of reasonable diligence, could have known of the presence of the violative condition". George Campbell Painting Corp. 18 BNA OSHC 1929, 1933 (No. 94-3121, 1999) *citing* Halmar 18 BNA OSHC 1015, 1016 (No. 94-2043, 1997).

With respect to Instances a and c, there is no evidence that Major had actual knowledge of the violations. With respect instance a, there is no evidence that a superintendent from Major was present on the deck at the time the violation occurred. With respect to instance c, there is an implication in CO Jensen's testimony, that Major representatives were present on the deck during the violation, ("Q: ...And sir, you don't know...whether or not anyone from Major knew at the time whether these employees were wearing eye wear? A: No, but they should have know, they're right there on the work floor. If they had been inspecting, I think they would have caught that" Tr. 664 - 665.). CO Jensen, however, failed to specify whether the representative on the floor was a superintendent, foreman, or other employee through whom knowledge could be imputed to the employer. Further, the violation is transient in nature; it occurred only as long as the workers were cutting. A regularly conducted safety inspection would disclose the violation only if the workers were sawing at the precise moment the inspection was underway.

The record demonstrates that Major made reasonable efforts to anticipate the particular hazard observed in instances a and c. Employees were put on notice of the general requirement to wear safety goggles for jobs involving cutting forms, and for a few other specified instances. Buttino testified that he supplied the employees with eye protection, and that there was only one employee who did most of the cutting on the job, and that he had eye protection. (Tr. 1266-1267). Further, Respondent's written safety rules direct that "safety goggles and/or other face protection shall be worn when chipping, welding, grinding or during other operations where eye injuries may result". (Complainant's Exhibit 6, paragraph K). The rules were delivered to the workers together with their paychecks. (Tr. 1237). Buttino also testified that the carpenters were given safety goggles, and that

the use of safety goggles, during cutting, was discussed during the weekly safety meetings. (Tr. 1229-1232). Thus, it appears that Respondent took reasonable, diligent measures to advise the workers of the necessity of wearing safety goggles while cutting forms.

There is no evidence, however, that Respondent made efforts to ensure that workers wore protective eye wear while attaching forms to concrete with the use of power automated tools such as a "hilty gun". Buttino did not tell the workers that they should wear protective eye wear while attaching form work to concrete during his safety meetings. Constructive knowledge may be imputed to the employer with respect to this instance. As a consequence, I find that the Secretary met her initial burden with respect to this citation item.

Classification and Penalty Consideration

The classification of this item as "serious" is affirmed. The worker was exposed to a serious personal injury, which included possible blindness. A penalty of $1,500 was charged, based on a high severity gravity base determination, with a low probability of occurrence. (Tr. 993). Further, Respondent was given a 40 % reduction for size, but no reduction for good faith. (Tr. 992-993). The hazard presented in the sole remaining instance supporting this violation, (instance b), is of high severity, as the loss of an eye may occur. There is, however, no evidence of prior instances of violations of this nature. Therefore, I reduce the penalty to $500.00, one third of the initial penalty assessed for this item.

Citation 1, Item 2

Respondent was cited under one instance for a violation of 29 CFR 1926.405(b)(1). This standard requires, in pertinent part, that,

> Conductors entering boxes, cabinets or fittings shall be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxed and fittings shall also be effectively closed.

Id. The Secretary claims, specifically, that Major employees were exposed to an activated, electrical panel with open fly parts, approximately six feet from stairs. (Tr. 359-360).

CO Jensen, the officer who provided the information for this citation, testified that he observed and videotaped the "clean up guy" for the concrete forms contractor walk by the open panel. (Tr. 360-361). The panel was live. (Tr. 361). The video corresponds with his testimony, depicting several concrete forms workers walking close to the open, live electrical panel on what appears to be the forms deck. The standard thus applies to the instance. I further find that Respondent violated the standard, as the panel was not closed. Also, the evidence indicates that Respondent's employees were exposed to the hazard; the video depicts concrete forms workers within two feet of the open panel. Finally, while there is no evidence that any Major employee of a supervisory nature had actual notice of the condition, there is sufficient evidence that with reasonable diligence, Major should have been aware of the violation. The open panel box was located on what appears to be a forms deck, close to an open ladder used by Major employees. This forms deck, in fact, is one of the areas identified by Major as one of its controlled access zones. Respondent controlled the area. The open panel is obvious in nature and should have been identified as a potential hazard during any even brief inspection. Therefore, I find that the Secretary met her initial burden with respect to this item.

Respondent argues that the breaker panel was the responsibility of the electrical contractor, not Major. Under commission precedent, however, an employer who did not otherwise create a hazardous condition may not therefore avoid liability unless it establishes, first, that it did not control the violative condition such that it could not realistically have abated the condition, and, second, that it either made reasonable alternative efforts to protect its employees or, did not have, and with the exercise of reasonable diligence, could not have had, notice of the hazardous condition. Capform Inc. *supra.*. *See also* Kokosing Constr. Co. Inc. 17 BNA OSHC 1869, (No. 92-2596, 1996). Major should have been aware of the hazardous condition, in the exercise of reasonable diligence. Further, it appears that no efforts at all were made to abate the condition, despite the fact that Respondent's employees were walking and working in the near vicinity, within the zone of danger. Thus, the mere fact that the electrical contractor may have created the hazardous condition will not absolve Major of responsibility in this instance.

Classification and Penalty Consideration

Major was assessed a penalty of $1,500.00 for this serious item, based on the potential injuries to which the employees were exposed. The classification is affirmed as the potential hazard involved possible electrocution and/or death. This penalty assessment of $1,500.00 is likewise appropriate. The hazard was not merely transient in nature, and therefore presented a greater risk to a larger number of employees. Nonetheless, Respondent made no efforts to abate the situation.

Citation 1, Item 3

The Secretary issued this citation item for three instances of violations of 29 CFR 1926.501(b)(2)(i). The applicable standard provides, in pertinent part,

> Each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems.

Id. The standard specifically provides for an exception where the employer can demonstrate that conventional fall protection is infeasible, or creates a greater hazard, in which case additional formal safety measures are required, (i.e. maintenance of a fall protection plan).

CO Jensen testified that he observed two employees performing leading edge work a few feet from the edge of the building on the 27th deck, on January 7, 1999. (Tr. 265). The workers were not protected by any means of fall protection. (Tr. 265). CO Jensen also later identified an individual standing on a rib, watching the two employees perform leading edge work, as Phil Miller, the carpentry deck foreman for Major. (Tr. 267-278). The video corresponds with the compliance officer's testimony. CO Jensen testified that this is the first instance that they observed a violation of this specific standard at this job site.

Four days later, CO Jensen again observed and videotaped employees performing leading edge work, on the 29th floor. Specifically, he testified to seeing an employee engaged in the last step of leading edge work within one foot of the edge of the building, with no means of fall protection. (Tr. 301-302). The exposed worker was identified as a Major employee as he was performing concrete forms

related work. (Tr. 302, 304). This violation is identified as instance b. On January 12, 1999, further evidence of violations of this standard were identified, although the facts were not preserved on videotape. (Tr. 601). Specifically, CO Jensen testified that he observed employees performing leading edge work on the perimeter of the building with no means of fall protection, on the 29th deck. (Tr. 601).

First, the standard applies. Leading edge is defined in 29CFR 1926.500, as "(T)he edge or a floor, roof, or form work for a floor or other walking/working surface (such as the deck) which changes location as additional floor, roof, decking or form work sections are placed, formed or constructed."*Id*. The employees were observed working on form work sections, either plywood, ribs or stringers, as the top deck was being constructed, causing the edge to change location. The exposed employees performing the leading edge work were observed at the exterior edge of the building, with a fall hazard of a minimum of a 26 story fall, at least as to instances a and b. Second, I find that the standard was violated. The evidence establishes that none of the employees were provided with any form of conventional fall protection identified in the regulation, despite the fact that they were performing leading edge work. Third, it is clear that the workers performing leading edge work were Major's employees, as the leading edge work involved the creation of the top deck of concrete forms.

Respondent argues that there is no evidence that the workers exposed to fall hazards were Major employees as the compliance officers did not testify that they confirmed their identities. (Respondent's post hearing brief, pp 31 - 34). Respondent's argument is unpersuasive. It is undisputed that Major was the concrete contractor, and that Major's work on the job involved the erection of concrete forms, including leading edge work. The record is replete with references to the fact that Major employed and paid the salaries of the concrete forms workers. Major should not now, therefore claim that it did not employ these workers.

Finally, I find that Major had knowledge of the violation. The evidence with respect to instance a places one of Major's foremen at the scene of the violation. This foreman, Phil Miller, was described

as having supervisory responsibilities. As such, knowledge to him can be imputed to Respondent. Even in the absence of Miller's identified presence, in instance b, I determine that Major's supervisors were well aware of the absence of guardrails, safety nets and personal fall protection systems. As early as November 3, 1998, Polites was aware that no fall protection was supplied to or used by the workers at the site. Thus, even if there is no proof that Major actually knew of the occurrence of instances b and c, in the exercise of reasonable diligence, Respondent should have had knowledge of the violations. The Secretary therefore has met her initial burden with respect to this item.

Respondent argues that conventional fall protection was infeasible or created a greater hazard, for workers performing leading edge work. As is discussed at length below, Respondent did not meet its burden with respect to this defense.

Classification and Penalty Consideration

This item was classified as serious, and a penalty of $5,000.00 was assessed. The classification is affirmed because workers were exposed to probably death. The penalty assessment is also affirmed, based on the dangerous nature of the conditions, and the repeated requests for compliance, (Tr. 994), and the fact that the instances occurred repeatedly.

Citation 1, Item 4

This item was issued for six instances of violations of 29 CFR 1926.501(b)(4), which provides, in pertinent part, that "(I) Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers or guardrail system erected around such holes, (ii) Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes, (including skylights) by covers."*Id*. Instance a arose as a result of observations made by CO Torre on November 3, 1998. Specifically, CO Torre, he reported unprotected employees working by open floor holes on the third floor, with no means of fall protection, (Tr. 77-78). Of interest, a worker who identified himself as a Major employee appeared and constructed a guardrail around one of the

areas in question while CO Torre was still present. (Tr. 188-192). The corresponding video depicts workers performing form work near the open hole. The citation identifies exposed employees on the 6th deck, as instance d, and is supported by testimony that on November 3, 1998, CO Torre observed employees walking near an open floor hole on the sixth floor deck, with no means of fall protection, despite a possible fall one story to the deck below. (Tr. 79-80). A corresponding, brief section of the videotape depicts workers standing near an open hole. CO Torre later identified the exposed employees as ironworkers. (Tr. 201-202).

Instance c of this item in the citation identifies a stairway opening observed on the 7th floor on November 16, 1998, and is based on CO Torre's observations of employees working near only partially covered floor holes. (Tr. 202). The corresponding vide depicts holes which are partially covered with construction debris, including a coffee cup, and a piece of plywood placed only partially across the opening. Workers performing concrete forms work are in the near vicinity.

Instances d, e, and f are based on observations made by CO Jensen. The citation identifies an open hole on the 27th floor on January 7, 1999 as instance d. CO Jensen testified that he observed the open floor hole elevator shaft with an inadequate guardrail on the top deck during his January 7, 1999 inspection. Major employees were working/walking in the area of the open floor hole. (Tr. 272). The corresponding videotape depicts the open elevator shaft on the top deck, or framing deck. Workers are in the area, but they are not identifiable as concrete forms workers. The hole is the only way to access the deck. (Tr. 675). CO Jensen testified that Major employees were present, even though ironworkers were in the area at the time the videotape was taken. (Tr. 674). Buttino testified with respect to this instance that he used the hole to pass materials up. In any event, he testified, the area is prepared for the pour, and he could not close off the hole because they hadn't poured the concrete yet. (Tr. 1272).

The citation identifies open elevator shaft openings and a stairway opening observed on the 28th floor on January 11, 1999, as Instance e. Co Jensen testified that he observed employees, performing concrete forms related work, walking near this unguarded floor hole, which was open to the deck

below. (Tr. 307-309). The video tape corresponds with his testimony. Again, Buttino explained that this hole, too, had to be open because it was used as a passway for construction materials. (Tr. 1272).

CO Jensen testified with respect to instance f, (identified as an open elevator shaft opening observed on January 12, 1999, on the 29th deck). He reported steel workers walking/working near open floor holes. CO Jensen testified that he cited Major because the Major employees necessarily had to pass by the hazardous condition in order to perform their work. (Tr. 328-329). In any event, the video depicts workers unloading plywood from a crane on the top deck in the near vicinity of the hazardous condition. (Tr. 330-331).

The instances identified each involve the danger that an employee could fall thorough the open hole nine feet to the deck below. The standards therefore apply to each instance cited. Respondent failed to provide any fall protection to the employees exposed to the holes. None of the holes were adequately covered, and none had visible guardrails. I also find that Respondent's employees had access to the hazardous conditions. Instances a, c, e and f involve workers performing concrete forms work close to the open floor holes. With respect to instance d, CO Jensen testified to seeing Respondent's employees in the vicinity, even if he did not catch them on the video tape. This testimony was not rebutted.

Instance b, on the other hand, involves exposure of workers identified only as ironworkers. It is not disputed that Major did not directly employ the ironworkers, and, therefore, the ironworkers exposed in this instance were clearly not on Major's payroll. Nonetheless, under Commission precedent, an employer in a multi-employer construction site may be held responsible if the employee of another employer is exposed to a hazard created or controlled by the cited employer. Harvey Workover, Inc. 7 OSHC 1687, 1689 (No. 76-1408, 1979). *See also,* Flint Engineering & Constr. Co. 15 BNA OSHC 2052, (No. 90-2873, 1992), "(W)here an employer is 'in control of an area, and responsible for its maintenance', to establish a violation the Secretary need only show that a hazardous condition existed and the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking'", *Id,* at 2055, *citing* Brennan v OSHA & Underhill

513 F. 2d 1032, 1038 (2d Cir., 1975). It is clear that Major controlled the top deck at the time this worker was exposed. Not only did Major construct the deck, and therefore, created the openings, but Major identified the whole of this top deck as one of its "controlled access zones". (Tr. 1211-1212). Also, it is undisputed that Major was still present at the job site at the time this instance was observed. As such, under the multi-employer rule, I find that these workers may be deemed an employee of Major for purposes of this citation.

Finally, I find that Respondent knew of the violative conditions in each instance. While there is no direct evidence that Major had actual knowledge in each instance, constructive knowledge of a hazardous condition may be found where the hazard is one likely to be detected during an inspection, and there is no evidence that Respondent conducted safety inspections. Automatic Sprinkler 8 BNA OSHC 1384, 1388 (No. 76-5089, 1980). With the exercise of reasonable diligence, Respondent should have been aware that the openings it created were not covered. In any event, Respondent should have been aware of the openings as Buttino admittedly was using them as passways for construction material. I thus find that the Secretary met her initial burden with respect to Citation 1, Item 4.

Classification and Penalty Consideration

OSHA assessed this serious violation with a proposed penalty of $3,500.00. The classification is affirmed. The workers were exposed to a fall of nine feet to the deck below; such a fall is likely to cause serious personal injury or disability.

The penalty assessment is likewise affirmed. AD Ricca testified that the gravity was medium, as the hazard was a fall of only one floor, and the likely injury would be serious, but not necessarily death. No reduction for size was given, based on the repeated failure of Respondent to correct the hazard. (Tr. 996-997). AD Ricca's reasons were cogent and based on the appropriate factors.

Citation 1 Item 5a

This item was issued for two violations of 1926.502(b)(1) occurring prior to the date OSHA posted

imminent danger[10]. The standard at issue provides in pertinent part that;

> Guardrail systems and their use shall comply with the following provisions.
> (1) Top edge height of top rails or equivalent guardrail system members shall be 42 inches (1.1m) plus or minus three inches (8 cm) above the walking/working level...

The Secretary established her *prima facie* case for this item. CO Jensen observed and videotaped a single rail, purportedly protecting employees preparing to rake out concrete on the 27th deck, on January 7, 1999. The rail was too low in that it came only to knee height, rather than the required 42 inches, (plus or minus three inches). These observations constitute instance a. The video corresponds with his testimony, depicting employees raking concrete near the clearly inadequate rail, exposed to a fall off the side of the building. On January 12, 1999, CO Jensen reported another instance of violation of this standard, when he observed and videotaped workers performing form work near a guardrail with a top rail only 27 inches above the supporting deck. CO Jensen measured the rail to be sure of its height. (Tr. 330-332). The videotape corresponds with his testimony.

The standard applies as the condition located involved portions of the top rail of a guardrail which were less than the required height. The standard was clearly violated; the evidence demonstrates that a portion of the top rail came only to an employee's knees, in instance a, and was only 27 inches from the grade of the deck in instance b. Both instances involve workers performing concrete forms work close to the deficient guardrails, and thus exposed to a fall. Respondent's employees, therefore, had access to the violative condition. Finally, Respondent had constructive knowledge of the violative condition. Respondent created the hazardous condition in that Major built the guardrails. Due care, then, in conducting an inspection of the guardrail should have discovered the violative condition.

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[10] The Secretary's witness grouped items 5a and 5b for penalty purposes. This is appropriate under her prosecutorial privilege. *See* A.E. Staley 19 BNA OSHC 1999, 1203 (Nos. 91-0637 and 91-0638, 2000).

Citation 1 Item 5B

This item involves a violation of 29 CFR 1926.502(b)(2), which provides in pertinent part, that "Midrails, screens, mesh, intermediate vertical members or equivalent intermediate structural members shall be installed between the top edge of the guardrail system and the walking/working surface when there is no wall or parapet wall at least 21 inches high." *Id.* The citation specifically charges that a midrail was missing from parts of a guardrail system on the 27th deck on January 7, 1999. The Secretary established her prima facie case with respect to this item, as well.

The trial testimony demonstrates that a guardrail on the top deck was missing a midrail in one section, and there was otherwise no wall or parapet protecting employees from falling below the guardrail. The standard therefore applies, and was violated. Workers are seen in the video pouring concrete, coming within two feet of the deficient guardrail, and exposed to a fall off the side of the building. Because Major was the concrete contractor for this job site, I find that the Secretary established that Respondent's employees had access to the condition. Finally, I find that Major had constructive notice of the condition. Major constructed the guardrails at issue. A proper inspection would have revealed that the midrail was missing. With reasonable diligence, therefore, Respondent should have become aware of the hazardous condition.

Classification and Penalty Consideration for Citation 1, Items 5a and Item 5b

The citation assessed Item 5a with a proposed penalty of $4,200. The citation does not propose a penalty for Item 5b, although AD Ricca testified that the proposed gravity based penalty for both items, together was $7,000. (Tr. 997). The classification is affirmed. The potential injury included a fall of 26 stories to the ground; the potential injury was death. The penalty assessment is also confirmed. AD Ricca testified that the hazards in both items were considered "high graders", but a 40 % reduction was given based on Respondent's size. (Tr. 997). His assessment is appropriate, and is further supported by the fact that Item 5a, instance b was observed five days after the observations made in Item 5a instance a and Item 5b instance a, indicating repeated instances of violations relating to the structure of the guardrail.

Citation 1 Item 6, Citation 1, Item 7, Citation 1, Item 8a, Citation 1, Item 8b and Citation 1, Item 9, Citation 1, Item 10, Citation 1, Item 11

The Secretary's post hearing brief states that these Citation items, (except for Items 10 and 11) were issued based on Respondent's claim that it was working pursuant to a fall protection plan. (Secretary's Post Hearing Brief, at p. 88). Items 10 and 11 were cited for standards which set forth requirements that the fall protection plan must meet, and I therefore discuss them together. These standards provide requirements that must be met if conventional fall protection cannot be used. Specifically. Citation 1, Item 6 involves a violation of 29 CFR 1926.502(g)(1), which establishes specific formal requirements for use when controlled access zone is used. Item 7 alleges a violation of 29 CFR 1926.502(h)(1), which sets forth the requirements for a safety monitoring system. Item 8a alleges a violation of 29 CFR 1926.503(h)(3), which limits access to a controlled access zone to employees covered by a fall protection plan. Item 8 alleges a violation of 29CFR1926.502(k)(9), which establishes the requirements of a fall protection plan. Item 9 alleges a violation of 29 CFR 1926.502(k)(3), which provides that a copy of the fall protection plan shall be maintained at the job site. Citation 1, Item 10 involves an alleged violation of 29 CFR 1926.502(k)(4), which directs that the implementation of the fall protection plan shall be under the supervision of a competent person. Finally, Citation 1, Item 11 involves an alleged violation of 29 CFR 1926.502(k)(7), which requires that the fall protection plan specify each location where conventional fall protection methods cannot be used, classify them as controlled access zones, and comply with 1926.502(g).

The Secretary argues that she established her prima facie case in each of these items, arguing that the facts support a finding that the standards have been violated. (See, Complainant's Post hearing brief, pp. 89-92). The initial inquiry, however, must be whether the standards apply to the facts of the case. As is discussed more fully, below, Respondent did not meet its burden of establishing that conventional fall protection was infeasible, or created a greater hazard. The precise question presented then, is whether Respondent may nonetheless be held liable for failure to comply with standards which establish requirements to be met in those circumstances where conventional fall protection cannot be used.

The requirement to produce, implement and maintain a written fall protection plan is triggered when conventional fall protection is infeasible to protect workers performing leading edge work. The language of the standard makes this clear: "(w)hen the employer can demonstrate that it is infeasible or creates a greater hazard to use (guardrail systems, safety net systems, or personal fall arrest systems), the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of Section 1926.502." 29 CFR 1926.501(b)(2). 29 CFR 1926.502(k), by its own terms, applies only to, "employees engaged in leading edge work...who can demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection". *Id.* A plain reading of the standard establishes that, if Respondent were able to establish that conventional fall protection were either infeasible or created a greater hazard, than Respondent would be held to the further requirements of 29 CFR 1926.502(k). Because Respondent did not prove that conventional fall protection was either infeasible or created a greater hazard to workers performing leading edge work, however, the requirements of 29 CFR 1926.502(k) were not triggered. Thus, 29 CFR 1926.502(k)(9), 29 CFR 1926.502(k)(3), 29 CFR 1926.502(k)(4) and 29 CFR 1926.502(k)(7) do not apply. Items 8, 9, 10 and 11 are vacated.

Similarly, the requirement to maintain a controlled access zone is conditioned on the requirement that conventional fall protection prove infeasible. A controlled access zone is specifically defined as, "an area in which certain work...may take place without the use of guardrail systems, personal fall arrest systems or safety systems and access to the zone is controlled". 29 CFR 1926.500. In fact, the requirements for a controlled access zone in 29 CFR 1926.502(g)(1), are made applicable by operation of 29 CR 1926.502(k), which provides that where a fall protection plan is used, "(7)...The fall protection plan shall identify each location *where conventional fall protection methods cannot be used*. These locations shall then be classified as controlled access zones and the employer must comply with the criteria in paragraph (g) of this section". *Id* (Emphasis supplied). Because Major did not establish that conventional fall protection was infeasible, the requirements relative to maintaining a proper controlled access zone are likewise not triggered. Citation 1, Item 6, [1926.502(g)(1), relating to a controlled access zone], and Citation 1, Item 8a, [1926.502(h)(3), which requires safety monitoring of employees in controlled access zones] are therefore vacated.

Finally, the requirement to maintain a safety monitoring system is conditioned on a finding that conventional fall protection is infeasible or would create a greater hazard, in that the necessity of implementing and maintaining a safety monitoring system with the requirements set forth in 1926.502(h)(1), is established by 1926.502(k)(8). Specifically, 1926.502(k) provides that, once an employer has established that conventional fall protection is either infeasible or creates a greater hazard, a fall protection plan must be established which meets certain requirements. Subsection 8 of that standard specifically provides that, "Where no other alternative measures has been implemented, the employer shall implement a safety monitoring system in conformance with Section 1926.502(h)." 29 CFR 1926.502(k)(8). The requirements of 1926.502(h), therefore, are triggered only after an employer has established that it is entitled to use a fall protection plan as an alternative safety measure to conventional fall protection. Because Respondent failed to establish that conventional fall protection was infeasible or created a greater hazard, the requirements relating to the maintenance of a fall protection plan were not triggered, and, therefore, nor were the requirements relating to the safety monitoring system. Item 7 is likewise vacated.

Citation 1 Item 12

This Citation item was issued for a violation of 29 CFR 1926.503(a)(1). The standard provides, in pertinent part, that "(1) the employer shall provide a training program for each employee who might be exposed to fall hazards..." *Id*. The Secretary has the burden of proving that the cited employer failed to provide instructions that a "reasonably prudent employer would have given in the same circumstances". N&N Contractors, Inc. 18 BNA OSHC 2121, 2126 (No. 96-0606, 2000). An employer may rebut the allegation of a training violation 'by showing that it has provided the type of training at issue, and the burden shifts to the Secretary to show some deficiency in the training provided.'" N & N, *Supra, citing* American Sterilizer Co. 18 BNA OSHC 1082, 1086, (No. 91-2494, 1997).

In this regard, CO Jensen testified that this citation item was issued for a failure to provide appropriate training, in general. (Tr. 701). It appeared to him that employees did not realize that there was a fall hazard. (Tr. 457). He admitted, however, that Majors' safety meeting talks and

toolbox forms were not taken into account when this citation was issued. (Tr. 703). This was the only evidence presented in support of this citation item.

There was no testimony relating to what instructions should have been given under the circumstances in the first instance. Merely stating that it appeared that employees did not recognize a hazard is insufficient. Thus, I find that the Secretary failed to meet her initial burden.[11] This citation item is vacated.

Citation 1 Item 13

This Citation item was issued for violation of 29 CFR 1926.701(b). The standard provides, specifically, that "all protruding, reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement." *Id.* The citation identifies six separate instances wherein Respondent's employees were exposed to uncapped, protruding rebar. In each instance, the testimony and correlating video tape depict protruding, uncapped rebar, presenting a hazard to workers in the area. Therefore, the standard applies and it was violated.

It is not disputed that the steel members were constructed by the ironworkers, another subcontractor who was not retained by Major for this job site. Instances b, c, d, e, and f, nonetheless involve the exposure of carpenters and concrete forms workers, undeniably Major's employees, to uncapped rebar. Instance b was observed on the top deck, where concrete forms workers were preparing for and pouring concrete into already laid forms. (Tr. 282-284). The two portions of the video which correspond with this instance clarifies that the ironworkers have completed their work and Respondent's employees are in control of the deck.

The alleged violation identified as instance c was observed on the framing deck. The corresponding video depicts concrete forms workers in the area, near a floor opening surrounded partially by steel

[11] Even if the Secretary had met her initial burden, the allegation was rebutted by the admission of the minutes from Respondent's safety meetings, and Respondent's safety form. This returned the burden to the Secretary to prove a deficiency in the training. The Secretary's witnesses failed in this regard.

rods protruding two to three feet from the deck below. Buttino is also present. Instance d was likewise observed on the framing deck, (this time on the 29th floor). Major employees were observed walking/working within a few feet of the protruding, uncapped rebar. (Tr. 363-364). Instances e and f were also observed on framing floors, (instance e was observed on January 22, 1999, when the 31st floor was the framing floor, and Instance f was observed on January 27, 1999, when Major was framing out the roof, on the 32nd floor). Respondent's employees were seen performing concrete forms work. (Tr. 394-398, 426-429). The evidence demonstrates, then, that Respondent's employees in fact had access to the hazardous condition in instances b, c, d, e and f.

The evidence also demonstrates that Respondent had knowledge of the hazardous condition. It is clear that Major had actual knowledge of the violations represented in instance c. Buttino was present and is seen on the videotape. As the framing deck carpentry foreman and the shop steward in charge of safety, his knowledge may easily be imputed to Major.

In any event, the evidence demonstrates that Major had constructive knowledge of the hazardous conditions presented in instances b,c,d,e, and f. Respondent was in control of the framing floor at the time the hazardous conditions were observed. The uncapped rebar was in plain view in each instance and would easily have been discovered in the course of an ordinary inspection, and should have been discovered in the exercise of reasonable diligence. Thus, I find that the Secretary met her initial burden with respect to instances b,c,d,e, and f.

The violations identified in instance a, on the other hand, occurred on the framed deck *after Major had relinquished the deck to the ironworkers.* The corresponding video depicts ironworkers installing rebar into a framed deck. There are no carpenters in the area. There is no evidence that Major was present on the deck, let alone in control of the floor. Further, there is no evidence that the rebar protruding through the deck existed before the ironworkers took control of the floor. On the contrary, it appears that the ironworkers were installing the rebar at the time the observation was made. Major could not have controlled the hazard. Therefore, instance a is vacated.

Respondent argues that it should not be held accountable for any of the instances of this item because the rebar was installed by the ironworkers, not Major. Specifically, Respondent argues that statements by CO Torre and CO Jensen to the effect that the ironworkers were responsible for capping the rebar should absolve Major from liability. (Respondent's Post-Trial Brief, pp 56-57). The mere fact that an employer did not create the specific hazard, or that another contractor may be responsible to provide a specific safeguard, however, will not absolve the employer from liability.

Defendant's argument is, essentially, a multi-employer worksite defense. However, it is clear that instances b.c.d.e and f occurred under areas under Major's control. The dangerous condition was not transient in nature, and should have been discovered with the exercise of reasonable diligence. Respondent also did not submit any evidence that it made any efforts whatsoever to protect its employees from the unguarded rebar, even while its employees were directly in the zone of danger. Under the precedent set in Capform Inc. *supra,* I find that Respondent failed to meet its burden of establishing this defense. *See also* Kokosing Constr. Co. Inc. *supra,* " access to unguarded rebar exists if there is a 'reasonable predictability' that employees 'will be, are or have been in' the 'zone of danger'". *Id* at 1870, *citing* Capform, *supra.*

Classification and Penalty Consideration

The citation proposes a $7,000.00 penalty for this serious item. The classification is affirmed. The workers were exposed to possible impalement and laceration injuries. The penalty assessment is also affirmed, even though one instance was vacated. AD Ricca testified that this item is a high grader based on the fact that the condition was continuously observed throughout the site, and there were no attempts to abate it. He testified that the gravity of the hazard was deemed high because an impalement onto exposed rebar could cause death. (Tr. 1003-1004). While no reduction for size was given, (Tr. 1003-1004), the number of instances, and the gravity of harm supports OSHA's assessment.

Citation 1, Item 14

This citation item was issued for a violation of 29 CFR 1926.703(a)(2), which provides, in pertinent

part, that "Drawings or plans, including all revisions, for the jack layout, form work, (including shoring equipment) working decks and scaffolds shall be available at the job site". *Id*. CO Jensen testified that he recommended the issuance of this citation item after being told by Buttino that there was no drawing or plan for the form work. (Tr. 458). CO Jensen further testified that Major's engineer should have prepared plans, including calculations. (Tr. 710). The hazard presented is that the forms could collapse. (Tr. 458-459).

Respondent constructed form work at the job site; the standard therefore applies. I also find that Buttino's statement makes it clear that Respondent did not keep available a copy of drawings or plans for the form work at the job site. Respondent therefore violated the standard. Respondent's employees were required to ascend and walk/work on the form work, which apparently was constructed without reference to a plan or drawing. Thus, Respondent's employees were exposed to the hazard that if the forms were not constructed according to a drawing on site, the form work could collapse.

Respondent also had knowledge of the condition. Respondent constructed the concrete form work, and, I find, should have been aware of the potential for collapse of such a structure. (Indeed, Respondent uses the form work's frailty as a basis for Respondent's argument that it is infeasible to use the forms as an anchor for a personal fall protection system). In any event, it is clear that Respondent knew it did not maintain drawings or plans for the form work for reference on site. The Secretary therefore met her burden with respect to this citation item.

Classification and Penalty Consideration

This item was properly classified as serious because serious personal injury and possible death would occur to employees trapped under the forms in the event of a form collapse. The proposed penalty of $3,000 is likewise affirmed. AD Ricca considered this item a "high grader" because the nature of the violation was such that if the form work were improperly erected, a collapse could occur, causing numerous serious injuries. Initially assessed at $5,000, a 40 % reduction for size was granted. (Tr. 1004). While merely maintaining a copy of a drawing on site will not in and of itself prevent a form

work collapse, not having a plan available for reference could result in improper and dangerous construction of the form work. The evidence indicates that there were a number of employees on the structure at any one time. A collapse of the forms, then, could cause serious personal injury, if not death to numerous employees.

The Willful Citations

Citation 2, Item 1a, Citation 2, Item 2a and Citation 2 Item 3a

These three Citation Items were issued for numerous instances of violations of 29 CFR 1926.501(b)(1)[12]. (Unprotected workers at the edge). As is discussed above, these items are grouped into one item.

The evidence demonstrates that the Secretary established her prima facie case for these items. Citation 2, Item 1a, instance a involves employees clamping columns in two instances on November 3, 1998, without fall protection, (Tr. 50, 66), in site of both Buttino and Polites.(Tr. 66). The corresponding videotape shows workers close to the edge, working with the forms, with no visible means of fall protection. Instance b involves ironworkers on the 6th deck, at the west top perimeter, performing ironwork. There was no form of passive fall protection, and the workers were close to the edge of the building. CO Torre testified that he cited Major for this violation, even though the exposed workers were iron workers, and not performing concrete related work, because Major's contract requires them to install a guardrail as a deck is being placed. (Tr. 74).

Citation 2, Item 1a instance c involves an unprotected forms worker on the fifth floor, observed by CO Torre on November 4, 1998. (Tr. 94). The exposed employee can be can be seen on the corresponding videotape as close as one foot to the edge, with no visible means of fall protection. Instance d involves an unprotected employee on the eighth floor, installing reshore only six inches from the exterior edge of the building, observed by CO Torre site on November 16, 1998. (Tr. 97). The corresponding video indeed shows a worker installing reshore, at least one foot from the edge, if not closer. Instance e involves workers stripping lumber on the 25th floor without fall protection,

[12] The text of the standard is quoted in full at page 33, *supra.*

observed by CO Jensen on January 6, 1998. (Tr. 255-256). The corresponding video shows a worker retrieving forms right at the exterior edge of the building. Instance f involves employees on the 26th floor, at the South perimeter of the building, near columns # 17 and # 18. CO Jensen testified that he observed an unprotected employee at the edge assisting other employees remove a clamp. (Tr. 258-259). The corresponding videotape indeed shows workers on the stripping floor performing forms work, near the columns, and close to the edge.

CO Norton testified with respect to Citation 2, Item 1a, Instance g, Citation 2 Item 1a, Instance h and Citation 2, Item 1a, Instance i. Instances g and h were videotaped, but the videotaped portion was not played during the trial. CO Norton testified that Instance g involved a worker at the southwest corner of the 25th floor, who appeared to be working near a column, although the column was already stripped. The employee was not protected by any type of fall protection, even though he was only two to three feet away from the edge. (Tr. 748-749). CO Norton believed the worker was working on the column, but he could not tell what he was doing to it, and could not tell what tools he was using. (Tr. 748). CO Norton testified that instance h involved a worker placing plastic around the 26th floor, within two to three feet of the edge, with no noticeable means of fall protection. (Tr. 749-750). During cross-examination, CO Norton testified that it was Major's duty to provide appropriate fall protection for this floor. (Tr. 847).

Instance i involves employees walking on the stripping deck, on the North side of the building near the center column, observed on January 11, 1999. The workers had no form of fall protection even though they were observed within three to four feet of the exterior edge. (Tr. 293, 754-755). CO Norton brought the situation to Buttino's attention. (Tr. 755). The corresponding video coincides with CO Norton's testimony. Instance J was issued as a result of violations CO Jensen observed on the 27th or 28th floor, where employees were identified near the edge without fall protection. (Tr. 295-206). The corresponding video depicts an employee performing forms work at the edge of a building. Somewhat unbelievably, another employee is seen on the video, putting the finishing touches on a guardrail behind him, leaving the exposed employee between the railing and the exterior edge of the building. (Tr. 296-297). Instance k involves additional employees performing concrete forms

related work near the edge with no fall protection, and is based on observations made by CO Jensen. (Tr. 298-299). His observations were memorialized, albeit briefly, on the corresponding videotape.

Citation 2, Item 2a addresses instances identified after OSHA posted the imminent danger notice at the job site. [13] Instance a involves a Major employee removing form work from existing stringers near the edge of the 27th floor, with no means of fall protection. (Tr. 341-343). The corresponding video tape shows the worker walk right to the exterior edge of the building. "Instance b" involved an employee performing form work on the 28th floor without fall protection. CO Norton observed the employee come as close as two feet from the edge. (Tr. 766-767). This violation was memorialized on videotape, but was identified as "Citation 2, Item 2a, Instance c", through an apparent recording error. The error was harmless, as the inconsistency was cleared up through CO Norton's testimony, (Tr. 770-771, 850), and the citation even with this minor error fully apprized Respondent of the substance of the allegations. . The video segment identified as "Citation 2, Item 2a, Instance c" corresponds and supports CO Norton's testimony with respect to the "Instance b".

Instance c involves another exposed worker at the top deck, with no means of fall protection. The videotape identified as "Citation 2, Item 2a, Instance b", but actually corresponding to this instance, depicts a worker at the very top deck, within two feet of the edge, with no means of fall protection. (Tr. 771). Under cross examination, CO Jensen testified that the employee exposed in this instance was "probably an ironworker" (Tr. 851).

Finally, instance d of Instance d of Citation 2, Item 2a, involves another unprotected forms worker whose work takes him right to, and beyond, the exterior edge of the building on the 30th floor. According to CO Jensen's testimony, this unprotected employee was seen actually place part of his body over the edge, to kick form work out onto a temporary catch basin. (Tr. 418-420).

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[13] As is discussed above, this factor would bear on the wilfulness of the violation, however, rather than whether it should receive instance by instance treatment, as suggested by Respondent. (Respondent's Post Hearing Brief, pp 106-107). As such, these instances have been grouped with Citation 2, Item 1a instances, and are discussed herein.

Citation 2, Item 3a, which is now grouped with Citation 2 Item 1a and Citation 2 Item 2a, was cited following the observation of three separate instances of violations of 29 CFR 1926.501(b)(1). CO Jensen testified with respect to Instances a and c. Instance a involves observations he made on January 26, 1999, when he observed and videotaped a worker carrying forms on the 31st floor, within three feet of the edge, with no form of fall protection. (Tr. 403-406). Instance c involves observations he on February 1, 1999. On that date, he observed an employee two and one half to three feet from the edge, on a floor which had been stripped. The employee was not protected by any form of fall protection. (Tr. 446-447). CO Jensen testified that he believed the worker was employed by Major, but he didn't see him actually doing any work. (Tr. 442-443). The corresponding video segment depict what appear to be two examples of workers exposed to an unprotected edge, with a relatively plump worker walking within at least three feet of the edge on a floor which appears to be almost fully stripped.

CO Norton's observations resulted in the identification of Instance b of Citation 2, Item 3a. Specifically, CO Norton testified that he observed a worker performing form related work one level below the top deck, on the 31st floor, with no means of fall protection. He ascertained that the exposed worker was a Major employee by virtue of the nature of his work. (Tr. 793-795). The corresponding video shows a worker standing within one foot of the edge, handing forms along the outside of the structure to workers on the top deck. The exposed worker does not appear to be in a hoist area. Of interest, the citation refers to the 32nd floor, which CO Norton explained was a mistake. (Tr. 856).

The standard clearly applies to the instances cited. Each floor, or deck, of the building was nine feet, one inch above the deck below. (Tr. 57).In any event, the observed workers were exposed to a fall off the exterior side of the building, and in each instance, the worker(s) were exposed to an unprotected side or edge. The second prong of the Secretary's burden, to wit, to prove the employer's noncompliance with the standard, was likewise met, as in no instance was there appropriate fall protection.

Further, I find that the Secretary met her burden of proof of establishing that each worker exposed in these items was an employee of Major. Item 1 a, instances a, c, d, e, f, i, j, and k, all involved workers performing concrete forms related work. I find this sufficient to identify them as employees of Major.

Citation 2 Item 1a instance b involved the exposure of an ironworker, not a forms worker, on the top deck. Nonetheless, the evidence demonstrates that Major controlled the top deck at the time this worker was exposed. Major constructed the deck in questions, and was still present in the vicinity at the time of the violation. In fact, this top deck was identified by Major as one of its "controlled access zones", (Tr. 1211-1212). As such, under the multi-employer rule, I find that this worker may be deemed an employee of Major for purposes of this citation.

Although videotape was taken of the circumstances involving instances g and h, none was shown at the trial. Nonetheless, I found CO Norton's testimony regarding his observations believable, and Respondent failed to offer any factual evidence to contradict CO Norton's observations. With respect to Instance g, the exposed worker was observed near a column on the 25th floor, (Tr. 748-749), unprotected by any safety net or fall protection. Again, like the top deck in question in Citation 2, Item 1a, instance b, this floor was under Respondent's control at the time. Respondent constructed the floor, and in fact, had contracted the obligation to provide a perimeter cable or other perimeter protection, at a minimum, after each floor is stripped. (Complainant's Exhibit 4, Schedule I, parph14). Likewise, I find that Major was under a duty to provide fall protection for the exposed workers on the 26th floor identified in instance g. As such, I find that the worker exposed to the hazard may be deemed a Major employee despite the fact that there was no direct testimony as to who his employer was and he was not, in fact, performing concrete form related work.

Finally, the evidence demonstrates that Major either knew, or with the exercise of reasonable care, should have known, of the violative conditions under this item. According to the trial testimony, Polites and Buttino were present on site on November 3, 1998, when CO Torre observed the circumstances that comprised Citation 2, Item 1a, Instances a and b. (Tr. 86). Polites was

specifically identified facing the workers at the site. (Tr. 55). Both Polites and Buttino admittedly had supervisory control over other employees sufficient to warrant the imputation of their knowledge of the violation to the remaining respondent. In short, Major, through its supervisors, had actual notice of the violations occurring on November 3, 1998. With respect to all other instances of violations of 29 CFR 1926.501(b)(1), Major's supervisors were well aware of the absence of guardrails, safety nets and personal fall protection systems, as early as November 3, 1998, when Polites was specifically told that no fall protection was supplied to or used by the workers at the site. Yet no reasonable efforts to abate the hazards were made, despite the ongoing construction. Thus, even if there is no proof that Major actually knew of the occurrence of each instance of violation, in the exercise of reasonable diligence, Major should have, and would have had knowledge the violations. Respondent has easily met her initial burden.

There was testimony to the effect that instance f of item 1a involved Stephen Koc, an employee who merely forgot to put his harness back on after a bathroom break. Sounding in a defense of unforseen or unpreventable employee misconduct, this argument appears abandoned by Respondent, despite the fact the Mr. Koc was called to the stand to testify solely on this issue. In any event, Respondent did not meet its burden of establishing this affirmative defense. The First Circuit succinctly delineated the Commission precedent for the elements of a defense of unforseen employee misconduct in .P. Gioioso & Sons Inc. 17 BNA OSHC 2091, (No. 96-1807, 1997). Essentially, an employer has the burden of proving that it "(1)established a work rule to prevent the ...unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed it" *Id*, 2098, *citing* Jensen Constr, Co 7 BNA OSHC 1477, (No. 76-1538, 1979). Respondent's safety plan does not direct that employees working near the edge use personal fall protection systems, and it does not appear that instructions were otherwise given to employees to do so. No evidence whatsoever was presented that Respondent took any steps to discovery incidents of noncompliance. Finally, Mr. Koc's penalty was merely to be "yelled at a little bit", which does not evidence any reasonable intent to effectively enforce the rule.

Respondent's post-hearing brief does address its argument that conventional fall protection was infeasible for workers working at the edge. As is discussed below, however, Respondent failed to meet its burden of establishing this defense.

Classification and Penalty Consideration

There is ample evidence to support the classification of this item as willful. Generally, "(w)ilfulness can be established by evidence that an employer knowledgeable of a standard's requirement either intentionally disregarded it or showed plain indifference to it". Morrison-Knudsen Co./Yonkers Contracting Co. 16 BNA OSHC 1105, 1123, (No. 88-572, 1993). The relevant inquiry is whether the state of mind of the employer appears such that "if he were informed of the (applicable standard), he would not care..." Morrison-Knudson Co./Yonkers Contracting Co. *citing* Brock v Norello Bros. Constr. 809 F. 2d 161, 164 (1st. Cir. 1987). The Third Circuit requires an assessment of whether the employers' actions depict an "obstinate refusal to comply with safety and health requirements". Universal Auto Radiator Mfg. v Marshall 631 F 2d 20, (Third Cir. 1980). The evidence is clear that the supervisors and foremen for Major were well aware of the requirements of the standard. Polites was aware of the requirements of providing fall protection to employees working at the edge as early as the mid 1980s. (Tr. 975). Major supervisors were apprized of the standards involving fall protection again, during an inspection of another job site, in 1997. (Tr. 1044-1050). Further, a number of these instances occurred following conversations with Major supervisors relating to the requirements of the standard during the course of the construction of this job site, and five occurred following the posting of endangerment, which identifies this hazard.

Respondent's only arguable attempts to comply with the standard did not become evident until January 19, 1999 seven days after posting of imminent danger, when Respondent delivered a copy of a hand written document entitled "fall protection plan" in response to a subpoena, and to have a few workers tie off to stringers above when working near the edge.

The fall protection plan, which was also hand delivered on January 21, 1999, during a further meeting, is completely different from the fall protection plans used by Politis Construction Company

and M.J.P., this plan was drafted, at the earliest, after construction of the site had already commenced, (it is dated September, 1998, and construction commenced in August), and long after the job was bid. It was not even read by the shop steward and foreman in charge of safety until early October. (Tr. 1148). No real safety pre-planning could have been performed. Furthermore, while this document is purportedly written by Major's engineer, Mr. Lee, it was redrafted at the direction of Major personnel, and is drafted in a completely different handwriting from that of the two prior fall protection plans in the record, also purportedly prepared by Mr. Lee. Finally, Buttino, the foreman who also acted as shop steward, and safety officer, and who conducted the weekly tool box meetings, testified that he has not even read the OSHA regulations. Also, the few instances in which Major grudgingly had a few of its employees working near the edge tie off to stringers with the use of lanyards, hardly constitutes good faith. No real course of conduct was altered, no rules or procedures were changed, and the employees continued to be exposed to falls off the side of the building with no form of fall protection.

Major's actions, as a whole, portray a state of mind of complete indifference to and a continued, obstinate refusal to comply with the OSHA fall protection standards, as well as an apparent disrespect for the investigation. This item is properly classified as willful.

The penalty assessment of $56,000 is affirmed. For each item, OSHA assessed an initial penalty of $70,000, based on the number of instances involved and the high gravity of injury. A 20% reduction for Respondent's size was accorded. Because these items have been grouped, one penalty will be assessed. The evidence warrants an assessment of $56,000.

Citation 2, Item 2b; Citation 2, Item 3b

Citation 2, Item 2b and Citation 2, Item 3b were issued based on numerous instances of violations of 29 CFR 1926.501(b)(2)(i), ("Leading Edges")[14] As is discussed above, the instances in Citation 2 dealing with a violation of this standard have been grouped into one item. In each instance cited,

[14] The standard involves exposure of employees performing leading edge work, and is cited in Citation 1, Item 3, as well.

the exposed worker can be identified as a Major employee by virtue of the fact that the work necessarily involved concrete forms work. The evidence amply demonstrates that the Secretary established her *prima facie* case.

Citation 2, Item 2b, instance a involves an observed an unprotected employee performing the last step of leading edge work on the 30th deck on January 19, 1999. (Tr. 344-346). The corresponding video does indeed show a worker performing leading edge work very close to the edge of the building. No visible means of fall protection is present. Citation 2, Item 3b, instance b involves employees performing leading edge work on the 27th floor, with no fall protection, on January 21, 1999, (Tr. 376). According to CO Jensen's testimony, two employees came as close as a couple of feet from the end of the building. His observations were memorialized on videotape, which supports his testimony. Citation 2, Item 3b, instance b, and c are also based on observations made by CO Jensen. These instances involve additional violations on January 22, 1999, when CO Jensen observed an unprotected employee performing leading edge work, on the 31st deck, and a second unprotected employee walking the ribs, and installing plywood. (Tr. 388- 390). The video is in accordance with his testimony.

Citation 2, item 3b, instance c involves additional violations observed by CO Norton on January 25 1999, and Citation 2, item 3b instance d involves additional violations observed by CO Jensen on January 26, 1999. The citation identifies Instance c as occurring on the 32nd deck, rather than the 31st deck, and instance d as occurring on the 31st deck, rather than the 32nd deck, even though the observations for instance d occurred the day after the those for instance C. This is clearly a typographical error, as leading edge work could not physically have been performed on the the 32nd deck the day before the 31st deck was formed. This error, however, was harmless. The discrepancy can easily be explained by reference to the videotape, which was disclosed during discovery. Further, the substance of the citation, together with the facts presented on the videotape, placed Respondent on notice of the violative conditions alleged. Thus, there is no prejudice to Respondent in allowing the cited instances to stand.

With respect to Instance c, CO Norton testified that he observed and videotaped unprotected employees near the edge of the building, placing ribs and plywood. (Tr. 781-782). The corresponding video shows a snowstorm occurring, while employees are indeed laying plywood, with no visible means of fall protection, even though the exposed employees are within what appears to be two feet from the end of the building, and thus exposed to a 30 story fall. One employee is seen precariously balancing on a rib. CO Jensen similarly testified that employees were observed on January 26, 1999, performing leading edge work, exposed to the end of the building, with no fall protection, causing him to recommend the issuance of Citation 2, Item 3b, Instance d. (Tr. 545-546). Using the video to refresh his memory, CO Jensen testified that an unprotected employee performing leading edge work came within four feet of the end of the building. (Tr. 544- 561).

Citation 2, Item 3b, instance e involves further violations of leading edge observed on January 26, 1999. CO Jensen testified that he observed employees performing leading edge work on the south side of the building, near the end of the building, with no form of fall protection. (Tr. 407-409). The corresponding video supports his testimony.

Citation 2, Item 3b Instance f, involves further violations of 29 CFR 1926.501(b)(2)(i) observed on January 27, 1999. According to CO Jensen's testimony, two unprotected employees were seen tacking plywood into ribs on the top deck. (Tr. 424). The video corresponds with his testimony. [15] It is clear from the video that the workers get dangerously close to the end of the building. Extended ribs are indicated as an arguable form of fall protection, although they are clearly not identified specifically in the standard as an acceptable method of conventional fall protection.

Instances g and h of Citation 2, Item 3b involve violations observed on the 33rd deck, (presumably, the roof), on January 28, 1999 and January 29, 1999, respectively. CO Jensen testified as to instance g, (Tr. 434-435), and the corresponding video depicts employees performing leading edge work

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[15] Of special note, with respect to Respondent's claim of the infeasibility of fall protection for workers at a walking working edge, the video for this citation also shows an employee on the stripping floor, below, who is protected by a harness.

within what appears to be two feet from the end of the building, with no visible means of fall protection. CO Norton testified that instance h was issued because he observed and videotaped an employee measuring out and installing the end of leading edge within two to three feet from the edge of the building, with no fall protection. (Tr. 796-797).

The standard applies in each instance. The workers were observed working on form work sections, either plywood, ribs or stringers, as the top deck was being constructed, causing the edge to change location. The exposed employees performing the leading edge work were observed at the end of the building, with a fall hazard of a minimum of 26 stories, (Instance a of Citation 2, Item 2b), and nine feet one inch above the deck immediately below. Thus, each instance cited involved an exposed employee performing leading edge work over 6 feet above any lower level. Second, there was only one apparent attempt to provide fall protection to these exposed employees. In instance f, ribs were extended out beyond the edge of the building. This is not, however, an item of allowable fall protection under the standard. I therefore find that the employer violated the terms of the standard. Finally, just as Respondent knew or should have known of the multiple violations of 29CFR1926.501(b)(1), (exposed employees at an unprotected side), Respondent should have been aware that its employees, directed to perform the leading edge work, would be exposed to the fall hazards described in the citations. Thus, I find that Major had constructive knowledge of the violative conditions.

Respondent argues that conventional fall protection was infeasible or created a greater hazard for protection employees working at the edge. As is discussed below, Respondent did not establish its burden of establishing this defense.

Classification and Penalty Consideration

The evidence supports the classification of these items as willful. As in Citation 2, Item 1a, Respondent's supervisors, should have been aware of OSHA's fall protection requirements long before the first instance was cited. In any event, during the course of the investigation of this job site, three instances of a violation of this standard were identified prior to the observance of the first instance in this item. (See, instances a, b and c of Citation 1, Item 3). Buttino specifically was

specifically apprized of the standard's requirements at least as of January 11, 1999, (Tr. 305). Issues relating to fall protection, generally, were discussed with Major's safety consultant during the January 12, 1999 meeting. Further, imminent danger was posted prior to the observation of the first instance in this item.

As is discussed above, Major did not undertake any significant pre-planning for safety for the job. It was not until the January 21, 1999 meeting, that Major first presented its "fall protection plan", which, although purportedly written by Mr. Lee, an engineer, was redrafted at the direction Mr. Rufalo. The evidence thus demonstrates the existence of a heightened awareness of the requirements of the standard, which was largely ignored, while Major conducted its business in the manner it chose. Therefore, this item is properly classified as wilful.

A penalty assessment of $56,000 is also appropriate. AD Ricca testified that the penalty for each item was determined to be $70,000, with a 20 % reduction based on Respondent's size. This is especially suitable now that Citation 2, Item 2b and Citation 2, Item 3b have been grouped, and one penalty will be awarded. The evidence demonstrates that the exposed employees were likely to be killed if they fell off the building, and Major made no real efforts to abate the danger, even after the posting of imminent danger. The assessment is also supported by the number of dangerous instances observed.

Citation 2, Item 3c

The citation charges three instances of violations of 29 CFR 1926.501(b)(2)(ii). The standard requires that "Each employee on a walking/working surface 6 feet (1.8m) or more above a lower level where leading edges are under construction, but who is not engaged in the leading work, shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system...." *Id*.The Secretary did not meet her burden of establishing that the standard applies to instance a. While CO Jensen testified that he observed workers involved in form related work at the leading edge, without fall protection, (Tr. 378-379), the corresponding video depicts a worker placing plywood on a rib at the edge of the building. It is not clear that the worker is doing non-leading edge

work, which CO Jensen ultimately admitted. (Tr 603).

However, I do find that the Secretary met her initial burden of establishing a violation of this standard in instances b and c of this Item. CO Jensen videotaped employees installing upright stanchions for a guardrail system at a portion of the leading edge, unprotected by fall protection, even though the employee is on the roof deck, (or 33rd floor). (Tr. 437-440). In installing the temporary guardrail, the employee is seen on the video right at the edge of the building. This instance is classified as "instance b". Likewise, "instance c" involves concrete forms workers installing a temporary guardrail at the leading edge; CO Norton specifically testified to observing an employee securing a stringer, and, in doing so, reaching over the edge of the building. (Tr. 789-799). The corresponding video depicts workers installing a guardrail system on the roof deck, at the leading edge. As both instances involve unprotected workers performing non-leading edge work, at the leading edge, I find the standard applies.

The employer violated the terms by not protecting the workers installing the guardrails with a safety net, or personal fall protection system. The exposed workers, who were observed and videotaped at the edge of the building, were performing concrete forms work, and are therefore deemed to be Major employees. Finally, just as Respondent knew or should have known that it did not provide the required fall protection for the workers performing leading edge work, Respondent should have known that the workers performing non-leading edge work, at the leading edge, were likewise unprotected. The two instances cited in this item were observed on January 28, 1999 and January 29, 1999, respectively. Respondent knew of the requirement for providing fall protection to protect employees exposed to the edge of the building as early as November, 1998. Respondent also knew that appropriate fall protection for workers preforming leading edge work was not provided to protect its employees as early as January 7, 1999, when the first observation relating to Major's failure to provide fall protection for workers at the leading edge was made. Furthermore, Major's failure to provide fall protection to workers performing leading edge work was addressed at the meeting of January 12, 1999, prior to the posting of imminent danger, which likewise occurred before these violations, and addressed work relating to the construction for form decks. It is

foreseeable that workers performing non-leading edge work at the leading edge would be exposed to the hazard. Respondent therefore had constructive notice of the violation.

Respondent's argument, that it was infeasible, or created a greater harm, to provide conventional fall protection to workers performing non-leading edge work at the leading edge, is discussed below.

Classification and Penalty Consideration

The evidence supports a classification of this item as willful. Just as Major ignored its obligation to provide fall protection to workers constructing leading edge work, (29 CFR 1926.501(b)(2)(I), Citation 2, Items 2b and 3b, above), Major ignored its obligations under 29 CFR 1926.501(b)(2)(ii), to provide fall protection to workers at the leading edge, who were performing non-leading edge work. The instances in this item all occurred after imminent danger was posted, and after at least one abatement meeting with OSHA compliance officers. However, Respondent continued to completely ignore the standard's requirements, despite the fact that its employees were exposed to the danger of falling off the side of the building, to their deaths.

I affirm the $56,000 penalty. AD Ricca testified that this item was identified as a high grader because of the likelihood of injury and gravity of harm. (Tr. 1008-1009). OSHA evaluated the item at $70,000, and reduced it 20 %, based on the size of the Respondent. This was an appropriate assessment.

Citation 2, Item 1b; Citation 2, Item 2c; and Citation 2, Item 3d

Citation 2, Item 1b, Citation 2 Item 2c and Citation 2, Item 3d were issued for alleged violations of 29 CFR 1926. 501(b)(3). (Hoist Areas). The applicable standard provides, in pertinent part, "Each employee in a hoist area shall be protected from falling 6 feet (1.8 m) or more to lower levels by guardrail systems or personal fall arrest systems. If guardrail systems, [or chain, gate or guardrail] or portions thereof, are removed to facilitate the hoisting operation (e.g., during landing of materials), and an employee must lean through the access opening or out over the edge of the access opening (to receive or guide equipment and materials, for example), that employee shall be protected from fall hazards by a personal fall arrest system". *Id*. Item 1b, Item 2c and Item 3d have been

grouped under on item for penalty purposes. The Secretary met her initial burden with respect to these items, although the instance identified in the Citation as Item 2c, instance b is vacated.

Citation 2, Item 1b identifies only once instance, which was based on an observation made by CO Torre on November 3, 1998. CO Torre testified that he observed and videotaped unprotected employees performing form related work at the edge in a hoist area, within two feet from the edge, on the fourth floor. (Tr. 75-76, 159-160). The videotape corresponds with his testimony, depicting what appears to be men working with forms work in a hoist area on the stacking floor.

Citation 2, Item 2c contains four instances of observed violations. Instance a involves observations made by CO Jensen the 25th floor on January 19, 1999. Major employees were seen in a hoist area, with no form of fall protection. CO Jensen ascertained that the workers were Major employees because they were performing forms related work. (Tr. 347-349).

The corresponding video, however, does not depict the exposed employees performing form related work. Rather, it shows two employees standing in a hoist area, close to the edge, talking. The floor appears to have been stripped. Nonetheless, I find that Major controlled the area in question in that Major undertook the contractual responsibility to install perimeter cables or guardrails after each floor is stripped. Furthermore, the hoist areas served to store and move concrete forms work. Major, as the concrete forms contractor, would clearly have controlled the area, and can be held accountable for the violation under the precedent set in Harvey Workover, Inc., *supra*, and Flint Engineering & Constr. Co. , *supra*.

The evidence at trial likewise demonstrates that the Secretary established her *prima facie* case with respect to the allegations identified in instances c and d of Citation 2, Item 2c. Instance c is supported by CO Norton's testimony that an unprotected employee performing forms work was observed within two to three feet of the edge, in a hoist area on the 28th floor. The corresponding video segment is in accordance, and the hazard is aggravated by the fact that it is snowing at the time, causing the deck to appear slippery. Instance d is supported by CO Jensen's testimony that an

unprotected employee was observed on January 26, 1999, in a hoist area, preparing to rig up a sling to connect to the material. (Tr. 401-402). The corresponding video supports his testimony.

CO Jensen reported that an additional violation of 29 CFR 1926.501(b)(3) occurred on February 1, 1999, when he observed an employee one and ½ feet from the edge in a hoist area on the 30th floor without fall protection. (Tr. 444 - 446). His observations formed the basis for the issuance of Citation 2, Item 3d, which identifies only this one instance, ("instance a"). While Jensen admitted that the video does not show Major employees exposed to the hazard, he reported observing Major employees present in the area who were not caught on the film showed during the hearing. (Tr. 649-651). Nonetheless, the hoist area in question was used to store and transport concrete forms. Major controlled the area and can be held responsible for the violation.

The evidence thus demonstrates that the Secretary established her prima facie case in all instances except for Citation 2, Item 2c, instance b. Respondent's argument that it was infeasible or created a greater harm to provide conventional fall protection to workers in the hoist areas is discussed, below.

Citation 2, Item 2c, Instance b identifies unprotected employees in a hoist area on the 27th floor, on the north side, observed on January 21, 1999.The corresponding video, however, depicts two employees performing leading edge work. As such, I find the standard cited, 29 CFR 1926. 501(b)(3) does not apply to this one instance.

Classification and Penalty Consideration

These items were properly classified as willful. Major's supervisors were on notice of the requirement for providing fall protection as early as the mid 1980's. Also, the record is devoid of any sincere attempts to consider a proper abatement plan, despite repeated discussions with compliance officers during the investigation of this job site. Furthermore, a number of these instances occurred after imminent danger was posted, and still, no real attempts to protect the employers were made. (The record reveals only a half hearted apparent direction that some employees tie off, after OSHA commenced the inspection, although no apparent efforts to actually enforce this 'rule' were made).

Similarly, even without Citation 2, Item 2c, instance b, this newly grouped item reports five instances of unprotected employees exposed to a fall off the side of the building and probable death. Thus, the penalty assessment, of $70,000, which was reduced to $56,000 based on the size of the employee, is affirmed.

Citation 2, Item 4

Complainant likewise met her burden of establishing violations of 29 CFR 1926.501(b)(4), ("Holes").[16] CO Jensen testified that he observed and videotaped unprotected workers near an unprotected floor opening on the 28th floor, on January 19, 1999. (Tr. 351-353). The video corresponds with his testimony; the open hole at issue leads to the deck below, and is surrounded by strips of yellow caution tape. Buttino identified the area in question as an open stairway, which was used to pass up construction materials from the deck below. He also admitted that Major taped the area, purportedly to prevent employees from falling through the hole. (Tr. 1261). Despite Buttino's testimony that the hole would be covered when not in use, there was no activity seen in the hole, at least during the brief video. This instance is identified as instance a.

CO Jensen testified to an unguarded hole on the south side of the building observed on January 22, 1999, with a form work side which approximately 15 inches high. Employees, one of whom was identified as Don Lee, were shown working near the opening. The video depicts the opening on the forming deck, partially surrounded by a small partition made of form work, which almost comes up to the knees of one of the employees working near the hole.

The standard applies to both instances. The hazard presented involves a potential fall of up to 9 feet, one inch, (to the deck below). Respondent violated the terms of the standard, as the openings were not covered or guarded in accordance with the statute. It is clear that Respondent's employees in instance b were exposed; the video shows a worker performing form work within two feet of the edge, (whether or not one of the workers near the opening is Don Lee). With respect to instance a, it is not clear whether the worker in the video who passes the opening is an iron worker or a concrete

[16] The standard was cited in Citation 1, Item 4, as well.

forms worker. Nonetheless, Buttino's testimony makes it clear that Respondent controlled the area. Finally, it is clear Respondent knew, or at least, should have known of the violative conditions. Respondent placed caution tape around the opening in instance a and also provided for half of the opening in instance b to be partially protected by a low forms work partition. Further, Buttino testified that Respondent used both openings to pass through materials; Respondent's deck foreman, (Buttino for the framing deck), in supervising the workers, should have observed the hazardous conditions in the exercise of due diligence.

Respondent asserts that it was infeasible to provide the statutory fall protection to workers exposed to open floor holes. As is discussed below, Respondent failed to meet its burden of proof for this affirmative defense.

Classification and Penalty Consideration

The record supports the classification. This item was classified as willful because Respondent was put on prior notice of the standard's requirements. (Tr. 1009-1010). While the imminent danger notice referenced employees exposed at the edge of the building, and not specifically to employees exposed to open floor holes, the record indicates that Buttino was aware of the standard's requirements at least as early as January 11, 1999, when he apparently had a heated discussion with a compliance officer relating to an open floor hole which formed the basis of Citation 1, Item 4, instance e. Major's attempts to "comply" with the standard, such as taping "caution tape" around an open floor hole, were lackadaisical, at best, and evidence a continuing refusal to even read the standards, let alone take them seriously.

AD Ricca testified that the gravity base was medium, with a possible greater severity. An assessment of $55,000 was determined, reduced by 20 % based on the size of the employer, resulting in a final proposed penalty of $32,000.00. This assessment is supported by the record. While the employees were not exposed to a fall off the side of the building, serious personal injury, even death, could occur with a fall to the grade below. The problem is aggravated by the number of prior observations, and the fact that any of Respondent's attempts to cover the floor holes were half-hearted, at best.

Respondent's defense of the Infeasibility of Conventional Fall Protection.

Respondent argues that it was infeasible to provide conventional fall protection for employees working at the edge, [29.CFR 1926.501(b)(1)], employees performing leading edge work, [29CFR. 1926.501(b)(2)(i)], employees at the edge in a hoist area, [29 CFR 1926.501 (b)(3)], and employees exposed to open floor holes [29 CFR 1926.501(b)(4)]. Respondent failed to meet its burden of proof to establish this defense.

29 CFR 1926.501(b)(2)(i) is the only one of the three standards involved which, by its terms, allows for an affirmative defense of infeasibility. Nonetheless, Commission precedent recognizes an affirmative defense where an employer is able to establish that compliance with a specific standard is infeasible, regardless of whether such a defense is contained within the standard at issue. In order to establish a defense of infeasibility, and employer must prove that, "(1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection". A.J. McNulty and Company 19 BNA OSHC 1121, 1129, (No. 94-1758, 2000). I find that Respondent Major failed to establish that the means of compliance prescribed the applicable standards were infeasible, or for that matter, created a greater harm.

Respondent failed to meet its burden of establishing that conventional fall protection was infeasible to protect workers performing leading edge work, [Respondent's violations of 29 CFR 1926.501(b)(2)(I)]. Respondent argues that there was no place for an employee to anchor a personal fall arrest system as the form work was not structurally sound enough to support the weight or to withstand lateral loads. Guardrails could not be used because the deck was continually moving out, and a perimeter net could not be attached closer than five stories below the leading edge, because the top five floors were "working floors", and nets would interfere with the operation of the material crane. (Respondent's brief, pp 14- 15). Respondent's experts also opined that the concrete slabs within three stories of the area to be protected were not strong enough to support a perimeter net or

to withstand a lateral pull which would occur if an employee were to drop into the net. (Tr. 1368, 1399)

It is necessary to clarify that the employees on this job site who were observed exposed to a fall hazard while performing leading edge work, were at the exterior edge of the building, as well as at the leading edge. This case therefore does not present the question of whether it is infeasible to continually place, remove, and replace a guardrail or temporary safety net at the leading edge as the edge progresses, but whether some sort of perimeter protection would have protected the employees performing leading edge work in these instances.

Respondent failed to establish the infeasibility of a perimeter net, the suggested form of conventional fall protection for these workers. (Tr. 305). Respondent apparently made the determination that the concrete slabs three levels below the leading edge deck, had not cured sufficiently to support a perimeter net, without conducting any on site testing or consulting any concrete strength reports. Nonetheless, Respondent was sufficiently assured that the concrete was adequately cured in order to support up to three levels above it at the time the supporting wooden forms were stripped from the concrete. The only real evidence Respondent presented in this regard is Respondent's expert's statements based on his review of the concrete "manufacturer's instructions". (Tr. 1381). This is insufficient, especially in light of Polites' deposition testimony that an independent contractor was retained by 30 River Court to conduct regular concrete strength tests, and that he had access to those reports, if needed. (C-29, p. 57).

Complainant's expert Mathew Burkart testified that the engineer on site should have documented the strength of the concrete before the forms were stripped. If the concrete were strong enough to be stripped, it should have been strong enough to support a perimeter net or to act as an anchor for a personal fall arrest system (Tr. 1413). Any fears that the concrete had insufficient strength to a net or personal fall arrest system should be alleviated by an on site testing by an engineer on site. (Tr. 1413). I find this suggestion reasonable. Furthermore, it sheds doubt on the veracity of Respondent's expert in that he either did not consult any site tests before offering his opinion, or he

did, and chose not to refer to them. Alternatively, of course, Respondent's engineer may have chosen not to conduct or even refer to site tests that were performed, in which case it is clear that no effort was made either during the planning stage or during the construction to determine the feasibility of conventional fall protection. In any event, I find that Respondent's failure to submit reports from any site tests fatal to Respondent's argument that the concrete three floors below the area to be protected was not strong enough to support a perimeter net at this job site.

Respondent's argument that a perimeter net was infeasible because it would interfere with the material crane unpersuasive. Respondent did not explain why a portion the perimeter net could not be removed in the hoist area so as not to interfere with the operation of the crane. In any event, even had Respondent met its burden in this regard, the Secretary's rebuttal experts proved that, with planning, the material hoist areas could have been specifically identified and localized to fewer areas on decks. Respondent thereupon could cantilever out that portion of the perimeter net which is directly below and above the hoist areas, so as to leave a clear path for the operation of the crane, regardless of the type of fall protection provided the workers in the hoist area. In this regard, I find the Secretary's expert witness, Mr. Paine, more credible than the Respondent's expert witness.

Likewise, I find feasible the suggestion that the ribs intended to be placed at the edge of the building could have been designed with a guardrail already attached, so as to provide protection for the workers working on the leading edge, who reach the perimeter of the building. (Tr. 1410). Respondent failed to explain why it would be infeasible to provide such a temporary guardrail.

Respondent similarly failed to meet its burden of proving that it was infeasible to provide conventional fall protection to employees exposed to unprotected sides, in violation of 29 CFR 1926.501(b)(1). Respondent's argument includes the claim that there was no anchorage point of sufficient strength to which to anchor a personal fall protection system, (Respondent's brief, pp 21 -22), there was no place to hook a guardrail, (Respondent's brief, at p22), and, in instances on the stripping and stacking floor, "guardrails were infeasible because the floor below had already been stripped" (Respondent's brief, p 23). Respondent also claims that there was no place to anchor a

lifeline to on the framing floor, because the form work above was necessarily merely toe nailed together and could not support therefore support a body weight. (Respondent's brief, pp 21 -23).

Again, however, Respondent apparently performed no on site or dynamic tests to determine whether the concrete slabs in each instance below the framing deck were not of sufficient strength to serve as an anchor for a personal fall arrest system, or to support a perimeter net. Nor did Respondent obtain the tests which were performed and admittedly available. Respondent likewise did not explain why it would be infeasible to strengthen a few areas of form work at the perimeter, to which lanyards for personal fall protection systems could be anchored. More blatantly, Respondent's argument that guardrails were infeasible where the floor below has been stripped because Respondent attached the guardrails to the form work below completely ignores the possibility that the guardrail could be attached to the floor on which the men were working, either to the form work, to anchors in the cement, or to anchors attached to the internal steel structures. Further, during the course of the investigation, it appears that some employees were in fact caught on tape wearing personal fall protection systems while performing work near the edge of the building. (Respondent argued, however, that it only required that its employees "tie off" after OSHA inspectors told them to. Requiring that employees use harnesses and lanyards attached to formwork, according to Respondent, was against its better judgment. Even if Respondent's witnesses were believed in this regard, however, Respondent has failed to establish that guardrails, and perimeter nets were infeasible and that sections of the form work could not be reinforced so as to support such equipment.)

Respondent likewise failed to meet its burden of proving the infeasibility of the prescribed fall protection methods of 29 CFR 1926. 501(b)(3). Again, Respondent failed to establish that the concrete slabs or columns were of insufficient strength to anchor a personal fall arrest system. Also, Respondent did not establish the infeasibility of the use of a guardrail system, at least while the hoist area is not in operation. Respondent presented no evidence why the stored forms could not be placed below the mid rail of the guardrail, or why the portion in operation could not be removed, as is contemplated by the standard. Arguing that the guardrail would impede the operation of the crane,

Respondent did not consider the possibility that the portion of the guardrail protecting the hoist area in operation could be removed while the crane is being utilized, as is expressly contemplated by the standard.

Similarly, Respondent failed prove that the prescribed methods for fall protection specified in 29 CFR 1926.501(b)(4) were infeasible. Respondent argues that the prescribed methods would "unreasonably disrupt" the work activities because the stairway openings and elevator shafts were being used in the work process for "passing the material up". (Respondent's brief, p 25). Thus, Respondent argues, a guardrail or cover would interfere with the ability to move material through the holes. Personal fall arrest systems were likewise infeasible because of a "tripping hazard" and the potential that the lines would become tangled in the various legs of the forms work. I find that Respondent has not established that guardrails would sufficiently interfere with Respondent's ability to move material through the holes so as to consider their use unreasonable. The standard requires that the top rail of a guardrail be 42 inches, plus or minus three inches, above the walking/working surface. 29 CFR 1926.502(b)(1). Respondent failed to submit evidence that material passed up nine feet from the deck below, cannot be reasonably passed up an additional, approximate, 42 inches. Furthermore, Respondent did not establish why the open holes in question could not be fully covered when not in use, or why the portion of the hole not in use could not be covered.

Citation 3, Item 1

This Citation was issued for two instances of violations of 29 CFR 1926.1053(b)(4), which provides in pertinent part that "ladders shall be used only for the purpose for which they were designed." *Id.* CO Jensen testified that on two different dates he observed an employee using an eight foot stepladder in a folded up manner. Tr. 410-411. The hazard, he testified, is that the ladder can slip. Tr. 411. I find that the standard applies, and that it was violated. The ladders were designed to be used as step ladders, and not as pitched ladders. However, the Secretary presented no evidence and makes no arguments that Respondent was aware, or should have been aware, of these two separate instances. Therefore, I find that the Secretary failed to meet her burden of establishing knowledge of the hazardous condition. This Citation is therefore vacated.

ORDER

Based on the foregoing decision, the citation items are disposed of and the penalties assessed, as follows:

Citation Item	**Violation**	**Disposition**	**Classification**	**Penalty**
Citation 1 Item 1	29 CFR 1926.95(a)	Affirmed as To Instance b	Serious	$500.00
Citation 1 Item 2	29 CFR1926.405(b)(I)	Affirmed	Serious	$1,500.00
Citation 1 Item 3	29CFR1926.501(b)(2)(I)	Affirmed	Serious	$5,000.00
Citation 1 Item 4	29CFR1926.501(b)(4)	Affirmed	Serious	$3,500.00
Citation 1 Item 5a Item 5b	29CFR1926.502(b)(1) 1926.502(b)(2)	Affirmed	Serious	$7,000.00
Citation 1 Item 6	29CFR1926.502(g)(1)	Vacated		
Citation 1 Item 7	29CFR1926.502(h)(1)	Vacated		
Citation 1 Item 8a	29CFR1926.502(h)(3)	Vacated		

Citation 1 Item 8b	29CFR1926.502(k)(9)	Vacated		
Citation 1 Item 9	29CFR1926.502(k)(3)	Vacated		
Citation 1 Item 10	29CFR1926.502(k)(4)	Vacated		
Citation 1 Item 11	29CFR1926.502(k)(7)	Vacated		
Citation 1 Item 12	29CFR1926.503(a)(1)	Vacated		
Citation 1 Item 13	29CFR1926.701(b)	Affirmed as to Instances b, c, d, e, & f	Serious	$7,000.00
Citation 1 Item 14	29CFR1926.703(a)(2)	Affirmed	Serious	$3,000.00
Citation 2 Item 1a Item 2a Item 3a	29CFR1926.502(b)(1)	Affirmed	Willful	$56,000.00
Citation 2 Item 2b Item 3b	29CFR1926.501(b)(2)(I)	Affirmed	Willful	$56,000.00
Citation 2 Item 3c	29CFR1926.501(b)(2)(ii)	Affirmed as to Instance b & c	Willful	$56,000.00

Citation 2 Item 1b Item 2c Item 3d	29CFR1926.501(b)(3)	Affirmed except As to instance b of Item 2c	Willful	$56,000.00
Citation 2 Item 4	29CFR1926.501(b)(4)	Affirmed	Willful	$32,000.00
Citation 3 Item 1	29CFR1926.1053(b)(4)	Vacated		

/s/
G.Marvin Bober, Administrative Law Judge
Washington, DC

Dated: March 16, 2001
Washington, DC