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. PEGASUS TOWER, Respondent.	OSHRC Docket No. 01-0547

DECISION

Before: RAILTON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

Pegasus Tower ("Pegasus") is a business engaged in dismantling and erecting television transmission towers. On January 18, 2001, the Occupational Safety and Health Administration ("OSHA") began an inspection of Pegasus' work site at the Channel 23 Tower erection site located in Akron, Ohio. As a result of the inspection, OSHA issued a five-item serious citation, a one-item willful citation and a one-item other-than-serious citation alleging violations of section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), and various OSHA standards. A total penalty of $24,600 was proposed. Administrative Law Judge Covette Rooney affirmed all the cited violations, but characterized the alleged willful violation as serious and assessed a total penalty of $16,500.

We have examined the record in its entirety and considered the arguments of the

parties.[1] We conclude that with two exceptions discussed below, the evidence and applicable legal precedent support the judge's decision.

Discussion

In Citation 1, Item 1, the Secretary alleges a violation of section 5(a)(1) of the Act, also known as the general duty clause,[2] for Pegasus' failure to protect employees from "[p]otential falls in excess of 400 feet at the Channel 23 Tower erection site" when employees used the dual-drum hoist line to access their workstations at the top of the tower. To establish a violation of the general duty clause, the Secretary must demonstrate that (1) a condition or activity in the workplace presented a hazard, (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Nelson Tree Serv., Inc. v. OSHRC*, 60 F.3d 1207 (6th Cir. 1995). In affirming the violation, the judge found that use of the dual-drum hoist to lift Pegasus employees to and from the tower presented a fall hazard to those employees; that such a fall was likely to cause death or serious physical harm; and that feasible and effective means of abatement, as set forth in OSHA Instruction Compliance Directive 2-1.29 ("CPL"), existed to eliminate or materially reduce this hazard.[3] With regard to recognition of the alleged hazard, the judge found that "the tower erection industry [has] recognized the hazards associated with the hoisting of employees to and from their work

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[1] In its brief to the Commission, Pegasus, appearing *pro se*, did not address any of the issues directed for review, but raised general objections to the judge's decision.

[2] Section 5(a)(1) states that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

[3] An OSHA compliance assistance specialist testified that OSHA formed a multi-agency Tower Task Force with representatives from OSHA, NIOSH, and several trade associations to develop the CPL, which became effective January 15, 1999. The CPL states that its purpose is to "describe[] OSHA's inspection policy and procedures to ensure uniform enforcement by field enforcement personnel of the provisions addressing fall protection and safe access to communications towers during construction."

stations…by participating in the Task Force that resulted in CPL 2-1.29."

We also affirm the violation of section 5(a)(1), but rest our finding of hazard recognition solely on Pegasus' own recognition of the hazard. The Commission has stated that "[h]azard recognition may be shown by either actual knowledge of the employer or the standard of knowledge in the employer's industry[.]" *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1873, 1995-97 CCH OSHD ¶ 31,207, p. 43,725 (No. 92-2596, 1996) (citing *Cont'l Oil Co. v. OSHRC*, 630 F.2d 446, 448 (6th Cir. 1980)). Here, testimony from Pegasus' safety instructor shows that Pegasus itself recognized the dangers associated with raising and lowering employees on the hoist line. Therefore, it is unnecessary for us to determine whether the tower erection industry has also recognized the hazard. Accordingly, we affirm the general duty clause violation, but do so based on Pegasus' own recognition of the hazard.

Finally, with regard to penalty, we find that it is appropriate in this case to assess one penalty for the closely-related violations affirmed under Citation 1, Item 4 and Citation 2, Item 1. Both of these items require Pegasus to provide its employees with adequate personal fall protection equipment. *See L.E. Myers Co.*, 16 BNA OSHC 1037, 1048, 1993-95 CCH OSHD ¶ 30,016, p. 41,134-35 (No. 90-945, 1993) (assessing a single penalty for two violations that are substantially similar). Taking into consideration the statutory factors set forth at section 17(j) of the Act, we assess a single penalty of $6,300 for Citation 1, Item 4 and Citation 2, Item 1.[4]

[4] Because we have grouped Citation 1, Item 4 and Citation 2, Item 1 and assessed a single penalty, we see no need to address the question of duplicativeness.

Order

Accordingly, we affirm Citation 1, Items 1, 3 and 4, and Citation 2, Item 1. We also affirm the penalties as assessed by the judge for Items 1 and 3 of Citation 1. We assess a single penalty of $6,300 for Citation 1, Item 4 and Citation 2, Item 1. Therefore, we assess a total penalty of $13,700 for all the affirmed violations.[5]

SO ORDERED.

/s/________________________________
W. Scott Railton
Chairman

/s/________________________________
Thomasina V. Rogers
Commissioner

Dated: July 13, 2005

[5] The judge affirmed Items 2, 5 and 6 of Citation 1, and assessed $1,400, $1,000 and $1,000, respectively. These items were not directed for review.

SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC DOCKET No. 01-1547
PEGASUS TOWER,	
Respondent.	

Appearances: Patrick L. DePace, Esquire
U.S. Department of Labor
Office of the Solicitor
Cleveland, OH
For the Complainant.

Bradford Broadus
Beau Broadus
Pegasus Tower
Calico Rock, AR
For the Respondent.

BEFORE: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The record establishes that Pegasus Tower ("Pegasus" or "Respondent") at all times relevant to this case had an office and principal place of business in Calico, Arkansas, and maintained a work site in Akron, Ohio, where it was engaged in the dismantling and erection of television transmission towers . Respondent engages in this type of work in various states across the country. (Tr. 194-95, 199, 274-75). I find that this is construction activity which as a whole affects interstate commerce. *See Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983). I further find that Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and that it is subject to the requirements of the Act.

Compliance Officer ("CO") Daniel Pubal of the Occupational Safety and Health Administration ("OSHA") inspected Respondent's work site in Akron, Ohio, during January and February of 2001, and, as a result, issued three citations alleging serious, willful and "other" violations. The total proposed penalty for the citations was $24,600.00. Respondent timely contested

the citations and proposed penalties, and a hearing was held in Cleveland, Ohio from May 28 through 30, 2002. The parties have briefed the issues, and this matter is ready for disposition.

Background

In November of 2000, Pegasus began work on a project, owned by a televison station, in Akron, Ohio. The project involved demolishing a 344-foot tower and erecting a 1000-foot tower, and the job required the employees of Pegasus to work at heights of up to 1000 feet.[1] Bradford Broadus ("Bradford") is the rigging and safety instructor of Pegasus. He has worked in the tower erection industry since 1972 and has put up more than 200 towers all over the United States, and his job includes instructing employees in how to do their work. Bradford's son, Beau Broadus ("Beau") is the owner of Pegasus. Whenever work was taking place at the site, either Beau or Bradford was present and in charge of the job. (Tr. 194-95, 198-99, 274-75).

The inspection began on January 18, 2001, when CO Pubal drove by the site and observed the tower under construction.[2] Before going onto the site, the CO watched and videoed the work activity. He saw two to three people working about 300 feet off the ground without proper fall protection. He noted they did not use safety harnesses but instead used saddle belts and positioning equipment with short lanyards that did not allow them to remain tied off the entire time; thus, they had no fall protection when moving from point to point. When the CO went onto the site, he spoke first to some employees who were on the ground. He then held an opening conference with Beau, who had been up on the tower but had come down, after which he began his inspection. CO Pubal observed employees "riding the line" from a dual-drum hoist in order to both access and egress the tower. He noted that the dual-drum hoist was a mechanical hoist and that it did not meet OSHA's requirements for personnel lifting, and he spoke to Bradford's brother, who was operating the hoist that day. CO Pubal also observed a lack of hard hats, both among employees on the tower and those on the ground tending to guy lines and other matters. Finally, CO Pubal observed a propane tank near a stairway on the outside of the building. When the CO inquired about the training employees had received, he learned that they had been trained in rigging and tower work but not in the type of personal fall arrest systems that should be used. (Tr. 13-19, 46-48, 52; Exh. C-2).

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[1]Another tower at the site, also 1000 feet in height, remained in operation during the erection of the new tower.

[2]The inspection was conducted pursuant to OSHA's tower construction program.

The CO returned to the site with his supervisor, Thomas Pontuti, two days later, and they observed employees again working on the tower at a height of about 300 feet. The CO saw essentially the same equipment he had seen the first day, and he and Mr. Pontuti spoke to Beau, to Bradford's brother, and to other employees. The CO expressed concern that they were not in compliance, and, upon leaving, he advised that he expected the use of full body harnesses and double or split lanyards, unless they wanted to use nets. The CO returned a couple of days later to give Pegasus more information about fall protection, and he made several follow-up visits to the site; during one of these, Mr. Pontuti had an in-depth discussion with Bradford. After a number of visits, the CO believed that Pegasus was not going to get the harnesses and he brought up posting an imminent danger sign with the site owner. The site owner then put pressure on Pegasus to get the proper fall protection, after which compliance was achieved. (Tr. 20-28, 154-55).

OSHA Compliance Directive CPL 2-1.29

Compliance Assistance Specialist ("CAS") Thomas Pontuti testified that the fatality rate in the telecommunication tower erection industry exceeds the fatality rate for every other U.S. industry.[3] He further testified that due to the hazards of tower erection, and the fact that OSHA had no specific standards in this regard, the tower erection industry asked OSHA to establish safety guidelines for the industry. In August of 1997, OSHA formed a multi-agency Tower Task Force that included representatives of OSHA, NIOSH and other agencies. The Task Force worked with the National Association of Tower Erectors ("NATE") to develop a compliance directive regarding the hazards in the industry, and the directive, CPL 2-1.29, became effective January 15, 1999.[4] (Tr. 160-63; Exh. C-3). The directive addresses fall protection and safe access, and, in particular, does the following:

- Establishes uniform policies and procedures for OSHA compliance officers when conducting inspections of towers under construction
- Describes best practices for use by the industry

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[3]CAS Pontuti has had extensive training in tower erection and has held training for employers in the industry. CAS Pontuti has also conducted or participated in inspections of tower erection work sites, has testified previously in Commission cases involving tower erection, and has been recognized as an expert in tower erection by a Commission Administrative Law Judge. *See Reflections Tower Serv.*, (No. 00-1201). (Tr. 160-65).

[4]NATE, with approximately 600 members, was a part of the 22-member Task Force. CAS Pontuti testified that he had worked with NATE in developing a partnership agreement and a local emphasis program in OSHA's Region 5 to ensure compliance with CPL 2-1.29. (Tr. 160-65).

- Requires telecommunication tower workers to maintain 100% fall protection when working 25 feet or more above the ground (this requirement applies to workers ascending, descending, or moving from point to point)
- Specifies procedures and allowable conditions under which workers may access the tower by "riding the line" (a practice in which workers are directly lifted up a tower by a hoist line)
  - Prohibits riding the line for work at heights less than 200 feet above the ground. Requires instead that workers access work stations at these heights using conventional methods such as climbing with fall protection or use of a personnel platform
  - Permits up to two tower erectors at a time to ride the line for work at heights more than 200 feet above the ground when (1) towers are erected with gin poles, (2) conditions preclude the use of a personnel platform, and (3) other conventional methods of climbing using a ladder or other approved climbing devices might create a greater hazard from fatigue or repetitive stress.
- Specifies minimum requirements for allowing workers to be hoisted on the hoist line, such as the following:
  - Worker training
  - Use of hoisting equipment that has been approved, certified, and/or inspected by a registered professional engineer or other designated professional
  - Trial lift and proof-testing procedures
  - Pre-lift meetings
  - Documentation of procedures used
  - Continuous communication between hoist operator and workers being hoisted
  - Consideration of environmental conditions
  - Specifications and maintenance for hydraulic hoists and gin poles.

See also NIOSH Alert, *Preventing Injuries and Deaths from Falls during Construction and Maintenance of Telecommunication Towers*, DHHS (NIOSH) Publication No. 2001-156 (July 2001).

Serious Citation 1, Item 1

Item 1 of Serious Citation 1 alleges a violation of the general duty clause, section 5(a)(1) of the Act, as follows:

> The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to: Potential falls in excess of 400 feet at the Channel 23 Tower erection site in Akron, Ohio.
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> Among other methods, feasible and acceptable methods to control the hazards are: Ensure the design and use of the base-mounted dual drum hoist used to lift employees to and from their workstations aloft be in accordance with OSHA Compliance Directive CPL 2-1-29.

The general duty clause was enacted to cover serious hazards where no specific standard applies. To prove a section 5(a)(1) violation, the Secretary must show that: (1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the employer or the employer's

industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) feasible means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co., Inc.,* 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996); *Waldon Healthcare Center,* 16 BNA OSHC 1052 (Nos. 89-2804 & 89-3097, 1993)*; Tampa Shipyards, Inc.,* 15 BNA OSHA 1533 (Nos. 86-360 & 86-469, 1992)*; Pelron Corp.,* 12 BNA OSHC 1833, 1835, (No. 82-388, 1986). "Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities." *American Cyanamid Co.,* 9 BNA OSHC 1591, 1600 (No. 79-5762, 1981), *aff'd*, 741 F.2d 444 (D.C. Cir. 1984). Under section 5(a)(1), a "hazard is deemed 'recognized' when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry." *Pepperidge Farm, Inc.,* 17 BNA OSHC 1993, 2003 (No. 89-265, 1997). The Secretary "must show that knowledgeable persons familiar with the industry would regard additional measures as necessary and appropriate in the particular circumstances existing at the employer's worksite." *Inland Steel Co.,* 12 BNA OSHC 1968, 1970-71 (No. 79-3286, 1986). As to feasibility, the "Secretary has the burden of coming forward with evidence on the feasibility issue." *Whirlpool Corp. v. OSHRC,* 645 F. 2d 1096, 1098 (D. C. Cir. 1981), *cert. denied,* 457 U.S. 1132 (1982). She "must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enter., Inc.,* 19 BNA OSHC 1161, 1190 (Nos. 91-3144, 92-238, 92-819, 92-1257, 93-724, 2000). She must also show that her proposed abatement measures are economically feasible. *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1063 (Nos. 89-2804 & 89-3097, 1993).

The Secretary alleges that the conditions for raising and lowering employees to and from their work stations on Respondent's work site did not comply with CPL 2-1.29, thereby exposing employees to fall hazards in excess of 400 feet, and that implementation of the recommendations of CPL 2-1.29 would have reduced these hazards. (Tr. 175). The Secretary cited ten deficiencies which were not in compliance with the recommendations set forth in CPL 2-1.29 (Exh. C-3).

I find that the record discloses unrebutted evidence of these deficiencies. First, Pegasus allowed employees to ride on the base-mounted dual-drum hoist line at the same time loads were lifted, a practice that increased the potential for falls or being caught on something. (Tr. 18, 45-48, 61-62, 119, 140-41, 291; Exhs. C-1, C-2). Second, Pegasus lifted up to four employees at a time on

the load line, a practice prohibited by CPL 2-129. (Tr. 58-60, 177, 200-01; Exhs. C-1, C-2). The hoist also permitted "free spooling," which allowed the line to run with no mechanical resistance, and, as a result, personnel could be raised or lowered too quickly. (Tr. 76, 155). Third, Pegasus did not ensure that proper fall arrest equipment was provided, used and inspected before riding the line. (Tr. 21-22, 58-61, 125-26; Exh. C-1).

Fourth, anti two-blocking was not provided on the hoist line where employees rode the line up above the base of the gin pole. The CPL recommends that a hoist used for raising or lowering employees must have an anti two-blocking device to prevent employees or materials being lifted from being pulled into the pulley connected to the tower at the top of the line. If a person or piece of equipment is drawn into the pulley, the person or equipment can fall and the tower itself can collapse. The CPL allows alternate methods to prevent the hazard, such as using radio contact or having an employee at the top to monitor the pulley. Regardless, the hoist at the site did not have an anti two-blocking device, and no alternate means of protection was in use. (Tr. 63-66).

Fifth, the hoist was anchored to a flatbed trailer that was not anchored to prevent movement. (Tr. 67, 294-95; Exh. C-1). An inadequately anchored hoist can move while employees or equipment are being hoisted, causing falls. (Tr. 67-68). Sixth, there was no redundant automatic emergency brake in use on the dual-drum hoist. (Tr. 70-71). Seventh, there was no line speed indicator on the hoist to indicate the speed at which it was being operated. (Tr. 74-76). Eighth, the brakes were not automatically applied upon return of the control lever to its center or neutral position, and unmarked controls were not the self-centering or deadman type that returned the machine to neutral when the control lever was released. (Tr. 69, 76-77.) Thus, the brakes would not automatically engage if for some reason the hoist operator lost control, and a person being hoisted up or down could be injured if the operator could not stop the hoist in time; for example, a person who got caught or "hung up" on the tower could be injured if the hoist continued to operate. (Tr. 69-70)

Ninth, there were no pre-lift meetings and documentation of such meetings on the work site to ensure that workers were trained about the procedures to follow if an emergency occurred. (Tr. 77-78). Pegasus held daily meetings, and these were documented. However, the meetings were for the limited purpose of discussing the work to be performed that day and to advise workers to "be careful." (T. 212, 284, 323; Exh. G-5). Finally, there were no operating manuals or inspection logs maintained on the site for the subject hoist, and the gin pole personnel load capacity and material

load capacity of the lifting system was not posted within sight of the operator. (Tr. 79-81). Pegasus acknowledged that it had not met these documentation requirements. (Tr. 212-14).

It is undisputed that employees falling under the foregoing conditions were likely to suffer death or serious bodily injury, (Tr. 52-53, 85-86, 173-74, 243-44, 282), and Pegasus conceded that employees "riding the line" could fall or hit the tower or drop materials or equipment on those below. (T. 225-26). Moreover, as set out *supra*, the tower erection industry recognized the hazards associated with the hoisting of employees to and from their work stations and addressed feasible means of reducing or eliminating those hazards by participating in the Task Force that resulted in CPL 2-1.29. Respondent's implementation of this directive could have abated the cited hazards. In addition, CAS Pontuti testified that he had observed employers using crane baskets or elevators to raise and lower employees, thereby eliminating the hazards associated with riding the line. (Tr. 174).

Based on the foregoing, I find that the Secretary has satisfied her burden of proving that Pegasus failed to provide its employees a workplace free from recognized hazards that were causing or likely to cause death or serious physical harm. This citation item is affirmed as a serious violation because it is clear that falls from 300 to 1000 feet could result in death or serious physical harm.[5] (Tr. 85-86). The Secretary has proposed a penalty of $2,000.00 for this item. After giving due consideration to the company's size, history and good faith, and to the gravity of the violation, I find the proposed penalty appropriate and it is accordingly assessed.[6] (Tr. 104-05).

Serious Citation 1, Items 2a, 2b and 2c

Items 2a, 2b and 2c of Citation 1 allege violations of 29 C.F.R. §§ 1926.1200(e)(1), (g)(8) and (h), respectively, which provide as follows:

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[5]Section 17(k) of the Act states that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result" from the violation. To establish that a violation is properly characterized as serious, the Secretary need not show that an accident is likely to occur, but, rather, that an accident is possible and that it is probable that death or serious physical harm could occur. *Flintco Inc.,* 16 BNA OSHA 1404, 1405 (No. 92-1396, 1993).

[6]As the final arbiter of penalties, the Commission must give "due consideration" to the four criteria set out in section 17(j) of the Act, that is, the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of OSHA violations. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). Gravity is the principal factor to be considered. *Trinity Indus., Inc.,* 15 BNA OSHC 1481 (No. 88-2691, 1992).

> (e)(1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:
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> (g)(8) The employer shall maintain in the workplace copies of the required material safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Electronic access, microfiche, and other alternatives to maintaining paper copies of the material safety data sheets are permitted as long as no barriers to immediate employee access in each workplace are created by such options.)
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> (h) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

The standard requires an employer with hazardous chemicals in its workplaces to prepare and implement a written hazard communication ("HAZCOM") program. The standard also requires the employer to ensure that all containers of hazardous materials are labeled, that employees are given access to material safety data sheets ("MSDS's"), and that an effective training program is conducted for all potentially exposed employees. The purpose of a written HAZCOM program is to ensure that employees have information about the hazards of chemicals they have access to and the protective measures to be used when working with such chemicals. The record establishes that hazardous chemicals were present on the subject site and available for use by employees. The record further establishes that these chemicals, which included gasoline, diesel, oxygen, acetylene and propane, were used as fuel for the hoist and for cars, trucks and trailers; they were also used for equipment such as mowers and welding and cutting torches. Pegasus concedes that these chemicals can pose serious hazards and cause serious injuries, such as burns, if handled improperly. In addition, it is undisputed that Pegasus did not ensure that a written HAZCOM program was developed and implemented on site, that it did not ensure that MSDS's were available for each hazardous chemical, and that it did not ensure that employees were trained in the HAZCOM program and in the chemicals they had access to on the site. (Tr.18, 87-90, 186-87, 214-18, 261). Respondent's failure to provide

the required information and training to employees could have led to the misuse of hazardous chemicals, which could have resulted in death or serious physical harm.

The Secretary has the burden of showing, by a preponderance of the evidence, a violation of a specific standard.[7] Based on the foregoing, I find that the Secretary has shown all of the elements required to prove a violation of the cited standard, including that of employer knowledge of the cited condition; in that regard, I note that the company, in exercise of reasonable diligence, should have known about and addressed this condition.[8] Items 2a, 2b and 2c are affirmed as serious violations because there was a substantial probability that exposure to the chemicals at the site could have resulted in serious physical harm. The Secretary has proposed a total penalty of $1,400.00 for Items 2a, 2b and 2c. After giving due consideration to the factors set out above, and especially to the gravity of the violation, I find the proposed penalty appropriate and it is accordingly assessed.

Serious Citation 1, Item 3

Citation 1, Item 3 alleges a violation of 29 C.F.R. 1926.21(b)(2), which states that:

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

The Secretary alleges that Pegasus did not ensure that each employee working on the tower at heights in excess of 300 feet was provided fall protection training to enable the employee to recognize the hazards of falling and the procedures to be followed to minimize those hazards. The

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[7]To establish a violation of a specific standard, the Secretary must show: (a) the applicability of the standard, (b) noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). Pegasus does not dispute the applicability of any of the cited standards. Thus, they are deemed applicable.

[8]To prove knowledge, the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991). Knowledge is established by showing employer awareness of the violative condition, and it need not be shown the employer understood or acknowledged that the condition was actually hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHA 1076,1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). The Secretary may establish constructive knowledge by demonstrating that an employer could have known of the condition if it had exercised reasonable diligence. *See, e.g., Pride Oil Well Serv.*,15 BNA OSHC 1809, 1814 (No. 87-692, 1992), in which the Commission set out the criteria to consider in this regard.

record establishes that there was no training on the guidelines provided in CPL 2-1.29. Bradford Broadus testified that the fall protection training he gave consisted of how to be safe and not fall off of or get entangled in the tower. He also testified that this advice was constantly given to employees on a daily basis; however, there was no documentation of this training. (Tr. 218-19).

To establish a violation of 29 C.F.R. 1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on "(1) how to recognize and avoid unsafe conditions they may encounter on the job, and (2) the regulations applicable to those hazardous conditions." *Superior Custom Cabinet Co.,* 18 BNA OSHC 1019, 1020 (No. 94-200, 1997), *aff'd. without published opinion,* 158 F.3d 583 (5th Cir. 1998). An employer's instructions must be modeled on the applicable standards and must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425 nn. 6, 7 (No. 90-1106, 1993). Instruction in the recognition and avoidance of unsafe conditions requires more than admonitions to "be careful" and reminders that a potential hazard is nearby. *See Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892 (No. 92-3684, 1997). I find that Respondent failed to provide its employees with safety training related specifically to its work at the subject site, and, further, that daily reminders were inadequate to meet the requirements of the cited standard. Without adequate fall protection training, employees were subject to potential fall hazards in excess of 300 feet. The Secretary has proved the alleged violation of 29 C.F.R. 1926.21(b)(2).

This item is affirmed as a serious violation because, as found above, it is clear that falls in excess of 300 feet could cause death or serious physical harm. The Secretary has proposed a penalty of $2,000.00 for this item. Upon considering the factors set out *supra*, and particularly the gravity of the violation, I find the proposed penalty appropriate and it is therefore assessed.

Serious Citation 1, Item 4

This item alleges a violation of 29 C.F.R. 1926.95(c), which requires "[a]ll personal protective equipment [to] be of safe design and construction for the work to be performed.[9]

The citation alleges that Pegasus did not ensure that non-locking-type pelican hooks had been removed from service. The record establishes that while working from a fixed position on the tower,

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[9]As issued, this item alleged a violation of 29 C.F.R. 1926.95(c) or, alternatively, 29 C.F.R. 1926.21(b)(3). In her brief, the Secretary moved to amend the alternative standard to 29 C.F.R. 1926.20(b)(3). However, while the parties addressed the alleged violation of this standard at the hearing, I do not address it here as I have found Pegasus to be in violation of 29 C.F.R. 1926.95(c).

an employee of Pegasus was observed using a saddle belt as a positioning device to protect against falls. The saddle belt was attached to the tower by a pelican hook that was non-locking. In fact, the hook had been modified to eliminate the locking mechanism, and it thus afforded no protection against a "rollout" or an inadvertent disconnection, exposing the employee to falls in excess of 300 feet. (Tr. 13-14, 61, 92-96,125-26, 168-70, 202, 282, 296; Exhs. C-1, C- 2]. The Secretary asserts that the modified pelican hook was not a safe means of attaching a positioning device to the tower.

Pegasus conceded that it used safety belts as fall protection. (Tr. 201). The term "safety belt" is defined in Subpart E, at 29 C.F.R. 1926.107(f), as a "device, usually worn around the waist which, by reason of its attachment to a lanyard and lifeline or a structure, will prevent a worker from falling." It is evident from the record that the non-locking pelican hook would not, when attached to a structure, prevent a worker from falling. Therefore, the personal protective equipment worn by Respondent's employee did not meet the requirements of the cited standard. Beau Broadus was aware of the employee who was using the non-locking pelican hook with his saddle belt, and he allowed the employee to use the hook. Beau Broadus testified that there were double-locking hooks on the site, but he acknowledged that the cited hook had not been removed from service and that the employee had not been required to use a more suitable hook (Tr. 202, 282).

Based on the above, I conclude the Secretary has shown a violation of the cited standard. This item is affirmed as a serious violation because of employee exposure to falls in excess of 300 feet, which could have caused death or serious injury. The Secretary has proposed a penalty of $2,800.00 for this item. After giving due consideration to the four factors noted *supra*, and especially to the gravity of the violation, I find the proposed penalty appropriate and it is consequently assessed.

Serious Citation 1, Item 5

This item alleges a violation of 29 C.F.R. 1926.100(a), which provides as follows:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The Secretary alleges that Pegasus did not ensure that each employee working and walking below the tower being erected was provided a protective helmet where work was being performed above with tools and fasteners at approximately 300 feet. Commission precedent has established that this standard by its express language applies whenever employees are exposed to a possible danger of head injury. *Skepton Contracting, Inc.*, 18 BNA OSHC 1413 (No. 97-208, 1997). CO Pubal

testified that upon arriving at the site, he saw employees who were not wearing hard hats tending to guy lines and other matters on the ground. He further testified that the employees were exposed to being struck by tools or equipment falling from above or by a part falling from the tower and that Beau Broadus was on the site when he made this observation. (Tr. 15-18, 96-97). On the basis of the CO's testimony, which Pegasus did not rebut, the Secretary has met her burden of proving the alleged violation. This item is affirmed as a serious violation because of the substantial probability that death or serious harm could have resulted from an employee being struck in the head by tools, equipment or parts of the tower. The Secretary has proposed a penalty of $1,000.00 for this item. After giving due consideration to the four factors discussed above, that is, the gravity of the violation and the company's size, history and good faith, I conclude that the proposed penalty is appropriate and it is accordingly assessed.

Citation 1, Item 6

This item alleges a violation of 29 C.F.R. 1926.553(a)(1), which states that:

> Exposed moving parts such as gears, projecting screws, setscrews, chain, cables, chain sprockets, and reciprocating or rotating parts, which constitute a hazard, shall be guarded.

The Secretary alleges that Pegasus did not ensure that the base-mounted dual-drum hoist in use had guarding on all exposed moving parts where gear teeth, fan blades, shaft ends with bolts and drum ends with raised portions were exposed. CO Pubal testified that he observed that the hoist in use with exposed parts that were not guarded to prevent employee access to pinch points and other hazardous locations. He also testified that the exposed parts included spoked wheels and rotating shaft ends and that the hoist operator or any other employee working in close proximity to the hoist could have been pulled into the moving parts and suffered an amputation or other serious injury. (Tr. 97; Exh. C-1, pp. 1, 10). Beau Broadus testified that he did not know whether the exposed areas had guards in place when the hoist was manufactured and that as far as he knew it had been in the same condition that it in at the time of the inspection. (Tr. 297-98).

Based upon the foregoing, I conclude that the Secretary has satisfied her burden of proving the alleged violation. This citation item is affirmed as a serious violation because of the substantial probability that serious physical harm could have resulted from an employee being caught in the exposed moving parts of the hoist. The Secretary has proposed a penalty of $1,000.00 for this item.

Upon considering the gravity of the violation, as well as the company's size, history and good faith, I find the proposed penalty appropriate and it is therefore assessed.

Willful Citation 2, Item 1

Willful Citation 2 alleges a violation of 29 C.F.R. 1926.105(a), which requires as follows:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The Secretary alleges that Pegasus "willfully" did not ensure that each employee climbing and moving point to point on the tower at heights in excess of 300 feet was provided protection from falling. CO Pubal testified that he saw some fall protection equipment in use on the first day of his inspection but that "it wasn't what OSHA required for personal fall arrest."[10] (Tr. 13-14). The record shows that to work on the tower, Respondent's employees utilized a saddle belt as a positioning device. The saddle belt was not equipped with a double lanyard, but, rather, a single lanyard, which required the employee, when moving from point to point, to unhook the lanyard, free climb to the next location, and reattach the lanyard to the tower. Respondent's employees were thus not protected from falls when moving from point to point. (Tr. 21-23, 98).

CO Pubal further testified that on his second visit to the site, with CAS Pontuti, he observed the same equipment in use that he had seen during his first visit. He and CAS Pontuti spoke to Beau, to Bradford's brother, and to other employees about fall protection. The CO expressed concern that they were not in compliance and advised that he expected "100 percent fall protection," including the use of full body harnesses and double or split lanyards, unless they wanted to use nets. During another visit, CO Pubal was again accompanied by CAS Pontuti, who had a lengthy discussion with Bradford about what OSHA expected for compliance. CO Pubal stated that Bradford appeared interested in what he was being told, but he did not want to use the full body harness and double lanyard. He also stated that Bradford appeared willing to go along with using a second lanyard with the saddle belts but that he "drew the line at the harnesses." However, as CO Pubal explained at the hearing, a double lanyard attached to a saddle belt would not provide the necessary protection and only a full body harness can safely absorb the shock and arrest the fall. As CO Pubal further

[10]The CO spoke to Beau Broadus and to other employees on his first visit. (Tr. 15-16).

explained, despite various visits to the site, he was not able to achieve compliance until he went to the owner of the site, who put pressure on Pegasus to come into full compliance. (Tr. 19-28, 154-55).

To prove a violation of 29 C.F.R. 1926.105(a), for failing to require a listed fall protection device other than a safety net, the Secretary must also show that the device was practical in the cited employer's circumstances. *Armstrong Steel Erectors, Inc.*, 18 BNA OSHC 1630, 1632 (No. 97-250, 1999) (citing *Century Steel Erectors, Inc. v. Secretary of Labor*, 888 F.2d 1399, 1403 (D.C. Cir. 1989)). As demonstrated by the abatement of the violation, the evidence here is sufficient under that test and the Secretary has met her burden of establishing the violation. The record clearly shows that, when moving from point to point, Respondent's employees were exposed to falls of over 300 feet. Management was aware of how the employees were working, and Beau Broadus was one of those working without adequate fall protection. (T. 201,103, 286).The record also shows that full body harnesses with double lanyards were practical on the site; on the last day of the inspection, the site owner had provided full body harnesses and double lanyards in order to be in compliance, and they were in use by employees. Bradford Broadus testified that there had been no problems since the implementation of the harnesses and double lanyards. (Tr. 138-40, 154-55, 223).

The Commission has defined a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1996). A willful violation is differentiated by the employer's "heightened awareness" of the illegality of the violative conduct or conditions. *Propellex Corp.,* 18 BNA OSHC 1677 (No. 96-265, 1999). As the Commission explained in *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987):

> It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting a violation; such evidence is necessary to establish any violation, serious or nonserious....A willful violation is differentiated by a heightened awareness–of the illegality of the conduct or conditions–and by a state of mind–conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or condition violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer

has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete.

In support of the willful classification, the Secretary argues that Pegasus was put on notice of OSHA's fall protection requirements during a 1999 inspection; that inspection took place in North Carolina, and Pegasus had a different name then. (S. Brief, p. 27; Exh. C-4). Although the violations resulting from that inspection were later withdrawn, CO Pubal testified that Bradford told him that the issue of harnesses was discussed at that time. (T. 29-30, 101). In addition, both Beau and Bradford recalled discussing OSHA's requirements during that inspection, (Tr. 222-23, 292-93), but, despite this notice, Pegasus employees were not using the appropriate protection at the subject site. The Secretary also argues that willfulness is further shown by the reaction to the inspection. CO Pubal and CAS Pontuti both discussed OSHA's requirements with Pegasus. CAS Pontuti discussed CPL 2-1.29 in depth, attempting to convince Pegasus of the need for fall protection while moving from point to point, but the company failed to comply and insisted its methods were safer, regardless of what OSHA required. Finally, the Secretary argues that Respondent's own log books document its "obstinate refusal" to comply with the fall protection requirements. (Exh. C-5, pp. 55, 63).

I observed the respective demeanors of Beau and Bradford Broadus on the stand as they testified, and I found both to be candid and forthright witnesses. On this basis, and in light of the particular circumstances of this case, I do not agree that Respondent's conduct rose to the level required to find a willful violation. First, I am simply unpersuaded that, at the end of the 1999 inspection, Respondent fully understood OSHA's fall protection requirements. The 1999 inspection resulted in an alleged violation of, *inter alia*, 29 C.F.R. 1926.28(a).[11] However, that citation was later withdrawn, and the record does not establish why. *See* Exh. C-4. Second, while the record shows that Bradford Broadus recalled discussing harnesses during that inspection, he indicated at the hearing that he was unsure when that requirement had gone into effect; he also indicated that he thought "some rules had [been] changed since then." (Tr. 222-23, 234). Third, Bradford Broadus testified that he did not learn about CPL 2-1.29 during the 1999 inspection, and both he and Beau Broadus testified as to their belief that they were working safely at the subject site; in addition, Beau Broadus testified about why he thought harnesses could actually be more hazardous. (Tr. 201-02, 234-36,

[11]29 C.F.R. 1926.28(a) requires "the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees."

286-87). Fourth, Bradford Broadus noted that his company had had an accident-free safety record that dated back to 1972. (Tr. 222, 235-36). In these circumstances, the Secretary has not demonstrated that Respondent Pegasus was acting "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety."

In rejecting the Secretary's position as to the willful classification, I am well aware that OSHA made several visits to the site and that, although OSHA informed the company what was required, Pegasus did not comply until OSHA went to the site owner, who put pressure on the company to comply. However, as found above, both Beau and Bradford Broadus truly believed that they were working safely and in a manner that protected employees at the site. This finding is supported by entries of Bradford Broadus in Respondent's Log Book. In one entry, for example, on February 6, 2001, Bradford Broadus noted that he told CO Pubal that they "would not do full body harnesses or double lanyards. Fight to max."[12] *See* Exh. C-5, p. 55. Another entry, made after OSHA's visit on February 14, 2001, indicates that Beau and Bradford Broadus decided to ask all of the employees on the site what fall protection they preferred to use; according to the entry, which listed each worker individually and his response, all of the employees wanted to continue with the same fall protection they had been using. *See* Exh. C-5, p. 63. In view of the record, and having observed the sincere and direct manner in which Beau and Bradford Broadus testified, it is my conclusion that Respondent Pegasus was not in willful violation of the cited standard.

Based on the foregoing, this citation item is affirmed as a serious violation of the standard, in light of the substantial probability that falls from the tower at the site could have resulted in death or serious physical harm. After giving due consideration to Respondent's size, history and good faith, and to the gravity of the violation, I conclude that a penalty of $6,300.00 is appropriate. A penalty of $6,300.00 is therefore assessed for this citation item.

"Other" Citation 3, Item 1

This citation alleges a violation of 29 C.F.R. 1926.153(k)(2), which requires "[c]ontainers [to] be in a suitable ventilated enclosure or otherwise protected against tampering." The Secretary alleges that Pegasus did not ensure that a propane container located at the bottom of the transmitter building upper-room stairs was stored in a suitably ventilated enclosure or otherwise protected

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[12]Bradford Broadus indicated he made this statement because he felt that the company's safety program was very effective and that changing it would not enhance safety. (Tr. 235).

against tampering. It is undisputed that propane tanks were sitting in a area outside the building, and CO Pubal testified that the tanks were subject to being tampered with or knocked over by personnel or equipment at the observed location (T. 18, 104; Exh. C-1, p. 16). Further, the record shows that the containers were in a location that was readily visible and accessible to all employees on the site. Based on the record, the Secretary has demonstrated all of the elements required to prove a violation of the cited standard. As to the classification of this item, an "other" violation requires a direct and immediate relationship between the violative condition and occupational safety; however, unlike a serious violation, the probability of death or serious physical injury does not exist. I find that this item is properly classified as "other." This citation item is therefore affirmed as an other-than-serious violation. No penalty was proposed for this item, and none is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of section 5(a)(a) of the Act, is AFFIRMED, and a penalty of $2,000.00 is assessed.

2. Citation 1, Items 2a, 2b and 2c, alleging serious violations of 29 C.F.R. §§ 1926.1200(e)(1), (g)(8), and (h), respectively, are AFFIRMED, and a total penalty of $1,400.00 is assessed for Item 2.

3. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. 1926.21 (b)(2), is AFFIRMED, and a penalty of $2,000.00 is assessed.

4. Citation 1, Item 4, alleging a serious violation of 29 C.F.R. 1926.95(c), is AFFIRMED, and a penalty of $2,800.00 is assessed.

5. Citation 1, Item 5, alleging a serious violation of 29 C.F.R. 1926.100(a), is AFFIRMED, and a penalty of $1,000.00 is assessed.

6. Citation 1, Item 6, alleging a serious violation of 29 C.F.R. 1926.553(a)(1) is AFFIRMED, and a penalty of $1,000.00 is assessed."

7. Citation 2, Item 1, alleging a willful violation of 29 C.F.R. 1926.105(a), is AFFIRMED as a serious violation, and a penalty of $6,300.00 is assessed.

8. Citation 3, Item 1, alleging an "other" violation of 29 C.F.R. 1926.153(k)(2), is AFFIRMED, and no penalty is assessed.

/s/

Covette Rooney
Judge, OSHRC

Dated: September 30,2002
Washington, D.C.