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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>AJP CONSTRUCTION, INC.,<br>Respondent. | OSHRC DOCKET NOS. 01-0568 & 01-1474 |

Appearances: Esther D. Curtwright, Esq.
U.S. Department of Labor
Office of the Solicitor
New York, New York
For Complainant.

Joseph P. Paranac, Jr., Esq.
St. John & Wayne
Newark, New Jersey
For 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"). Respondent, AJP Construction, Inc. ("AJP"), at all times relevant to this case maintained a construction work site in Hoboken, New Jersey. AJP admits that it is an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act and that it is subject to the requirements of the Act.

On September 28, 2000, the Occupational Safety and Health Administration ("OSHA") began its first inspection of the work site, which resulted in the issuance of one citation alleging

serious violations with a proposed total penalty of $13,600.00.[1] On January 31, 2001, OSHA began its second inspection of the work site following a fatal accident. As a result of the second inspection, OSHA issued to AJP two citations alleging serious and willful violations with a proposed total penalty of $92,000.00.[2] AJP filed timely notices of contest, and, upon the Secretary's motion, the two cases were consolidated on August 24, 2001. A hearing was held June 24-28, 2002, in New York, New York, and the parties have submitted post-hearing briefs and reply briefs.

***Background***

In January 2000, AJD Construction, the general contractor, started construction on a 13-story residential building at the South Waterfront work site in Hoboken, New Jersey. AJD Construction subcontracted the concrete super structure work to Major Construction ("Major"). Major in turn subcontracted the work to AJP. Major and AJP share the same business address, telephone and fax numbers and some of the same contact personnel, including Michael J. Polites, Dong Lee, Anthony Buttino, and Dominic Scerbo. (Tr. 9, 12, 47, 318-19; C-6-7.)

On September 28, 2000, OSHA Compliance Officer ("CO") Patrick Nies arrived at the site pursuant to a referral. After speaking with the general contractor, CO Nies attempted to begin his inspection, but AJP would not allow the inspection until AJP's safety representative could be present on the site. CO Nies returned to the site with CO Gary Jensen on October 2, 2000, to conduct his inspection, and the COs inspected the work site for several days in October 2000. (Tr. 45-49.)

On January 30, 2001, AJP employee James Sherengo was on the seventh floor work platform attempting to unload a mud buggy. The platform was approximately 8 feet by 8 feet, and the mud buggy was about 4 feet by 7 feet. When fellow AJP employees Daniel Giordano and

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[1]As issued, the citation had five items and proposed a total penalty of $26,000.00. Before the hearing, the Secretary withdrew Items 3 and 4a, leaving for resolution Items 1, 2, 4b and 5, with a proposed total penalty of $13,600.00.

[2]As issued, Serious Citation 1 had six items and Willful Citation 2 had one item, and the proposed total penalty was $96,000.00. Before the hearing, the Secretary withdrew Items 2 and 6a of Citation 1, leaving for resolution Items 1, 3, 4, 5 and 6b of Citation 1, and Item 1 of Citation 2, with a proposed total penalty of $92,000.00.

James Johnson saw Mr. Sherengo attempting to "land" the mud buggy by himself, they went out onto the platform to help him. While the employees were thus engaged, cantilevered form material from the twelfth floor fell onto the seventh floor platform, killing Mr. Sherengo. As a result of the accident, CO Nies returned to the site to conduct another inspection. (Tr. 203-08, 216-21, 240-46, 459, 561-62.)

***The Secretary's Burden***

To establish a violation of a standard, the Secretary must show (a) the applicability of the cited standard, (b) the employer's 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).

***Docket No. 01-0568 - Citation 1, Item 1***

This item alleges a serious violation of 29 C.F.R. § 1926.451(g)(3), which provides, in pertinent part, that "[i]n addition to meeting the requirements of Sec. 1926.502(d), personal fall arrest systems used on scaffolds shall be attached by lanyard to a vertical lifeline, horizontal lifeline, or scaffold structural member."[3] Section 1926.502(d)(16)(iii) provides, in turn, that "[p]ersonal fall arrest systems, when stopping a fall, shall be rigged such that an employee can neither free fall more than 6 feet (1.8 m), nor contact any lower level." I find that the cited standard applies and that AJP violated the terms of the standard. CO Nies and CO Jensen testified that they saw two employees working immediately adjacent to the outside edge while on baker's rack type scaffolds, which are mobile scaffolds. (Tr. 25-26, 58, 66-73, 115-17.) The employees were wearing harnesses and lanyards, but the lanyards were too long, so that if the employees had fallen from the scaffolds they could have fallen from the outside edge and fallen more than 10 feet. *Id.* To verify this, CO Nies unhooked a lanyard from one of the employees and tossed it towards the edge to demonstrate that the lanyard would go beyond the edge and

[3]In her original complaint, the Secretary cited AJP for a violation of 29 C.F.R. § 1926.451(g)(1). The Secretary filed a motion to amend her complaint to allege a serious violation of 29 C.F.R. § 1926.451(g)(3), which I granted on August 15, 2001.

continue falling without actually pulling on a coil of cable that was on the floor at the base of the column. (Tr. 67-68.) This evidence supports a finding that AJP did not comply with the standard.

In essence, AJP asserts that CO Nies' demonstration did not accurately portray the situation of the employees and that if they had fallen off the scaffolds they would have fallen to the concrete floor below.[4] (Tr. 411-13.) I reject this assertion. While the scaffolds may only have been a few feet above the concrete floor they were working on, the employees, if they had fallen from the scaffolds, could just as easily have fallen from the edge of the floor due to their proximity to the edge. (Tr. 58, 66, 71.) This conclusion is supported by the admission of Anthony Buttino, AJP's carpentry foreman, that the scaffolds were within 2 feet of the building's edge. (Tr. 413.) Moreover, as the scaffolds were mobile and near the edge of the floor, there was an increased risk that the scaffolds themselves could have fallen off the edge. (Tr. 70-71, 75, 100-01.) I found Mr. Buttino's testimony that the angle at which the employees were working would have prevented a fall to be not credible, and his failure to state his belief to the CO during the inspection that the employees were not exposed further undermines his credibility. (Tr. 477-79.) Employees were thus exposed to the cited hazard.

I also find that AJP had knowledge of the hazardous condition. Both COs testified that Mr. Buttino told them he set up the operation and that he therefore knew the conditions the employees were working under. (Tr. 26-27, 71.) When the Secretary seeks to establish her burden of proving knowledge by demonstrating that the supervisor violated the standard, the Secretary must show that the supervisor's actions were reasonably foreseeable because of inadequacies in the employer's safety program, and the employer, therefore, did not exercise reasonable care to prevent or detect the condition. *Pennsylvania Power & Light Co.*, 737 F.2d 350, 357-58 (3d Cir. 1984).

> In cases where the Secretary proves that a company supervisor had knowledge of, or participated in, conduct violating the Act, we do not quarrel with the logic of requiring the company to come forward with some evidence that it has undertaken

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[4]Although AJP questions his credibility, I find the CO's testimony to be more credible than that of AJP's witnesses. The CO had the opportunity and capacity to observe the cited condition, and his observations and conclusions were consistent with the other evidence of record. Further, I observed the CO's demeanor as he testified, and I found him a credible and convincing witness.

> reasonable safety precautions....We do hold, however, that the Secretary may not shift to the employer the ultimate risk of non-persuasion in a case where the inference of employer knowledge is raised only by proof of a supervisor's misconduct. The participation of the company's own supervisory personnel may be evidence that an employer could have foreseen and prevented a violation through the exercise of reasonable diligence, but it will not, standing alone, end the inquiry into foreseeability.

*Id.* at 357-58. The Third Circuit further noted that "an employer will be held 'excused from responsibility for acts of its supervisory employees' upon a showing 'that the acts were contrary to a consistently enforced company policy, that the supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors.'" *Id.* at 358.

In the subject case, AJP failed to present any evidence that it had undertaken reasonable safety precautions. First, I question the adequacy of the company policy itself. The only evidence of a safety plan is the handwritten "Fall Protection Plan for A.J.P. Construction," prepared by Dong Lee in September 2000. (C-4.) This document in essence states that conventional fall protection cannot always be used and that in such cases controlled access zones will be used for employees who are selected for their "experience, knowledge, and/or training." *Id.* I find that this document hardly qualifies as a fall protection plan and that it falls far short of what a reasonably diligent employer would provide to train employees in company safety policy.[5] In addition, the evidence of record clearly demonstrates that supervisors were not adequately trained in safety matters. Louis DeMarco, the laborer foreman, testified without equivocation that he received no safety training and had not received a copy of the fall protection plan from AJP.[6] (Tr. 358-59.) Dominic Scerbo, the shop steward for laborers, also testified that he received no safety training from AJP. (Tr. 459-60.) Finally, there is no evidence to show what steps AJP took to discover

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[5]Besides the fact that the plan was clearly inadequate, I also note that it was not drafted and implemented until September 2000, several months after AJP started work on this project. (C-4.)

[6]In fact, no witness testified to receiving a copy of this plan. Further, Mr. Buttino and Mr. Scerbo offered no testimony about their own training in fall protection, and Mr. Scerbo admitted that he had had no training on scaffolds. (Tr. 460.)

safety violations or what steps it took when it discovered violations.[7] Based on the foregoing, I conclude that AJP had knowledge of the violative condition and that it could have foreseen and prevented the condition through the exercise of reasonable diligence. This item is accordingly affirmed.

This violation was properly classified as serious because there was a substantial probability that the cited hazard could have resulted in death or serious physical harm.[8] As to an appropriate penalty, section 17(j) of the Act requires the Commission to give due consideration to four factors: (1) the size of the employer's business, (2) the gravity of the violation, (3) the employer's good faith, and (4) the employer's prior history of OSHA violations. *See also J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). Based on the conditions in which employees were working, I agree with the Secretary's determination that the condition had high severity and greater probability. (Tr. 75.) I also agree that AJP deserves no adjustment for prior history or good faith. (Tr. 73-76.) While AJP itself may not have been cited for earlier OSHA violations, several companies owned and operated by Michael J. Polites, AJP's principal, have been cited for many OSHA violations, including fall protection. (C-6.) There is undeniable similarity between AJP and these other companies–Polites Construction, MJP Construction and Major–all of which have essentially the same officers, management, business purpose and type of operation.[9] (Tr. 311-12; C-6, C-10.) In reviewing the extensive history of OSHA violations of

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[7]While there is no evidence that AJP took any reasonable steps to discover safety violations, the evidence shows that Keith Healy, the general contractor's assistant superintendent, personally observed safety violations and took steps to inform AJP of them, including speaking to Mr. Polites and writing memos to the company. (Tr. 336-52.) Mr. Healy specifically testified that he saw various employees, including supervisors, working without fall protection. (Tr. 340-44, 352.) In addition, a review of C-3 shows that most of the safety memos Mr. Healy wrote to AJP had to do with fall hazards. AJP did not rebut this evidence, and it offered nothing to demonstrate what measures it took to discover safety violations or what actions it took after learning of such violations.

[8]While the citation alleges that a fall from the outside edge to the ground below was about 40 feet, CO Nies testified that the two employees on the scaffold could have fallen more than 10 feet. (Tr. 58.) Despite this discrepancy, the violation is properly classified as serious because a fall from either distance could cause serious injury or death.

[9]It is noteworthy that the general contractor, AJD Construction, did not know that AJP was working at the site. (Tr. 318-20.) According to AJD officials, AJD subcontracted the concrete super

these companies, I conclude that the purposes of the Act would be best served by if the previous OSHA violations of these companies are considered in assessing the penalty for this item. Likewise, no credit will be given for good faith, in light of the company's continued refusal to take steps to protect its employees from fall hazards.[10] For these reasons, the proposed penalty of $4,000.00 for this item is assessed.

***Docket No. 01-0568 - Citation 1, Item 2***

Item 2 alleges a serious violation of 29 C.F.R. § 1926.501(b)(1), which provides that "each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." In instance 2a, the Secretary alleges that on October 3, 2000, AJP employee Shawn Flynn was walking near an unprotected edge on the fourth floor and was exposed to a fall of 9 feet, 9 inches. AJP argues that this standard is not applicable because Mr. Flynn was part of the leading edge crew. (R. Brief at pp. 11-12.) CO Jensen testified Mr. Flynn was a rigger and not part of the leading edge crew. (Tr. 13-14, 30.) Further, Mr. Buttino, the carpentry foreman, admitted that he did not know if Mr. Flynn was doing leading edge work at the time of the alleged violation. (Tr. 419-20.) I find that the cited standard applies.

I also find that AJP did not comply with the terms of the standard, that employees were exposed to the hazard, and that AJP had knowledge of the violation. CO Jensen testified that he observed Mr. Flynn walk within 2 inches of an unprotected edge without fall protection. (Tr. 13-14, 29-30.) In light of the CO's credible testimony and AJP's failure to present any rebuttal evidence, Mr. Flynn was exposed to the cited hazard and AJP violated the terms of the standard. As to knowledge, CO Jensen stated that two AJP supervisors were present at the time of the

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structure work to Major, and AJD was not even aware that Major had subcontracted the work to AJP until the OSHA investigation began. *Id.* Prior to this time, AJD had directed all correspondence and contact about the project to Michael Polites and Major. (Tr. 321, 333, 338, 340-41, 348-49.)

[10]The Secretary did accord a 20 percent credit for size, which is appropriate in light of the size of AJP's business. Moreover, I conclude that the adjustments made to the penalty for this item are appropriate for all of the affirmed items in this case, including those in Docket No. 01-1474.

violation. (Tr. 13-14.) As found *supra*, AJP clearly had knowledge of the violative condition and could have foreseen and prevented the condition with the exercise of reasonable diligence. This violation was properly classified as serious, since either serious injury or death was possible if an accident had occurred. Item 2a is thus is affirmed as a serious violation.

In instance 2b, the Secretary alleges that on October 5, 2000, two employees working on the third floor with improperly anchored personal fall protection equipment were exposed to falls of 40 feet. After a careful review of the testimony of both COs, I conclude that neither CO specifically addressed this instance at the hearing. Without other evidence to support the alleged violation, I find the Secretary has not met her burden of proving the cited instance. Item 2b is therefore vacated.

Having affirmed Item 2a and vacated Item 2b, I note that the Secretary has proposed a total penalty of $2,800.00 for these two instances. Based on this fact, and in accordance with the penalty discussion set out in Item 1 above, I conclude that a penalty of $1,400.00 is appropriate for Item 2a. A penalty of $1,400.00 is consequently assessed for this item.

***Docket No. 01-0568 - Citation 1, Item 4b***

Item 4b alleges a serious violation of 29 C.F.R. § 1926.502(g)(1), which states that "[w]hen used to control access to areas where leading edge and other operations are taking place the controlled access zone shall be defined by a control line or by any other means that restricts access." I find that the standard applies and that AJP violated the terms of the standard. According to AJP's fall protection plan, it was the company's intention to use controlled access zones ("CAZs") to restrict access to leading edge areas. (C-4.) CO Nies testified that on October 24, 2000, he observed that AJP had not used a control line or other means to restrict access to areas where leading edge work was in progress. (Tr. 81-82, 137-46.) In particular, the CO saw four ironworkers performing non-leading edge work inside the area that should have been designated as a CAZ. (Tr. 83, 120-21, 136-37.) While Mr. Buttino disputed the CO's observations, he did not testify that he actually saw the alleged violation and relied instead upon his review of the CO's videotape. (Tr. 405-10.) I find CO Nies' first-hand observations more reliable than Mr. Buttino's analysis of a videotape, and I have already found CO Nies to be more credible than the witnesses offered by AJP. AJP failed to present anything to rebut the

Secretary's evidence, and I find that the standard was violated.

I further find that employees were exposed to the hazardous condition. Under the multi-employer work site doctrine, the Secretary need not show that AJP's employees were exposed; rather, where an employer controlled an area and was responsible for its maintenance, the Secretary need only show the violation occurred and that the area of the violation was accessible to employees of the cited employer or those of other employers engaged in a common undertaking. *Brennan v. OSHRC*, 513 F.2d 1032, 1038 (2d Cir. 1975); *Anning-Johnson*, 4 BNA OSHC 1193, 1199 (No. 3694, 1976). It is undisputed that AJP's leading edge crew was in control of the area and responsible for its maintenance, as evidenced by the presence of leading edge foreman Phil Miller. (Tr. 83-84, 137-41.) The four ironworkers, who were not part of the leading edge crew, had access to the area, as observed by CO Nies. *Id.* This evidence is sufficient to meet the Secretary's burden in regard to exposure.

As to knowledge, Mr. Miller was present at the location where the violation took place. Furthermore, as noted above, the record is devoid of any evidence that these acts were contrary to a consistently enforced company policy, that supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by supervisors. I conclude, therefore, that AJP had knowledge of the violative condition and that it could have foreseen and prevented the condition with the exercise of reasonable diligence. I also conclude that this violation was properly classified as serious, since serious injuries or death were possible if an accident had occurred. Item 4b is consequently affirmed as a serious violation. After giving due consideration to the gravity of the violation, and based on the penalty discussion set out above, I find the proposed penalty of $2,800.00 to be appropriate. That penalty is accordingly assessed.

***Docket No. 01-0568 - Citation 1, Item 5***

Item 5 alleges a serious violation of 29 C.F.R. § 1926.503(a)(1), which provides that "[t]he employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards." I find that the cited standard applies and that AJP violated the terms of the standard. Mr. Polites told

CO Nies at least three times that he intended to bring someone in to conduct training on fall protection. (Tr. 100, 146-49.) In addition, COs Jensen and Nies testified employees told them that they had not received training for fall hazards. (Tr. 19-24, 34-36.) Specifically, three carpenters, George Dean, Bird Hagopin and Joe Fazio, told the COs that they had not received fall protection training. (Tr. 20-21, 90-92.) AJP laborer foreman DeMarco also testified that he had not had any training in fall hazards and fall protection and that he had not seen anyone providing such training; he further testified that he had not seen nor received a copy of the fall protection plan. (Tr. 358-59.) Foreman Buttino and Mr. Scerbo, the laborer shop steward, disputed the foregoing and described 10-to-15-minute toolbox safety meetings held weekly or biweekly. (Tr. 390-96, 416-18, 427-31, 456-60; R-3.) Mr. Scerbo, however, was never given any safety training by AJP. (Tr. 459-60.) Moreover, in reviewing the descriptions of these meetings, I find that they do not meet the requirements of the standard. Without more, weekly or biweekly meetings of 10 to 15 minutes are insufficient to train employees to recognize the fall hazards to which they will be exposed and the procedures to follow to minimize such hazards. This conclusion is supported by the other affirmed violations in this case and by employee responses to the COs' questions about fall protection, as set out below.

AJP provided harnesses and lanyards to employees but failed to train its employees in the use of the equipment. When the COs asked about wearing fall protection equipment, the employees' answers indicated a lack of adequate training. (Tr. 19-21, 90-92; 215.) Two employees, Mr. Hagopin and Mr. Fazio, told CO Nies that no one had told them how to properly use their harnesses, lanyards and horizontal cable lifeline. (Tr. 91-92.) Foreman DeMarco himself did not have knowledge about the different lifelines, despite Mr. Polites' statement that it was the foreman's duty to train the employees. (Tr. 369.) Based on the evidence, it would appear that the extent of AJP's instructions to employees about this equipment was to wrap it around or tie it off to an interior column. (Tr. 91-92, 367-68, 416-18, 511.) AJP's instructions were clearly inadequate, and I find that the company failed to meet the terms of the standard.

I further find that employees were exposed to the cited condition and that AJP had knowledge of the condition. As noted above, Foreman DeMarco stated that there was no fall hazard or fall protection training. (Tr. 358-59.) In addition, Mr. Polites' admission that he

intended to train all employees in fall hazards and fall protection implies that such training was nonexistent or inadequate. (Tr. 100, 146-49.) Even if AJP did not have actual knowledge of the violation, it should have discovered the violation with the exercise of reasonable diligence. The Secretary has met her burden of showing the alleged violation, and this item is affirmed.

This violation has been properly classified as serious, in that serious injuries or death were possible consequences. After giving due consideration to the high gravity of the violation, and in accordance with the penalty discussion *supra*, I conclude that the Secretary's proposed penalty of $4,000.00 is appropriate. A penalty of $4,000.00 is therefore assessed.

***Docket No. 01-1474 - Citation 1, Item 1***

Item 1 alleges a serious violation of 29 C.F.R. § 1926.451(f)(7), which states that "[s]caffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. Such activities shall be performed only by experienced and trained employees selected for such work by the competent person." As a preliminary matter, I note that this citation item and four of the five that follow refer to hazards related to work on an "outrigger scaffold." AJP argues that the cited work platform does not meet the standard's definition of an "outrigger scaffold," implying that, as a consequence, the cited standards are not applicable.[11]

29 C.F.R. § 1926.450(b) defines an outrigger scaffold as "a supported scaffold consisting of a platform resting on outrigger beams (thrustouts) projecting beyond the wall or face of the building or structure, the inboard ends of which are secured inside the building or structure." The standard further defines an outrigger beam (thrustout) as "the structural member of a suspension

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[11]First, this item and the others that refer to an outrigger scaffold cite to the general scaffolding requirements set out in 29 C.F.R. § 1926.451 and not to the requirements that specifically relate to outrigger scaffolds set out in 29 C.F.R. § 1926.452(i). Second, if AJP's argument is that it somehow did not have fair notice of what it was being cited for because OSHA referred to the work platform as an outrigger scaffold, that argument is rejected, particularly since the evidence of record supports a finding that the cited work platform was in fact an outrigger scaffold. Finally, I also reject AJP's apparent argument that because the work platform did not meet§ 1926.452(i), it was not an outrigger scaffold. (R. Brief at pp. 22-23; Tr. 290-93.) That the platform did not meet § 1926.452(i) is evidence that it was not in compliance with OSHA standards, not that it did not fall within the definition of an outrigger scaffold.

scaffold or outrigger scaffold by extending the scaffold point of attachment to a point out and away from the structure or building." Two witnesses described the platform as being 16 feet long and 8 feet wide. (Tr. 262-66, 290, 297-04, 385-87; C-1.) According to these witnesses, seven to nine pieces of timber were placed such that 8 feet projected out beyond the face of the structure and 8 feet were secured inside the building. *Id.* 5-inch plywood was nailed on top of the timbers, and the platform was secured inside the building with another piece of timber and screw jacks between the platform and concrete ceiling. *Id.* Based on this description, I find that the subject platform was an outrigger scaffold as contemplated by the standard, and AJP's apparent argument that the cited standards did not apply is rejected.

Having found that the cited standard applies, I further find that AJP failed to comply with the terms of 29 C.F.R. § 1926.451(f)(7). CO Nies testified that several AJP supervisors and officers told him that Louis DeMarco, the laborer foreman, supervised the scaffold's construction. (Tr. 198-99, 209, 276, 279-80, 360-61.) Mr. DeMarco testified that Michael Polites told him to use "four by sixes, 16 footers and plywood and to secure it ... with screw jacks to the ceiling." (Tr. 199-02, 360-61, 370.) Mr. DeMarco was not shown a diagram or design of the scaffold, nor was he given specific instructions as to how to build the scaffold. (Tr. 360-61, 370.) Further, he could not answer the CO's basic questions about scaffold construction. (Tr. 200, 215.) This evidence plainly demonstrates that Mr. DeMarco was not a "competent person qualified in scaffold erection, moving, dismantling or alteration." AJP attempts to assert that the carpenters were in charge of these matters, asserting, specifically, that Steve Pitoniac, the stair foreman, was in charge of supervising the building of the scaffold.[12] (R. Brief at pp. 24-27; Tr. 274-75, 384-85, 389-90.) I find the testimony of CO Nies and Mr. DeMarco more credible than Mr. Buttino's statement that Mr. Pitoniac was responsible for supervising the building of the scaffold.[13] Based on the foregoing evidence, the Secretary has established her burden of proving

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[12]This argument is contrary to a statement of Dong Lee, a management official of AJP, that Anthony Buttino was in charge of constructing the scaffold. (C-7.) Mr. Buttino, however, testified that he had limited scaffolding experience. (Tr. 476-77.)

[13]As noted in footnote 4, I found CO Nies a credible witness. I also find Mr. DeMarco's testimony credible, based on his opportunity and capacity to observe, his lack of bias, the consistency

that AJP violated the terms of the standard.

The Secretary has also shown that AJP's employees were exposed to the cited condition and that AJP had the requisite knowledge of condition. (Tr. 507-08, 533-34.) It is undisputed that at least three laborers, Daniel Giordano, James Sherengo and James Johnson, worked on the scaffold regularly and were exposed to the hazard. Moreover, these scaffolds were built in plain view and with the knowledge of AJP's supervisors, and, as discussed *supra,* AJP clearly could have foreseen and prevented the violation with the exercise of reasonable diligence. This citation item is accordingly affirmed.

The Secretary has properly classified this item as serious, since serious injuries or death were possible had the violation resulted in an accident. As to penalty assessment, I have given due consideration to the gravity of the violation, and, in light of the penalty discussion set out above, I find the proposed penalty of $2,000.00 appropriate. The proposed penalty is therefore assessed.

***Docket No. 01-1474 - Citation 1, Item 3***

Item 3 alleges a serious violation of 29 C.F.R. § 1926.451(h)(1), which provides as follows:

> [i]n addition to wearing hardhats each employee on a scaffold shall be provided with additional protection from falling hand tools, debris, and other small objects through the installation of toeboards, screens, or guardrail systems, or through the erection of debris nets, catch platforms, or canopy structures that contain or deflect the falling objects. When the falling objects are too large, heavy or massive to be contained or deflected by any of the above-listed measures, the employer shall place such potential falling objects away from the edge of the surface from which they could fall and shall secure those materials as necessary to prevent their falling.

I find the cited standard applies and that AJP violated the terms of the standard. The evidence clearly shows that AJP stacked large wood form materials in a cantilevered manner over the edge of the building. (Tr. 203-08, 240-42, 245-46, 459, 561-62; C-1.) The record further shows that, on the day of the accident, an AJP laborer working on the twelfth floor saw a crane rigging contact a stack of the wood form cantilevered materials on that floor. The materials fell from the

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of his testimony with other evidence and his demeanor while testifying.

twelfth floor onto the seventh floor outrigger scaffold where AJP employee Sherengo was working. The scaffold then collapsed and fell, landing on the fourth floor, and Mr. Sherengo died as a result. (Tr. 206-07, 247-48.) It appears from the record that the cantilevered materials were too large to be contained or deflected as set out in the standard, and AJP should therefore have placed them away from the edge of the building and secured them to prevent their falling. However, AJP failed to take any of the measures outlined in the standard, and Foreman DeMarco told the CO that there were no procedures in place for stacking materials. (Tr. 204-08.) Based on the record, AJP violated the terms of the standard.

The record also establishes that employees were exposed to the hazardous condition and that AJP had knowledge of the condition. It is undisputed that Mssrs. Sherengo and Giordano were exposed to falling objects, and two supervisors, Mr. Polites and Foreman DeMarco, said it was normal for AJP to stage materials in this manner. (Tr. 207-08, 459.) Even if AJP did not have actual knowledge of this condition, it could have foreseen and prevented the condition through the exercise of reasonable diligence. I agree with the Secretary's serious classification of the violation because serious injuries or death were possible as demonstrated by the accident. This item is consequently affirmed as a serious violation. After giving due consideration to the high gravity of the violation, and based on the penalty discussion set out *supra*, I conclude that a penalty of $5,600.00 is appropriate for this item. A penalty of $5,600.00 is accordingly assessed.[14]

***Docket No. 01-1474 - Citation 1, Item 4***

Item 4 alleges a serious violation of 29 C.F.R. § 1926.452(i)(8), which requires "[s]caffolds and scaffold components [to] be designed by a registered professional engineer and [to] be constructed and loaded in accordance with such design." The cited standard applies, and I find that AJP violated the terms of the standard. The record clearly shows that the outrigger scaffold that AJP used was not "designed by a registered professional engineer and constructed

[14]I have noted the Secretary's assertion that no penalty adjustments are appropriate, even for size, for the items relating directly to the fatality. (C. Brief at p. 59.) However, the Commission is the final arbiter of penalties in contested cases and is not bound by the Secretary's proposed penalties. As set out *supra*, in Docket No. 01-0568, I conclude that a 20 percent reduction for size is appropriate for all of the penalties assessed in this case.

and loaded in accordance with such design." Mr. Polites admitted to OSHA that he did not know who designed the scaffold and that it was "something that [they] were using for years and years." (C-6.) Dong Lee, the only engineer employed by AJP, stated that no one designed the scaffold. (C-7.) As noted previously, Foreman DeMarco was responsible for constructing the outrigger scaffold and received little instruction from anyone, other than Mr. Polites and Mr. Lee, in that regard. (Tr. 199-02, 350-61, 370.) It is reasonable to infer from this that Mr. DeMarco did not construct the scaffold according to a design prepared by a registered professional engineer. AJP thus violated the cited standard.

I further find that employees were exposed to the cited condition and that AJP had knowledge of the condition. It is undisputed that employees were exposed when working on the scaffold, and the record supports the Secretary's assertion that AJP had actual knowledge of the violation. (Tr. 507-08, 533-54.) None of AJP's witnesses and management officials denied knowing that the scaffold was not designed by a registered professional engineer and constructed according to such a design, and it was AJP's management officials and supervisors who were in the best position to know whether the scaffold was in compliance with OSHA standards. I find, therefore, that the Secretary has satisfied her burden of proving the alleged violation, and this item is affirmed. I agree with the Secretary's classification of the violation as serious because serious injury or death were possible consequences of an accident. In regard to penalty, I have given due consideration to the gravity of the violation, and, in accordance with the penalty discussion set out *supra*, I conclude that the proposed penalty of $2,000.00 is appropriate. The proposed penalty of $2,000.00 is accordingly assessed.

***Docket No. 01-1474 - Citation 1, Item 5***

Item 5 alleges a serious violation of 29 C.F.R. § 1926.454(a), for failing to provide training by a qualified person to employees working on scaffolds.[15] The cited standard applies,

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[15]The standard provides: "The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. The training shall include the following areas, as applicable: (1) The nature of any electrical hazards, fall hazards and falling object hazards in the work area; (2) The correct procedures for dealing with electrical hazards and for erecting, maintaining, and disassembling the fall protection

and I find that AJP violated the terms of the standard. In addition to the evidence set out above for Citation 1, Item 5, in Docket No.01-0568, the record contains further evidence that AJP did not provide specific training for employees working on the outrigger scaffold. CO Nies and Foreman DeMarco both testified that Mr. DeMarco did not have any formal or informal training for scaffolds or outrigger scaffolds. (Tr. 199-200, 212, 215, 358-62, 460.) Foreman DeMarco also lacked basic knowledge about working on the scaffold, including fall protection and maximum load capacity for the scaffold. *Id.* Despite Foreman DeMarco's lack of training and knowledge in this regard, Mr. Polites told CO Nies that it was the foreman's responsibility to provide training and enforce fall protection. (Tr. 215.) As a foreman and the immediate supervisor of the three employees who were working on the scaffold, Mr. DeMarco was himself not trained to recognize the hazards associated with the outrigger scaffold and to understand the procedures to control or minimize those hazards; therefore, he could not be the "qualified person" under the standard to train laborers on the hazards associated with the scaffold. Further, CO Nies testified that the employees who were working on the scaffold could not answer his questions about correct procedures and weight limitations, and one of the laborers supervised by Foreman DeMarco testified that he never received specific training in working on the outrigger scaffold. (Tr. 211, 511-12.) In view of the record, AJP was in violation of the standard.

The Secretary has also satisfied the other elements of her burden of proof. It is undisputed that at least three employees worked out on the outrigger scaffold and were thus exposed to the cited condition. (Tr. 507-08, 533-34.) As to knowledge, Foreman DeMarco admitted that employees, himself included, had not been trained on outrigger scaffolds. (Tr. 361-63.) However, even if AJP did not have actual knowledge of the violation, it should have discovered the condition with the exercise of reasonable diligence since employee training is within its control. This item is affirmed, and I agree with the Secretary's serious classification of the violation. After giving due consideration to the high gravity of the violation, and in light of the penalty discussion set out above, I conclude that the proposed penalty of $4,000.00 is appropriate. The

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systems and falling object protection systems being used; (3) The proper use of the scaffold, and the proper handling of materials on the scaffold; (4) The maximum intended load and the load-carrying capacities of the scaffolds used; and (5) Any other pertinent requirements of this subpart."

proposed penalty is accordingly assessed.

***Docket No. 01-1474 - Citation 1, Item 6b***

Item 6b alleges a serious violation of 29 C.F.R. § 1926.501(b)(1), which provides that "[e]ach employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." The cited standard applies, and I find that AJP violated the terms of the standard. The CO testified that three employees, Messrs. Sherengo, Giordano and Johnson, were at an unguarded edge on the seventh floor, and it is undisputed that there were no guardrail, safety net or personal fall arrest systems in use at the time of the accident on January 30, 2001. (Tr. 216-21.) AJP argues that because the employees were out on the work platform rather than in the building while waiting for the mud buggy to land, they were not exposed to the unprotected edge of the building. (R. Brief at pp. 34-35.) According to Third Circuit and Commission precedent, the Secretary does not need to show actual exposure, but, rather, "access" to danger. *See Adams Steel Erection*, 766 F.2d 804 (3d Cir. 1985); *Phoenix Roofing, Inc.*,17 BNA OSHC 1076, 1079 (No. 90-2148), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). In the subject case, the Secretary does not need to show that employees were actually standing at the unprotected edge of the building, but only that employees had access to an area of potential danger. The evidence clearly establishes that employees had such access because they were working at and around the unprotected edge and were therefore exposed to the hazard.[16]

I further find that the Secretary has established that AJP had knowledge of the violative condition. Even if AJP did not have actual knowledge of this specific instance, it could have foreseen and prevented the hazardous condition through the exercise of reasonable diligence. As found above, AJP's policy regarding fall protection was inadequate and it was inadequately communicated to employees. Despite repeated warnings from the general contractor that AJP

[16]At the hearing, the Secretary made an offer of proof of a videotape recording of Al Hanovic in support of CO Nies' testimony regarding the location of the three employees on the day of the accident. I did not give any weight to this offer of proof in reaching my findings for this cited violation.

employees were working without fall protection, there is no evidence that AJP took any reasonable steps to discover these repeated safety violations or that it took any action to correct or prevent future fall hazards. Based on this evidence, I conclude that AJP had knowledge of the violation and this item is therefore affirmed. I agree with the Secretary that the violation was serious, in that falls from the unprotected edge could have resulted in serious injuries or death. In regard to penalty, I have considered the high gravity of the condition, and, in accordance with the penalty discussion set out *supra*, I conclude that a penalty of $5,600.00 is appropriate. A penalty of $5,600.00 is consequently assessed for this item.

***Docket No. 01-1474 - Citation 2, Item 1***

This item alleges a willful violation of 29 C.F.R. § 1926.451(g)(1)(vii), which states that "[f]or all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section." Paragraphs (g)(1)(i)-(vi) provide for various types of scaffolds, but do not refer specifically to baker or mobile scaffolds. Paragraph (g)(1)(vii), however, states that "[f]or all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section." The cited standard applies, and I find that AJP violated the terms of the standard. It is undisputed that guardrail systems were not in place on the outrigger scaffold in use at the site. (Tr. 228–29.) It is further undisputed that the three employees on the outrigger scaffold were not wearing any fall protection on January 30, 2001. (Tr. 460-62, 515-16, 540-42.) The evidence clearly demonstrates that these employees were exposed to a fall hazard. The only issue left to be resolved, in determining whether the Secretary has established her burden of proving the alleged violation, is whether AJP had the requisite knowledge of the hazardous condition.

I find that the Secretary has shown by a preponderance of evidence that AJP had knowledge of the violation. AJP asserts the three employees were issued fall protection equipment and that it had never seen them on the work platform without appropriate fall protection. (R. Brief at pp. 39-40; Tr. 435.) Specifically, Shop Steward Scerbo testified that he

had never seen employees working on the platform without being hooked up. (Tr. 435.) However, Keith Healy, an employee of the general contractor, directly contradicted Mr. Scerbo's testimony, stating that he had observed AJP employees not wearing fall protection on the platform on numerous occasions. (Tr. 338-44.) He also testified that he warned AJP repeatedly about the employees' failure to wear fall protection. (Tr. 338-51; C-3.) Based on Mr. Healy's opportunity and capacity to observe, the consistency of his testimony, his lack of bias, and the overall reasonableness of his testimony, I find him a more reliable and credible witness than Mr. Scerbo. I conclude, therefore, that AJP had actual knowledge of the violation.

AJP asserts that the violation was a result of unpreventable employee misconduct. However, the evidence of record does not support this assertion. First, R-1, Major's Safety Manual, and C-4, AJP's fall protection plan, contain nothing to show that AJP had established work rules designed to prevent the violation. Second, even if AJP had such work rules in place, there was inadequate communication to employees in light of the limited training AJP provided its workers.[17] Third, AJP has failed to identify any specific steps it took to discover violations. Finally, no evidence was presented to show that AJP enforced its work rules when violations were discovered. In view of the foregoing, the Secretary has established the alleged violation.

The Secretary has classified this item as willful. The Third Circuit has held that "[w]illfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission–it involves an element of obstinate refusal to comply."[18] *Frank Irey, Jr. Inc. v. OSHRC*, 519 F.2d 1200 (3d Cir. 1974), *aff'd en banc*, *id.* at 1215, *aff'd sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977). A review of the record demonstrates that AJP

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[17]*See* Citation 1, Item 5 of Docket No. 01-0568, *supra*.

[18]However, as the Third Circuit noted in *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160 (3d Cir. 1980), this definition of willful bears little difference from the other circuits:

> [A]n "intentional disregard of OSHA requirements" differs little from an "obstinate refusal to comply;" nor is there in context much to distinguish "defiance" from "intentional disregard." "Flaunting the act" or "flouting it," as some would say, again carries the same meaning....[T]he same results would likely be reached in various cases...regardless of the verbiage utilized.

obstinately refused to comply with the requirements of the Act. Based on previous violations of companies owned and/or managed by AJP's officers, Mr. Polites and Mr. Lee clearly were aware of the Act's requirements with respect to fall protection. They were intimately involved in the day-to-day operations of several of companies, including Polites Construction and MJP Construction, in which OSHA issued citations for fall hazards.[19] Despite this knowledge, AJP carried out its operations at the site with employees exposed to fall hazards. AJP knew from safety memos and discussions with the general contractor that fall protection was an ongoing problem at the site and yet could not articulate any measures that it took to address or correct the problem, thus unequivocally demonstrating the company's plain indifference to employee safety. (C-3.) Moreover, the accident that resulted in the fatality of an employee was a direct result of AJP's "knowing, conscious, and deliberate flaunting of the Act." This item is accordingly affirmed as a willful violation.

In regard to penalty, and in accordance with the penalty discussion set out in Docket No. 01-0568, I conclude that some adjustment is appropriate for size. *See Fiore Const. Co., Inc.*, 19 BNA OSHC 1408, 1410 (No. 99-1217, 2001). However, AJP merits no other adjustments to penalty, in light of its history of OSHA violations and its lack of good faith. After giving due consideration to these factors and particular consideration to the high gravity of this violation, I conclude that a high penalty assessment is necessary in this case to induce future compliance and to serve the remedial purposes of the Act. *See Revoli Constr. Co.*, 19 BNA OSHC 1682, 1687 (No. 00-0315, 2001); *E.L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2052-53 (No. 92-35, 1994). For these reasons, I find that a penalty of $56,000.00 is appropriate for this item. A penalty of $56,000.00 is accordingly 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).

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[19]*See* penalty discussion in Citation 1, Item 1, in Docket No. 01-0568, for further explanation of the company's prior history, and the relationship between AJP and other companies owned and operated by Michael J. Polites.

***ORDER***

Based upon the foregoing, it is hereby ORDERED that:

Docket No. 01-0568:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.451(g)(3), is AFFIRMED, and a penalty of $4,000.00 is assessed.

2. Citation 1, Item 2a, alleging a serious violation of 29 C.F.R. § 1926.501(b)(1), is AFFIRMED, and a penalty of $1,400.00 is assessed.

3. Citation 1, Item 2b, alleging a serious violation of 29 C.F.R. § 1926.501(b)(1), is VACATED.

4. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1926.501(b)(4)(i), is VACATED.

5. Citation 1, Item 4a, alleging a serious violation of 29 C.F.R. § 1926.502(g)(1), is VACATED.

6. Citation 1, Item 4b, alleging a serious violation of 29 C.F.R. § 1926.502(g)(1), is AFFIRMED, and a penalty of $2,800.00 is assessed.

7. Citation 1, Item 5, alleging a serious violation of 29 C.F.R. § 1926.503(a)(1), is AFFIRMED, and a penalty of $4,000.00 is assessed.

Docket No. 01-1474:

8. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.451(f)(7), is AFFIRMED, and a penalty of $2,000.00 is assessed.

9. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.451(f)(9), is VACATED.

10. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1926.451(h)(1), is AFFIRMED, and a penalty of $5,600.00 is assessed.

11. Citation 1, Item 4, alleging a serious violation of 29 C.F.R. § 1926.452(i)(8) , is AFFIRMED, and a penalty of $2,000.00 is assessed.

12. Citation 1, Item 5, alleging a serious violation of 29 C.F.R. § 1926.454(a), is AFFIRMED, and a penalty of $4,000.00 is assessed.

13. Citation 1, Item 6a, alleging a serious violation of 29 C.F.R. § 1926.501(b)(1), is

VACATED.

14. Citation 1, Item 6b, alleging a serious violation of 29 C.F.R. § 1926.501(b)(1), is AFFIRMED, and a penalty of $5,600.00 is assessed.

15. Citation 2, Item 1, alleging a willful violation of 29 C.F.R. § 1926.451(g)(1)(vii), is AFFIRMED, and a penalty of $56,000.00 is assessed.

/s/
Covette Rooney
Judge, OSHRC

Dated: December 13, 2002
Washington, D.C.