

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, :
: :
Complainant, :
: :
v. : :
: :
JAN FIVE CORP. d/b/a ALEXANDRA :
CONSTRUCTION, :
: :
Respondent. :

DOCKET NO. 03-0694

Appearances:

James Glickman, Esquire
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Scott K. DeMello, Esquire
Newton, Massachusetts
For the Respondent.

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Procedural Background

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 Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a high school additions and renovations project in Westwood, Massachusetts during October 2002 after a 55-foot steel column collapsed at the site right after it was set in place; the column collapsed on October 1, 2002, and OSHA began its inspection on October 4, 2002. As a result of the inspection, OSHA issued citations to the above-referenced Respondent. Specifically, Alexandra Construction (“Alexandra”) was issued a one-item “other” citation alleging a violation of 29 C.F.R. § 1926.350(a)(9) and a three-item willful citation alleging violations of 29 C.F.R. §§ 1926.752(a)(1), 1926.752(a)(2) and 1926.755(b)(1). Alexandra filed a timely notice of

contest, bringing this matter before the Commission.¹ Following a hearing in this case in Boston, Massachusetts, both parties have submitted post-hearing briefs and the Secretary has submitted a reply brief.

Jurisdiction

At all times relevant to this action, Alexandra maintained a work site at the Westwood High School in Westwood, Massachusetts, where it was the general contractor of the additions and renovations project taking place at the school. The Commission has held that construction is in a class of activity that as a whole affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). In addition, Alexandra admits in its Answer that it is a business subject to the Act and that the Commission has jurisdiction of this matter. I find, therefore, that Alexandra is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, and I conclude that the Commission has jurisdiction of this action.

Factual Background

The essential facts are as follows.² The Westwood High School project involved the construction of a new school building and the renovation of the existing building. Kaestle Boos Associates (“KBA”), an architectural firm, was engaged to design the project and to provide construction administration services. Laurence Trim, a project architect for KBA, was responsible for the entire project from start to finish. Other KBA employees involved were Edward Monahan, the construction administrator, and Edward Cifune, the “job captain.” Monahan was responsible for the project’s paperwork and for recording and transcribing the minutes of the weekly job meetings held at the site, while Cifune was responsible for assisting Trim. Trim, Monahan and Cifune attended the weekly job meetings and also usually walked the project to observe its progress when they went to the site for the job meetings. (Tr. 38-39, 311-12, 315-18, 330-31, 399-405, 449-55).

¹As Alexandra did not contest the “other” citation, that citation is not before me.

²Although Alexandra disputes certain of these facts, my determination that these are the essential facts in this case is based on the record as a whole and on my credibility findings set out in the discussions relating to the specific citation items, *infra*. Furthermore, all findings of fact necessary for a determination of all relevant issues have been made in this decision, *see* Fed. R. Civ. P. 52(a), and any proposed findings of fact inconsistent with this decision are denied.

KBA hired Odeh Engineers (“Odeh”), an engineering firm, to provide the structural design and drawings for the project. Larry Marini, a senior structural engineer with Odeh, was the structural engineer of record for the project. Marini developed most of the structural design for the project, and he and others in his office developed the drawings. Marini was also responsible for conducting site inspections, answering questions from KBA and the contractors, and reviewing and approving shop drawings and requests for changes submitted by the contractors. (Tr. 35-41, 45-48, 69-76).

Allan Miller was the “clerk of the works” for the project.³ His duties involved walking the site on a continuous basis, recording the daily events that took place during the project, and attending the weekly job meetings. Miller was also responsible for maintaining a full set of the plans and specifications for the project, marking them as changes were made during construction, and verifying that the requirements of the plans and specifications were being met. (Tr. 496-501, 507).

Alexandra was the general contractor of the Westwood High School project, and the Alexandra employees involved with the project included Ronald Collins, the project manager, David Pilcher, the on-site project manager, Daniel Campbell, the job superintendent, Tahir Dizdari, the assistant superintendent, Daniel Turcotte, the job site foreman, and Edmund Norton, the safety manager. Alexandra subcontracted the concrete and foundation work to Epernay Design and Construction (“Epernay”), and William Baldwin was Epernay’s foreman at the site. Alexandra subcontracted the structural steel fabrication and erection work to Trimax Steel (“Trimax”); Trimax, in turn, subcontracted the steel erection work to Construction Welding Services (“CWS”), and Mo Luckern was Trimax’s representative at the site. At some point in September 2002, both CWS and Luckern left the project, after which Trimax hired Northern Construction Dynamics (“NCD”) to perform the steel erection. Marc Chauvin is NCD’s president. (Tr. 800-01, 807-08, 896-97, 903, 973, 989). *See also* Stip. Nos. 1-4, 15-16.⁴

³The Permanent Building Committee of the town of Westwood hired Miller to be the clerk of the works; the committee also hired KBA to work on the project. (Tr. 315, 498-99).

⁴The parties’ amended joint pre-hearing statement includes, on pages 9-12, a number of agreed-upon facts; in this decision, each of these is referred to as “Stip. No. ____.”

When excavation of the site began in March of 2002, it was discovered that much of the soil was “unsuitable.”⁵ That soil thus had to be removed and replaced with suitable soil, and, while Alexandra was compensated for this work, it caused the project to be set back three to five months. Further, when the foundation work began, Baldwin and his foundation crew made measuring errors, causing certain concrete walls and piers to be poured in the wrong places in Area A.⁶ The errors also caused anchor bolts in at least 20 column areas to be set in incorrect locations. One of these was the Column M-1 area (“M-1”), which was located at the rear of the auditorium, stage right; the four anchor bolts at M-1 were in the wrong locations as the pier had been poured 2 inches too short.⁷ (Tr. 52, 77-82, 97, 332, 386-88, 454, 500-01, 545, 744-45, 811-12, 815-18). *See also* Stip. Nos. 5-6, 12.

Anchor bolts are the structural components that serve to attach a steel column to the concrete foundation, and anchor bolts are particularly important during erection, when they are the only things holding up the column. The design for the project required the anchor bolts to be set into the piers when the concrete was poured, and their precise placement was essential for the steel to be erected properly.⁸ It was also essential to use the anchor bolts specified, which, in the case of M-1, were 30 inches long (to be embedded 26 inches in the concrete) with a 4-inch threaded top and a head at the bottom to prevent the bolt from being pulled out; the column to be set at M-1, however, was one of the largest and tallest of the columns to be used at the site, and specifications for the anchor bolts varied at different locations, depending upon the size of the column and the load it would bear. (Tr. 41-43, 54-66, 92-94, 366-67, 570).

⁵All dates herein will refer to the year 2002, unless otherwise stated.

⁶The project consisted of seven areas, referred to as Areas A through G; Area A was the auditorium and the music and art rooms. The discussion herein relates to Area A. (Tr. 39).

⁷Column M-1 is the column that fell on October 1, 2002; it was one of four 55-foot columns that formed the back of the auditorium. *See* Stip. No. 12.

⁸Also used at the site were leveling plates, which would be put on the piers to denote precisely where the columns would go, and a base plate welded onto the bottom of the column would sit on top of the leveling plate. The leveling and base plates at M-1 were to be the same size (1 foot 2 inches square), and both had corresponding holes through which the anchor bolts would fit; further, the bolts were to be 1.5 inches from the leveling plate edges. (Tr. 42, 56-59).

Baldwin's crew made repairs to the anchor bolts in at least the 20 locations referenced above. This was accomplished by cutting off the anchor bolts and placing threaded rod or cut anchor bolts, along with epoxy, into newly-drilled holes in the proper locations; the newly-placed bolts were much shorter than the original 30 inches, and the repairs at M-1 resulted in two of the bolts being set improperly at depths of 3.75 inches and 5.5 to 6 inches, respectively. As to the two other bolts at M-1, two new 30-inch anchor bolts were placed in the proper locations in a 2-inch-wide grout extension that was added on to the pier. The grout, a form of concrete, was not tested for compressive strength prior to the accident on October 1. (Tr. 112-13, 123, 130-31, 596-97, 635-40). *See also* Stip. Nos. 5-6.

The repairs that Baldwin's crew made to the anchor bolts were structural in nature, and, according to the project's procedures, KBA and Odeh were required to approve structural repairs. Exhibit 26, the manual for the project, states at section 05120, paragraph 3.2D: "Do not field cut or alter structural members without approval of Architect." Similarly, Exhibit 92, Alexandra's field manual for superintendents, states on page 13 that "[i]f it should become necessary to cut a structural element, no action is to be taken by any Company personnel and no authorization is to be given to any subcontractor without the prior written approval of the specific cutting by the Owner, Architect and the Owner's or Architect's Engineer." Thus, a contractor intending to deviate from the structural plans and specifications was to propose the modification, usually in the form of a "request for information" ("RFI"), and to provide a sketch or a written description. The RFI went first to KBA, where it was reviewed; the RFI next would go on to Marini, who would review it and approve it or not, after which it would go back to KBA and then on to the contractor. (Tr. 69-75, 78-79, 90, 101-02, 108, 130, 258, 264-65, 324-30, 367-68, 383-85, 504-05, 935-36).

Marini made his first site visit on August 1. He saw several problems he had not been told about, one of which was a concrete wall poured in the wrong place and anchor bolts that were too close to the wall edges; in Exhibit 7, his report to Trim dated August 1, he advised how the contractor should address this problem and the others he had seen.⁹ Monahan had also noticed some problems with anchor bolts at the site, and, at the August 8 job meeting, he asked Alexandra to provide "as-built

⁹Marini generally spoke to a representative of the contractor about any problems he saw before leaving the site; in addition, the field reports that he gave to KBA were passed on to the contractor. (Tr. 79, 84-86).

locations for any [anchor bolts] that [Alexandra] knows are out of tolerance.” Further, Miller had seen some cut-off anchor bolts that looked “suspect,” prompting him to ask, at the August 22 job meeting, “that Odeh’s field inspection include footings, walls, piers, and [anchor bolt] locations.” Alexandra did not provide the information that Monahan had requested before the collapse of Column M-1 on October 1. (Tr. 77-89, 407-08, 511-13; Exh. 34, p. 11, No. 17.17; Exh. 38, p. 11, No. 17.17).

Marini’s next visit was on August 28, when he saw two items he should have been told about; one was a concrete patch on some foundation work that did not meet the structural plans and specifications, and the other was concrete that had been added onto the side of a footing. Marini also looked at M-1 and discussed it with Baldwin, who proposed using a smaller leveling plate to take care of the fact that the M-1 pier had been poured 2 inches too short. Marini replied that he would consider the idea; however, Trimax rejected the idea later that same day, and Marini was aware that Trimax had done so. The grout extension to the M-1 pier was not there on August 28, and Baldwin and Marini did not discuss such an extension. (Tr. 98-111, 255).

On September 5, Monahan and Cifune were at the site and saw Baldwin and a laborer adding a grout extension to the M-1 pier. Monahan and Cifune asked what they were doing, and Baldwin said that they were fixing the foundation and that they were told to perform the work. Monahan and Cifune informed Baldwin that the work was a structural repair and that Marini should be involved. Later that day, Monahan and Cifune talked to Collins about the work they had seen; they told him that it was a structural repair, that KBA had not gotten anything about it, and that the repair did not look proper. Collins responded that he would look into it. (Tr. 409-10, 413-14, 455-63, 473).

Marini made another visit to the site on September 12. He saw that a grout extension had been added to the M-1 pier and that two anchor bolts had been set into the extension; in addition, the four original anchor bolts at M-1 had been cut off, and two more bolts had been drilled into new locations on the pier. Marini had not been told about these fixes and had not approved them. Further, because the work was not done pursuant to the plans and specifications, and because he could not tell what type or how long the new bolts were or what kind of reinforcing steel, if any, was inside the extension, he concluded that the repair work was unacceptable. Marini saw a number of other problems, including about a half dozen more column locations where all four anchor bolts had been cut off and bolts had been drilled into new locations. (Tr. 111-25). Given the filipendulous condition

of a large steel column being erected on pier M-1, as well as the other conditions at the site, Marini issued a letter that very day by fax. (Ex 17)

Marini's field report about this site visit was sent to Trim at KBA; Trim faxed the report and his own cover letter to Collins at Alexandra on September 16. In his report, Marini set out 14 bulleted items detailing the construction problems he had observed. Item 8 addressed the repair work at M-1 and noted it had been done without the general contractor first having submitted sketches of the proposed repair work to the architect/engineer for approval; the item also noted that the repair work appeared unacceptable.¹⁰ Item 14 addressed the various anchor bolts that had been cut off and replaced with drilled-in bolts and stated that the "Architect/Engineer must be informed of all field corrections such as these before any repairs are made." The last page of the report stated that the quality of the foundation construction needed to be improved and recommended that the general contractor provide greater supervision of the concrete contractor; the report also recommended an anchor bolt survey prior to erection. Trim's cover letter requested that Alexandra's plan for correcting "the deficient work" be forwarded to KBA within seven days. In addition, Monahan sent Pilcher an e-mail on September 24, requesting that Alexandra "get something underway as soon as possible re: sketches etc. for any locations where there are problems w/ A.B.'s" and that it "address the issues brought up in Odeh's site visit as quickly as possible." (Tr. 126-36, 344-45, 423-24, Exhs. 18, 27).

Alexandra responded to the 14 items in Marini's report in a memo signed by Pilcher and sent to KBA on September 23; the memo included a sketch for M-1 that proposed two additional anchor bolts, for a total of six, two of which would be set in the grout extension. Baldwin and Dizdari assisted Pilcher with the response, and Campbell reviewed it before it was sent. Marini did not receive the response until October 1 and, accordingly, did not address it until after Column M-1 had fallen. Marini in any case did not agree with the proposed fix set out in the sketch for M-1, particularly since two of the anchor bolts were still shown as being set in the grout extension. Marini also did not have a favorable reaction to the response as to the cutting of anchor bolts and replacing them with drilled-in

¹⁰This item and three other items specifically stated that "[t]he General Contractor must submit sketches to the Architect/Engineer for review and approval of all repair work to correct construction mistakes or errors."

bolts; the response did not include M-1 in the list of locations, and it had insufficient information for him to be able to give his approval. (Tr. 138-44, 250, 907-09, 921, 936-37; Exh. 19).

On September 26 and 27, NCD, the steel erection company that had replaced CWS, was on site. Chauvin, NCD's president, was also on site, and he and his crew were using a large crane to unload the steel and to place it in the locations where it was going to be erected.¹¹ The steel columns that were placed in the auditorium stage area, where M-1 was located, were about 55 feet in length. Chauvin introduced himself to Campbell and Pilcher, and he also met Collins, who indicated to Chauvin that NCD "needed to get going." Chauvin and Campbell walked Area A, and Chauvin told Campbell where he would start erecting, which was in the auditorium stage area, and to keep the trade workers out of the fall radius of the columns. Chauvin then asked if the anchor bolts were where they belonged, and Campbell indicated that they were except for some that were not in the same area where erection was to begin. (Tr. 513-15, 553-64; Exhs. 1, 41-42). *See also* Stip. Nos. 7, 12.

On October 1, NCD began steel erection. Prior to starting, however, Chauvin asked Campbell for a letter certifying the anchor bolts were in accord with the plans, or, if they were not, specifying the modifications performed and approved; Chauvin also asked for a letter certifying the concrete strength. Campbell asked how to do the letters, and Chauvin told him how. Campbell then told Chauvin that he would prepare the letters, to "go ahead and erect," and that Chauvin was "all set." Chauvin then began erecting the steel, without being aware of any problems with the anchor bolts in the area where he was working. NCD erected four columns without incident, with Chauvin operating the crane, but the fifth column erected, Column M-1, fell about 30 seconds after it was detached from the crane. All four of the anchor bolts that had been installed at M-1, that is, the two in the grout extension and the two in the actual pier, pulled out when Column M-1 fell. Fortunately, no one was injured when the column collapsed. (Tr. 564-70; Exh. 1). *See also* Stip. Nos. 8-13.

On October 2, Campbell gave Chauvin a handwritten letter that stated that "all base plates and anchor bolt modifications have been completed with the approval of the structural engineer of record

¹¹On September 26, Pilcher advised Monahan that NCD and Chauvin would be doing the erection and that some steel had been delivered and unloaded. On that same day, when Monahan was at the site and was at M-1 with Campbell, Monahan told Campbell to inform the erector of the conditions at M-1 before any erection took place there. (Tr. 389, 415-16; Exh. 28).

in Area A, except (M-1, D-1, D-4, D.9-14 and C-12.9). The five for mentioned [sic] anchor bolts and plates are awaiting approval.” The same letter, in typewritten form, was sent to Trimax on October 3. On October 2, Campbell sent a letter to Trimax stating that “[a]ll concrete in area A of the building ... has reached or surpassed 75% of the compressive strength per spec.” All of Campbell’s letters in this regard, including the handwritten one, were addressed to Danny Savoie at Trimax; Trimax, however, sent copies of the letters it had received from Campbell to Chauvin’s office by facsimile. (Tr.153-59, 587-91; Exhs. 20-21, 52-54).

A structural steel preconstruction meeting was held on the site on October 3.¹² At the meeting, the collapse of Column M-1 was discussed, as was the requirement that any proposed structural repairs be approved by Marini; also discussed was the need for the contractors to provide details on any proposed structural repair sketches sufficient for Marini to determine if the proposed repair was acceptable. On October 7 and afterwards, pullout testing, which tests if an anchor bolt will hold when a specified force is exerted upon it, was done of the modified anchor bolts at the site. Certain of the modified anchor bolts failed the pullout testing. (Tr. 152-53, 349-54, 913-15; Exhs 28, V-2).

Despite the foregoing, Marini saw drilled-in anchor bolts and rebar in new locations on October 10, and these repairs had been done without sketches being submitted. Monahan also noticed new repairs, of which KBA had had no prior notice, after the date the column fell; the repairs included numerous anchor bolts that were cut off and a repair involving angle iron at the auditorium entrance. Marini and KBA documented the continuing problem of unauthorized repairs and sketches that were missing necessary information. Alexandra ultimately submitted acceptable sketches for M-1 and the other the repairs at issue, which were approved on October 22. In addition, on November 1, Campbell sent new notification letters to Chauvin with respect to anchor bolt modifications and concrete compressive strength. (Tr. 165-66, 171-73, 430-31; Exhs. 23, 25, 29-32, 55-56).

Willful Citation 2 - Items 1 and 2

Items 1 and 2 of Citation 2 allege willful violations of 29 C.F.R. §§ 1926.752(a)(1) and (2), which provide as follows:

¹²The structural steel preconstruction meeting should have been held before steel erection began at the site. (Tr. 346-47).

Before authorizing the commencement of steel erection, the controlling contractor shall ensure that the steel erector is provided with the following written notifications: (1) The concrete in the footings, piers and walls ... has attained ... either 75 percent of the intended minimum compressive design strength or sufficient strength to support the loads imposed during erection. (2) Any repairs, replacements and modifications to the anchor bolts were conducted in accordance with § 1926.755(b).

To establish a violation of a specific OSHA standard, the Secretary must prove by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the standard, (3) employees had access to the violative condition, and (4) the employer either knew of the condition or could have known of it with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Alexandra admits it violated the cited standards by not providing the required notifications to the steel erector before erection began on October 1; it also admits the violations were serious. (Tr. 8; R. Brief, pp. 22, 28; Stip. Nos. 9-10). The Secretary is thus deemed to have met her burden of proof as to these two citation items, and the alleged violations are affirmed as serious. Alexandra does, however, dispute the willful classification of the violations. To prove a willful violation, the Secretary must show that the violation was committed “with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.” *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987) (citation omitted). As *Williams* further explains:

It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting a violation....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 conditions violated it. *Id.* at 1256-57.

As noted *supra*, Alexandra disputes certain of the facts set out in the factual background portion of this decision. For example, Alexandra disputes Chauvin’s testimony that he and Campbell walked Area A on September 26 or 27 and that Chauvin asked Campbell for the notification letters on October 1 before beginning the erection work. (Tr. 561-65; R. Brief, p. 24, n.32). Campbell specifically denied that he and Chauvin walked Area A and that Chauvin asked him for the notification

letters. (Tr. 902). Moreover, Norton, Alexandra's safety manager, testified that, when he conducted his investigation into the circumstances surrounding the accident, Chauvin never told him that he had walked the area with Campbell or that he had asked Campbell for the notification letters. (Tr. 991-92, 999). I observed the demeanors of these three witnesses on the stand and noted their facial expressions, attitudes, tones of voice, eye contact, posture and body movements. I have also considered the consistency and reasonableness of their testimony, or lack thereof, in light of the record as a whole, as well as the motivation of each witness for testifying in a particular way. For all of these reasons, I find that Chauvin was a sincere, credible and convincing witness, while Campbell and Norton were less than forthright. Chauvin's testimony is therefore credited over that of Campbell and Norton.¹³

Alexandra also disputes Monahan's testimony that on September 26, when he was at the site at M-1 with Campbell, he told Campbell to advise the erector about the conditions at M-1 before any erection occurred there. (Tr. 415-16; R. Brief, pp. 25-26). Monahan also testified that at the October 3 preconstruction meeting, he told Norton what he had said to Campbell on September 26; further, Monahan memorialized what he told Norton in the October 3 meeting minutes. (Tr. 432-33; Exh. 28, Item PCSS-14). Campbell denied that the September 26 conversation with Monahan took place, and he did not recall Monahan bringing up such a conversation at the October 3 meeting. (Tr. 925). Norton likewise did not recall Monahan addressing any such conversation at the October 3 meeting. (Tr. 1002). Trim and Baldwin, however, both remembered Monahan bringing up the conversation on October 3. (Tr. 388-39, 852). I observed Monahan's demeanor as he testified, noting all the factors set out *supra*, and I found him to be a sincere and credible witness. In addition, his testimony is supported by Exhibit 28 and by the testimony of Trim and Baldwin, and Campbell and Norton have already been found to be less than believable witnesses in this matter. On this basis, Monahan's testimony is credited over that of Campbell and Norton.

Finally, Alexandra disputes the evidence in the record, especially the testimony of Marini, to the effect that Baldwin and his crew were making modifications to the anchor bolts and other structural

¹³In so finding, I have noted and rejected all of Alexandra's arguments as to why Chauvin should not be believed. I have also noted Campbell's failure to rebut Chauvin's testimony that, when Chauvin asked if all the anchor bolts were where they belonged, Campbell indicated they were except for some that were not in the same area where erection was to begin. (Tr. 563-64).

members at the site without first obtaining Marini's approval. Alexandra's contention in this regard is that Marini had given Baldwin verbal approvals of proposed modifications and that his testimony to the contrary was not credible. *See* R. Brief, pp. 12-17. This contention is rejected, for the reasons set out in the discussion relating to Item 3 of Citation 2, *infra*, and I find that Baldwin and his crew made modifications to the anchor bolts at the site without Marini's approval and that Alexandra knew this was the case. Alexandra also had specific knowledge of the repairs made at M-1 and that the repairs were not acceptable.

It is clear that Campbell, Alexandra's job superintendent at the site, reviewed Exhibit 17, Marini's September 12 field report, before he reviewed Exhibit 19, Alexandra's September 23 response to the field report. (Tr. 907-09, 936-38). Campbell was therefore aware, at least a week before the accident, that the repairs at M-1 were unacceptable.¹⁴ (Exh. 17, Item 8). Further, Campbell had a heightened awareness of the M-1 repair situation after Monahan spoke to him at the site on September 26 and told him to tell the erector about the problems with the repairs at M-1 before any erection took place there. (Tr. 415-16). Despite this heightened awareness and Monahan's advice to let the erector know about the situation at M-1, Campbell did not tell Chauvin about the problems with the repairs at M-1. Instead, when Chauvin informed Campbell that he would begin erecting in the auditorium stage area and asked if all the anchor bolts were where they belonged, Campbell indicated that they were except for some that were not in the area where Chauvin would be erecting. (Tr. 554-55, 561-64). Moreover, when Chauvin asked for the notification letters on October 1, Campbell said he would provide them, that Chauvin should go ahead and start erecting, and that Chauvin was "all set." (Tr. 564-66). Thus, rather than warning Chauvin about trying to erect a 55-foot column at a location where he (Campbell) knew the anchor bolt repair work was unacceptable, Campbell gave Chauvin every indication that the erection work could proceed safely at M-1; as Chauvin put it, he knew of no

¹⁴Collins was also aware of the M-1 situation, as Trim's letter forwarding Exhibit 17 was sent to him; Pilcher and Dizdari also knew of the situation. (Tr. 907-09, 921, 937; Exh. 27).

problems at M-1, and he thought that “everything was all right.”¹⁵ (Tr. 565, 568-70). Campbell was the job site superintendent, and his knowledge and conduct are imputable to Alexandra.

In addition to the foregoing, the record supports a conclusion that Alexandra was eager to have the erection commence because of the project being several months behind. First, Campbell himself admitted that the unsuitable soil issue had caused a “big delay” and that Alexandra “wanted to put the steel up.” (Tr. 938-40). Second, when Chauvin met Collins, Alexandra’s project manager, at the site, Collins made it clear to Chauvin that NCD “needed to get going.”¹⁶ (Tr. 560). Third, as noted in the factual background portion of this decision, the preconstruction steel erection meeting should have been held prior to erection beginning. (Tr. 346-47). Alexandra, however, allowed the erection to start before the preconstruction meeting took place.

As the Secretary asserts, Alexandra’s actions after the column fell provide additional support for finding that the violations were willful. Exhibit 52, the handwritten letter Campbell gave Chauvin on October 2, stated that “all base plates and anchor bolt modifications have been completed with the approval of the structural engineer of record in Area A, except (M-1, D-1, D-4, D.9-14 and C-12.9). The five for mentioned [sic] anchor bolts and plates are awaiting approval.” This letter, as the Secretary notes, neglects to mention the 15 other column locations where anchor bolts had been modified, as set out in the parties’ stipulations. *See* Stip. No. 5. Further, Exhibit 20, the letter Campbell sent to Trimax on October 2, stated that “[a]ll concrete in area A of the building ... has reached or surpassed 75% of the compressive strength per spec.” As the Secretary notes, the parties stipulated that the grout extension was not tested for compressive strength at any time before October 1. *See* Stip. No. 6. I agree with the Secretary the letter was inaccurate, despite Alexandra’s contention that “the grout was no longer an issue at M-1 due to the damage of the column falling.” (R. Brief, p. 24). I further

¹⁵I have noted Alexandra’s contention to the effect that it relied upon Mo Luckern, who was Trimax’s representative at the site, to inform the erector of the anchor bolt conditions prior to erection starting, and that it (Alexandra) did not know that Luckern had left the project when Trimax replaced CWS with NCD. (R. Brief, pp. 22-23). This contention is irrelevant, in light of Campbell’s knowledge of the conditions at M-1 and his conversations with Chauvin not only the week before erection commenced but also the very day erection began.

¹⁶Chauvin testified that Collins was yelling at the time and that his actual words to him were “let’s go, let’s go, erect the f****ing steel.” (Tr. 560-61).

agree with the Secretary that the letter was also inaccurate because, in view of that damage, the concrete pier at M-1 would have to be replaced. (Tr. 159). *See* C. Reply Brief, pp. 6, 11, n.9.

In defense of the willful classification, Alexandra notes the evidence in the record as to the testing of the modified anchor bolts after the accident. The record shows that a company named UTS performed pullout testing of four modified anchor bolts on October 7 and that all four anchor bolts failed. (Tr. 152-53, 349, 912-14; Exh. V-2). In addition, Campbell testified that following the UTS testing, he himself purchased a jack and pulled out all of the other modified anchor bolts at the site. New bolts were then installed in all of the locations where the modified bolts had been pulled out, after which UTS tested them, and any bolts that failed were pulled out again and new bolts were reinstalled and retested; this process was continued until all of the bolts passed the pullout testing. (Tr. 914-17, 944-47; Exh. V-1). These actions were clearly necessary, in light of the accident and the number of anchor bolts at the site that had been modified without approval. Regardless, under the circumstances of this case, and especially in view of Campbell's conduct in this matter, the testing and reinstalling of the anchor bolts does nothing to mitigate against a finding that the violations were willful.

For all of the foregoing reasons, I conclude that the violations of the cited standards were willful. Items 1 and 2 of Willful Citation 2 are accordingly AFFIRMED.¹⁷ The penalty assessment for all three of the willful items in this case is set out *infra*, following the discussion relating to Item 3.

Willful Citation 2 - Item 3

Item 3 of Citation 2 alleges a willful violation of 29 C.F.R. 1926.755(b)(1), which states that:

Anchor rods (anchor bolts) shall not be repaired, replaced or field modified without the approval of the project structural engineer of record.

Alexandra contends that it did not violate the cited standard because the standard does not require written approval and Marini verbally approved the anchor bolt modifications made at the site. Alexandra asserts that an OSHA compliance directive relating to structural steel erection specifically states that the engineer's approval need not be in writing and, moreover, that the approval need only

¹⁷Campbell's conduct clearly shows plain indifference to employee safety. With respect to conscious disregard, Campbell made certain statements indicating that he had been aware of the standards' requirements before the accident. (Tr. 711-12, 904). That he had to ask Chauvin how to write the notification letters, however, suggests that he may not in fact have been familiar with what the standards required. Regardless, the violations were plainly willful.

occur prior to erection. (R. Brief, p. 11). Even assuming *arguendo* that the Secretary is bound by the statements in the compliance directive, Alexandra's contention is not relevant because, based on my findings below, verbal approvals of anchor bolt and other structural repairs were not permitted on the subject project and Marini did not give such approvals.¹⁸

The required procedure on the subject project, for when a contractor intended to deviate from the structural plans, is set out on page 5 of this decision. Marini and Trim testified in this regard, and Miller, the clerk of the works, confirmed their testimony about the procedure. (Tr. 69-75, 78-79, 90, 101-02, 108, 130, 324-27, 367-68, 504-05). Alexandra's field manual for superintendents is consistent with the testimony of Marini, Trim and Miller, stating that "[i]f it should become necessary to cut a structural element, no action is to be taken by any Company personnel and no authorization is to be given to any subcontractor without the prior written approval of the specific cutting by the Owner, Architect and the Owner's or Architect's Engineer." (Tr. 935-36, Exh. 92, p. 13). Marini, Trim and Miller all testified to the effect that a contractor could not make structural changes in the field without the written approval of the architect and engineer and that this was the standard procedure in the construction industry. (Tr. 69-75, 258-59, 264-65, 324-27, 367-68, 505).

Marini's testimony about his three visits to the site, and the modifications he saw that he had not been told about and had not approved, including the modifications at M-1, is set out on pages 5 and 6 of this decision. (Tr. 77-89, 98-125, 255). The testimony of Marini in this regard is supported by the testimony of Monahan, Miller and Cifune. (Tr. 407-14, 455-63, 473, 511-13). Marini's September 12 visit to the site resulted in Exhibit 17, his report about that visit, the details of which are described on page 7 of this decision. The report sets out 14 items addressing the problems Marini had seen, including the repair work at M-1 and other locations where anchor bolts had been cut off and replaced with drilled-in bolts. Item 8, the item relating to M-1, and three other items state that "[t]he General Contractor must submit sketches to the Architect/Engineer for review and approval of all repair work to correct construction mistakes or errors." Item 14, the item pertaining to the other locations where anchor bolts had been cut off, states that "[t]he Architect/Engineer must be informed

¹⁸At the hearing, Alexandra presented Exhibit rr, a draft of the compliance directive, and Exhibit ss, the actual directive. Exhibit rr was received in evidence, but Alexandra never sought admission of Exhibit ss. (Tr. 1006-09, 1037-40).

of all field corrections such as these before any repairs are made.” Marini specifically testified that he had not approved the repairs addressed in Items 8 and 14 before October 1. (Tr. 145-46).

Alexandra disputes Marini’s testimony, noting Baldwin’s testimony that he discussed repairs with Marini either on the phone or in the field and that Marini verbally approved such repairs; Baldwin also testified that he never made any repairs, including those at M-1 and the other anchor bolt repairs, without first consulting Marini and that he had not had to submit sketches or written proposals.¹⁹ (Tr. 817-30, 835-39, 855, 886). In support of Baldwin’s testimony, Alexandra presented phone records showing numerous phone calls during the relevant period between Odeh’s office and either Alexandra’s site phone or Baldwin’s cell phone. *See* Exhibits W-1-7.

As a preliminary matter, I agree with the Secretary that the phone records noted above are not probative of the content of conversations that took place between Odeh and either Baldwin or Alexandra personnel; the project was a large one, the calls could have involved any number of topics, and while it is clear that Marini spoke to Baldwin and Alexandra representatives on the phone and when he was at the site, and that he gave them verbal direction, these facts do not prove that Marini gave verbal approvals as Alexandra claims. (Tr. 79, 231-33, 237, 276). *See also* Exhibit 7, p. 2. Beyond that, I conclude that Alexandra’s contention simply makes no sense, in light of the evidence of record. As the Secretary points out, if Marini had been verbally approving the repairs at the site, then Alexandra would surely have protested upon receiving Exhibit 17, Marini’s September 12 report, which plainly expressed Marini’s disapproval of how Epernay and Alexandra were proceeding at the site and stated four times the requirement that Alexandra submit sketches and obtain the engineer’s approval for all repair work. There is no evidence of any such protest in the record, including in Exhibit 19, Alexandra’s response to Exhibit 17. As the Secretary also points out, Alexandra’s own field manual for superintendents prohibited the cutting of structural elements without the “written approval” of the architect or engineer. (Exh. 92, p. 13). Further, the Secretary points out that Alexandra’s answer to Interrogatory No. 11, relating to anchor bolt repairs, was as follows:

Depending on the repairs being performed, prior to September 16, 2002 the requested fix was either communicated verbally or in writing to Larry Marini or Ed Monahan, and RFI was sent or a fix would be provided by Larry Marini in his field reports. After

¹⁹Baldwin testified that he also discussed repairs with Monahan. (Tr. 817-19, 825, 835).

September 16, 2002 Larry Marini requested sketches of proposed repairs and these would be submitted for approval. (Tr. 1035, Exh. 93, Ans. #11).

Turning to some of the specifics of Baldwin's testimony, Baldwin testified that he had asked Marini at the very beginning what the standard procedure was for fixing anchor bolts on the project. Baldwin said he had always made anchor bolt repairs by drilling down 8 to 10 inches, cleaning the hole thoroughly, and then setting the bolt into the hole along with the approved epoxy; he also said that he had advised Marini of this method and that no one had ever told him before October 1 that it was not an approved fix for anchor bolts. Baldwin further testified that when he discovered that the wall at M-1 was 2 inches too short, he spoke to Marini and Monahan and suggested adding a grout extension and installing two anchor bolts in the grout and two more in the correct locations on the pier. As a result of his discussions with Marini and Monahan, this repair work was done, but, according to Baldwin, he concluded upon viewing the repair that "it was just a shoddy piece of work." He again contacted Marini, telling him he was not comfortable with the repair, and he asked Marini to visit the site to look at it. Marini visited the site for that purpose, although Baldwin was not sure of the date, and while Marini and Baldwin talked about other possible fixes, such as adding two more anchor bolts, the matter was not resolved. Baldwin was "vaguely" familiar with Exhibits 17 and 19, Marini's September 12 report and Alexandra's response to the report, respectively, and he indicated he might have gone over some of the items in the documents with Pilcher; he also stated that page 3 of Exhibit 19 showed the two additional bolts he and Marini had discussed. Baldwin indicated that his manner of dealing with Marini, that is, calling him to get approval for a fix over the phone or having Marini look at a particular problem at the site and then getting his verbal approval to fix it, was consistent with his experience on previous projects. (Tr. 817-30, 835-39).

I find the foregoing testimony not credible for several reasons. First, Baldwin's testimony about getting verbal approvals from Marini for repair work at the site is directly contrary to the testimony of Marini, Trim and Miller, to the statement from Alexandra's manual for superintendents, and to Alexandra's answer to Interrogatory No. 11, all of which are set out *supra*; similarly, Baldwin's indicating that the verbal approvals he allegedly received on the project were consistent with how he had worked at other sites is contrary to the testimony of Marini, Trim and Miller that written approval was the standard procedure in the construction industry. Second, Baldwin's testimony indicating there

was a standard procedure for anchor bolt fixes contradicted the testimony of Marini and Trim that proposed “typical” anchor bolt fixes were not acceptable because a particular column, even if it looked similar to a column next to it, could have different loads bearing on it and the engineer had to evaluate the fix for the specific column.²⁰ (Tr. 92-94, 366-67). Third, Baldwin’s “vague familiarity” with Exhibits 17 and 19 is at odds with Campbell’s testimony that Baldwin, Pilcher and Dizdari had provided the answers in Exhibit 19.²¹ (Tr. 907-09, 921, 937). Fourth, Baldwin’s testimony about how the M-1 repairs came about is at odds with the testimony of Marini, Monahan and Cifune; their testimony in this regard is on page 6 of this decision. (Tr. 111-25, 409-10, 413-14, 455-63, 473).

In addition to the above, I observed the demeanors of Marini and Baldwin as they testified, as well as the demeanors of Trim, Cifune and Miller.²² In so doing, I noted their facial expressions, attitudes, tones of voice, eye contact, posture and body movements. I also noted the consistency and reasonableness of their testimony, or lack thereof, in view of the record as a whole, as well as the

²⁰Marini approved essentially the same repair that Baldwin described for the anchor bolts noted in his report of August 1, and on October 11 he approved this repair for M-1 and the other modified anchor bolts at the site. Marini said the October 11 approval included the epoxy to use, an embedment depth of 9 inches, and a pullout strength of 11,120 pounds; he also said an anchor bolt repair done with epoxy could have in certain cases a lesser embedment than a bolt that was set in concrete as per the original specifications. (Tr. 270-74, 291-92; Exh. F). While Alexandra points to this evidence in support of its position, I have found Marini and Trim to be believable witnesses, as set out *infra*, and I therefore credit their testimony that the engineer had to evaluate the fix for the particular column. That this is so is apparent from the faulty repairs at M-1, where the extension was added to the pier, and the accident that occurred; stated another way, an anchor bolt fix could entail more than simply cutting off the bolts and re-drilling them in new locations. Moreover, Marini testified that the repair requirements set out in his October 11 approval were “what would be acceptable,” thereby setting out the minimum requirements for the anchor bolt repairs, and it is reasonable to infer he based those requirements on his professional engineering judgment. Finally, that Marini ultimately approved a single fix for the many anchor bolts that were out of tolerance does not support Alexandra’s contention that he gave verbal approvals, based on the other evidence or record, and had no effect on Alexandra’s obligation to obtain written approval from Marini before making anchor bolt repairs at the site.

²¹On cross-examination, Baldwin first denied any familiarity with Exhibit 19, but he then said that Pilcher “may have” talked to him about it. (Tr. 877-78).

²²I have already found Monahan to be a credible witness, in the discussion relating to Items 1 and 2, *supra*.

motivation of each witness for testifying in a particular way. I found Marini, Trim, Cifune and Miller²³ to be credible and convincing witnesses, and their testimony is also supported by documentary evidence in the record.²⁴ On the other hand, I found significant parts of Baldwin's testimony evasive and/or equivocal, besides being contrary to that of other witnesses and documentary evidence. In sum, I found Baldwin to be a less than candid witness, and his testimony, to the extent that it is inconsistent with that of other witnesses or documentary evidence, is not credited in this matter.

For all of the reasons set out above, I conclude that the Secretary has met her burden of proof with respect to this citation item. Specifically, I find that the standard applies and that its terms were violated; besides the evidence noted *supra*, Baldwin admitted that the fix at M-1 was not an approved condition when erection began (Tr. 879), and Campbell admitted, in his October 2 letter to Chauvin of NCD, that anchor bolt modifications had not been completed with the approval of the structural engineer of record at M-1 and four other locations in Area A. *See* Exhibit 52. I further find that employees were exposed to the cited hazard; in this regard, Alexandra has stipulated that employees of NCD were exposed within the fall radius of Column M-1 in Area A at the project on October 1. (Tr. 8). Finally, I find that Alexandra had knowledge of the cited condition. Baldwin, Epernay's foreman, and Campbell, Alexandra's job superintendent, clearly knew of the repairs at M-1 and the other anchor bolt modifications.²⁵ (Tr. 907-09, 921, 937). In addition, Collins, Pilcher and Dizdari, all of whom were management personnel of Alexandra, also knew of the modified anchor bolts at the site, in light

²³In finding Miller a credible witness, I have noted the fact that he was hired by the town of Westwood. I have further noted his considerable experience and the fact that his professional duty lay in having the work on the project done correctly. (Tr. 496-501).

²⁴In finding Marini a credible witness, I have considered and rejected all of Alexandra's arguments that he was not. In particular, I have noted that Marini agreed that a number of errors were made in the project drawings. *See, e.g.*, Tr. 190-208. He also testified, however, that there were "thousands and thousands" of items on any given project and that the number of errors he made was not unusual considering the size and complexity of this project. (Tr. 300-04). Further, on this record, Marini has not been shown to have made errors of judgment. I have also noted the many e-mails in the record that, according to Alexandra, support its position that Marini did give verbal approvals in this matter. Given the substantial evidence in the record that is contrary to Alexandra's position, as set out above, the e-mails are accorded little weight.

²⁵Campbell's knowledge of the M-1 repairs is set out in the discussion as to Items 1 and 2.

of Exhibit 17, Marini's September 12 field report, and Exhibit 19, Alexandra's response; Exhibit 17 was sent to Collins, and Baldwin, Pilcher and Dizdari all participated in preparing Alexandra's response to that report. (Tr. 907-09, 921, 937). Alexandra, as the general contractor with responsibility for the overall project, was the controlling contractor. (Tr. 711-12). Moreover, Alexandra oversaw the work Epernay performed and exercised responsibility for obtaining approval for structural changes. *See* Exhibit 17. The alleged violation is accordingly affirmed. *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1975); *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199 (Nos. 3694 7& 4409, 1976).

Turning to the classification of this item, the reasons given for finding that Items 1 and 2 were willful, set out on pages 10 through 14 of this decision, *supra*, also support a conclusion that this item was willful. There is also a further reason for finding that Item 3 was a willful violation. At the preconstruction meeting held on October 3, Marini reiterated the requirement that any repair needed must have a sketch showing the proposed repair and that the proposed repair had to be approved before it took place. (Exh. 28, Item PCSS-08). During a site visit on October 10, however, Marini saw drilled-in anchor bolts and rebar in new locations, and these repairs had been done without sketches being submitted. (Tr.165-66, Exh. 23, Item 1). Monahan also noticed new repairs, of which KBA had not had previous notice, after the date the column fell; these included numerous anchor bolts that were cut off and a repair involving angle iron at the auditorium entrance. (Tr. 430-31). Trim wrote several letters to Alexandra following the October 3 meeting. Exhibits 29 and 30, both dated October 8, addressed, respectively, the continuing problem of unauthorized repairs and anchor bolts and base plates being out of tolerance. Exhibit 31, dated October 10, stated that proposed repairs must be on a case-by-case basis, that "typical" repairs would not be reviewed, and that, as noted previously, no anchor bolts were to be cut or removed unless directed by Odeh. Exhibit 32, dated October 15, noted that sketches Alexandra had submitted as proposed solutions for various columns were incomplete and could not be properly evaluated. Alexandra ultimately submitted acceptable sketches for M-1 and the other repairs at issue, and these were approved on October 22. (Tr. 171-73, Exh. 25).

For all of the foregoing reasons, I find that Alexandra's conduct exhibited both a conscious disregard of the cited standard and plain indifference to employee safety. Item 3 of Willful Citation

2 is therefore AFFIRMED as a willful violation; the violation was also serious, in that the condition plainly could have resulted in death or serious injury, as set out in section 17(j) of the Act.

Penalty Assessment

In assessing 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, and the employer’s good faith and previous history of OSHA violations. These criteria are not necessarily accorded equal weight, and the gravity of the violation is usually the primary factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001 (No. 0004, 1972). I find the gravity of all three of the violations in this case to be high. Alexandra allowed unauthorized anchor bolt repairs to take place at the site, and, in particular, it allowed the faulty repairs at M-1 to occur. Alexandra failed to give Chauvin of NCD the required certification letters, and it also failed to warn Chauvin about the repairs in the M-1 area where he was to begin erecting. All of these factors led to the accident in this case, which clearly could have resulted in death or serious injury. Chauvin and his crew of five to eight employees were exposed to the hazard of the M-1 column falling, but, fortunately, it injured no one when it collapsed. (Tr. 558). I also find that while a reduction in penalty for the employer’s small size is appropriate, no reduction is appropriate for good faith or history. (Tr. 761-70). I conclude that the Secretary’s proposed penalty of \$42,000.00 for each violation is appropriate. A penalty of \$42,000.00 each is consequently assessed for Items 1, 2 and 3 of Willful Citation 2.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made within the text above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent Alexandra was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Act.
2. The Commission has jurisdiction over the parties and the subject matter.
3. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standards as alleged in Willful Citation 2, Items 1, 2 and 3.
4. All of the violations of the Act found above were both willful and serious within the meaning of the Act.
5. A total civil penalty of \$42,000.00 for each of the violations affirmed in Willful Citation 2 is appropriate.

ORDER

1. Items 1, 2 and 3 of Willful Citation 2 are AFFIRMED.
2. A total civil penalty of \$126,000.00 is assessed.

/s/
Michael H. Schoenfeld
Judge, OSHRC

Dated: August 23, 2004
Washington, D.C.