OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. SKANSKA KOCH, INC., Respondent.	OSHRC Docket No. 08-1623

APPEARANCES:

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BEFORE: G. Marvin Bober
Administrative Law Judge

DECISION

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

On May 6, 2008, Skanska Koch, Inc. (“respondent”) was engaged in the renovation of the Triborough Bridge in New York City. While engaged in his assigned

work, an employee of respondent fell through an uncovered saddle beam hole, approximately 37 feet above the ground. The employee was rushed to the hospital where he died. As a result of an inspection conducted by an Occupational Safety and Health Administration compliance officer ("CO"), the Secretary issued a citation alleging a serious violation of the Act for a failure to provide appropriate fall protection as required by 29 C.F.R. §1926.760(a)(1). The standard provides:

> §1926.760 **Fall protection.**
>
> (a) *General requirements*. (1) Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

A penalty of $3500 was proposed for the violation. Respondent filed a timely notice of contest.

The administrative trial was held in New York City on April 14-15, 2009. Both parties have filed post-trial briefs, and this case is ready for disposition.

Inspection Site

Since 2005, respondent has been engaged in steel erection activities in an ongoing project to repair, alter and renovate the Triborough Bridge in New York City. (Ex. C-1, Stip. 3)[1] As part of its work, respondent has been removing and replacing old metal bridge bearing plates and their structural support pedestals between the bridge roadway and the supporting concrete piers at various locations at the bridge. (Ex. C-1, Stip. 4) The process of removing and replacing the bearing plates involves placing hydraulic jacks on

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[1]Transcript pages are referred to as "Tr." The Complainant's exhibits are referred to as "C." The respondent's exhibits are referred to as "R." The Administrative Law Judge exhibits are referred to as "ALJ."

the bridge deck surface and piers, raising the bridge to take the load off existing bridge bearing plates, removing the old bearing plates and pedestals, using equipment to hoist down old bearing plates, hoisting up the new replacement bearing plates, sliding in the new bearing plates and pedestals and bolting the new plates between bridge piers and girders. (Ex. C-1, Stip. 5) In order to replace the bearings, respondent's employees needed to work in an area under the bridge's roadway known as the "elevated work platform" or "elevated work area." (Ex. C-1 Stip. 6) As part of respondent's activities on the elevated work areas under he bridge, "jacking beams" were fabricated which included hinged metal plates. (Ex. C-1, Stip. 11) The hinged metal plates connected the "jacking beams" to the pier and were designed to cover the gaps between the jacking beams and the pier. (Ex. C-1, Stip. 12) The hinged metal plates covered most of the length of an approximately two foot wide gap between the jacking beam and the concrete pier. (Ex. C-1, Stip. 13) From March 2008 through May 6, 2008 several of the piers on the Queens side of the bridge had uncovered openings or holes, also known as "saddle beam holes," located between the jacking beams and the concrete piers. (Ex. C-1, Stip. 14)

From approximately May 2007 through May 6, 2008, Generoso Gelormino and Shawn Seaman were partners working as ironworkers on the jacking crew engaged in bearing replacement operations at the bridge. (Ex. C-1, Stip. 19) During that period, there were approximately twenty employees working on the jacking crew, including the jacking crew ironworkers. (Ex. C-1, Stip. 21)

From 2006 through January 2009, Hugh Gelormino was the foreman for the jacking crew ironworkers, as well as being Generoso Gelormino's cousin. (Ex. C-1, Stip. 22) From approximately March 2008 through May 6, 2008, Generoso Gelormino, Shawn Seaman and other members of the jacking crew, were working on the elevated work areas on the Queens side piers of the bridge removing and replacing old metal bridge bearing plates and their structural support pedestals. (Ex. C-1, Stip. 30) On May 6, 2008, Generoso Gelormino and Shawn Seaman were assigned by foreman Hugh Gelormino to

remove rivets from an old bridge bearing plate on Pier 32 of the Queens side of the bridge. (Ex. C-1, Stip. 32) Pier 32 was approximately 37 feet above the ground. (Ex. C-1, Stip. 15) To do this work Generoso Gelormino and Shawn Seaman were using a pneumatic device known as a “hell dog” to remove the rivets, but they were unable to remove them all. (Ex. C-1, Stip. 34) The rivets being removed were immediately next to the edge of two uncovered openings on Pier 32. (Ex. C-1, Stip. 35) At approximately 2:45 P.M., on the afternoon of May 6, 2008, immediately after putting down the “hell dog.” Generoso Gelormino fell approximately 30 to 35 feet to the ground below (Tr. 31, 33), through an uncovered saddle beam hole approximately two feet wide by four feet long. (Ex. C-1, Stip. 36, 37) At the time of the accident, neither Generoso Gelormino nor Shawn Seaman were tied off. (Ex. C-1, Stip. 38) As a result of the fall, Generoso Gelormino sustained multiple injuries and died at a hospital that evening. (Ex. C-1, Stip. 39)

Testimony

Shawn Seaman

Shawn Seaman testified that, when they first started working, he was told by foreman Hugh Gelormino that they didn’t need to be tied off while working on the elevated pier under the roadway. (Tr. 52-53) He further testified that he saw other members of the jacking crew walking around the saddle beams holes without being tied off. (Tr.58-60) Seaman also claimed that he told Hugh Gelormino about concerns regarding the saddle beam holes, and that the foreman told him that they would get something to cover them up, but that they never did. (Tr. 64)

Seaman asserted that he complained about the saddle beam holes to field engineer Frank Keller. (Tr. 94) He never specifically raised the issue with project safety manager Robert Budny. (Tr. 94) However, he stated that Budny told them that tying off was required only when they went to the outer most extreme point of the jacking system. (Tr. 98) Seaman testified that he had a lanyard and that there was a static line available.

Nonetheless, he didn't tie off even though doing so would have been protected from any danger posed by the saddle beam holes. (Tr. 97) Seaman also admitted that he was never affirmatively told that he shouldn't tie off while removing rivets from the bearings. (Tr. 97) However, Seaman testified that once the jacking beams were in place, all the plates were out and everything was secure, they would not tie off, even though they would work within a foot of a saddle beam hole. (Tr. 51, 64)

Seaman testified that Keller would come up to the piers approximately once a week. (Tr. 62) According to Seaman, Keller saw him and other employees working without being tied off. (Tr. 61-62) Nonetheless, Keller never told anybody to tie off or disciplined any employee for not being tied off. (Tr. 62) Moreover, Seaman testified that he never saw any of respondent's supervisors conduct any safety inspections from the elevated work areas. (Tr. 62) Seaman stated that he would see Budny walking on the ground and looking up. On these occasions, Seaman would shout down to Budny "the work's not down there, the work is up here." (Tr. 63) 97)

Danny Mei

Compliance officer Danny Mei testified that Hugh Gelormino told him that he saw employees working without being tied off. According to the CO, the foreman told him that although respondent had a progressive disciplinary program, he yelled at employees who were not tied-off without imposing any further discipline. (Tr. 154)

The CO interviewed foreman Hugh Gelormino. Much of what the foreman conveyed to the CO was consistent with the testimony of Shawn Seaman. Hugh Gelormino told the CO that he saw employees working without being tied off and that they were not disciplined. (Tr. 137, 154) Rather, even though respondent had a graduated disciplinary system, he would just yell at them. (T. 154) The CO was also told by another employee that he was not tied off while on the elevated work area. (Tr. 146, 151)

Privileged informants[2] also named Kenny Chase, David Miller, Jesse Harrell as employees who did not tie off while working on the piers.(Tr. 167-170)

Robert Budny

Robert Budny is respondent's project safety manager. (Tr. 183) He testified that he would inspect the site on a daily basis to ensure that employees were tied off. (Tr. 190) To conduct these inspections, Budny usually observed from the ground the employees working on the piers. Budny testified that he could usually observe employees from the ground, but when he couldn't he would shout up to the them and they would pull on the lanyard or give some other indication that they were tied off. (Tr. 188-189, 212) Such an inspection occurred on May 6, the morning of the accident, and everyone was tied off. (Tr. 189) According to Budny, he would actually go up on the piers about once a month. (Tr. 210)

Budny testified that the rule was 100% tie off. (Tr. 191) He explained that this meant that employees were required to be tied off every moment when on a platform. (Tr. 193-194) To comply with this rule, all employees were equipped with a double lanyard. (Tr. 194) Budny testified that he was never informed that Hugh Gelormino told employees that they didn't have to be tied off on the piers (Tr. 195) Moreover, Hugh Gelormino never told him that any employee had a concern about the saddle beam holes. (Tr. 196) Budny testified that if an employee would be found not tied off, he would be sent down, retrained and receive a written safety violation. Then, it would be up to project manager Payea if the employee would be suspended. (Tr. 196) However, Budny could not recall if such a situation ever arose. (Tr. 199) Budny testified that he never saw Generoso Gelormino, Shawn Seaman or any other member of the jacking crew working without being tied off. (Tr. 204-205)

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[2]To protect the employees, their names were deemed protected by the informant's privilege and not revealed. (See Tr. 150, 159)

Respondent's formal fall protection policy requires that all employees working 15 feet or more above a lower level be protected by a guardrail system, safety net system, personal fall arrest system, position devices, or fall restraint systems. (Ex. C-13, p. 4). Budny testified, however, that this document was not distributed to employees upon hiring. Rather, employees were given a summary of the fall protection policy which states that:

> ALL EMPLOYEES are required to wear a safety harness/lanyard at all times while on this jobsite. Although some work tasks may not require you to wear a harness/lanyard, you must have it with you at all times so you are always prepared to tie off when the need arises.

(Ex. R-1, p. 6)

The Secretary then asked Budny if he ever explained this document to employees. Budny could not remember. (Tr. 223-224)

Respondent's notes for the safety meeting of February 22, 2007 at the Triborough Bridge project is entitled "Fall Protection" and states in pertinent part:

> All workers on the safe span system must be wearing a harness with a double lanyard. There are areas where tie off is not required, and there are many other areas that do require you to be tied off. Always be prepared to tie off when & where it is required.

(Ex. C-15, p.6)

Asked to explain where tying off would not be required, Budny explained that "if there is an area where you have runs and it's reflected that you wouldn't be required to tie off." (Tr. 220) When pressed if that meant that tying off was actually not required everywhere on the project, Budny replied that he was told by safety director John Pouso that 100% tie off was required. (Tr. 221) Budny stated that he was told of the 100% tie off requirement by Pouso about a year and a half before the trial, and admitted that he did not personally hear Pouso tell that to anybody else. (Tr. 221) Nonetheless, Budny testified that he conveyed the 100% tie off rule at the orientation for new hires. He also testified that during training, he would convey the rule when the employees were on aerial lifts.

(Tr. 221) However, Budny could not recall anyplace where the 100% tie off rule was written down. (Tr. 222)

Frank Keller

Frank Keller, respondent's field engineer, testified that he had responsibility for employee safety. (Tr. 244) According to Keller, the company rule required 100% tie off from the moment an employee left the ground. (Tr. 247-248) Keller recalled that, at the start of the project, he asked project manager Daniel Payea if employees could skip tying off in an area already protected by a hand rail and mid-rail. According to Keller, Payea informed him that the proposal was unacceptable and that employees had to be tied off 100% from the moment they left the ground. (Tr. 248) Keller also testified that he conducted regular inspections to ensure that employees were obeying the tie off rule. Approximately 90% of the time, Keller conducted these inspections by observing from the ground the employees working on the elevated platforms. (Tr. 246) He described these inspections as "a very quick overview of what the situation was." (Tr. 254) Keller testified that he would call up to the employees for them to show him that they were properly tied off. In turn, the employees would "bang the lanyard" or otherwise demonstrate that the lanyard was attached properly. (Tr. 254-255) Keller admitted that he never saw this procedure set forth in writing and did not know if it was written anywhere. (Tr. 255)

Keller estimated that, in 10% of his inspections, or about twice a week, he actually went up on the piers to check on the employees. (Tr. 247, 257) He went up onto the piers as the work when it became difficult to see the employees from the ground. (Tr. 257) This was only necessary for the top two piers. (Tr. 256) Keller asserted that there was not a single occasion where he found an employee not tied off. (Tr. 250)

Keller also denied that he ever heard Hugh Gelormino tell employees that there were circumstances where it was permissible not to be tied off. (Tr. 250) However, he could not recall ever seeing a document which stated that, on the Queens side piers,

employees had to be tied off 100% of the time while in the elevated working area. (Tr. 265)

Daniel Payea

Daniel Payea is respondent's project manager at the Triborough Bridge. (Tr. 288) He testified that no member of the jacking crew ever complained to him about a hazard posed by the saddle beam holes. (Tr. 293) Similarly, he stated that neither of the two ironworker shop stewards ever expressed concerns regarding safety practices employed on the Queens side piers. (Tr. 293)[3] Payea testified that he was never told that either Shawn Seaman or Generoso Gelormino were not properly tied off. (Tr. 295) Before the accident, he never saw an employee working without being tied off, and was not aware of any statement by Hugh Gelormino that, under certain conditions, it was not necessary to tie off. (Tr. 299-300) Had he been aware of such a statement, he would have retrained the entire gang. (Tr. 300) Payea reviewed several incidents where employees were disciplined for various safety infractions. (Ex. C-17) He noted that Generoso Gelormino was once given a safety violation notice for failure to tie off while in a lift. (Ex. C-17, p. 13).

Exhibit C-17 also contains two disciplinary notices issued to an employee, Dan Kane. The first notice, issued March 27, 2007 states that the employee was observed "exposing himself to a fall greater than 30' w/out being tied off to static line." (Ex. C-17, p.12) A second notice was issued on May 22, 2007 and stated that the employee "was observed at 11:30 am setting street panels at leading edge w/no fall protection. Dan has been given several verbal warnings & written citation March 27, 2007 for the same

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[3]Payea recalled receiving a report from project safety manager Robert Budny that two employees on the jacking crew on the Queens side piers were observed not tied off while working. Payea told Budny to immediately take the men off the bridge and send them home for the day. They were both sent home and later retrained. (Tr. 294) However, this incident apparently occurred after the alleged violation. (Tr. 215-216)

violation. He has again placed himself in eminent danger." (Ex. C-17, p.8) Another document, entitled "Policy review/corrective action," dated May 23, 2007 indicates that the employee was asked to come in and review the company video on fall protection and the Fall Protection Policy. The employee watched the video in its entirety. The document concludes by summarizing actions implemented, including the installation of a static line. There is nothing that indicates if either of these incidents occurred at the Triborough Bridge project. (Ex. R-6) Payea noted that the employee left after the second incident, and indicated his belief that the employee was dismissed after the second violation. (Tr. 332-333) He admitted, however, that nothing in the document indicated that he was dismissed and could not actually recall whether Kane was actually dismissed based on the incidents. (Tr. 334)[4]

Burden of Proof

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

There is no dispute that the cited standard applies and that both Shawn Seaman and Generoso Gelormino were not tied off, in violation of the standard. Moreover, it is undisputed that the employees were working near the unprotected saddle beam holes which exposed them to a fall hazard of 37 feet. The dispute in this case centers on whether respondent knew or could have known of the violation with the exercise of reasonable diligence.

On this record, the Secretary has established *prima facie* that respondent knew or

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[4]At the conclusion of the trial, I requested that respondent provide some official documentation to indicate why Kane was dismissed. (Tr. 337) Respondent informed me that it was unable to provide such documentation. (ALJ 1)

should have known that employees were working without appropriate fall protection. According to both Shawn Seaman and the CO, foreman Hugh Gelormino knew that employees were working near the saddle beam holes without being tied off. Moreover, the evidence indicates that, instead of disciplining employees to induce compliance, the foreman merely yelled at them. Merely using verbal warnings is not a sufficient method of enforcing safety rules. *See GEM Industrial Inc.*, 17 BNA OSHC 1861, 1864 (No. 93-1122, 1996). The foreman's knowledge is imputable to the employer. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-0369, 1991).

Employee Misconduct

Respondent, argues that the failure of Shawn Seaman and Generoso Gelormino to tie off was the result of unpreventable employee misconduct. It contends that it had an established, well-communicated and enforced workrule that required all employees to be tied off at all times. Moreover, it argues that Seaman's claim that Hugh Gelormino told the crew that it was not necessary to tie off when working near the saddle beam holes is (1) not credible and (2) if said, was in violation of well-established company policy. Respondent further argues that, if Hugh Gelormino was aware of a problem with employee's tying-off, that problem was never communicated to his superiors. Finally, it contends that company officials regularly inspected the worksite to ensure that employees were complying with the tie-off policy and that these officials never had reason to believe or suspect that employees were not complying with the rule that required employees to be tied off 100% of the time.

In Commission proceedings, the Judge's findings of fact must resolve the conflicting testimony of witnesses. *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297 (No. 14249, 1978) ("[i]t is the policy of the Commission to ordinarily accept an Administrative Law Judge's evaluation of the credibility of witnesses, for it is the Judge who has lived with the case, heard the witnesses, and observed their demeanor") *Accord, E.L. Jones and Son, Inc.*, 14 BNA OSHC 2129, 2132 (No. 87-0008, 1991). Further, while the

Commission has the authority to make factual findings where the Judge has not, it ordinarily will prefer that the Judge make such determinations. *E.g., Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066 (No. 98-866, 2000); *Able Contractors, Inc.*, 5 BNA OSHC 1975, 1978 (No. 12931, 1977). The Judge has the obligation of fairly considering the entire record and adequately explaining his or her findings. *Asplundh Tree Expert Co.*, 6 BNA OSHC 1951, 1953-1954 (No. 16162, 1978).

Clearly, there are substantial conflicts between the testimony of Shawn Seaman and respondent's supervisory personnel. For example, Seaman's assertion that he complained about the saddle beam holes to Keller was denied by the safety engineer. (Tr. 249) Similarly, Budny denied that he instructed Seaman that tying off was required only when working at the outer most extreme point of the jacking system. Certainly, given Seaman's purported concerns, his assertion that he worked without tying off strains credulity. Yet, despite the testimony of respondent's supervisors that they never saw anybody working without being tied off, Seaman's assertion that it was common for members of the jacking crew to tie off was supported by the CO's interviews with other employees.

Unlike Budny, Payea and Keller, who rarely went up on the piers, Seaman was the only witness who was actually up on the piers and observed the activities of the other employees on a daily basis. Having observed the demeanor of Seaman, including his body language and facial expressions, I found him to be a sincere, credible and convincing witness, and I credit his testimony. In reaching my conclusion I have considered the testimony of Budny, Payea and Keller that they enforced a 100% tie off rule and that employees on the platforms complied with the rule. However, I find their testimony to be not credible given the inherent confusion of the written instructions given to the employees and the testimony of Seaman, which was largely supported by information independently obtained by the CO.

To establish the affirmative defense of "unpreventable employee misconduct," the

employer must prove that it: (a) has established work rules designed to prevent the violation, (b) adequately communicated those rules to its employees, (c) took steps to discover violations, and (d) effectively enforced the rules when violations were discovered. *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999).

Seaman's testimony demonstrates that, rather being an unpreventable instance of employee misconduct, his and Generoso Gelormino's failure to tie off was a routine occurrence. Moreover, Seaman's assertion that he complained about the saddle beam holes to Keller, should have made him aware that any 100% tie off rule was not being followed.

While I find Seaman's disputed testimony to be sufficient to defeat respondent's "unpreventable misconduct" defense, I also find the defense fails based on the essentially undisputed evidence of record.

The first element of the defense requires the employer to demonstrate that it had "established work rules designed to prevent the violation." Respondent's rule requiring employees to tie off 100% of the time is confusing and contrary to the written work rules provided employees. For example, Exhibit R-1, which is part of the employee hiring package, states that employees are required to have their harnesses with them at all times. However, it further states that "some work tasks may not require you to wear a harness/lanyard, you must have it with you at all times so you are always prepared to tie off when the need arises." This plainly suggests that there are times when employees are not required to tie off. Similarly, although respondent's safety meeting notes (Ex C-15) requires employees to wear their safety harnesses and double lanyards, it goes on to state that "[t]here are areas where tie off is not required, and there are many other areas that do require you to be tied off. Always be prepared to tie off when & where it is required." In contrast, respondent could not provide any documents which explicitly states that employees working on the piers must be tied off 100% of the time. Moreover, respondent's witnesses were unable to effectively indicate those occasions where, under

the written rules, tying off might not have been necessary.

Next, the employer must demonstrate that the work rule was effectively communicated. Here too, respondent falls short. The written instructions given to employees failed to communicate that they had to tie off 100% of the time when on the elevated working surfaces. To the contrary, the written instructions given to employees clearly suggest that there are exceptions to the rule. However, respondent was unable to explain what those exceptions were and under what circumstances they might apply. Indeed, the testimony of the compliance officer and Shawn Seaman indicates that, as a result of these inconsistencies, the employees working on the piers did not understand that they were required to tie off at all times. In contrast, the evidence indicates that employees had no problem understanding that they were required to tie off when on the aerial lift taking them to their work stations. (Tr. 86, 191) Unlike the rule requiring employees to be tied off when on the piers, the rule requiring tie off when on a manlift was unambiguous, clear and effectively communicated, and the results are obvious in employee comprehension of the rule.

Third, effective implementation of a safety program requires a diligent effort to discover violations of safety rules by employees. *Propellex Corp.*, 18 BNA OSHC 1677, 1862 (No. 96-0265, 1999 The evidence indicates that respondent failed to make a diligent effort to discover violations of its workrule. The inspections conducted by respondent's supervisory officials essentially consisted of looking up to the employees working 37 feet above to see if they were tied off. This method was not a reasonable method of discovering violations. For example, Budny testified that, when he couldn't see the employee from the ground, he would shout up to them and have them demonstrate that they were tied off. Similarly, Keller testified that he would call up to employees to have them demonstrate that they were tied off. Rarely, however, did Budny, Keller or Payea actually go up to the working surfaces to ensure that employees were in compliance. Yelling up to the employees could have enabled those who were not tied off to quickly

attach their lanyards to the nearest static line so they could show that they were in compliance. Seaman's testimony that both he and Generoso Gelormino regularly worked without being tied off was supported by the employee interviews conducted by the CO, where he learned that several other members of the crew failed to tie off. The ineffectiveness of respondent's ground based inspection system is boldly demonstrated by Budny's failure to discover that neither Seaman nor Generoso Gelormino were tied off on May 6, 2008, the day of the fatal accident. Clearly, respondent's ground based method of ensuring compliance was ineffective in discovering these violations. Therefore, I find that respondent method of discovering violations was ineffective and not reasonably calculated to discover violations.

Finally, the evidence demonstrates that, when a violation was discovered, respondent did not effectively enforce the rule. Hugh Gelormino told the CO that, although respondent had a progressive enforcement plan, when he would find an employee working without being tied off, he would merely yell at them rather than report the incident for further discipline. Merely using verbal warnings is not a sufficient method of enforcing safety rules. *See GEM Industrial Inc.,* 17 BNA OSHC 1861, 1864 (No. 93-1122, 1996)

Finding that respondent failed to have a clear workrule that was adequately communicated or enforced, I hold that respondent failed to establish the affirmative defense of "unpreventable employee misconduct". Therefore, the citation is affirmed.

CHARACTERIZATION AND PENALTY

The Secretary characterized the violation as serious. As demonstrated by the accident, a fall from 37 feet is likely to cause death or serious physical harm. Accordingly, the citation was properly characterized as serious. (Tr. 137-138)

The Secretary proposed a penalty of $3500 for the violation. When determining an appropriate penalty, the Commission must consider an employer's size, history of

previous violations, good faith, and the gravity of the violation. 29 U.S.C. § 666(j), section 17(j) of the Act. The CO testified that the unadjusted penalty for the violation was $5000[5] and that credit was given for the employers size and history. Because of the seriousness and severity of the violation, no credit was given for good faith. (Tr. 140) I find the proposed penalty to be appropriate.

ORDER

Accordingly, it is **ORDERED** that Citation 1, item 1, for a serious violation of 29 C.F.R. §1926.760(a)(1) is **AFFIRMED** and a penalty of $3500 is **ASSESSED.**

SO ORDERED

________/s/________________________________

G. Marvin Bober

Administrative Law Judge

Dated: October 1, 2009

Washington, D.C.

[5]Under 29 U.S.C. §666(b), section 17(b) of the Act, the maximum penalty for a serious violation is $7000.