United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Virginia Construction & Management Company, Inc. Respondent.	OSHRC Docket No. **11-0328**

Appearances:

Dane Steffenson, Esq., U. S. Department of Labor, Office of the Solicitor,
Atlanta, Georgia
For Complainant

Gershon Booso, Brooklyn, NY
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Virginia Construction & Management, Inc. (VCM), is a construction management company with headquarters in Brooklyn, New York. In August of 2010, VCM was overseeing a renovation project on Lincoln Road in Miami Beach, Florida. Occupational Safety and Health Administration (OSHA) compliance officer Henry Shpiruk inspected the worksite on August 10 and 11, 2010. As the result of his inspection, the Secretary issued two citations to VCM on January 11, 2011.

Citation No. 1 alleges the following serious violations and proposes penalties:

Item 1: 29 C. F. R. § 1910.178(l)(1), for failing to train operators in the safe operation of powered industrial trucks. The Secretary proposes a penalty of $ 1,400.00.

Item 2: 29 C. F. R. § 1926.96, for failing to require employees to wear safety-toe footwear. The Secretary proposes a penalty of $ 600.00.

Item 3: 29 C. F. R. § 1926.100(a), for failing to require employees to wear protective helmets. The Secretary proposes a penalty of $ 600.00.

Item 4: 29 C. F. R. § 1926.102(a)(1), for failing to require employees to wear protective eye and face equipment. The Secretary proposes a penalty of $ 800.00.

Item 5: 29 C. F. R. § 1926.403(b)(2), for failing to use equipment in accordance with instructions. The Secretary proposes a penalty of $ 800.00.

Item 6: 29 C. F. R. § 1926.451(e)(1), for failing to provide required access for a scaffold platform. The Secretary proposes a penalty of $ 2,000.00.

Item 7a: 29 C. F. R. § 1926.451(f)(7), for failing to erect a scaffold under the supervision of a competent person qualified in scaffold erection.

Item 7b: 29 C. F. R. § 1926.451(f)(3), for failing to inspect a scaffold for visible defects before each work shift. The Secretary proposes a grouped penalty of $ 1,400.00 for Items 7a and 7b.

Item 8: 29 C. F. R. § 1926.451(g)(1), for failing to provide fall protection for an employee working more than 10 feet above a lower level. The Secretary proposes a penalty of $ 2,000.00.

Item 9: 29 C. F. R. § 26.454(a), for failing to provide training by a person qualified in scaffold safety to an employee working on a scaffold. The Secretary proposes a penalty of $ 800.00.

In Citation No. 2, the Secretary alleges VCM committed a willful violation of 29 C. F, R, § 1926.501(b)(1), for failing to provide fall protection for an employee working on a walking/working surface 6 feet or more above a lower level. The Secretary proposes a penalty of $ 28,000.00 for Item 1.

The court held a hearing in this matter on November 16, 2011, in Miami, Florida. VCM was represented *pro se* by project manager Gershon "Tony" Booso. The parties waived filing post-hearing briefs.

Based upon the record, the court vacates Item 8 of Citation No. 1. The court affirms all of the other cited items of Citation No. 1, and assesses the reduced penalties set out in the Order. The court affirms Item 1 of Citation No. 2, and assesses a penalty of $ 28,000.00.

Background

VCM has been in the construction management business since 1987. Its president is Miriam Booso, who co-owns the company with her son-in-law Neiv Ziarno. Miriam's husband it Tony Booso, who acts as project manager on the company's worksites.

Most of VCM's projects have been located in New York. VCM had worked on projects for many years with a company called Levy and Levy (also referred to during the hearing as "Levy and Levy Wings," "LMIG Group," and "Wings Group" (Tr. 36-37), and as "MCJC, Inc." in its contract with VCM (Exh. C-1)). After Levy and Levy bought a five-story building located at 350 Lincoln Road in Miami Beach, Florida, VCM agreed to provide project management services for its renovation during 2009 and 2010.

The renovation proved to be a rocky road for VMC with respect to OSHA. OSHA compliance officers inspected the Lincoln Road project three times before the instant inspection (in May 2009, February 2010, and June 2010), resulting in numerous citations (Exhs. C-13, C-14, and C-151). VCM's relationship with OSHA was strained further when, on August 10, 2010, compliance officer Henry Shpiruk arrived at the site and proceeded to attempt to hold an opening conference with Tony Booso.

Shpiruk was assigned to inspect the Lincoln Road project based on a referral. On the day of the inspection, he parked approximately one block north of the project and walked towards it.

1 The Secretary issued the June 2010 citation to Belkay Construction, the general contractor on the Lincoln Road project. VCM asked to have the citation re-issued in its name and arranged to take over the payments of the OSHA penalties levied against Belkay (Exh. C-15).

As he did so, Shpiruk observed employee Jose Arana working on top of an overhang, or canopy, located above the front doors of the building. The overhang was 16 feet, 7 inches, above the sidewalk. Employees used a scaffold located underneath the canopy to climb up to the canopy surface. Arana was not tied off and was not wearing any personal protective equipment (PPE). Shpiruk asked Arana to come down, and then asked him who was in charge of the site. Arana pointed to Booso, who was walking up to them.

Shpiruk showed Booso his credentials. Booso began yelling at Shpiruk that OSHA was harassing him, and then turned to Arana and fired him (he hired him back that night). As Shpiruk attempted to photograph the chipping hammer Arana had been using on the overhang, Booso grabbed the hammer from him and "shoulder pushed" Shpiruk in the chest. Shpiruk called Area Director Darlene Fossum to report these events. Fossum asked to speak to Booso. Booso, according to Shpiruk, "immediately went into a verbal tirade," and Fossum asked Booso to hand the phone back to Shpiruk (Tr. 215). She then instructed Shpiruk to end the inspection and return to the office. Before leaving, Shpiruk asked Arana to walk with him across the street, where Shpiruk conducted an interview with him.

Once back at OSHA's office, Shpiruk took part in a conference call with Fossum and Miriam Booso. They agreed that Shpiruk would return to the Lincoln Road site the next day. Shpiruk testified, "Mrs. Booso assured us that Mr. Booso would be present and would let us continue with the inspection and would be calm" (Tr. 217).

Shpiruk returned the following day. He took photographs and gathered information from Booso. Shpiruk also interviewed VCM employee Kingsley Valentine. At some point Dane Steffenson, the Secretary's counsel at the hearing, arrived at the site.

Based upon Shpiruk's inspection, the Secretary issued the two citations to VCM that gave rise to this proceeding. At the hearing, Booso attempted to litigate the citations previously issued by the Secretary. The Secretary and VCM (or Belkay) reached settlement agreements on those citations, for which Review Commission judges had issued final orders. The court has no jurisdiction over those citations (Exhibits C-13, C-14, and C-15), and they are not reopened for the purposes of this decision. The previous citations will be considered with respect to the element of

employer knowledge and to the willful classification of Item 1 of Citation No. 2.

Jurisdiction and Coverage

The Review Commission has jurisdiction over this proceeding under § 10(c) of the Occupational Safety and Health Act of 1970 (Act). VCM is an incorporated company, headquartered in New York that was engaged in construction in Florida. It is a covered business under § 3(5) of the Act.

Was Jose Arana an Employee of VCM?

Prior to testifying as a sworn witness, Booso asserted as a defense the claim that Jose Arana was not an employee working for VCM. Booso contended Arana was a sheetrock subcontractor. At times during his own testimony and during his cross-examination of Arana, Booso appeared to be acknowledging Arana was a VCM employee. For example, when asked how many total employees VCM had working for the company in 2010, Booso responded:

> I don't know. We average about 40 employees. Like years. Not like only when I got the job, I keep my employees, I keep my employees even if I don't have a job. If I don't have work like, *example, Mr. Arana, a few times he was instructed to broom because, if not, go home. There's no job, it's not sheetrock, he came to put sheetrock.* So just to give the employee the money so he can take to his wife and kid, which he needed, I kept him to clean, to broom even.

(Tr.. 33-34; emphasis added).

Later, when Booso was lamenting keeping Arana on despite knowing his penchant for ignoring safety rules, he stated, "I don't know how I can be so stupid to let him on the job after so many warnings and Troy warning [him], he just [had] my—you know, my sympathy to give him salary" (Tr. 121).

Arana testified that he worked for Booso, that he considered VCM to be his employer, and that VCM paid him an hourly rate in cash. (Arana stated the first three or four times he got paid, it was by check from Belkay, handed to him by VCM supervisor Trotman). He stated he had initially been hired by VCM to perform framing and drywall work, which he did for the first three months of the ten or eleven months he worked at the Lincoln Road site. After that, he did whatever he was instructed to do by Booso, or by VCM supervisors Troy Trotman and Kingsley

Valentine. Arana stated he used tools provided by VCM at the site.

The court finds that VCM was the employer of Jose Arana. VCM's project manager hired, fired, and rehired Arana. VCM's supervisors instructed Arana on what tasks to perform on the worksite. VCM owned and provided the tools Arana used. VCM paid Arana an hourly wage.

Citation No. 1

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Item 1: Alleged Serious Violation of 29 C. F. R. § 1910178(l)(1)

Item 1 of Citation No. 1 alleges:

> 29 CFR 1910.178(l)(1): Operators were not trained in the safe operation of powered industrial trucks:
>
> a) Inside and on the sidewalk of a building under renovation located at 350 Lincoln Road in Miami Beach, Florida: The employer did not ensure that each powered industrial truck operator was competent to operate a powered industrial truck safely, as demonstrated by the successful completion of a training and evaluation program, on or about August 11, 2010.

The standard at 29 C. F. R. § 1910.178(l)(1) provides:

> The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).

Paragraph (l)(4)(iii) provides:

> An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years.

VCM operated a forklift at the Lincoln Road site. The standard at 29 C. F. R. § 1910.178

addresses "Powered industrial trucks," and contains safety requirements for lift trucks. The cited standard applies to the forklift used by VCM.

Shpiruk observed VCM employee Kingsley Valentine operating the forklift (Exh. C-11). When Shpiruk interviewed Valentine, he asked him if he had been certified in the safe operation of a forklift. Valentine replied he had received certification in 2005, but his certification document was in Brooklyn. Valentine stated he would forward a copy of the documentation to Shpiruk, but he never did so.

Assuming Valentine was certified in 2005, to meet the requirements of 29 C. F. R. § 1910.178(l)(4)(iii) he would have had to be reevaluated in 2008. It is the employer's duty to ensure its employees have successfully completed the training and evaluation specified in the standard. Booso did not check Kingsley's certification, and he did not prohibit him from driving the forklift until Valentine was reevaluated. Booso testified that he considered Valentine competent to drive a forklift, and therefore he did not think it necessary for Valentine to receive actual certification:

> He's competent. I watch him, he's competent. You see, I'm near him and I know he does a good job. I let him do this. If I know Kingsley's drunk, he's drinking, he's never going to go on top of this. If I know he's not suitable to do, he's never going to do this.
>
> He's a trained guy. I trust him. I give him—give him my permission for him to do it. It's my permission. It's my job. It's my responsibility not to have an accident with this. It's not somebody like an agency to come and force me to get the license for the forklift. You don't need a license for a forklift.

(Tr. 143-144).

The Secretary has established that VCM failed to comply with the cited standard. The hazard created by this failure to comply was the potential that Valentine would operate the forklift in an unsafe manner, striking or seriously injuring another employee on the site. Exhibits C-11 and C-12 show Valentine at the controls of the forklift, with Booso and another VCM employee standing immediately next to the lift. Booso admitted that Valentine raised himself and others on the lift. Booso called this "industry practice," and stated, "Maybe it's not safe by the book, but

it's safe by us" (Tr. 13). The Secretary has shown VCM's employees had access to the violative condition.

Booso was aware he had not checked Valentine's certification and had not ensured that his training was up to date. The Secretary issued a citation to VCM's general contractor on June 17, 2011, at the same site for violating the same standard cited here. Booso simply rejects the requirements of 29 C. F. R. § 1910.178(l)(i) as unnecessary. As the project manager, Booso's knowledge is imputed to VCM.

The Secretary has established a serious violation of 29 C. F. R. § 1910.178(l)(1). Item 1 is affirmed.

Items 2, 3, and 4: Alleged Serious Violation of 29 C. F. R. §§ 1926.96, 100(a), and 102(a)(1)

Item 2 of Citation No. 1 alleges:

> 29 CFR 1926.96: Safety-toe footwear for employees did not meet the requirements and specifications in American National Standard for Men's Safety—Toe Footwear, Z41.1-1967:
>
> a) On top of a concrete canopy at the northwest exterior elevations of a building located at 350 Lincoln Road in Miami Beach, Florida: An employee working on a site removing concrete spoils from a walking/working surface using an electric rotary hammer was not wearing safety toe footwear, on or about August 10, 2010.

The standard at 29 C. F. R. § 1926.96 provides:

> Safety-toe footwear for employees shall meet the requirements and specifications in American National Standard for Men's Safety-Toe Footwear, Z41.1-1967.

Item 3 of Citation No. 1 alleges:

> 29 CFR 1926.100(a): Employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns:
>
> a) An employee performing work on a concrete canopy and gaining access to and from that canopy by climbing a mobile fabricated frame scaffold was not wearing head protection equipment where there was a possible danger of head

injury from impact or from falling or flying objects, on or about August 10, 2010. The standard at 29 C. F. R. § 1926.100(a) provides:

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

Item 4 of Citation No. 1 alleges:

> 29 CFR 1926.102(a)(1): Eye and face protective equipment was not used when machines or operations presented potential eye or face injury:
>
> a) On top of a concrete canopy at the northwest exterior of a building located at 350 Lincoln Road in Miami Beach, Florida: An employee removing concrete spoils from an existing concrete canopy using an electric rotary hammer was not wearing eye protection equipment when operation presented potential eye injury from physical agents, on or about August 10, 2010.

The standard at 29 C. F. R. § 1926.102(a)(1) provides:

> Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

The cited standards are part of OSHA's construction standards addressing PPE. They apply to the employees working on the Lincoln Road construction project.

On August 10, 2010, VCM employee Jose Arana was working while standing on the overhang at the front of the building under renovation on Lincoln Road. It is undisputed Arana was wearing sneakers instead of safety-toed shoes, and he was not wearing a protective helmet or safety glasses as he used an electric rotary hammer to chip concrete (Exhs. C-3 through C-7).

Arana admitted at the hearing that he was wearing sneakers the first day of Shpiruk's inspection, and that he was not wearing a safety helmet or safety glasses. He testified he arrived at approximately 7:00 a.m., and was working with the rotary hammer on the overhang until Shpiruk arrived, between 9:30 and 10:00 a.m. He also stated that Valentine had been working with him on the overhang until just before Shpiruk had arrived. Valentine was not wearing a safety helmet or safety glasses.

When asked why he was not wearing safety-toed shoes, Arana replied, "Nobody used safety shoes." When asked why he did not wear a safety helmet, Arana answered, "Too hot" (Tr. 76).

Both Arana and Valentine were exposed to hazards created by their lack of PPE. They had tools sitting on the overhang. Shpiruk estimated the rotary hammer weighed approximately 30 pounds. Arana was exposed to the hazard of dropping a tool or other material on his foot. The employees accessed the overhang by climbing the end of the scaffold. While climbing, they were exposed to tools and materials potentially falling on them and hitting their heads. While on the overhang, Arana and Valentine were chipping concrete with the rotary hammer. The chipped concrete could potentially fly up and strike an employee in the face, injuring him.

Booso was aware that Arana and Valentine were working on the overhang without the appropriate PPE. Booso set up his "office" in a McDonald's across the street from the Lincoln Road project, where he would sit and watch the progress on the site. He testified, "[M]y office was in McDonald's. I was sitting in McDonald's from 7:00 to 9:00/10:00, watching the corner. This was my office" (Tr. 40). When asked if he could see Arana as he worked without the required PPE on August 10, 2010, Booso responded, "Yes, of course I see him on the ledge. I saw him all the time. I'm coming back and forth. I know I say McDonald's is my office, I'm sitting there for two hours" (Tr. 123).

The Secretary has established serious violations of the PPE standards at 29 C. F. R. § § 1926.96, 100(a), and 102(a)(1). Items 2, 3, and 4 are affirmed.

Item 5: Alleged Serious Violation of 29 C. F. R. § 1926.403(b)(2)

Item 5 of Citation No. 1 alleges:

> 29 CFR 1926.403(b)(2): Listed, labeled or certified equipment was not installed and used in accordance with instructions included in the listing, labeling, or certification:
>
> a) On top of a concrete canopy at the northwest exterior elevation of a

building located at 350 Lincoln Road in Miami Beach, Florida: An employee using an electrical rotary hammer being powered by a four way gang box attached to the end of an extension cord was not installed and used in accordance with instructions, on or about August 10, 2010.

The standard at 29 C. F. R. § 1926.403(b)(2) provides:

> Listed, labeled, or certified equipment shall be installed and used in accordance with instructions included in the listing, labeling, or certification.

The cited standard appears in Subpart K—Electrical of OSHA's construction standards. "Sections 1926.402 through 1926.408 contain installation safety requirements for electrical equipment and installations used to provide electric power and light at the jobsite." 29 C. F. R. § 1926.402(a). The cited standard applies to the conditions at the Lincoln Road site.

On the day of the inspection, Arana was using an electric rotary hammer to chip concrete on the canopy. The electric cord of the hammer was connected to an extension cord, which was in turn connected to a gang box. The gang box was connected to another extension cord which was plugged into an electrical outlet inside the building (Exh. C-8).

Shpiruk testified the gang box was not being used in accordance with its listing. He also observed the gang box was missing a knockout. Shpiruk stated:

> That box is made for permanent installation whether it be inside sheetrock or on a wall, it's made for permanent installation. In this case it was used as temporary wiring . . . to power the chipping hammer. Especially with a knockout missing where you could put your fingers into that knockout and touch any live wires or the sides of the actual receptacles which could cause burns . . . and/or electrical shock.

(Tr. 228-229).

Booso acknowledged that the gang box was not intended for outdoor use, and stated he would not use the gang box for temporary outdoor wiring if the employee planned to be using it for 8 hours. However, since he knew Arana was going to be using the hammer for only a couple of hours in the morning, Booso saw no reason not to use the gang box in this manner.

The Secretary has established a violation of 29 C. F. R. § 1926.403(b)(2). VCM failed to comply with the terms of the standard. Arana and Valentine were working on the canopy, using

the electric hammer. They were exposed to electric shock or burns from the gang box. Project manager Booso and foreman Valentine knew they were using inappropriate equipment for the outdoor work. Item 5 is affirmed.

Item 6: Alleged Serious Violation of 29 C. F. R. § 1926.451(e)(1)

Item 6 of Citation No. 1 alleges:

> 29 CFR 1926.451(e)(1): When scaffold platforms were more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface were not used:
>
> a) At the northwest exterior elevation of a building under renovation located at 350 Lincoln Road in Miami Beach, Florida: An employer gaining access to and from the work level platform of a fabricated frame scaffold approximately 13 feet above a lower level did not have a ladder, stair tower, ramp, walkway, or direct access from another scaffold, on or about August 10, 2010.

The standard at 29 C. F. R. § 1926.451(e)(1) provides:

> When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

The standard at 29 C. F. R. § 1926.451(e) provides: "This paragraph applies to scaffold access for all employees." Arana and Valentine were using the scaffold to climb to the canopy on which they were working. The cited standard applies to the cited conditions.

Arana and Valentine climbed up one side of the scaffold to reach the canopy (Exh. C-4). The scaffold did not have a built-in ladder and VCM did not otherwise provide a ladder, ramp, walkway, or any other means of scaffold access listed in 29 C. F. R. § 1926.451(e)(1). Furthermore, Exhibit C-4 shows that the planks set across the middle of the scaffold protrude over

the end that Arana is climbing. Arana and Valentine had to climb the side of a scaffold that was not designed for climbing, and then maneuver around the projecting board ends. Shpiruk testified the hazard created by the inadequate access was that of falling to the sidewalk below. He stated that in the approximately 400 inspections he had conducted, "I've had people fall at that height break their wrist, break their ankle, but at that height I've had people die. So it could be a fracture, laceration and up to death" (Tr. 233).

Arana and Valentine were exposed to the hazard of falling from the scaffold. Valentine was a foreman, and Booso was sitting across the street, observing the VCM employees going up and down the scaffold. Booso stated he was not concerned that his employees had to climb the scaffold with planks extending over the edge because they were "only going to go once or twice" (Tr. 160). The actual knowledge of Valentine and Arana is imputed to VCM.

The Secretary has established a serious violation of 29 C. F. R. § 1926.451(e)(i). Item 6 is affirmed.

Items 7a and 7b: Alleged Serious Violations of 29 C. F. R. §§ 1926.451(f)(7) and (3)

Item 7a of Citation No. 1 alleges:

> 29 CFR 1926.451(f)(7): Scaffolds were not 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:
>
> a) At the northwest exterior elevation of a building under renovation located at 350 Lincoln Road in Miami Beach, Florida: The fabricated frame scaffold being used by an employee was not erected by a competent person qualified in scaffold erection or performed by experienced and trained employees selected for such work by the competent person, on or about August 10, 2010.

The standard at 29 C. F. R. § 1926.451(f)(7) provides:

> Scaffolds 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.

Item 7b of Citation No. 1 alleges:

29 CFR 1926.451(f)(3): Scaffolds and scaffold components were not inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity:

a) At the northwest exterior elevation of a building under renovation located at 350 Lincoln Road in Miami Beach, Florida: The fabricated frame scaffold being used by an employee was not inspected for visible defects by a competent person before each work shift, on or about August 10, 2010.

The standard at 29 C. F. R. § 1926.451(f)(3) provides:

Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity.

VCM was using a scaffold on August 10, 2010, that Arana and Valentine used to access the canopy. The cited standards apply to VCM's scaffold.

The standard at 29 C. F. R. § 451(b) defines "competent person" as "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

Arana did not inspect the scaffold before each shift. Arana testified VCM never trained him in the scaffold safety. In 2005, while working for a different company, Arana had received some scaffold safety instruction along with other general construction safety instruction during an 8-hour OSHA safety course. Valentine told Shpiruk that he had not been trained and was not a competent person.

When asked if anyone inspected the scaffold before each work shift, Booso responded, "Who's going to inspect it?" (Tr. 163). When asked who the competent person on site was to erect and dismantle the scaffold, Booso stated, "Everybody is competent to erect [a] scaffold"

(Tr. 146). Booso's explanation shed light on his approach to compliance with OSHA's safety standards:

> If I go and buy a scaffold, I can go to Home Depot, buy a scaffold, [do] they ask me for [a] license, if I have been trained to do this? They sell it to me, the scaffold. I own maybe 200 pieces, a lot of scaffold I own. If I can buy it from the store and the store doesn't ask me for a license to purchase this, I need OSHA to train me? What is OSHA?

(Tr. 147).

The hazard created by the failure to have a competent person oversee the erection of the scaffold and conduct a daily inspection is that defects in the scaffold are not prevented or detected. This failure exposed Arana and Valentine to falls from the scaffold.

Booso was aware he did not have a competent person on site to oversee scaffold safety and to inspect the scaffold before its use. His actual knowledge is imputed to VCM. The Secretary has established a serious violation of 29 C. F. R. § 1926.451(f)(7) and (3). Items 7a and 7b are affirmed.

Item 8: Alleged Serious Violation of 29 C. F. R. § 1926.451(g)(1)

Item 8 of Citation No. 1 alleges:

> 29 CFR § 1926.451(g)(1): Each employee on a scaffold more than 10 feet above a lower level was not protected from falling to that lower level:
>
> a) At the northwest exterior elevation of a building under renovation located at 350 Lincoln Road in Miami Beach, Florida: Each employee on the work level platform of a fabricated frame scaffold approximately 13 feet above a lower level was not protected from that lower level, on or about August 10, 2010.

The standard at 29 C. F. R. § 1926.451(g)(1) provides:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.

VCM was using a scaffold on August 10, 2010, that Arana and Valentine used to access the

canopy. The cited standard applies to VCM's scaffold.

Shpiruk testified:

> The requirement is you need full protection on scaffolding at 10 feet or more and through measurement and interviews the platform was estimated to be approximately 13 feet above the lower level. So right there you're at least 3 feet above what the requirement is for fall protection on that scaffold.

(Tr. 237).

It is undisputed that Arana and Valentine used the scaffold as a means of gaining access to the canopy where they were chipping concrete. There was a gap of approximately 4 feet between the top level of the scaffold and the canopy. Arana testified he accessed the canopy from the scaffold by "[j]umping up, jumping from the scaffold to the concrete" (Tr. 71).

CM's employees never worked from the top level of the scaffold (they did some framing from the bottom level of the scaffold, which was less than 10 feet from the sidewalk). Paragraph (g) requires employees on a scaffold more than 10 feet high to use a guardrail system or a personal fall arrest system as fall protection. In the present case, a guardrail system would not have provided protection, since the employees were not working from the scaffold platform. The employees were only on the edge of the scaffold's top level momentarily as they used it to climb to the canopy above it.

In Item 1 of Citation No. 2, the Secretary cited VCM for a willful violation of 29 C. F. R. § 1926.501(b)(1), for failing to require its employees to use fall protection while working on the canopy. This is essentially the same violation cited under Item 8 here. Violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well. *Flint Eng. & Const. Co.,* 15 BNA OSHC 2052, 2056-2057 (No. 90-2873, 1997). The abatement is the same for both cited standards: require employees to use a personal fall arrest system when working 6 (or 10) feet or more above the lower level. Because Arana and Valentine were both actually working from the canopy, the standard cited under Item 1 of Citation No. 2 is deemed more applicable. The court determines Item 8 is duplicative of the alleged willful violation. Item 8 is

vacated.

Item 9: Alleged Serious Violation of 29 C. F. R. § 1926.454(a)

Item 9 of Citation No. 1 alleges:

> 29 CFR 1926.454(a): The employer did not have each employee who performs work while on a scaffold(s) trained by a person qualified in the subject matter to recognize those hazards associated with the type of scaffold(s) being used and to understand the procedure(s) to control or minimize those hazards:
>
> a) On site of a building under renovation located at 350 Lincoln Road in Miami Beach, Florida: The employer did not have each employee who performs work while on a fabricated frame 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 hazard, on or about August 10, 2010.

The standard at 29 C. F. R. § 1926.454(a) 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.

VCM was using a scaffold on August 10, 2010, that Arana and Valentine used to access the canopy. The cited standard applies to VCM's scaffold.

Arana and Valentine each told Shpiruk that VCM had not provided scaffold training to them by a person qualified in the subject matter. The hazard created by this failure was that the employees did not recognize the defects of the scaffold, including the lack of adequate access to the scaffold, and the protruding boards. This failure exposed Arana and Valentine to fall hazards.

Booso was aware he had not provided training to the VCM employees. As project manager, Booso's actual knowledge is imputed to VCM. The Secretary has established a serious violation of 29 C. F. R. § 1926.454(a).

Citation No. 2

Item 1: Alleged Willful Violation of 29 C. F. R. § 1926.501(b)(1)

Item 1 of Citation No. 2 provides:

> 29 CFR 1926.501(b)(1): Each employee on a walking/working surface having an unprotected side or edge which was 6 or more feet (1.8 m) above a lower level was not protected from falling by the use of a guardrail system, a safety net system, or a personal fall arrest system:
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> a) At the northwest exterior elevation of a building under renovation located at 350 Lincoln Road in Miami Beach, Florida: Each employee performing work on a walking/working surface approximately 16 ft. 7 inches above a lower level with unprotected side and edges was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems, on or about August 10, 2010.
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> Virginia Construction and Management, Inc. was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent standard at 29 CFR 1926.501(b)(14), which was contained in OSHA inspection number 313109316, Citation Number 1, Item Number 3, and was affirmed as a final order on 3/22/2010, with respect to the workplace located at 350 Lincoln Road in Miami Beach, Florida.
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> The standard at 29 C. F. R. § 1926.501(b)(1) provides:
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> 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.

Arana and Valentine were working on the concrete canopy above the entrance of the Lincoln Road building at issue. The cited standard applies to the cited conditions.

Shpiruk photographed Arana on the 16-foot, 7-inch, canopy without fall protection (Exhs. C-3 and C-6). No guardrails or safety net systems were installed. Arana was not using a personal fall arrest system, and he testified that Valentine never used a personal fall arrest when he was working atop the canopy.

The employees were exposed to a fall of 16 feet, 7 inches, to the concrete sidewalk below. The likely result of such a fall is death or serious physical injury. Booso was aware the employees were working without fall protection. His actual knowledge is imputed to VCM.

The Secretary has established a violation of 29 C. F. R. § 1926.501(b)(1).

Willful Classification of Item 1 of Citation No. 2

The Secretary classifies this violation as willful.

> A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O'Horo Co.,* 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.,* conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated).

A.E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

Project manager Booso knew that his employees were working at a height of 16 feet, 7 inches, above the sidewalk. He was sitting across the street at McDonald's and had a clear view of the worksite. When Shpiruk arrived and began talking to Arana, Booso hurried over to the worksite.

Booso also knew OSHA required fall protection for employees working 6 feet or more above a lower level. Shpiruk photographed Booso's copy of the OSHA construction standards, in which Booso had highlighted the standard at 29 C. F. R. § 1926.502(b)(1) in lime-green marker (Exh. C-10). At the hearing, Booso acknowledged he knew the requirements of the standard, but argued he had discretion to disregard the requirements: "Yes, I'm aware [of 29 C. F. R. § 1926.501(b)(1)], but depends where. It's my judgment to decide" (Tr. 127).

Booso knew the requirements of the cited standard, yet he made the choice to ignore them.

The Secretary had issued a citation for the violation of 29 C. F. R. § 1926.501 at the site three months earlier (Exh. C-15). "The hallmark of a willful violation is the employer's state of mind at the time of the violation–an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff'd* 268 F.3d 1123 (D.C. Cir. 2001).

The court finds this to be a clear-cut case of willfulness. Booso repeatedly expressed his disdain for the requirements set out in OSHA's standard during the hearing. When confronted with the unambiguous mandates of the standards, Booso would claim he had some leeway or discretion or that it was his judgment call whether or not to comply with the standards. Booso knowingly encouraged his employees to engage in various unsafe practices. He made it evident he did not consider OSHA's standards to be binding on him or his employees, and he blatantly violated any standard he found inconvenient.

The employer is responsible for the willful nature of its supervisors' actions to the same extent that the employer is responsible for their knowledge of violative conditions." *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (Nos. 86-360, 86-469; 1992). Booso's willful actions are imputed to VCM. The Secretary has established VCM committed an intentional violation of 29 C. F. R. § 1926.501(b)(1). Item 1 of Citation No. 2 is affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

VCM employed approximately 40 employees. Two VCM employees worked on this canopy and scaffold. The Secretary had issued three citations to VCM and its contractor in the previous year. VCM demonstrated a lack of good faith during this proceeding. Booso physically assaulted the compliance officer the first day of the inspection. He expressed disdain for OSHA's standards and OSHA personnel throughout the proceeding. His last act of the

hearing was threatening Shpiruk that he was going to "hunt" him (Tr. 277). Here two employees worked on the canopy, more than 16 feet above concrete with no fall protection or personal protective equipment. No precaution were taken to protect these workers.

The remaining factor to be considered is gravity. "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Citation No. 1

Item 1—Valentine operated the forklift without proper certification. This exposed VCM employees Booso, Trotman, Arana, and Felix Otiana to the hazard of being struck and injured. A penalty of $ 300.00 is assessed.

Item 2—Arana and Valentine were not wearing safety-toed footwear. They were exposed to possible foot injuries if they dropped equipment or material on their foot. A penalty of $ 100.00 is assessed.

Item 3—Arana and Valentine were not wearing protective helmets. They were exposed to tools or materials falling on their heads when climbing the scaffold. A penalty of $ 100.00 is assessed.

Item 4—Arana and Valentine were not wearing protective eye equipment. They were chipping concrete with an electric rotary hammer. They were exposed to the hazard of concrete chips flying into their eyes. A penalty of $ 600.00 is assessed.

Item 5—Arana and Valentine were using the electric rotary hammer connected to a gang box designed for permanent installation. They were exposed to shock and burn hazards. A penalty of $ 200.00 is assessed.

Item 6—Arana and Valentine got on the canopy by climbing a scaffold that was not equipped with an appropriate means of access. A penalty of $ 200.00 is assessed.

Items 7a and 7b—No one on the site was a competent person qualified to oversee the erection and dismantling of the scaffold, or to inspect it. A grouped penalty of $ 700.00 is assessed.

Item 9—VCM failed to properly train Arana and Valentine in scaffold safety. A penalty of $ 300.00 is assessed.

Citation No. 2

Item—Arana and Valentine were working on the concrete canopy, at a height of 16 feet, 7 inches, without fall protection. They were exposed to the fall hazard of death or serious physical injury. Booso was aware that the cited standard required fall protection, and he was aware the VCM employees were not using it. He watched them work on the canopy 16 feet above concrete in this unprotected condition for over two hours, demonstrating plain indifference for their safety. The court determines that a penalty of $ 28,000.00 is appropriate.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1910.178(l)(1), is affirmed, and a penalty of $ 300.00 is assessed;

2. Item 2 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.96, is affirmed, and a penalty of $ 100.00 is assessed;

3. Item 3 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.100(a), is affirmed, and a penalty of $ $ 100.00 is assessed;

4. Item 4 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.102(a)(1), is affirmed, and a penalty of $ 600.00 is assessed;

5. Item 5 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.1403(b)(2), is affirmed, and a penalty of $ 200.00 is assessed;

6. Item 6 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.451(e)(1), is affirmed, and a penalty of $ 800.00 is assessed;

7. Items 7a and 7b of Citation No. 1, alleging serious violations of 29 C. F. R. § 1926.451(f)(7) and (3), are affirmed, and a grouped penalty of $ 700.00 is assessed;

8. Item 8 of Citation No.1, alleging a serious violation of 29 C. F. R. § 1926.451(g)(1), is vacated, and no penalty is assessed;

9. Item 9 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.454(a), is affirmed, and a penalty of $ 300.00 is assessed; and

10. Item 1 of Citation No. 2, alleging a willful violation of 29 C. F. R. § 1926.501(b)(1), is affirmed, and a penalty of $ 28,000.00 is assessed.

/s/_____
STEPHEN J. SIMKO, JR.
Judge

Date: January 23, 2012
Atlanta, Georgia