SECRETARY OF LABOR,

Complainant,

v. OSHRC Docket No. 94-1758

A.J. McNULTY & COMPANY, INC.

Respondent.

THE STEEL INSTITUTE OF NEW YORK,

Intervenor.

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

In November 1993, precast concrete erector A.J. McNulty was erecting a parking garage in White Plains, New York, when the Occupational Safety and Health Administration ("OSHA") conducted an inspection and issued three citations alleging numerous violations of OSHA standards, including several standards requiring fall protection. Administrative Law Judge Irving Sommer subsequently issued a decision in which he affirmed a majority of the items cited and assessed total penalties of $105,000.

The following issues are on review: (1) Whether, as McNulty's motion to exclude evidence contends, the compliance officer failed to comply with 29 U.S.C. § 657(e); (2) Whether the Secretary established the practicality of safety belts and ladders, such that the employer's use of controlled access zones as an alternative means of protection was impermissible, *see Century Steel Erectors, Inc. v. Dole,* 888 F.2d 1399 (D.C. Cir. 1989), and *Falcon Steel Co.,* 16 BNA OSHC 1179, 1188-93, 1993-95 CCH OSHD ¶ 30,059, pp. 41,337-42 (No. 89-2883, 1993) (consolidated) (willful citation item 1, five sub-items); (3)

Whether McNulty established that the use of guardrails as required by the cited standards was infeasible (willful citation item 2, three sub-items; item 3, six sub-items; serious citation item 3); and (4) Whether the Secretary established that the alleged violations were willful.[1]

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[1]Commissioner Weisberg notes that on December 20, 1996, former Commissioner Montoya directed review in this case on four specific issues:

> (1) Did the judge err in denying the Respondent's motion to exclude evidence? (2) Did the judge err in concluding that the Respondent did not establish controlled access zones as an alternative means of fall protection at this worksite? (3) Did the judge err in rejecting the Respondent's argument that the traditional means of fall protection were not feasible at this worksite? and (4) Did the judge err in finding any of the violations to be willful?

On February 28, 1997, Respondent's current counsel entered an appearance in this case. On April 16, 1997, Respondent's counsel filed a motion with the directing commissioner to amend her direction for review or, in the alternative, with the Commission for a briefing order that included either all issues raised by the judge's decision, or at a minimum, four other enumerated issues in addition to those set forth in the direction for review. Commissioner Montoya did not amend her direction for review. The Commission considered the request made by Respondent's counsel in his motion and included in its briefing notice only the one additional issue concerning the relevance of *Century Steel* and *Falcon Steel* to the question of whether the use of controlled access zones was permissible.

Respondent's counsel then sought permission to file an oversized brief. The Commission granted that request. However, Commissioner Weisberg notes that almost a third of the Respondent's 80 page oversize brief on review deals specifically with issues not included in the direction for review or the briefing notice, including whether certain standards applied, whether employees were exposed or had access to certain hazards, whether McNulty established its greater hazard affirmative defenses, whether the judge erred in amending certain serious items to repeated, and whether the repeated citation was properly classified.

Commissioner Weisberg would admonish Respondent's counsel for briefing these additional issues which presented the Secretary with a dilemma as to whether she needed to respond to the issues not included in the direction for review or the briefing order, and it needlessly complicated and lengthened the Commission's review of the case. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2204, 1991-93 CCH OSHD ¶ 29,964, p. 41,023 (87-

(continued...)

I. The Employer's Right to Accompany the Compliance Officer in the Inspection

Section 8(e) of the Act, 29 U.S.C. § 657(e), provides that "a representative of the employer . . . shall be given an opportunity to accompany the Secretary['s] . . . representative during the physical inspection." McNulty argues that on three of the five days of the inspection, the compliance officer failed to give McNulty's on-site representatives the opportunity to accompany him in its work areas. McNulty filed a motion with the judge to exclude the Secretary's evidence relating to those days.

Judge Sommer denied McNulty's motion. He found that the compliance officer, William Donovan, did inform McNulty of its accompaniment right on the first day of the inspection and did give McNulty adequate opportunity to accompany him on all subsequent days. Judge Sommer also found that Donovan's conduct during the inspection did not prejudice McNulty. We affirm Judge Sommer's decision for the following reasons.[2]

Compliance officer Donovan held an opening conference for all contractors and subcontractors on the first day of the inspection, November 19, 1993. McNulty's personnel were too busy to attend, but within two hours, Donovan encountered Jack Doyle, a McNulty foreman, and Aiden Lynch, McNulty's project manager, and informed them that they or

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[1](...continued)
2059, 1993). In general, the Commission only addresses issues included in the briefing notice. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n.4, 1991-93 CCH OSHD ¶ 29,617, p. 40,097 n.4 (No. 86-469, 1992). Commissioner Weisberg sees no reason to depart from that policy here, and notes that the Commission has limited its review to the issues identified in the briefing order.

[2]McNulty also argues for the first time in its brief on review that Donovan did not comply with the requirements of § 8(a), 29 U.S.C. § 657(a), because he did not present his credentials before inspecting the work areas pertaining to citation 2, sub-items 1E and 2C. Donovan presented his credentials to a McNulty foreman early on the first day of the inspection and informed him that the inspection would take several days. McNulty did not raise the credentials issue in its trial motion to exclude evidence or in its petition for review. Accordingly, that issue was not directed for review and we will not address it. *See Tampa*, 15 BNA OSHC at 1535 n.4, 1991-93 CCH OSHD at p. 40,097 n.4 (in general, Commission only addresses issues in briefing notice).

other McNulty representatives could accompany him when he inspected McNulty's work areas. McNulty's chief executive officer Lawrence Weiss subsequently sent a letter to Donovan asking for advance notice of future site visits, but such advance notice is generally prohibited under the Act. *See* 29 U.S.C. § 666(f); 29 C.F.R. § 1903.6. However, each day Donovan was on the project, he promptly located a McNulty representative after he observed a hazard in a McNulty work area.

McNulty argues that § 8(e) requires a compliance officer to do much more than this during an inspection of this kind. McNulty argues that the compliance officer should alert each contractor each day and each time a portion of its work will be inspected. Commission and court precedent on § 8(e) does not mandate such a strict protocol. A compliance officer need not alert an employer prior to inspecting its work area if he informs the employer of the accompaniment right at the outset of the inspection and makes an effort within a reasonable time to report any violations to the employer. *See Marshall v. Western Waterproofing. Co.,* 560 F.2d 947, 952 (8th Cir. 1977); *Chicago Bridge & Iron Co v. OSHRC,* 535 F.2d 371, 376-77 (7th Cir. 1976); *Environmental Util. Corp.,* 5 BNA OSHC 1195, 1198, 1977-78 CCH OSHD ¶ 21,709, p. 26,074 (No. 5324, 1977). Moreover, a compliance officer's failure to do one or both of these things to achieve substantial compliance with § 8(e) does not warrant vacating a citation item unless the employer makes a specific showing that the misbehavior prejudiced it in preparing or presenting its defense. *Chicago Bridge,* 535 F.2d at 77; *GEM Indus., Inc.,* 17 BNA OSHC 1184, 1187-88, 1993-95 CCH OSHD ¶ 30,762, p. 42,747-78 (No. 93-1122, 1995), *aff'd without published opinion,* 149 F.3d 1183 (6th Cir. 1998) (table); *Environmental Util.,* 5 BNA OSHC at 1197, 1977-78 CCH OSHD at p. 26,074-75.

We turn now to the particular incidents McNulty raises. On November 30, the second day of the inspection, CO Donovan came upon a number of cited hazards while McNulty representatives were not present, but he located a McNulty representative within approximately one to fifteen minutes in each instance and reported each hazard to either Lynch, Doyle or Paul Brady, another McNulty foreman. This type of notification so soon

after the hazard was detected gave the McNulty representatives an opportunity to ask Donovan what he had observed, including which employees were exposed to the hazard when it was detected.[3] On these facts, we find that Donovan substantially complied with § 8(e). A compliance officer need not alert an employer before observing possible violations. We also find that McNulty was not prejudiced since its representatives learned of possible violations almost immediately after he observed them.[4]

Donovan met with Lynch and Weiss on December 1 to notify them that he would be videotaping from the roof of the mall across from the garage and to ask them if they had any objections or wanted to accompany him. They had no objections and indicated that they were too busy to accompany him. The next day, Whiting-Turner Contracting Company, the project manager, notified Lynch and Robert Weiss, McNulty's project coordinator, that Scott Schrilla, a compliance officer assisting in the inspection, wanted to videotape from an adjacent roof while McNulty's employees performed erection work. Lynch and Weiss again declined to accompany Schrilla. Instead, Weiss videotaped Schrilla from the garage deck where the erection work Schrilla was videotaping was taking place. Lynch was also present on the garage deck. Because these McNulty representatives were in the erection area that OSHA was videotaping and were offered the opportunity to accompany the OSHA compliance officer to observe the erection work from his vantage point, we find that the Secretary substantially complied with § 8(e) and that McNulty was not prejudiced.

On that same day, Donovan also saw improperly stored gas cylinders near McNulty's trailer. He immediately went inside the trailer and discussed them with Doyle, who abated

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[3]McNulty argues that we should not "assume[] that Mr. Brady knew the importance of immediately obtaining and preserving" evidence on "the employees' distances from the edge." However, there is no evidence that Brady did not know this. Moreover, instructing its personnel on how to respond to OSHA inspections is McNulty's responsibility.

[4]McNulty argues that Lynch could not find any employee exposed to a stairway that lacked guardrails. However, McNulty did not show that Lynch asked Donovan to identify any employee that he observed.

the hazards. This evidence establishes that Donovan substantially complied with § 8(e) and that McNulty was not prejudiced.

On December 8, the last day of the inspection, Donovan photographed two hazards, a floor opening and an open-sided floor, from an adjacent building. He asked the Whiting-Turner representative accompanying him to radio its representative in the garage and inform McNulty. McNulty contends that, because it "had no chance to be present, it could not introduce first-hand testimony" and could not determine whether it had a safety monitor in the area. However, Lynch calculated from McNulty's project drawings that the employee was 6 feet away from the floor opening, and McNulty relied on Donovan's photograph to support this calculation. McNulty also used the photograph to argue that the crouched position of the employee depicted there minimized his risk of falling. Lynch also testified that its "pusher" or foreman "running the raising gang was the safety monitor." McNulty does not claim that it lacked records identifying its foremen or that its blueprint and daily field report were insufficient to indicate whether a foreman was acting as a safety monitor on level P-5. McNulty only makes a vague and unsupported claim that the area was "a transient situation" that could not be "precisely reconstructed." Under the circumstances, we find that McNulty did not show that it was prejudiced.[5] We also find that OSHA compliance officer Donovan substantially complied with the Act when he relied on Whiting-Turner to inform McNulty of the potentially violative conditions since it was a reasonable way to give McNulty the opportunity to accompany him during his inspection. We therefore uphold

[5]McNulty relies on *Pittsburgh Forgings Co.*, 10 BNA OSHC 1512, 1514, 1982 CCH OSHD ¶ 25,974, pp. 32,568-69 (No. 78-1361, 1982), for the proposition that, "where a condition has been abated, it is proper to vacate citation items without a showing of prejudice." However, *Pittsburgh Forgings* dealt with a contumacious breach of discovery by the Secretary that the judge sanctioned by vacating some abated citation items. The Commission, under an abuse of discretion standard, upheld the decision because it did not "frustrate[] the remedial purposes of the Act." Here, however, the remedial purposes of the Act would be frustrated inasmuch as there is no evidence the Secretary violated § 8(e).

Judge Sommer's decision dismissing McNulty's motion to exclude the Secretary's evidence relating to the second, fourth, and last days of the inspection.

II. Practicality (Item 1 of Willful Citation No. 2)

The Secretary alleges that McNulty failed to use safety belts and, in one location, a ladder, in violation of 29 C.F.R. § 1926.105(a).[6] When the Secretary alleges that an employer has failed to comply with § 1926.105(a) by failing to require the use of a fall protection device other than a safety net, she has the burden of (1) proving where and how the device could have been used and (2) overcoming the employer's evidence that use of the devices was impractical, including evidence of industry custom and practice. *Falcon Steel Co.,* 16 BNA OSHC 1179, 1189-90, 1993-95 CCH OSHD ¶ 30,059, pp. 41,338-39 (No. 89-2883, 1993); *see also Century Steel Erectors, Inc., v. Secretary*, 888 F.2d 1399 (D.C. Cir. 1989). McNulty challenges the Secretary's proof of practicality in three instances, *i.e.*, sub-items 1A, 1C and 1D.[7] For the following reasons, we affirm sub-items 1A and 1C, but we vacate sub-item 1D.

A. Sub-item 1A

McNulty permitted an employee to walk across the top of a precast concrete wall piece without fall protection. The wall piece was being stabilized in its final position, and the employee seen walking across its top was engaged in checking whether it was level and plumb and in releasing it from the crane hook. Compliance officer Donovan testified that this work could have been done from a "sufficient length" ladder "leaning up against the [wall] piece itself." McNulty argues that the Secretary failed to establish practicality because (1)

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

[7]McNulty did not present a practicality challenge to sub-items 1B and 1E despite the fact that the Commission put the practicality issue on review at McNulty's request. We therefore will not address practicality for these sub-items. McNulty argues that the Secretary failed to establish other elements of the underlying violations, but these issues are not on review.

she failed to prove that the work could have been done from a ladder; (2) the floor for a ladder was incomplete and only extended to the wall's midpoint, or slightly beyond; and (3) the wall was too unstable to support a ladder.

We find that a ladder was practical for work on almost two-thirds of the wall, *i.e.*, where the floor existed. There is no dispute that the employee could have released the crane hook while standing on the ladder. Edward Cush, a recently retired Business Manager for the Ironworkers Union, testified as a witness for McNulty that "cutting it loose" (i.e., releasing the crane hook from the precast concrete piece) "could be done from a ladder." McNulty's project manager Lynch testified that an employee used a ladder for this work at another location on this project. Michael Willis, a compliance officer with extensive experience inspecting construction work, including precast erection, testified that he had observed employees releasing crane hooks while standing on ladders.

The preponderance of the evidence also establishes that a ladder could have been used to check whether the wall was level and plumb. Cush testified that the procedure involves one employee holding a ruler against the wall while another employee uses a transit that is set up on the floor. The employee at the wall could have held the ruler while standing on a ladder. That this procedure was practical was confirmed by the Secretary's expert witness, Steven Miller, an independent consultant in construction safety. Miller testified that the helper-employee who must "get to the top of the [wall] panel to hold the tape measure" would "be able to put a ladder up and remain on the ladder." McNulty did not establish that the employee had to stand on top of the wall to hold the tape measure or ruler.[8] We therefore find that the employee doing the work involved here could have used a ladder.

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[8]Cush testified that "[s]ometimes he might have to," but Cush's explanation only indicates that the employee who releases the crane hook has to, an opinion that is not supported by the record as a whole. Cush's explanation is as follows: "The connectors have to when they cut the piece [loose] and the surveyor could be considered part of the connecting crew because he is necessary to make it plumb before you do cut it loose."

The fact that the floor beside the wall was incomplete did not relieve McNulty of its duty to comply. The floor extended approximately two-thirds of the wall's length, i.e., well beyond the wall's midpoint. Although the record seems to indicate that the work involved here had to be done on both ends of the wall, it is clear that a ladder could have been used for the end where the floor existed. McNulty points to Cush's testimony that the surveyor's helper would "walk the top edge of the wall," but Cush also testified that the helper has to "hold a ruler against the wall on the inside of the wall." Cush did not say that the helper has to stand on top of the wall to do this or hold the ruler at so many places on the wall that it would have been impractical to use a ladder. An employer must comply to the extent that it can. *See Walker Towing Corp.*,14 BNA OSHC 2072, 2075, 1991-93 CCH OSHD ¶ 29,239, p. 39,159 (No. 87-1359, 1991).

McNulty's third argument, that the wall piece was too unstable to support a ladder, also lacks merit. Project manager Lynch testified that the piece, which weighed 25 tons and was 12 feet high, was "very precarious" when the crane landed it because it rested on supports ten feet off the floor. McNulty had to "hold it in the [crane] hook" while braces were attached, and the piece was not stable until braces at both ends were attached. McNulty used a ladder to attach one of the braces. Other temporary connections, such as temporary welds, were done during the time that braces were attached. The surveyors did not check whether the piece was level and plumb until the braces were attached and temporary connections were made. Also, the crane hook remained attached to the piece, and a possibility of a collapse only existed if the crane engineer should "hit[] the wrong lever and lose[] tension in the cable." When the wall piece here was level and plumb, the braces were fixed in place. Compliance officer Donovan testified that the "piece would have to be stable before you release the crane [hook]." Lynch gave similar testimony: "When you erect these precast walls, you've got to hold them in the hook of the crane" and "attach the braces before you can release the crane." In sum, the record establishes that the surveying work was done

while the piece was held upright by the crane hook, braces and temporary connections, and that the crane hook would not be released until the piece was permanently connected.

McNulty makes an overall argument that the industry does not use fall protection where erection is "still ongoing." McNulty claims that the employees working as erectors and surveyors are generally more concerned about crushing hazards than about falling hazards. McNulty did not present any evidence, however, that the industry customarily declines to use ladders where erection is ongoing or that ladders are viewed as problematic because they keep employees from fleeing a crushing hazard. None of McNulty's witnesses who described McNulty's pre-erection planning sessions testified that McNulty planned to exclude ladders from zones where erection was ongoing. We therefore find that the Secretary has established that ladders were practical even though erection was ongoing, and we affirm sub-item 1A of item 1 of willful citation No. 2.[9]

B. Sub-item 1C

The Secretary also alleges that McNulty violated the standard because employees were installing guardrail stanchions along an open edge of deck level 10 of the parking garage at the same time that a McNulty erection crew was connecting precast concrete pieces at the open edge. All these employees were doing welding, bolting and drilling work without tied-off safety belts. The Secretary's witnesses[10] testified that McNulty could have installed lifelines ("static lines" and "retractable lifelines") to which these employees could have tied off. The Secretary's witnesses also testified that these employees could have been tied off to the "lifting loops"[11] located at floor level and at the top of certain chest-level columns near the open edge.

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[9]We decline to rely on the new fall protection standards that specifically address precast erection because they were issued by OSHA after the inspection in this case.

[10]Specifically, these witnesses were compliance officer Donovan, expert compliance officer Willis, and expert witness Miller, the independent consultant in precast safety.

[11]Loops manufactured into the precast concrete pieces for attaching the crane hook.

McNulty claims that the precast concrete erection industry regarded safety belts as impractical for erectors and connectors because they need mobility to avoid being crushed by unstable concrete pieces.[12] According to McNulty, industry custom and practice was to create controlled-access zones ("CAZs") around erection in progress[13] in which the erectors and connectors would not use safety belts but, rather, would be warned by a safety monitor if they came too close to an open edge.

McNulty's evidence on industry custom and practice, however, establishes that guardrail crews are not part of erection crews, are not allowed inside CAZs while concrete pieces are being landed and stabilized, and are only given access after erection work is finished, *i.e.*, when the zone is no longer designated as a CAZ. Accordingly, McNulty did not follow industry practice when it allowed its guardrail crew to install stanchions inside the CAZ while the erection crew was still working. After completion of the erection work, the guardrail employees could have used tied-off safety belts. In sum, contrary to McNulty's arguments on review, the record here establishes the practicality of excluding the guardrail crew from the CAZ until erection was complete and requiring tied-off safety belts for guardrail work at that time. On this basis, we affirm sub-item 1C.

C. Sub-item 1D

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[12]Numerous witnesses testified that they knew of occasions when concrete pieces fell and employees had to flee to escape being crushed. For example, Randall Davis, vice president of Midlantic Erectors, testified that concrete pieces have dropped from crane booms during lifts and can "land on someone" or "land on some other piece that is not fully connected and knock it over." Charles Hardesty, the Secretary's construction safety specialist, knew of employees being crushed when pieces "pancaked, one right on top of the other."

[13]A photograph in evidence shows that one floor piece was swung over the open edge where the employees were working. The evidence is conflicting regarding whether McNulty created CAZs where erection was taking place, but Judge Sommer found that "McNulty did agree to use" CAZs and "evidently did cordon off work areas where erection was taking place." In light of this finding, we disregard his statement that the record was "inconclusive" as to whether McNulty implemented CAZs.

Sub-item 1D concerns an erection crew employee who did not tie-off when he went to a floor edge to drop a bucket.[14] Expert compliance officer Willis testified that McNulty could have installed lifelines ("static lines" and "retractable lifelines") for this employee to tie off to. However, McNulty established that this employee was part of the erection crew and was working in a CAZ adjacent to a wall piece that was being stabilized. McNulty presented extensive and substantial industry custom and practice evidence that CAZs are preferred over traditional fall protection where erection is taking place because of the crushing hazards that the work involves. The evidence on industry custom and practice is as follows.

1. McNulty's Evidence

a. McNulty's Project Planning Sessions and On-the-Job Consultations

CEO Weiss testified that he consulted with "leading experts" in the precast erection industry regarding fall protection. Participating extensively in the project planning sessions were Spancrete Northeast, Inc., an experienced precast erector, and Eastern Prestress, a major fabricator and erector of garages in the Philadelphia area. These erectors also consulted with McNulty as the project progressed. Eastern Prestress sent Barry Aronowitz, its head superintendent with 20 years of experience in precast erection, to "live this job" with McNulty. Safety belts with retractable lifelines or static lines were considered. The "common feeling" at the planning sessions was that these devices would not offer "any practical and safe means of protection," and as the project progressed, Aronowitz "concurred entirely"

[14]McNulty argues on review that the employee worked for another employer. This issue is not on review. We also note that, although Lynch testified that he could not positively identify the employee because of the distance from which he was videotaped or photographed, Lynch also testified that the area where he was working was a CAZ, that the employees in the area were erection crew employees, and that non-erection employees were excluded from CAZs. Lynch testified that he was not denying that any employees videotaped or photographed there were McNulty's. Accordingly, we will treat the employee as McNulty's as we turn to the question of whether the Secretary established the practicality of a safety belt for him.

with McNulty in not using them where erection was taking place. As CEO Weiss testified, "[W]e went through discussions of the equipment with him[,] and he felt that they were all productive of more dangerous risks to the men than not to utilize this equipment."

Weiss detailed the reasons why everyone decided not to use safety belts with static lines or retractable lifelines where erection was taking place. It was decided that employees could not anchor these devices to lifting loops in floor pieces without creating tripping hazards and "forcing tie-off below the point of operation" which is "generally condemned by safety experts and manufacturers of safety equipment" because it "creates the possibility of a pendulating fall" and "severe injury." Retractable lifelines have the additional problem that they "grab" employees when they make sudden moves to avoid concrete pieces coming at them. Safety belts generally have six-foot lanyards that leave "practically no room for movement" around the pieces "that can spin out of control." Weiss "didn't want to contribute to the lack of safety."

David Melick, senior loss prevention consultant from Liberty Mutual Group, made fall protection recommendations that McNulty considered at a planning session. According to Lynch, there was a "long detailed discussion on each device and we went through the pros and cons of the use of each device." Lynch pointed out the "inherent dangers" of tying off while erecting 25 ton structural floor pieces 60 feet long, 10 feet wide, 2 feet, 6 inches deep. He and Ivan Millett, Spancrete's field manager, expressed concerned that erection crew employees "tethered to a static line at their feet with a six foot lanyard" would be "totally immobile and in great danger of being seriously injured." Melick "acquiesced" with Lynch and Millett that fall protection could not be used and agreed to "leave the issue of tie-off of the men to the lifting loops . . . to [our] professional judgment . . . ." Mellick agreed that static lines and retractable lifelines for safety belts with lanyards "were inappropriate and caused a greater hazard and didn't really do what they were supposed to." Lynch explained that the precast erection industry preferred to use CAZs "to insure that no other workers that were not involved in the erection process strayed into our work area."

Millett corroborated this testimony. He testified that the participants in McNulty's planning sessions agreed that retractable lifelines and static lines would "encumber" the erection crew employees such that "they couldn't get away from [the concrete pieces], or they would be hurt, squished, knocked off or anything." Millett also testified that employees doing the connecting work in an erection crew, *i.e.*, welding, bolting and drilling, could not tie off in a CAZ because they "couldn't get away from the product and needed to get around and not have cables get tied up in the product."

b. Additional Testimony on Industry Custom and Practice

Thomas Humphrey, a business agent for the stone, derrickmen and riggers union, which had union members doing architectural precast work on McNulty's project, testified that "[w]e have never tied off" for the connecting work, *i.e.*, welding, bolting and drilling, at the open edges involved in architectural precast work because "you need mobility when you are connecting panels." "You have to be able to go from one end to the other, you have to be able to move quickly." Humphrey explained, "Now, if something goes wrong, that thing can come right in on you." Humphrey regarded crushing hazards as more of a threat than fall hazards: "I don't know anyone that fell in my 31 years doing a precast job although I can recall about three people who got crushed from something happening like that, not being able to move fast enough."

Randall Davis, vice president of another precast erector, Midlantic Erector, testified that the industry disapproves of tying off in erection zones "because it is more hazardous in our view for the employees to be restrained from moving about in the area where they are working." Floor pieces weigh anywhere from 20,000 to 40,000 plus pounds. "[I]magine a fully loaded bus hanging on a wide rope above your head[;] you wouldn't want to be tied down and not able to get out of the way should something happen." Lifting loops have failed during lifts, in Davis' experience.

James Hinson, a consultant safety engineer and risk analyst, agreed with McNulty's other witnesses and planning session participants that tying off lanyards to floor-level lifting

loops would be hazardous and contrary to manufacturers' recommendations. He agreed that "[y]ou wouldn't want anybody falling off the edge" and that adjusting the length of a lanyard could minimize the risks of a "free-fall too far if your anchorage is not in the right location."[15] However, Hinson believed that tying off at floor-level creates tripping hazards and increases the risk of falling off the floor edge, which poses extreme risks of internal injuries or suffocation. He also believed that erection crew members, connectors as well as erectors, should not be tied off because the "stability of the structure" is a central problem and the "greatest number of fatalities . . . result [from the] collapse of components within the structure." In sum, Hinson believed that McNulty acted in accordance with industry custom and practice by permitting erection crew members to work without tied-off safety belts within a CAZ.

2. The Secretary's Evidence

The Secretary called her expert witness Miller to rebut McNulty's evidence. Miller had developed and used safety belts with lifelines on "several" precast erection projects as a safety director for a precast erector and as an independent consultant. He had also worked on an experimental or pilot-project CAZ with the Precast Concrete Institute ("PCI") and OSHA in 1992. OSHA wanted to see whether a CAZ would be a "practical and safe" alternative to conventional fall protection. Miller testified that OSHA concluded that in "certain situations" including leading edges where erection was underway, conventional fall protection could not be used effectively or might be inadvisable "at times" and "should be left up to the contractor." However, according to Miller, OSHA also concluded that

[15]Hinson also agreed that falling 80 feet presents a greater risk of death than falling 6 feet. Judge Sommer relied on this testimony to reject McNulty's argument that tying-off to the lifting loops would have been impractical. However, the judge incorrectly analyzed this evidence in the context of an affirmative defense of infeasibility and greater hazard instead of as part of the Secretary's burden to establish practicality. Accordingly, we decline to rely on his finding.

conventional fall protection "could be used at most times" and should be enforced whenever "feasible" or "practical" or "possible."

Miller testified that lifting loops in floor pieces are "readily available" anchorages for retractable lifelines or static lines and that "it is pretty basic and pretty simple" to install them in a way that "allow[s] freedom of movement." Miller testified that "a progressive static line" can be anchored on a line of lifting loops to allow an employee to "move along with the leading edge" in a way "similar to a dog run." If the employee had to "move quickly, he could just run the whole length of this static line, [which] could be 60 or 80 or 90 feet." The static line "would in no way hamper or hinder his movement or freedom of movement."

The employee could also use a retractable lifeline attached to the static line. This would allow him to remain tied off all along the leading edge, and "if something did go wrong and he had to retreat or escape, he would always be running back towards the retractable [device on the lifeline] and he would not have to worry about the retractable prematurely setting up or grabbing him or tripping him up." That is, where a retractable lifeline is anchored behind the point of operation, *i.e.*, the leading edge, the employee always runs towards the anchorage point when escaping a concrete piece, and the retractable device sucks the line in or retracts it as he runs towards it. "There would be nothing to trip on."

Miller testified that the necessity to escape a falling piece could be minimized for the connectors because they should leave the CAZ when a piece is being landed. "[I]n the part of the country that I've worked in . . . the same two workers that land the piece initially also do the welds and — at least to secure the piece."[16] Miller further testified that erectors can tie off to static lines or retractable lifelines without risk of being crushed by the piece being

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[16]McNulty's witnesses testified that industry practice in New York was for connectors to do the welding and bolting necessary to stabilize the piece before it was released from the crane. Miller testified, however, that where he worked, the erectors do "the connecting job that an iron worker would do." That is, "they set a plate down on either end of the [floor piece], and they put a sufficient amount of weld on it to keep it in place, until they can cut it loose and send the crane to get another piece."

landed because "common sense would tell you that you don't get underneath any incoming loads." In his view, erectors could certainly tie off once a piece is below head height. Miller had seen erectors working tied off "many times" who were "comfortable with the situation."

Miller testified on cross-examination that his belief in the practicality of conventional fall protection would not change even if crane failures and lift failures do occasionally occur and other instability problems do exist. He had never seen a lifting loop fail or a column break. He had never heard of braces failing, causing a piece to fall after it had been released from the crane hook. He had never known of an operational error by a crane operator, although he agreed it would be possible because crane operators must rely on radio signals when they cannot see the area where the piece is moving. Miller realized that a piece can swing out of control if a lifting loop breaks, but he adhered to his opinion that conventional fall protection could be used.

Miller agreed on cross-examination that a falling concrete piece "would not only destroy humans beneath them[,] but the structure as well." The "general area" would be "destroyed," not just the area immediately under the concrete piece. However, Miller posited that any employee who got stopped by his retractable lifeline would be "an inexperienced worker putting himself in a crushing position, who shouldn't have been there in the first place." Miller believed that retractable lifelines only prevent escape if they have not been positioned properly. However, Miller agreed that a retractable lifeline "may" grab an employee who needs to run beyond its anchorage point. Miller also agreed that a retractable lifeline attached to a static line only gives an employee the ability to "run the length of the floor, north and south." If he needs to go east, he cannot run because the retractable will stop him; he will have a 60-foot range to the east at a slower pace.

3. Discussion

As we have indicated, when the Secretary cites § 1926.105(a) to require safety belts, she has the burden of (1) proving where and how the device could have been used and (2) overcoming the employer's evidence that use of the devices was impractical, including

evidence of industry custom and practice. *Falcon Steel Co.,* 16 BNA OSHC at 1189-90, 1993-95 CCH OSHD at pp. 41,338-39. We find on the basis of the evidentiary record that the Secretary failed to meet her practicality burden by a preponderance of the evidence. Although the Secretary introduced some evidence as to how safety belts could have been used by erection crew members working adjacent to unstable walls, we find that it was insufficient to overcome McNulty's evidence that industry custom and practice is to use a CAZ because safety belts present a significant risk of employees' being immobilized and crushed by the enormous, unstable precast concrete pieces. We therefore vacate sub-item 1D of item 1 of willful citation No. 2.

III. McNulty's Infeasibility Defenses to Item 2 of the Willful Citation

The standard the Secretary cited in item 2 of the willful citation is 29 C.F.R. § 1926.500(b)(1), which requires guardrails for floor openings.[17] McNulty raised infeasibility as an affirmative defense to each of the three sub-items involved in item 2. To establish an infeasibility affirmative defense, an employer must prove that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would be technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection. *E.g., Armstrong Steel Erec., Inc.*, 17 BNA OSHC 1385, 1387, 1995-97 CCH OSHD ¶ 30,909, p. 43,030 (No. 92-262, 1995). Judge Sommer rejected McNulty's infeasibility defenses. On review, McNulty continues to argue that guardrails would have been infeasible around the particular floor openings at issue here. For the following reasons, we affirm sub-items 2A and 2C, but we vacate sub-item 2B.

A. Sub-item 2A

At issue here is the unfinished floor encountered in sub-item 1A. One 65-foot by 10-foot floor piece did not arrive on schedule for installation. This left an unfinished floor edge where the opening was. Lynch testified that the "only piece I could move the men onto" was the overhead wall panel even though "there was a hole in the middle of our erection area." Lynch testified that he didn't put guardrails there because Spancrete had promised to deliver the missing floor piece later that day. "I would have been exposing the men to double jeopardy, sending them out to the edge to cable it and an hour later taking the cable down."[18]

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[17]As we have indicated, subpart M has been changed, but as of the inspection here, the cited standard stated, in pertinent part that "[f]loor openings shall be guarded by a standard railing and toeboards or cover . . . ."

[18]The record shows that the floor opening actually existed for substantially more than an (continued...)

McNulty argues that the unfinished edge constituted a leading edge because, although the floor piece was not actually being installed there while the employees worked on the wall piece nearby, they would install the floor piece immediately thereafter.

However, the weight of the industry custom and practice evidence presented in this case indicates that a leading edge only exists where a piece is actually being installed. McNulty's foreman Doyle testified that a leading edge exists where a floor piece, wall section, or column is being positioned. "As you set one piece, you have a leading edge, you set another piece, you have a leading edge." Melick, the senior loss prevention consultant for Liberty Mutual that McNulty consulted regarding fall protection for this project, testified that the term "leading edge" refers to the "point of active erection, where a concrete member is waiting for another one to be placed." Spancrete's field manager Millett took a far more expansive view, that all edges of all pieces anywhere within an erection area constitute leading edges, regardless of whether anything is being added, because "[t]hose pieces aren't totally installed yet and still may need to be moved, and the incoming pieces are over and around that area, still coming in over that area." However, Millett's assertion that the industry does not consider installing guardrails anywhere in an erection area is contradicted by Melick's testimony. He testified that the industry is divided over whether and how to protect leading edges, and he recommends protection if they are open overnight. We also note that, although Lynch and CEO Weiss testified that they found in their planning sessions for this project that the industry prefers CAZs to safety belts and lifelines, these witnesses did not testify that the industry declines to use guardrails on temporarily stationary edges in CAZs.

The record also shows that the industry was aware of a form of guardrail-type protection for temporarily non-leading edges such as the one involved here. Approximately

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[18](...continued)
hour. According to McNulty's daily field report, the floor piece was not installed on November 19 because rain ended work that day at 1:00 p.m. McNulty's "gang #1" installed the wall piece on November 19 and returned on November 20 to install the floor piece.

three months prior to the inspection here, Liberty Mutual sent a letter to Spancrete recommending that McNulty use an "easily moveable and cost effective" form of edge protection known as a "Motion Stopping System." Liberty Mutual characterized it as an "awareness barrier" to "help identify the leading edge" even though a "leading edge continually moves . . . ." Spancrete and McNulty also received warnings from Roger Cross, a Whiting-Turner superintendent, that leading edges of decks on this project needed to be protected.[19] In sum, these warnings and Liberty Mutual's recommendation for an awareness barrier indicated a need for protection where a piece is installed out of sequence exposing employees to an edge that would remain stationary for an extended period of time.

McNulty argues that it would have been infeasible to put guardrails on the edge because they would have had to be removed while the floor piece was being installed. However, compliance officer Donovan testified that McNulty could have put free-weighted or free-standing guardrails back from the edge where they would not have interfered with installing the floor piece. McNulty did not rebut this evidence. Lynch only testified about "stanchions bolted . . . or clamped to the edge." He claimed that "there is a high probability that the incoming member is going to knock those stanchions off and hit somebody underneath on the lower level." Lynch did not testify that the incoming member would knock down free-standing guardrails positioned back from the edge. He also did not testify that free-standing guardrails could not have been moved before installation if they would interfere with the installation. Judge Sommer found that McNulty could have used this kind of

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[19]Some of these warnings are evidenced by diary notations. Whiting-Turner superintendent Cross testified that he made them on a daily basis. The written warnings were sent to Spancrete rather than McNulty, but Judge Sommer found that McNulty received them, and the record supports his finding. Donovan testified that McNulty supplied them from its own files. CEO Weiss testified that Whiting-Turner customarily or pursuant to contract sent written communications to Spancrete for McNulty, *i.e.*, communicated in writing with McNulty through Spancrete. Gary Johnson, Whiting-Turner's superintendent, also testified that he orally warned a McNulty supervisor prior to writing up a warning.

guardrail protection while the employees worked on the wall piece. We adopt his finding.[20] Because McNulty failed to establish that it could not have used free-standing guardrails to mark off the floor opening to which the employees were exposed in erecting the wall piece, we reject McNulty's infeasibility defense and affirm sub-item 2A of item 2 of willful citation No. 2.[21]

B. Sub-item 2B

Donovan described McNulty employees standing at and looking into an unguarded 10-foot-deep shaft opening that he testified should have been protected from falls by guardrails. McNulty claims that guardrails would have interfered with a "material-handling operation" that was about to take place. Lynch's uncontradicted testimony supports this claim. He testified that a load of steel beams was "being raised." He also testified that the "next task is to install that steel" and that guardrails would have interfered with the beam installation work. Judge Sommer affirmed the sub-item because "Lynch did not testify that

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[20]McNulty makes two inapplicability arguments that it claims prove infeasibility. The first one is that the cited standard does not apply where the opening is too large for a cover. However, § 1926.502(b)'s definition of "[f]loor opening" does not set an upper limit on size, only a lower limit ("12 inches or more in its least dimension"). Also, employers may comply with the cited standard by installing guardrails around openings too large for a cover. McNulty also argues that the cited guardrail standard is inapplicable to an incomplete floor. McNulty relies on *Pima Constr. Co.*, 4 BNA OSHC 1620, 1622, 1976-77 CCH OSHD ¶ 20,998, p. 25,229 (No. 5221, 1976), where the Commission did not apply § 1926.500(d)(1) to an incomplete floor because a particular steel erection standard applied. As no steel erection standard applies here, *Pima* is not pertinent. To the extent that McNulty also relies on unreviewed judges' decisions, we note that they do not constitute Commission precedent. *See e.g.*, *Pressure Concrete Constr Co.*, 15 BNA OSHC 2011, 2016 n.5, 1991-93 CCH OSHD ¶ 29,902, p. 40,811 n.5 (No. 90-2668, 1992). No Commission case holds that the guardrail standards do not apply to precast erection.

[21]Because we find that guardrails, the cited standard's required means of protection, were not infeasible, we need not address whether McNulty could have used safety belts as an alternative means of protection or whether its CAZ constituted an alternative means of protection. Where a required means of protection is feasible and safe, employers cannot substitute an alternative means. *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1390-91, 1991-93 CCH OSHD ¶ 29,531, pp. 39,863-64 (No. 88-282, 1991).

guardrails could not have been used before the beam installation work." However, before the beam installation work, the steel was being raised. Donovan's testimony in support of installing guardrails was that they should be installed *except* "[w]hen the load passes through." Because the Secretary's own compliance officer agreed that guardrails would not be required during the process that was about to take place when he saw the employee exposure, we reverse the judge and find that guardrails were infeasible here.

Ordinarily, to establish an infeasibility defense, an employer must also establish that it either used an alternative means of protection or that there was no feasible alternative means. *E.g., Armstrong Steel,* 17 BNA OSHC at 1387, 1995-97 CCH OSHD at p. 43,030. The Secretary claims that McNulty failed to establish its infeasibility defense because it failed to show the infeasibility of safety belts as an alternative means.[22] However, in light of *Spancrete Northeast, Inc. v. OSHRC,* 905 F.2d 589 (2d Cir. 1990), such a showing is not required in this case. There, the Second Circuit essentially held that an employer cannot be required to defend a failure to use safety belts unless the Secretary has cited a standard requiring them. The Secretary has not done so here. We therefore follow *Spancrete* as the law of the circuit and do not require McNulty to establish the infeasibility of safety belts. *See, e.g., Farrens Tree Surgeons, Inc.,* 15 BNA OSHC 1793, 1794-95, 1991-93 CCH OSHD ¶ 29,770, p. 40,489 (No. 90-998, 1992). Accordingly, we sustain McNulty's infeasibility defense and vacate sub-item 2B.

C. Sub-item 2C

Compliance officer Donovan saw an unguarded floor opening in an area that McNulty claims was "under construction." McNulty claims that guardrails would have interfered with "wall members" that "were to be set into place."[23] For the following reasons, we find that

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[22]McNulty does not argue that a CAZ was an alternative means for this sub-item.

[23]McNulty also argues that the Secretary failed to establish employee exposure because the employee was 6-7 feet away from the opening. Employee exposure is not on review and is

(continued...)

erection was taking place, but that McNulty failed to establish that guardrails would have interfered with it.

A blueprint in evidence shows that the floor opening was for floor piece "T-23." McNulty's field report for the day shows that this piece was installed in the late afternoon following the installation of five wall pieces. Inasmuch as Donovan testified he did not contact McNulty during the morning, it appears likely that he saw the employee exposure in the afternoon when the area was under erection as McNulty claims.

To establish infeasibility, however, McNulty must prove that all forms of guardrails would make work operations technologically or economically infeasible. The Secretary presented evidence that free-standing guardrails could have been used here. Because free-standing guardrails could have been repositioned or removed as necessary to permit the concrete pieces to be landed, McNulty needed to present evidence that it considered using free-standing guardrails and that it decided that they could not be maneuvered as necessary for the erection work that was involved here. For example, McNulty could have shown that the wall pieces were swung so low across the floor opening that free-standing guardrails could not be installed there. However, McNulty failed to introduce any evidence that free-standing guardrails could not be used. Accordingly, we find that McNulty failed to establish its infeasibility defense, and we affirm sub-item 2C of item 2 of citation No. 2.

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[23](...continued)
not relevant to the infeasibility defense raised here.

IV. *McNulty's Infeasibility Defenses to Item 3 of the Willful Citation*

The standard cited in item 3 of the willful citation is 29 C.F.R. § 1926.500(d)(1).[24] The six sub-items of item 3 allege that McNulty failed to install guardrails on certain floor perimeters and platform edges. At issue is McNulty's infeasibility defense. For the reasons that follow, we affirm all six sub-items.

A.Sub-item 3A

This sub-item concerns two unguarded floor perimeters near the elevated wall piece that we referred to in sub-items 1A and 2A. The wall piece was on the east side of the floor. One of the open perimeters at issue now was on the north side of the floor. The other open perimeter was under the wall piece on the east side.

1. The North Perimeter

McNulty claims that, although the perimeter guarding was not in place when compliance officer Donovan inspected the area, the perimeter cabling crew was working "as expeditiously as feasible" and that the Act "does not require instant compliance." The guardrail crew started work at 7:00 a.m. The crew tightened existing cables in the garage from 7:00 a.m. to 8:00 a.m. Rain stopped the crew from working between 8:00 a.m. and 9:00 a.m. The erection gang's work on the wall piece began at approximately 9:00 a.m. The cabling crew installed cables on the north perimeter at approximately 11:00 a.m.

As Judge Sommer found and McNulty does not dispute, the north perimeter was completed the day before the erection gang's work began. Therefore, Judge Sommer found that a cable could have been installed before that work began. For the following reasons, we affirm this finding.

McNulty argues that a cable installed before 11:00 a.m. would have interfered with the erection gang's work. McNulty cites a portion of Lynch's testimony: "I directed [the

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[24]At the time of the inspection here, this standard stated that "[e]very open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent . . . ."

cabling crew] to put the cable up on the north face *and also* as the brace shortly afterwards had been lifted into its final position, they were in a position to cable off that shaft" (emphasis added). The words we have emphasized indicate that Lynch *also* wanted the cabling crew to cable off a second area, a shaft. Lynch's testimony as a whole reveals that he needed the cabling crew to delay putting the cable on the shaft until the floor-to-wall brace McNulty relies on had been rotated a certain way. However, we find no testimony by Lynch or anyone else that the cabling crew could not have cabled off the north perimeter because of the floor-to-wall brace. In fact, the record establishes that this brace was installed 20 feet away from the north perimeter, i.e., two 10-foot floor pieces away. We therefore find that McNulty failed to prove it could not have installed a cable on the north perimeter before the erection gang began work on the wall piece 20 feet away.[25]

2. The East Perimeter

The east perimeter, under the elevated wall piece the erection gang was bracing, also lacked perimeter protection. McNulty claims that the elevated wall piece might have fallen down and crushed anyone who tried to install a cable under it. However, the record indicates that McNulty could have installed perimeter protection before bringing the elevated wall piece up to the floor for installation. The wall piece, which was located 10 feet off the floor and resting on columns or wall ends, formed "an entrance into the new Fashion Mall that they have [planned to] construct[] [when] [w]e finished the garage . . . ." This indicates that the east perimeter was not a leading edge on the day involved here, and McNulty's witnesses who planned the work on the suspended wall piece did not explain why they failed to give priority to installing temporary guardrails (free-standing or clamp-on) on the east perimeter

[25]Compliance officer Donovan testified that McNulty could have used temporary guardrails (free-standing or clamp-on) instead of a cable. Thus, if McNulty did not want to require its cabling crew to install the cable on the north perimeter first thing in the morning, McNulty could have used temporary free-standing or clamp-on guardrails at the north perimeter. McNulty argues that it used safety monitors, but an employer cannot substitute alternative protection for feasible required protection. *R & R Builders,* 15 BNA OSHC at 1390-91, 1991-93 CCH OSHD at pp. 39,863-64.

between the support pieces for the wall piece before they set it on the support pieces. Lynch only testified that McNulty decided to install the wall piece out of sequence because a floor piece was not delivered on schedule. We therefore reject McNulty's infeasibility defense for the east perimeter[26] and affirm sub-item 3A of item 3 of citation No. 2.

B. Sub-item 3B

This item concerns a platform without guardrails that was located beside the wall piece under erection. McNulty bases its claim that guardrails were infeasible on certain testimony that Judge Sommer discounted as follows: "[W]hile Lynch testified that guardrails would have prevented the worker on the platform from pulling the brace into position and holding it there, I fail to see, based on the photos, why this is so." McNulty objects that Lynch's testimony was unrebutted, but Donovan testified that guardrails on this platform would not have interfered with the installation of this brace. McNulty also objects that "still photographs" cannot "prove anything about the movements of employees while bracing." Nevertheless, we find that McNulty did not establish by a preponderance of the evidence that the brace would have bumped a guardrail or that employees could not have reached around a guardrail while installing the brace. This evidentiary deficiency is fatal to the infeasibility claim.

McNulty also argues that the cited standard applies only to permanent platforms and is therefore inapplicable to the temporary platform here. McNulty cites certain Commission cases holding that under the general industry scaffold standards, the scaffold standards apply to temporary surfaces while the platform standards apply only to permanent structures. However, the standard at issue here is a construction standard that necessarily applies to temporary conditions.[27] Commission and court precedent indicates that the guardrail

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[26]Because we find that McNulty could have erected guardrails, we need not reach McNulty's argument that it could not use safety belts. *See id.* at 1390-91, 1991-93 CCH OSHD at pp. 39,863-64.

[27]For example, § 1926.500(a) specifies that "[t]his subpart shall apply to temporary or (continued...)

standards for construction apply to temporary surfaces. *See e.g., Armstrong Steel,* 17 BNA OSHC at 1386-87, 1995-97 CCH OSHD at p. 43,029-30 (temporary plank-passageway constitutes runway requiring guardrails). The District of Columbia Circuit has held that guardrails are required for temporary platforms where a "construction-related task" is being performed "for some time." *Donovan v. Williams Enterp., Inc.*, 744 F.2d 170, 176 (D.C. Cir. 1984). We therefore reject McNulty's argument.

McNulty argues that, even if the standard in applicable, this two-foot-wide platform was too narrow for guardrails. However, the photographs in evidence show that the platform was resting on wide concrete beams and none of McNulty's witnesses testified that a wider platform could not have been substituted for the narrow one being used. An employer claiming that a platform was too narrow for guardrails must establish that it could not have substituted a wider one. *See Armstrong Steel,* 17 BNA OSHC at 1388,1995-97 CCH OSHD at p. 43,030-32 (infeasibility defense cannot be sustained if chosen equipment was "inadequate to comply with the standards"). We also reject McNulty's further argument that guardrails would have made the platform top-heavy. Hinson, McNulty's consultant safety engineer, testified that if a load struck the guardrail, it could tip the platform over because there was "no way to secure" it to the structure. However, there is no evidence that a load came through the area while the elevated wall piece was being worked on. Moreover, we note that McNulty's employees drilled holes in the structure for braces and guardrail stanchions, and McNulty did not show why the platform could not have been attached in a similar manner. Miller, the Secretary's expert, testified that employees on other projects drilled into the structure to anchor safety belts and lanyards. The record here establishes that this platform was resting on a part of the structure that McNulty knew it could attach equipment to, for Lynch testified that a brace was being attached to it. We thus reject

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[27](...continued)
emergency conditions where there is danger of employees or materials falling through floor, roof, or wall openings, or from stairways or runways."

McNulty's technological infeasibility claims and we affirm sub-item 3B of item 3 of citation No. 2.

C. Sub-item 3C

There was an unguarded platform for a ladder on the exterior side of the elevated wall piece. Lynch testified that the platform was needed for releasing the crane hook on the end of the elevated wall piece where the floor was incomplete and a brace could not have been installed if guardrail-type protection had been in place.[28] Lynch testified that a guardrail on the platform "would have intersected the air space" for a brace that "had to be rotated from the vertical position through a 45 degree angle and be attached to the top of the wall at the stair shaft." However, Lynch did not testify that guardrails could not have been used and then removed to install the brace, then reinstalled for at least some of the surveying work and for releasing the crane hook at this end of the elevated wall piece. As we found in our discussion of sub-item 1A, releasing the crane hook is done after all the bracing is done, and at least some of the surveying work is done after the bracing. Therefore, we reject McNulty's infeasibility defense,[29] and affirm sub-item 3C of item 3 of citation No. 2.

D. Sub-item 3D

A photograph in evidence shows that item 3D concerns a platform consisting of two planks. McNulty argues that this platform was too narrow for guardrails. However, McNulty did not present any evidence that a wider platform could not have been used instead of the two planks, and the photograph suggests that there was enough space for a platform with guardrails. The burden is on the employer to establish that it could not have substituted a

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[28]The record establishes that this crane hook could not be reached except from the unguarded platform involved here. We therefore reject Judge Sommer's finding that the platform was unnecessary.

[29]We have already rejected McNulty's argument that the cited standard does not apply to temporary platforms. McNulty argues that this platform was too narrow for guardrails, but photographs in evidence indicate that it did not have to be so narrow, and McNulty did not present any evidence that it did.

wider one. *See Armstrong Steel,* 17 BNA OSHC at 1388,1995-97 CCH OSHD at p. 43,030-32. McNulty also argues that the cited standard does not apply to a temporary platform. However, because the standard is a construction standard, it necessarily applies to temporary conditions. *Williams Enterp.*, 744 F.2d at 176; *Armstrong Steel,* 17 BNA OSHC at 1386-87, 1995-97 CCH OSHD at p. 43,029-30. We therefore reject McNulty's infeasibility defense and affirm sub-item 3D of item 3 of citation No. 2.

E. Sub-item 3E

Item 3E involves an open-sided floor in the area that item 2B involved. However, McNulty does not argue an infeasibility defense as to the open-sided floor. McNulty argues that the Secretary failed to prove employee exposure, but the elements of the Secretary's case in chief are not on review. We therefore affirm sub-item 3E.

F. Sub-item 3F

This sub-item involves an unguarded floor perimeter in the area that we found was under erection in sub-item 2C. McNulty argues that guardrails on the floor perimeter would have interfered with the erection work. However, for essentially the same reasons we gave regarding sub-item 2C, we find that McNulty failed to prove the infeasibility of a temporary form of guardrails such as free-standing guardrails.[30] McNulty needed to prove that all forms of guardrails would make work operations technologically or economically infeasible because the Secretary presented evidence that free-standing guardrails could have been used. Because this fall protection device could have been repositioned or removed as necessary to permit the concrete pieces to be landed, McNulty needed to present evidence that free-standing guardrails could not have been maneuvered as necessary for the work. However, McNulty did not make this showing. We therefore reject its infeasibility defense and affirm sub-item 3F of item 3 of citation No. 2.

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[30]Therefore, we need not reach the argument that safety monitors were used as an alternative means of protection. *See R&R*, 15 BNA OSHC at 1390-91, 1991-93 CCH OSHD at pp. 39,863-64.

V. The Willful Classification of the Sub-items in Citation No. 2

Whether a willful violation exists depends upon the employer's state of mind with respect to the requirements imposed by the applicable standard. *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987). The Secretary must show that the employer had a "heightened awareness" of the illegality of its conduct. *E.g.*, *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1727, 1999 CCH OSHD ¶ 31,821, p. 46,783 (No. 95-1449, 1999) (citing *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)); *Pentecost Contrac. Corp.*, 17 BNA OSHC 1953, 1955, 1995-97 CCH OSHD ¶ 31,289, p. 43,965 (No. 92-3788, 1997). An employer who has notice of a standard and is aware of a condition which violates that standard but fails to correct or eliminate the employee exposure to the violation demonstrates knowing disregard for purposes of establishing willfulness. *Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1613, 1991-93 CCH OSHD ¶ 29,673, p. 40,210 (No. 87-2007, 1992); *accord A. Schonbek Co.*, 9 BNA OSHC 1189, 1191, 1981 CCH OSHD ¶ 25,081, p. 30,984 (No. 76-3980, 1980), *aff'd*, 646 F.2d 799, 800 (2d Cir. 1981); *Tampa Shipyards*, 15 BNA OSHC at 1541, 1991-93 CCH OSHD at pp. 40,103-04. The Commission has found knowing disregard where an employer has been previously cited for violations of the standards in question, is aware of their requirements, and is on notice that violative conditions exist. *Propellex Corp.*, 18 BNA OSHC 1677, 1684, 1999 CCH OSHD ¶ 31,792, p. 46,592 (No. 96-265, 1999) (quoting *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2209, 1991-93 CCH OSHD ¶ 29,964, p. 41,029 (No. 87-2059, 1993)). A willful charge is not justified, however, if the employer made a good faith effort to comply with the standard or to eliminate the hazard even though the employer's efforts are not entirely effective or complete. *E.g. Keco Indus.*, 13 BNA OSHC 1161, 1169, 1986-87 CCH OSHD ¶ 27,860, p. 36,478 (No. 81-263, 1987).

Here, Judge Sommer found all sub-items willful because McNulty did not comply with known fall protection standards and did not monitor and protect the employees in its CAZs as strictly as industry custom and practice required. The judge did not look at each

sub-item individually, and for the most part, the parties on review have not done so either. The parties focused their arguments on whether McNulty established a good faith defense, *i.e.*, whether it adopted CAZs in good faith. The parties take this approach because McNulty admits on review that it "was aware that OSHA has fall protection standards" and "knew that it had not provided safety belts and guardrails." McNulty asserts that it believed in good faith that traditional fall protection would be "so dangerous and infeasible" in erection areas that CAZs should be adopted instead. The Secretary counters that CAZs cannot be a substitute for traditional fall protection.

We have examined each of the twelve individual sub-items that we affirm as violations to determine whether the Secretary established heightened awareness as well as whether McNulty established a good faith defense. We agree with the judge that for those items we affirm, McNulty committed willful violations of the cited guardrail standards, § 1926.500(b)(1) and § 1926.500(d)(1). However, we affirm the four violations of § 1926.105(a) as serious.

McNulty's undisputed awareness of § 1926.105(a) plus the fact that its contract for the project required it to comply with OSHA requirements in general is not enough to prove heightened awareness in the specific instances involved here.[31] The Secretary also placed in evidence some prior citations that cited fall protection standards, but as the citations do not involve violative conditions similar to those involved here, they would not have given McNulty a heightened awareness that what it was doing here contravened §1926.105(a). Even the fact that Liberty Mutual sent a letter prior to the inspection to Spancrete and McNulty that referred to §1926.105(a) does not establish heightened awareness because

[31]Commissioner Weisberg agrees to affirm sub-items 1A and 1C as serious for the purposes of reaching agreement in this case. As to these items, however, he would have found them willful based on McNulty's heightened awareness that it was not providing traditional fall protection and its failure to establish a "good faith" defense. Accordingly, he does not concur with the analysis of these two sub-items and notes that the discussion concerning sub-items 1A and 1C set forth in the body of the opinion do not represent the views of the Commission but simply those of Chairman Rogers.

Liberty Mutual did not apply §1926.105(a) to any of the specific conditions involved here. We turn now to those specific conditions.

A. Sub-item 1A:

This is the sub-item concerning failure to use a ladder for surveying work and for releasing a crane hook. The prior citations the Secretary put into evidence and the Secretary's testimonial and written evidence of warnings from Whiting-Turner do not establish that McNulty was notified of a requirement to use ladders for surveying work, releasing crane hooks, or any similar activity. The only ladder problem that Whiting-Turner had warned McNulty about was that ladders must be tied-off. McNulty's safety program addressed certain aspects of ladder use, such as the necessity to rest a ladder at the proper angle. However, the safety program did not specify any particular tasks where a ladder must be used. McNulty instructed its employees at tool box meetings about some aspects of ladder use, *i.e.*, do not alter or damage a ladder, do report any damage, do not move any ladder without ensuring that no one else is using it. However, none of the tool box meeting minutes show that McNulty instructed its employees to use ladders for surveying work or for releasing crane hooks.

The only evidence in the record that McNulty was aware that it could or should use a ladder for the task involved here is project manager Lynch's testimony that a videotape shows an employee using a ladder to release a crane hook. However, the Secretary did not elicit any testimony from Lynch that he recognized this practice as one required by § 1926.105(a). Lynch's testimony as a whole indicates that he viewed walking on top of precast pieces as acceptable practice. Therefore, the particular testimony from Lynch about the videotape is not enough to satisfy the Secretary's burden on heightened awareness. Lynch's testimony as a whole was consistent with Midlantic Erector's vice president, Davis, who testified that a surveyor might use a ladder if possible, but might walk on top of an open wall if there was no other way to get where he needed to go.

In sum, the Secretary only established that McNulty knew of the cited standard, not that McNulty had a heightened awareness of the illegality of its conduct in violation of the standard here. Sub-item 1A is affirmed as a serious violation.

B. *Sub-Items 1B and 1E*:

These two sub-items concern two separate days when employees using a suspended basket failed to tie off to an independent lifeline. The Secretary did not present any citation, warning, safety program requirement or tool box meeting instruction that would establish that McNulty had a heightened awareness of the need for an independent tie off prior to the first day involved here, November 30. We therefore affirm a serious violation for sub-item 1B, which pertains to the November 30 exposure.

The incident involved in sub-item 1E is a much closer case because, after the first incident, compliance officer Donovan explained the independent tie-off requirement to McNulty's CEO, Lawrence Weiss. Two days later, Schrilla, the compliance officer who was assisting Donovan in the inspection, observed an employee using the suspended basket again without an independent tie off. According to Donovan, McNulty's project coordinator Robert Weiss was videotaping the inspection at the time, and the suspended basket was in his direct view. At compliance officer Schrilla's request, the Whiting-Turner representative accompanying him "yelled over" to Weiss, asking "that the man be tied off independent." Weiss replied that "[h]e is tied off." Schrilla testified that he "yelled back and said he's got to be tied off independent, independently of the basket," and Weiss then stated that he would "take care of it." Schrilla also testified that after this discussion the employee exited the basket and the basket was removed.

In our view, this testimony establishes only that project coordinator Weiss became aware of the violative condition *after* it was brought to his attention by the Whiting-Turner representative. Although the compliance officer testified that the violative condition was in Weiss' view as he was videotaping, Weiss' contemporaneous reply to the Whiting-Turner representative indicates that he thought the employee was already properly tied-off.

Moreover, the Secretary has introduced no evidence that Weiss noticed the violative condition through the video camera, or that it would have been impossible for him not to have noticed it. In these circumstances, we conclude that the Secretary did not establish that McNulty had a sufficient awareness of the violative condition to establish willfulness. *E.g.*, *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶ 30,759, p. 42,740 (No. 93-239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). Accordingly, we affirm sub-item 1E as serious.

C. *Sub-Item 1C*:

We affirmed this sub-item on the basis that McNulty had guardrail-crew employees without safety belts at an open perimeter inside a CAZ even though industry custom and practice was to deny entry to anyone not assigned to the erection-crew. The record clearly establishes McNulty's awareness of the particular industry custom and practice; in fact, McNulty's policy tracked industry custom and practice.[32] However, the focal point of a willful classification is "heightened awareness" of the illegality of the conduct. *E.g.*, *Pentecost Contrac.*, 17 BNA OSHC at 1955, 1995-97 CCH OSHD at p. 43,965; *Williams Enterp.*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,589. Therefore, at issue is whether McNulty knew that a legal duty required it to conform to industry custom and practice.[33] *Compare Sal Masonry Contrac.*, 15 BNA OSHC 1609, 1613, 1991-93 CCH OSHD ¶ 29,673, p. 40,210 (No. 87-2007, 1992) (failure to act on known duty demonstrates knowing disregard); *accord A. Schonbek*, 9 BNA OSHC at 1191, 1980 CCH OSHD at p.

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[32]Lynch testified that he instructed the "pushers" or foremen to "restrict all other personnel except for the raising gang from access" to CAZs and that "[o]ur general policy was as soon as the area is erect and safe, the erection is complete, pieces are in, the cabling crew[] moves into the area and puts up a perimeter cable and then the raising gang moves on to the next area." Lynch also testified: "The position PCI takes is that anybody that's in an erection zone that's involved in erection of the product[] does not tie off[] because it causes a greater hazard."

[33]As noted above, Commissioner Weisberg agrees to affirm this item as serious, but does not concur in the analysis set forth herein.

30,984. Alternatively, the issue is whether McNulty had a state of mind such that, if informed of the duty, it would not have cared about complying. *Morello*, 809 F.2d at 164 (not caring about complying demonstrates plain indifference).

There is no basis for finding that, if McNulty was informed of the duty, it would not have cared. McNulty had a policy to comply and was generally following it. The Secretary presented some general and conclusory evidence that McNulty had a bad attitude towards safety. However, there is also evidence that McNulty corrected hazardous situations when informed of them, and there is no specific evidence that McNulty ever refused to exclude non-erection employees from a CAZ when informed of a duty to do so.[34]

Whether McNulty disregarded a known duty here and therefore acted willfully is more problematic. McNulty admits in its review brief that it knew of § 1926.105(a), and as we have already noted, the record establishes that McNulty knew of the industry custom and practice to require guardrail-crew employees to use safety belts after erection was completed. However, these two facts do not necessarily equate with heightened awareness when the practicality issue that § 1926.105(a) presents is considered. This standard does not straightforwardly require that safety belts must always be used in particular circumstances. Instead, it states that safety nets are required where other devices including safety belts are impractical. *See, e.g.*, *Falcon Steel*, 16 BNA OSHC at 1188, 1993-95 CCH OSHD at p. 41,337. Because the Secretary did not allege and has not attempted to establish that safety nets were required here, she is proceeding on the assumption that safety belts were practical and that, accordingly, McNulty should have analyzed their practicality and implemented

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[34]Robert Fadrowski, project manager Whiting-Turner's safety coordinator for the project, testified that he believed McNulty was generally indifferent to safety because McNulty did not install proper guardrails on "leading edges," did not always respond to his warnings that some McNulty employees lacked safety belts, and did not keep employees out of "areas where their safety would be in jeopardy." However, Fadrowski did not specify whether the employees involved in these warnings were guardrail-crew employees or erection crew employees. They may have been erection crew employees because he erroneously believed that they must always wear safety belts inside a CAZ.

them to the extent practical. *See Falcon Steel,* 16 BNA OSHC at 1189-90, 1993-95 CCH OSHD at pp. 41,338-39. As a result, under these particular circumstances, the Secretary must establish a heightened awareness of the practicality of safety belts. This evidence is missing here.

The prior citations the Secretary presented shed no light on heightened awareness in these circumstances. The two more recent citations (April 1986 and April 1989), which cited § 1926.105(a), involved failure to tie off while working on monorail systems. Nothing in the record indicates that open floors inside CAZs were involved. In fact, the 1986 citation states that the failure to tie off involved an employee sitting on a beam. The only prior citation that involved failure to tie off while working at an open floor perimeter goes back to 1976. *A.J. McNulty & Company,* 4 BNA OSHC 1097, 1975-76 CCH OSHD ¶ 20,600 (No. 2295, 1976). There, however, McNulty was constructing a multi-floor steel frame structure, not a precast concrete structure, and there is no indication that a CAZ was involved.

Of course, as the record in the present case indicates, industry custom and practice regarding precast concrete erection have been in considerable flux since 1976, and CAZs appear to be a more recent development. The Secretary argues in support of the judge's decision that McNulty was simply required to comply with the OSHA fall protection standards that were as applicable during McNulty's 1993 inspection as they were in McNulty's 1976 case. However, it is difficult to premise a willful classification on that view because the Secretary herself has raised uncertainty about proper practice. The Secretary announced a complete review of the old Subpart M in 1977, proposed in 1986 to revise almost all the fall protection standards and consolidate them in Subpart M, and reopened the record on this process in 1992 to allow the precast concrete industry to present new information regarding fall protection for the precast erection industry. 59 Fed.Reg. 40672 at pp. 40672-73 (1994). As of 1994, with the issuance of new Subpart M, certain designated employees may be permitted to perform erection work without tied-off safety belts inside a CAZ. Therefore, in the particular circumstances involved here, the 1976 Commission

decision regarding steel erection cannot be relied on for a finding of heightened awareness in 1993 in precast erection.

Whiting-Turner's general warnings about a need for safety belts are also not relied on because Whiting-Turner does not seem to have distinguished between erection-crew employees and guardrail-crew employees. Whiting-Turner erroneously believed both that McNulty had not establish any CAZs and that everyone was required to use safety belts regardless of on-going erection. This suggests that Whiting-Turner may have issued warnings regarding situations where safety belts could have endangered the employees. McNulty would have been justified in not following these warnings. Because the record is not detailed enough about the warnings for us to isolate any that specifically concerned guardrail-crew employees in a CAZ, it is difficult to find that Whiting-Turner's warnings provided heightened awareness.

Also, McNulty's safety rules do not serve as a basis for a willful finding. The relevant rules are as follows: "When work in a leading edge area is completed[,] all open sides should be promptly protected by proper OSHA approved guards cables [sic]." "Safety belts and life lines will be used, when necessary and feasible, in areas where guardrails, nets, or scaffolding cannot be used." It is difficult to find heightened awareness in a case that involves § 1926.105(a) because of the standard's practicality condition. McNulty's rule requiring safety belts states essentially the same condition ("when necessary and feasible"), and therefore cannot be said to show a heightened awareness in any particular factual circumstance. McNulty's rule on guardrails appears primarily geared to ensuring prompt installation, which was essentially taking place here in a safe manner for the location. The rule does indicate that the guardrails should be installed after the erection is completed, but this by itself is not enough to establish heightened awareness for purposes of § 1926.105(a).

Industry custom and practice recognized the impracticality of safety belts for employees working in a CAZ. The guardrail-crew employees at issue here were working in a CAZ. They should not have been there, but to have required them to wear tied-off safety

belts could have endangered them, and they were doing precisely the same kind of work, *i.e.*, welding, bolting, drilling, that the erection-crew employees working alongside them were doing without tied-off safety belts. Therefore, the Secretary has not met her burden of proof on willfulness. Sub-item 1C is affirmed as a serious violation.

D. *Sub-items 2A and 2C*

We now turn to the willfulness of McNulty's violations of the OSHA standards requiring guardrails. Sub-items 2A and 2C involve floor openings. Sub-item 2A involves the floor opening that lacked guardrails while employees performed out-of-sequence work nearby, *i.e.*, installing a wall piece while waiting for the floor piece to be delivered. Sub-item 2C involves the erection area where McNulty installed five wall pieces before installing the floor piece that eliminated the floor opening at issue. The standard cited in both sub-items, § 1926.500(b)(1), specifies that floor openings "shall be guarded by a standard railing and toeboards or cover." McNulty essentially concedes on review that it knew of the cited standard, and the Secretary introduced into evidence at least two prior settlements affirming citations alleging violations of § 1926.500(b)(1). McNulty gave the following instruction to its employees at a tool box meeting: "If you are working near openings in floors . . . which are unguarded, your foreman must ensure that they are protected . . . ." Whiting-Turner issued to McNulty as many as eleven warnings about deficient perimeter protection on this project prior to the inspection involved here. Three of the warnings indicated that all openings must be protected. Another two warnings stated that perimeter protection must be provided on leading edges. The floor opening edges involved here were not immediately leading edges until the particular floor pieces were actually installed. Liberty Mutual had recommended that McNulty use motion stopping systems or awareness barriers on edges that were not immediately leading. Although McNulty did not agree with Liberty Mutual's recommendation, we find that McNulty had a heightened awareness of the need for guardrails on edges such as the ones here that were not immediately leading.

We also find that McNulty did not have an objectively reasonable good faith belief that it did not need guardrail protection at these floor openings. McNulty argues that it believed in good faith that guardrail protection would be infeasible and hazardous in areas where erection was still taking place. As we already found, however, McNulty failed to establish that the ongoing erection made guardrails infeasible and hazardous. McNulty also failed to establish that it had considered and specifically rejected the use of temporary protection, such as free-standing guardrails or an awareness barrier. In fact, the testimony about McNulty's planning sessions for this project makes no mention of guardrails as a feasibility problem or a hazard.

We also find that the placement of these floor openings inside a CAZ does not obviate willfulness here. The evidence shows that industry practice regarding the use of guardrails on stationary edges in a CAZ was not consistent. Moreover, McNulty's safety rule that required guardrails on all platforms being used as scaffolds made no exception for scaffolds located inside a CAZ. In our view, this shows that McNulty recognized the utility of guardrails inside a CAZ. Accordingly, we affirm sub-item 2A and sub-item 2C of citation No. 2 as willful violations.

E. Sub-item 3A

The remaining six sub-items the Secretary contends were willful violations involve § 1926.500(d)(1)'s requirement of guardrails on open-sided floors or platforms six feet or more above the adjacent level. McNulty essentially concedes on review that it was aware of the cited standard, and the Secretary introduced into evidence at least two prior settlements affirming citations that alleged violations of § 1926.500(d)(1). The record also shows that, prior to the inspection of the project here, Whiting-Turner had issued to McNulty as many as eleven warnings about deficient perimeter protection. The warnings essentially informed McNulty that protection was required on all open edges, leading edges as well as completed edges. Also prior to the inspection, Liberty Mutual had recommended that McNulty use motion stopping systems or awareness barriers on edges that were not immediately leading.

Although McNulty did not agree with this recommendation, it is further evidence that McNulty had been alerted to the need for and availability of appropriate guardrail protection.

1. The North Perimeter

This part of sub-item 3A involves a completed perimeter. One of McNulty's safety rules required cables on all completed perimeters. It stated: "When work in a leading edge area is completed[,] all open sides should be promptly protected by proper OSHA approved guards cables [sic]." The record establishes that Lynch was aware of the rule's applicability to this particular condition. He testified that he expected the cabling crew to install cables because this perimeter had been completed. We therefore find that the Secretary established heightened awareness and made a prima facie case of willfulness.

McNulty claims that it made objectively reasonable, good faith efforts to comply with the requirement for perimeter protection. However, the judge found that McNulty did not try to install guardrails as soon as possible and did not monitor the employees for fall hazards. Regarding the monitoring aspect of this finding, compliance officer Donovan gave unrebutted testimony that he observed foreman Doyle exposed to an approximately 19-foot fall as he stood at the open edge to catch a roll of yellow caution tape that was being tossed up to him. McNulty claims that its foremen were acting as monitors for fall hazards. However, this exposure by Doyle suggests otherwise. Where a supervisor engages in misconduct, that is strong evidence of lax enforcement of the employer's safety program. *Pride Oil Well Serv.*, 15 BNA OSHC 1809,1815, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87-692, 1992). As for the perimeter protection itself, McNulty did not establish that it arranged to have it installed before the erection crew started work, and McNulty did not establish that it had an objectively reasonable explanation for failing to do so. We therefore find that McNulty did not make a good faith effort to comply with the standard or to eliminate the hazard. We affirm the judge's classification of this part of sub-item 3A as willful.

2. The East Perimeter

The other part of sub-item 3A concerns the open perimeter under the suspended wall piece. As we have mentioned, Whiting-Turner issued numerous warnings about perimeter protection, and McNulty's safety program called for cables on completed edges. The area where this edge was located was an erection area at the time, and the edge itself was not yet technically complete, but there is no evidence that it was an immediately leading edge, and the record indicates that it was going to be stationary for some time. Lynch testified that it would eventually be made into an entrance to the new Fashion Mall when McNulty "finished the garage." McNulty's witnesses who planned the work on the suspended wall piece did not explain why they failed to give priority to installing temporary guardrails there before they allowed the erection crew to set the suspended wall piece. We therefore find that the Secretary established heightened awareness and that McNulty did not establish a good faith defense. We classify this part of sub-item 3A as willful and we affirm sub-item 3A as a willful violation.

F. *Sub-items 3B, 3C and 3D*

These sub-items involve the unguarded platforms that we affirmed as violations of § 1926.500(d)(1). McNulty's safety program included a rule that evidences heightened awareness of a need for guardrails on all platforms being used as scaffolds: "Guardrails and toeboards shall be installed on all scaffolds in accordance with OSHA requirements." The rule makes no exception for scaffolds in erection areas. It apparently contemplates that guardrail protection can and should be installed on platforms located there. Therefore, the rule gave McNulty a heightened awareness of the need to comply with § 1926.500(d)(1).

There is scant evidence of good faith. Regarding the platform involved in sub-item 3B, McNulty argues that erection work would have made guardrails infeasible and a greater hazard because any precast piece being swung into the area could strike the guardrails and topple the platform. However, we have not found any evidence that any precast piece was scheduled to be swung into the area, and there is no evidence that McNulty studied the situation in advance and determined that guardrails would be a problem. McNulty's other

arguments have the same flaw. McNulty argues that this platform and the one involved in sub-item 3D were too narrow for guardrails, but McNulty did not present any evidence that it made a good faith evaluation of the facts and actually found that the platforms could not be wider. McNulty claims that the platforms involved in sub-items 3B and 3C could not have had guardrails because they would have interfered with the installation of certain braces. This claim is inconsistent with McNulty's rule requiring guardrails on scaffolds in erection areas where braces are being installed, and McNulty did not present any evidence that it made a good faith evaluation of the facts and actually found that guardrails could not be installed on these platforms because they would have interfered with the installation of braces. We therefore find that McNulty failed to establish any of its good faith defenses, and we affirm the judge's finding that the violations involved in sub-items 3B, 3C and 3D were willful as alleged.

G. *Sub-items 3E and 3F*

Sub-item 3E involves the willfulness of a failure to guard the edge of an open-sided floor that we have not previously described because McNulty did not raise an infeasibility defense to it. It was located behind the employees at the shaft opening discussed in sub-item 2B. Sub-item 3F involves the open-sided floor in the erection area where McNulty installed five wall pieces and a floor piece in a floor opening (sub-item 2C). We find that the Secretary has made out a prima facie case of willfulness for these two violations because McNulty had a heightened awareness of the guardrail requirements of § 1926.500(d)(1) from the prior citations involving the standard and from Whiting-Turner's numerous warnings to install perimeter guarding.

We also find that McNulty has not established a good faith defense. McNulty argues that the industry does not use guardrails where erection is taking place because they interfere with the placement of precast pieces. This does not establish good faith here because McNulty failed to show that guardrails on the particular open-sided floors at issue would have interfered with particular precast pieces being erected. Compliance officer Donovan

testified that both open-sided floors could have been protected with free-weighted or free-standing guardrails, and McNulty failed to rebut this testimony with any showing that erection was taking place at or near the open-sided floors in question. In fact, as we have indicated, McNulty did not raise an infeasibility defense regarding the open-sided floor in sub-item 3E, and did not argue that the area was a CAZ. As for the area involved in sub-item 3F, we have earlier rejected McNulty's claim that the fact that it was "under construction" made guardrails infeasible everywhere. McNulty did not present any evidence of a good faith effort to use guardrails at the cited locations involved here, despite Liberty Mutual's specific recommendation that McNulty use awareness barriers for edges that are not immediately leading. Therefore, we uphold the Secretary's willful classification for sub-items 3E and 3F of citation No. 2.

VI. *Penalties for Willful Citation No. 2*

The OSH Act mandates that the Commission give "due consideration . . . to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). The judge affirmed all of the items as willful and assessed the Secretary's proposed penalties as follows: $29,400 for item 1 (five sub-items), $21,000 for item 2 (three sub-items), and $29,400 for item 3 (six sub-items). The judge credited compliance officer Donovan's testimony that the gravity of the violations was high in view of the fall distances involved, that McNulty is small in size, that McNulty failed to demonstrate good faith, and that McNulty has a history of serious OSHA violations. McNulty opposes the judge's assessments on two grounds, that the gravity was not high for every instance of noncompliance and that its adoption of CAZs demonstrates good faith.

We affirm sub-items 1A, 1B, 1C and 1E, as serious violations. Each involve fall distances of more than 40 feet and therefore involve a substantial probability of death or serious physical harm. At least one employee was exposed to the fall distance in sub-items 1A, 1B, and 1E, and more than one employee was exposed in sub-item 1C. Therefore, the

gravity of all of these violations was moderate to high. Although McNulty is small in size, McNulty has a history of serious violations including fall protection violations. McNulty's good faith is questionable because, although McNulty implemented a CAZ policy for erection employees, McNulty did not present any evidence that CAZs made ladders infeasible or hazardous to use (sub-item 1A), that CAZ employees customarily worked without independently tied off safety belts in suspended baskets (sub-items 1B and 1E), or that guardrail crew employees were permitted to work without safety belts inside a CAZ (sub-item 1C). We therefore believe that credit for good faith is not warranted for these four serious sub-items, 1A, 1B, 1C and 1E. We assess $3,000 for each of them.

Sub-items 2A and 2C, which we affirm as willful violations, involve fall distances of 19 and 10 feet. Although these distances are far less than those involved in item 1, they still present significant fall hazards. *See, e.g., Monitor Constr. Co.,* 16 BNA OSHC 1589, 1596, 1993-95 CCH OSHD ¶ 30,338, p. 41,828 (No. 91-1807, 1994). Moreover, a larger number of employees was potentially exposed, for McNulty had an erection gang working in the area of each unguarded floor opening involved here. Therefore, the gravity of these violations was moderate to high. As noted above, although McNulty is small in size, McNulty has a history of serious violations. McNulty argues that it should be given credit for good faith because industry custom and practice favored CAZs over traditional fall protection such as guardrails, but we have found that some persons familiar with the industry advocated using temporary guardrail-type protection at non-leading edges in erection areas. We therefore do not believe that credit for good faith is warranted. On balance, we believe that an assessment of $7,000 each is warranted for willful sub-items 2A and 2C.

Sub-items 3A, 3B, 3C, 3D, 3E, and 3F, which we affirm as willful violations, involve fall distances greater than 15 feet and therefore present significant fall hazards. *See, e.g. Monitor Constr.*, 16 BNA OSHC at 1596, 1993-95 CCH OSHD at p. 41,828. The number of employees exposed ranged from one employee to whole erection gangs. Therefore, the gravity was moderate to high. Although McNulty was small in size, McNulty also had a

history of serious violations. As for good faith, although McNulty generally argues that its CAZ policy excuses its failure to use guardrails, we disagree because McNulty was aware of Liberty Mutual's recommendation for temporary guardrail-type protection on edges that were not immediately leading and because McNulty's own safety program required guardrails on completed edges and scaffold platforms. Taking into consideration McNulty's small size and history, we assess the proposed total of $29,400 for these willful sub-items.

VII. McNulty's Infeasibility Defense to Item 3 of Serious Citation No. 1

The Secretary alleged that McNulty violated 29 C.F.R. § 1926.500(c)(1)[35] by failing to install guardrails on the shaft opening at one side of the suspended wall piece that we have encountered throughout this case. McNulty argues that guardrails were infeasible because they would have interfered with the installation of a brace on the wall that McNulty was erecting. Lynch testified that "the brace has got to be rotated through the air space that the cable would have gone in" and that "the brace . . . hanging . . . straight down" from the wall under erection "has now got to be rotated" or "raised into a horizontal position" by "about 45 degrees" to attach it to the shaft wall. Judge Sommer rejected McNulty's infeasibility defense on the basis that "the positions of the brace in the photos" establish that guardrails would not have interfered with it. We reverse his decision and uphold McNulty's infeasibility defense. McNulty presented specific evidence explaining how guardrails would have been infeasible. The Secretary introduced no testimony to rebut McNulty's explanation, and we find that the photographs alone are insufficient to do so. Accordingly, we vacate item 3 of the serious citation.

ORDER

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[35]At the time of the inspection here, the standard stated that "[w]all openings, from which there is a drop of more than 4 feet, . . . shall be guarded as follows: (I) [w]hen the height and placement of the opening in relation to the working surface is such that either a standard or intermediate rail will effectively reduce the danger of falling, one or both shall be provided . . . ."

We affirm sub-items 2A and 2C of item 2 of citation No. 2 as willful violations and assess two $7,000 penalties. We affirm sub-items 3A, 3B, 3C, 3D, 3E, and 3F of item 3 of citation No. 2 as willful violations and assess a total penalty of $29,400. We affirm sub-items 1A, 1B, 1C, and 1E of item 1 of citation No. 2 as serious violations and assess four $3,000 penalties. We vacate sub-items 1D and 2B of citation No. 2. We also vacate item 3 of Citation No. 1.

/s/
Thomasina V. Rogers
Chairman

/s/
Stuart E. Weisberg
Commissioner

Dated: October 5, 2000

VISSCHER, Commissioner, concurring in part, dissenting in part:

I concur in denying McNulty's motion to exclude the Secretary's evidence. I also concur in affirming the violations alleged in items 1B, 2A and 2C and 3A through 3F, and in vacating the violations alleged in item 1D and 2B. I further agree that the violations alleged in items 1B, 1C and 1E were not willful. I dissent, however, with regard to item 1A. I also dissent with regard to the majority's finding that the violations affirmed in citations 2 and 3 were willful.

McNulty's Motion to Exclude Evidence

While I concur in denying McNulty's motion to exclude evidence, I do so on the basis that McNulty failed to establish that the Secretary violated section 8(e). I therefore would not reach the question of whether McNulty has shown that it was prejudiced, and will leave for another case the question of whether an employer must show that it was prejudiced to establish a remedy under section 8(e). *See, e.g., L.R. Willson and Sons, Inc*., 17 BNA OSHC 2059, 1995-1997 CCH OSHD ¶ 31,262 (No. 94-2179)(Montoya, Commissioner, dissenting), *rev'd on other grounds*, 134 F. 3d 1235, 18 BNA OSHC 1129 (4th Cir.), *cert. denied*, 525 U.S. 962 (1998).

Section 8(e) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 657 (e) provides that "a representative of the employer . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . for the purpose of aiding such inspection." As the Commission has said, "the courts emphasize that the Secretary is obligated under the act to afford an *opportunity* for accompaniment." *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1618, 1991-1993 CCH OSHD ¶ 29,681, p. 40,241 (No. 89-2019, 1992)(emphasis in original)

As the Commission has also said, "[t]he extent of the efforts required on the part of the inspector to satisfy section 8(e) will depend upon the circumstances of the particular case." *Id.* at 1618, 1991-1993 CCH OSHD p. 40,241. In my view, the Secretary satisfied these obligations to McNulty during this inspection. Compliance officer Donovan began the inspection on November 19, 1993 with an opening conference for all contractors and subcontractors on the site. Though no one from McNulty was present at the conference, Donovan came upon two of McNulty's supervisors a short time later and informed them that

McNulty representatives could accompany him when he inspected McNulty's work areas. Despite this direct offer, McNulty's supervisors indicated no interest in accompanying OSHA personnel during the inspection. While it does appear that McNulty was not always aware that an OSHA compliance officer had begun inspecting its work areas, the company showed no interest in accompanying the compliance officer once it was informed. For example, compliance officer Donovan invited McNulty representatives to accompany him during the videotaping of McNulty's worksite on both the third and fourth days of the inspection. Both times the offer was declined.

After the inspection began, McNulty's president, Lawrence Weiss, did send a letter to compliance officer Donovan asking him to "please notify me in advance" of future site visits "so that I can arrange to be present for any jobsite inspections or conferences." While this letter may indicate some intention to accompany the compliance officers, the more specific request was for advance notice of inspection visits, which is generally disallowed under the OSH Act. Indeed, section 17(f) of the Act, 29 U.S.C. 666(f), provides criminal penalties for giving advance notice of inspections, and the Secretary's regulations forbid most forms of advance notice. 29 C.F.R. § 1903.6. And, even if the letter does express Mr. Weiss' intention to accompany the compliance officers during the remainder of the inspection, this intention was contradicted by McNulty's supervisors the very next day. As mentioned above, Mr. Donovan invited these supervisors to accompany him during the videotaping. At the same time, Mr. Donovan also suggested that they call Mr. Weiss. In declining his offer, the supervisors said that both they and Mr. Weiss were too busy.

Violations alleged in Item 1 of Willful Citation 2

Item 1 of willful citation 2 alleges five violations of the fall protection standard at 29 C.F.R. § 1926.105(a). As the main opinion notes, the only issue directed for review as to the validity of the violations in item 1 - "practicality" - was not argued with regard to subitems B and E. As a result, the Commission has considered those violations only with regard to whether they were willful. As mentioned above, I concur with the majority that these violations were not willful. With regard to the three remaining subitems, I concur in

affirming the violation alleged in subitem C as serious only, and in vacating the violation alleged in subitem D. My dissent regards the violation alleged in subitem 1A, which I would vacate.

Subitem 1A alleges that McNulty violated the fall protection standard when it allowed an employee to walk across the top of a section of precast concrete wall without fall protection. The section in question was being set into position, and the employee was checking to determine if the section was level and plumb as it was being braced and connected. He also walked across the top of the section in order to release the crane hooks once it had been secured. At the time the employee was observed walking on top of this wall section, there was no interior floor for much of its length.

The Secretary alleges that plumbing and leveling the wall section and releasing the crane hooks could all have been done from a ladder. The majority acknowledges, however, that since the floor adjacent to the wall piece was not complete, some of the work involved could not be done from a ladder as there was no floor on which a ladder could be set. The majority nonetheless affirms the violation on the basis that McNulty's employee could have done *some* of the work from a ladder, citing *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075, 1991-93 CCH OSHD ¶ 29,239, p. 39,159 (No. 87-1359, 1991).

At issue in *Walker Towing* was an alleged violation of a shipyard standard, 29 C.F.R. § 1915.73(d), which requires guardrails around the edges of decks, platforms, and similar flat surfaces more than 5 feet above a solid surface "unless the nature of the work in progress or the physical conditions prohibit the use or installation of such guardrails." The Commission found that even though the employer could not "fully comply with the literal terms of" the standard, the employer was nonetheless required to install guardrails around the edges of its work platform except to the extent that the employer proved that compliance was infeasible. *Id.* at 2075, 1991-93 CCH OSHD p. 39,159.

In contrast, the standard cited here, 1926.105(a), requires the Secretary to prove that the means of fall protection urged by the Secretary - using a ladder - was "practical." *Century*

Steel Erectors v. Dole, 888 F.2d 1399 (D.C. Cir. 1989); *Falcon Steel Co.*, 16 BNA OSHC 1179, 1993-95 CCH OSHD ¶ 30,059 (No. 89-2883, 1993). In *Century Steel*, the Court of Appeals for the District of Columbia emphasized that "practical" is not a synonym for "feasible," the standard applied by the Commission in *Walker Towing.* Quoting from Webster's Ninth New Collegiate Dictionary, the court defined "practical" as "relating to, or manifested in practice or action: not theoretical or ideal . . . [practical] applies to things and to persons and implies proven success in meeting the demands made by actual living or use." *Id.* at 1405. The Secretary's evidence here focused on whether it was generally practical to do the work involved here from a ladder. But Secretary has not established that a ladder could have provided a means for "meeting the demands" of the employee's work in the circumstances here, where a portion of the wall could not be reached from a ladder. Furthermore, *Walker Towing* involved the installation of guardrails at the edge of a barge, a situation in which partial compliance was relatively easy. In contrast, the employee involved in leveling and plumbing the wall section could not do his job without crossing the section from the top.

I would therefore find that the Secretary has failed to carry her burden of proving that the ladder was a practical means of fall protection, and vacate the violation alleged in subitem 1A.

Violations alleged in items 2 and 3 of Willful Citation 2

Items 2 and 3 of willful citation 2 allege violations of guardrail standards, 1926.500(b)(1) and 1926.500(d)(1), respectively. The only issue directed for review that goes to the validity of these subitems, other than for subitem 2B, is McNulty's defense of infeasibility. The main opinion discusses the Commission's precedent regarding the defense of infeasibility, and the proof in this case with regard to each of the subitems. As stated above, I concur in finding that McNulty has not met its burden of proving infeasibility with regard to subitems 2A and 2C and subitems 3A through 3F. I also concur in vacating subitem 2B on the basis of the Second Circuit Court of Appeals decision in *Spancrete Northeast, Inc.*

v. OSHRC, 905 F.2d 589 (2d Cir. 1990). I disagree, however, with the majority's finding that the violations affirmed in items 2 and 3 were willful.

The violations in items 2 and 3 involve the lack of guardrails around floor openings (items 2A and 2C), at open floor edges (items 3A, 3E, 3F) and on work platforms (3B, 3C, 3D). All of these floor openings, floor edges, and work platforms were in areas in which precast concrete erection work was taking place.

"In order to conclude that a respondent's violation of an OSHA regulation was willful, the Commission must find that its conduct was in intentional disregard of the law, or reflected plain indifference to the law." *S. Zara & Sons Contracting Co. v. OSHRC*, 697 F.2d 297 (2nd Cir. 1982).

McNulty has acknowledged that it was aware of the OSHA standards that required guardrails around all floor openings and on open sided floors and platforms. To this the majority adds McNulty's own work rule requiring guardrails around floor openings and warnings from Whiting-Turner regarding the need for perimeter protection on the project to support its conclusion that McNulty "intentionally disregarded" the guardrail requirements of the standards.

While this evidence certainly shows that McNulty knew of the general obligation to use guardrails around floor openings, edges, and platforms, there is no evidence that McNulty knew that guardrails were required *in the areas where precast concrete erection work was taking place.* Indeed, the record establishes a number of sound reasons for McNulty to have believed that it was *not required* to erect guardrails until the erection of an area or floor was completed.

The cited standards, 1926.500(b) and 1926.500(d), did not on their face include any exceptions, but both the Commission and the Secretary had recognized an exception to the requirement for guardrails when work is taking place at a "leading edge." *See Monitor Constr. Co.*, 16 BNA OSHC 1589, 1595-96, 1994 CCH OSHD ¶ 30,338, p. (No. 91-1807, 1994). *See also Dun-Par Engd. Form Co.*, 12 BNA OSHC 1949, 1959, 1986 CCH OSHD

27,650, p. 36,027 ("*Dun-Par I-A*"), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988);*Williams Enterp.*, 11 BNA OSHC 1410, 1417, 1983-84 CCH OSHD ¶ 26,542, p. 33,878 (No. 79-843, 1983).

What constitutes a "leading edge" in precast concrete construction? Prior to this inspection in 1993, three Commission judges had held that the considerations which had led the Commission to say that guardrails were not required at the "leading edge" applied to the entire erection area in precast concrete construction. *See Spancrete Northeast, Inc.*, 1991 CCH OSHD ¶ 29,520, 1991 WL 232788 (No. 90-1726, 1991)(judge noted Secretary's admission that none of the alternate methods of fall protection listed in section 1926.105(a) were practical for precast concrete construction), *rev'd on other grounds*, 16 BNA OSHC 1616, 1993-95 CCH OSHD ¶ 30,366 (Feb. 16, 1994), *aff'd without published opinion*, 40 F.3d 1237 (2nd Cir.1994); *Spancrete Northeast, Inc.*, 9 BNA OSHC 1406, 1407 , 1981 CCH OSHD ¶ 25,213 (No. 79-3431 & 4223, 1981)("perimeter protection would interfere with the guiding and control of heavy, large, precast members"); *American Crane Co.*, 5 BNA OSHC 1749, 1750, 1976-77 CCH OSHD ¶ 21,434 (No. 15,114, 1977)("guardrail would be dangerous because of the possibility that it could be knocked off which would be extremely dangerous to anyone below"). While these judge's decisions do not establish Commission precedent, in the absence of a contrary interpretation they certainly support McNulty's claim that it was not intentionally disregarding the guardrail standards when it did not employ guardrails in erection areas.

Moreover, in the revised fall protection standards issued shortly after this inspection, the Secretary agreed that the "leading edge" in precast concrete construction is the entire erection area. Under certain circumstances the revised fall protection standard allows employers to use alternative fall protection plans for "leading edge" work, 29 C.F.R. 1926.501(b)(2). In the case of precast concrete construction, the standard allows an employer to use that alternative fall protection plan for "[e]ach employee engaged in the erection of precast concrete members (including, but not limited to the erection of wall panels, columns,

beams, and floor and roof 'tees') and related operations such as grouting." 29 C.F.R. 1926.501(b)(12).[1]

The majority relies on the fact that during the safety planning meetings prior to construction, one of the individuals with whom McNulty consulted recommended that McNulty use a "motion stopping system" or "awareness barrier" around open edges in erection areas, and that McNulty disagreed with that advice and did not use such devices. Though the majority claims that this advice resulted in McNulty's "heightened awareness" of the need for guardrails, it is better viewed as further evidence that neither McNulty nor other safety experts familiar with precast concrete construction believed that guardrails were required in erection areas. While McNulty must show why those or other alternative protective measures were not used in order for it to meet the elements of the burden of proof which the Commission has established for the defense of infeasibility, failure to use these alternatives in erection areas, where the Commission agrees guardrails were infeasible, does not mean that McNulty intentionally disregarded the guardrail standards.

/s/
Gary L. Visscher
Commissioner

Date: October 5, 2000

[1]Both 1926.501(b)(2) and 1926.501(b)(12) state that the alternative fall protection plan may only be used where conventional fall protection (guardrail systems, safety net systems, or personal fall arrest systems) are infeasible or create a greater hazard. A subsequent enforcement policy issued in July 1995 indicated that the Secretary would accept the reasons stated by the employer in the fall protection plan as meeting these requirements.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v. OSHRC DOCKET NO. 94-1758

A.J. MCNULTY & COMPANY, INC.,

Respondent.

THE STEEL INSTITUTE OF
NEW YORK,

Intervenor.

APPEARANCES:

Barnett Silverstein, Esquire
Nancee Adams-Taylor, Esquire
New York, New York
For the Secretary.

Michael D. Tryon, Esquire
Garden City, New York
For the Respondent
and the Intervenor.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This is a proceeding before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). In November and December of 1993, the Occupational Safety and Health

Administration ("OSHA") conducted an inspection of a ten-deck parking garage being erected by Respondent A.J. McNulty ("McNulty") in White Plains, New York. As a result, McNulty was issued one serious, one willful and one repeat citation alleging a number of violations of the Act; the majority of the items alleged conditions exposing employees to fall hazards. McNulty contested the citations, and a thirteen-day hearing took place from February 16, 1995, to June 9, 1995.

Background

The subject parking garage was part of a large shopping mall construction project. Whiting-Turner Contracting Company ("Whiting-Turner"), the agent for the owner and the construction manager for the entire project, contracted with various companies to perform the work necessary to build the parking garage. Whiting-Turner contracted with Spancrete Northeast ("Spancrete") to furnish and erect the precast concrete needed for the garage; the contract also provided for pouring concrete where needed and waterproofing the concrete. Spancrete subcontracted all of this work to other companies, except for some of the fabrication, and had only a field manager and a materials coordinator on the job. McNulty was awarded the erection job. The job entailed lifting the precast members by crane up to the designated location and then, with employees guiding them by tag lines, setting or landing the pieces in place; the precast members included columns, walls and "double tees," the horizontal pieces that rested on the other members and formed the garage floors. The job also entailed temporarily bracing some members and connecting the pieces to the rest of the structure, requiring tasks such as drilling, grouting, surveying and welding. McNulty had thirty to forty employees on the job, which began in late summer 1993 and was completed by the end of the year; the job was about 70 percent finished when the inspection began. OSHA initiated its inspection of the site on November 16, 1993, due to a structural steel collapse in a particular area, but expanded the inspection to the entire mall project after arrival at the site. The inspection of McNulty's areas took place on November 19 and 30 and December 1, 2 and 8, 1993. OSHA held an on-site meeting with McNulty on December 22, 1993, a closing conference on May 12, 1994, and the citations were issued May 18, 1994; OSHA's Motion to Exclude Evidence

McNulty's Motion to Exclude Evidence

As a preliminary matter, McNulty asserts it was not provided the opportunity to accompany OSHA during the inspection in violation of section 8(e) of the Act.[2] McNulty contends its

[2]McNulty also asserts that the Secretary withheld requested information and documents in (continued...)

inability to accompany OSHA has seriously prejudiced its defense in this case and that the evidence obtained during the inspection should be excluded. The issue of whether an employer had an adequate opportunity to accompany OSHA depends on the facts of the particular case. However, even where there has been a violation of section 8(e), vacation of the citations is inappropriate unless the employer's defense was prejudiced. *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1618-19, 1991-93 CCH OSHD ¶ 29,681, pp. 40,241-42 (No. 89-2019, 1992).

William Donovan, the OSHA compliance officer ("CO") who conducted the inspection, testified that he held an opening conference with the trades involved with the garage on November 19 after asking Robert Fadrowski, Whiting-Turner's safety coordinator, to advise them of it; Ivan Millett, Spancrete's field manager, was at the meeting but no one from McNulty appeared. Shortly thereafter, the CO came upon Jack Doyle, McNulty's general foreman at the site; he had an opening conference with Doyle and told him he would be inspecting his work areas later and that Doyle could accompany him then. About an hour later the CO saw McNulty employees exposed to what he considered serious fall hazards. Doyle, Aiden Lynch and then Robert Weiss, McNulty's project manager and project coordinator, respectively, arrived and the CO held opening conferences with Lynch and Weiss, who allowed him to speak to the employees privately; one of these was Paul Brady, another McNulty foreman. The CO discussed his concerns with Lynch and Weiss and they disagreed with him. The CO then left to call his office and when he returned he again saw what he considered serious fall hazards and brought them to Lynch's attention; the CO discussed the fall protection required at the site with Lynch and Weiss, and while they again disagreed employees began putting up perimeter cabling in the area. (Tr. 13-18; 137-51; 356-69; 407-13; 418-23).

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[2](...continued)
this case and failed to identify an expert witness, called as a rebuttal witness, until three weeks before he testified, and that these actions also prejudiced its defense. These assertions were considered and dismissed at hearing and will not be addressed again here.

The CO continued his inspection on November 30. He saw several conditions he considered violations which he discussed with Brady, and, later that morning, Lynch. That afternoon the CO saw workers at the edge of a floor opening and he advised Doyle of the condition. Later that day the CO learned of a "man basket" McNulty was using which he concluded was a serious hazard. He discussed the basket with Lynch, who defended it, and then discussed with Fadrowski his desire to video McNulty's work the next day. Late that afternoon Donovan received a letter from Lawrence Weiss, McNulty's president, in which Weiss requested notice in advance of any further inspections at the site so he could be present; Donovan told Weiss it was against OSHA policy to give advance notice but that he would advise McNulty management upon arrival at the site for any further inspections so they could contact him. (Tr. 151-66; 492-502; 563-64; 569-73; 642-50; R-141).

Donovan met with Robert Weiss and Aiden Lynch the next morning to tell them he would be videotaping from the roof of the mall across from the garage and asked if they had any objections or wanted to accompany him; they had no objections and indicated they were too busy to go. He asked them to call Lawrence Weiss, noting his conversation of the day before, and Robert Weiss replied his father did not have time to come to the site and they did not have to call him. Donovan and Fadrowski went to the roof of the mall with Scott Schrilla, the other CO at the site, and Schrilla videoed McNulty's work, which in Donovan's opinion exposed several employees to serious fall hazards; Doyle and Weiss were also involved in these operations, and Weiss videoed some of the work as well as Schrilla's filming from the opposite roof. (Tr. 66-67; 162-66; 170; 580-605).

CO Schrilla went back to the roof of the mall with another Whiting-Turner representative on December 2 to video the use of the man basket, and Robert Weiss, who was also in the area, videoed some of the operation and Schrilla's filming. Donovan also continued his inspection that morning accompanied by Fadrowski. He saw acetylene and oxygen canisters which in his opinion were a serious hazard and brought them to Doyle's attention; he then met with Robert Weiss to review McNulty's safety programs. On December 8, CO Donovan, who was at that time assisting CO Schrilla in his inspection of

the mall, saw workers exposed to fall hazards on the fifth level of the garage. CO Donovan asked Fadrowski to radio a Whiting-Turner supervisor to inform McNulty of the condition, and it was his understanding this was done. (Tr. 103-05; 166-71; 346; 618-20).

Based on the foregoing, McNulty had an adequate opportunity to accompany OSHA during the inspection. While McNulty disputes some of the CO's testimony, it is supported by other witnesses. The testimony of Robert Fadrowski, for example, with respect to the initial contacts with Doyle, Lynch and Weiss, was substantially the same as that of the CO, and Fadrowski specifically testified that the CO advised Lynch and/or Weiss they could accompany him and that Weiss said he was too busy. (Tr. 811-19; 895-900). Moreover, Ivan Millett testified that he discussed the initial opening conference with Lynch before and after it occurred and that he also advised Lynch of the CO's statement that company representatives could go with him. (Tr. 1492-1506).

Respondent's primary complaints seem to be that the CO carried out the inspection so as to prevent McNulty management from accompanying him and that he told Whiting-Turner but not McNulty of his intent to continue the inspection on December 1. The CO explained why he did not give McNulty advance notice of the December 1 inspection, and advising Whiting-Turner, which had overall responsibility for the entire project, does not seem unreasonable, particularly since there is no evidence the CO inspected any of its work areas that day. In addition, the record shows the CO attempted to involve McNulty in the inspection and that it did not take advantage of his offers. On November 19, the CO told Doyle he could go with him when he was in McNulty's work areas. On November 19 and December 1, the CO invited Robert Weiss and/or Aiden Lynch to go with him and was told they were too busy, and on December 1 he was told Lawrence Weiss did not have to be contacted. I have considered the testimony of Lawrence Weiss and Aiden Lynch on this issue and find their testimony indicating the CO did not give McNulty representatives an adequate opportunity to accompany him unsupported by the record as a whole. (Tr. 1053-54; 1058-64; 1072-74; 1157-66; 1189-92; 1248-51; 1289-90; 1317-18; 1347). I have also considered McNulty's claim it was prejudiced in its defense and find it was not. The cited

conditions indicated above took place in view of and/or were brought to the attention of management and on two days some of the conditions were filmed by Robert Weiss. (Tr. 1291-1305; R-30). Respondent's motion to exclude is denied.

The Secretary's Motion to Amend

As a further preliminary matter, the Secretary moved at the hearing to conform certain items to the evidence, that is, to amend items 2, 7 and 8 of serious citation 1 to allege repeat violations and item 2 of willful citation 2 to allege a repeat violation in the alternative. The basis of the motion was C-1 and C-15, final orders relating to previous citations issued to McNulty. McNulty objected to the motion, and a ruling was held in abeyance. (Tr. 347-50). The Secretary renews this motion in his post-hearing brief but in so doing includes five additional items which were not part of his original motion. McNulty objects to the amendment of any items, claiming undue prejudice, but especially objects to the five additional items. It is my conclusion that the amendment of the five additional items at this stage of the proceeding would be inappropriate. The motion as to these items is denied. With respect to the first four items, I note that the original motion was made about halfway through the third day of trial at the conclusion of the Secretary's direct examination of the CO who inspected the site. In view of the timing of the motion, it is clear McNulty had adequate opportunity to defend against the items as amended. The motion as to these items is granted.

The Parties' Positions as to the Fall Protection Required at the Site

As noted above, most of the citation items in this case allege conditions exposing employees to fall hazards. McNulty's position as to various items is that it is infeasible and a greater hazard to use standard fall protection in erection areas on precast concrete erection sites. It asserts erection includes landing the structural members and other activities and that using guardrails or safety belts and lanyards in erection areas is infeasible as it interferes with the erection work. It also asserts that structural members can fall as they are lifted or landed or until they are permanently secured and that use of guardrails or tying off would immobilize workers and subject them to the greater hazard of being struck by the members.

McNulty contends the use of controlled access zones ("CAZ's") was the "state of the art" in fall protection on precast erection sites at the time of the inspection and that it used CAZ's at the site to limit exposure to fall hazards to only those needed in the erection area. McNulty further contends its workers used fall protection where necessary and feasible outside the CAZ's, which were defined by cabling, and that cabling was also put up on open sides as soon as erection in an area was complete. The Secretary has conceded nets were not practical for McNulty's work at the site. *See* R-66, response 3. Further, the Secretary does not dispute that alternatives to standard fall protection can be used as long as the employer can show that standard fall protection was infeasible or a greater hazard. The Secretary does dispute that McNulty used CAZ's at the site. He also disputes that the cited activities constituted erection, noting that none of them had to do with employees performing "leading edge" or landing work. The Secretary contends that the citation items describe activities other than actual erection and that the employees were exposed to fall hazards requiring fall protection such as guardrails or safety belts and lanyards.

The CAZ Provisions

The final rule containing the new Subpart M fall protection standards, which incorporate the CAZ provisions, was issued August 9, 1994, with an effective date of February 6, 1995. 59 Fed. Reg. 40,672 (1994).[3] The rule was under consideration from 1977 until May 1993, during which time various industry groups submitted comments and recommendations. One of these was the Prestressed/Precast Concrete Institute ("PCI"). As a result of the involvement of PCI and other groups, the CAZ provisions became part of the final rule. *Id*. at 40,672-73 and 40,692. However, they apply only to leading edge, precast concrete erection and residential construction work where the employer can show standard fall protection would be infeasible or a greater hazard. 29 C.F.R. 1926.501(b)(2), (12) and (13). In such cases, the employer is required to have a written fall protection plan stating why standard protection is infeasible or a greater hazard and any alternative measures that

[3]The rule was received in evidence as R-161.

can be used. The plan must identify all areas where conventional protection cannot be used, which are classified as CAZ's, and areas where no alternative measures are in place must have a safety monitoring system ("SMS"). The plan must also identify the employees who may work in the CAZ's and restrict the access of all others to those areas, and CAZ's must be defined by control lines or other means. Control lines must be flagged and extend along the entire unprotected edge, and, in precast erection, be no less than 6 feet nor more than 60 feet or half the length of the member being erected, whichever is less, from the edge. An SMS requires designating a competent person to warn employees when it appears they are unaware of fall hazards or working unsafely, and employers are required to train employees in the fall protection to be used. 29 C.F.R. 1926.502(g), (h) and (k) and 1926.503. A non-mandatory sample fall protection plan based on the submissions of PCI and other groups appears in Appendix E to the standard. 59 Fed. Reg. 40,692 (1994).

McNulty's Affirmative Defenses and the Use of CAZ's at the Site

It is clear the current Subpart M was not in effect in 1993 and McNulty cannot be held to its requirements in this case. However, McNulty is asserting it used CAZ's as an alternative to standard fall protection in conjunction with its affirmative defenses. Accordingly, a preliminary question is whether McNulty's practices met the above provisions. I note first that McNulty had no written fall protection plan for the project and that other than ladder, scaffold and open hole safety, none of McNulty's site safety meetings addressed fall hazards. *See* R-149. On the other hand, McNulty's written safety program for the site does reference fall protection, stating that safety belts and lines will be used when necessary and feasible where other protection cannot be used; it also states access to leading edge work will be restricted to erection personnel and that when work in these areas is completed open sides will be promptly protected by guard cables. *See* R-152, pp. 13, 16.

McNulty witnesses Lawrence Weiss, Aiden Lynch, Jack Doyle, Ivan Millett and Anthony Mazzeo all testified about the use of CAZ's at the site.[4] In essence, they testified

[4]Ivan Millett, as noted above, was Spancrete's field manager at the site, while Anthony (continued...)

it was decided in meetings held before the job began that standard fall protection could not be used in erection areas due to the nature of the work and the hazard of precast pieces falling or swinging out of control and that McNulty began using CAZ's after a September 17 meeting addressing fall hazards attended by Lynch and representatives of Spancrete and Liberty Mutual, the insurer of Spancrete and Whiting-Turner; they also testified that CAZ's in 1993 meant restricting the erection area by cabling or other means to the erection crew and requiring the foreman to warn any crew members exposed to hazards and to keep everyone else out of the area and that this was done at the site. (Tr. 1010-15; 1022-29; 1049-53; 1118-22; 1455-61; 1466-71; 1559-73; 1579-81; 1602-09; 2086-87; 2126; 2134-44; C-21).

CO Donovan testified he obtained PCI's CAZ provisions during the inspection and that they were essentially the same as the present OSHA standard. He further testified that while some work areas were cordoned off there were no CAZ's at the site and that although he saw McNulty employees exposed to fall hazards each day of his inspection and advised company management of the hazards no one mentioned CAZ's to him until the December 22 meeting after the inspection.[5] (Tr. 178-200; 378-86; 423-28; 442-47; 460-63; 627-29; 639-41; 1949-53). Gary Johnson, the top Whiting-Turner superintendent at the site, also testified he did not see CAZ's as he understood them utilized at the site. (Tr. 707-25; 743-44; 750-61). James Hinson and Steven Miller, the expert witnesses of McNulty and the Secretary, respectively, had contrary views based on the evidence of record; Miller opined there were no CAZ's at the site as there was neither effective monitoring of employees nor the physical components of CAZ's, while Hinson opined there were CAZ's, that the employees were working safely, and that McNulty's use of CAZ's was in accordance with the Subpart M requirements. (Tr. 1726-40; 1748-57; 1770-73; 1787; 1984-99; 2010-13).

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[4](...continued)
Mazzeo is Spancrete's general manager. (Tr. 1449-50; 1598).

[5]Aiden Lynch testified he told CO Donovan they were using CAZ's on the first day of the inspection. (Tr. 1184-85).

The foregoing is inconclusive as to McNulty's use of CAZ's at the site. However, the more significant question is whether McNulty protected employees to the extent possible under the circumstances, which is clearly the purpose and the intent of the fall protection standards. Accordingly, regardless of whether an area may have been designated as a CAZ, where employees were exposed to fall hazards and McNulty asserts that compliance was infeasible or a greater hazard, the extent to which employees were or could have been protected under the circumstances will be a key consideration. The affirmative defense of infeasibility requires showing that literal compliance with the standard was infeasible under the circumstances and that either an alternative means of protection was used or no alternative means was feasible, while the affirmative defense of greater hazard requires showing that the hazards of compliance were greater than the hazards of noncompliance, that alternate protection was used or unavailable, and that application for a variance from the standard was inappropriate. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1159-60, 1994-95 CCH OSHD ¶ 30,042, pp. 41,225-26 (Nos. 90-1620 & 90-2894, 1993).

Willful Citation 2 - Item 1

This item alleges various instances of employees exposed to falls of over 25 feet without the use of safety nets or other fall protection in violation of 29 C.F.R. 1926.95(a) and/or 1926.105(a); 1926.95(a) requires the use of protective equipment wherever necessary to protect against hazards capable of causing bodily injury or impairment, while 1926.105(a) requires the use of safety nets when workplaces are more than 25 feet above the ground or other surfaces where use of ladders, scaffolds, catch platforms, temporary floors, safety lines or safety belts is impractical.

Item 1A alleges employees working atop a precast wall above the second level of the garage on November 19 had no fall protection and were exposed to falls of up to 43 feet. CO Donovan testified the employees walking on the wall were exposed to interior falls of about 24 feet and exterior falls of about 43 feet; he also testified that photos C-3(a-c) and C-4(a-b) depict the condition and that he advised Aiden Lynch of it. (Tr. 19-20; 43-45; 82-88; 123; 149). McNulty contends the wall had just been erected, that the employees got up on it to

release it from the crane and ensure it was level, and that the work could not have been done any other way. The testimony of Aiden Lynch and the CO indicates the wall was in fact erected and braced that morning and that the employees accessed the wall to release it from the crane and to survey it to make sure it was level. (Tr. 88; 149; 392-407; 429-39; 1132-57; 1171-72). The CO testified this work could have been done on the interior side from a ladder of sufficient length or on the exterior side from a lift. (Tr. 88). Lynch testified the work could not have been done from a ladder as there was no floor under the wall and that the terrain on the exterior was too uneven for a lift to operate. (Tr. 1229-31). However, C-4(a) shows a ladder on the interior side leaning up against the wall, and, as the CO said, a longer ladder could have been used. Steven Miller also testified the surveying work could have been done from a ladder, and James Hinson testified only that two workers were required, one down below and one above. (Tr. 1786-87; 2025; 2058-60). Finally, the testimony of McNulty witnesses Randall Davis, the vice-president of an erection company, and Edward Cush, a retired union business manager with erection experience, indicated the crane could have been released from a ladder and the surveying could have been done with one worker on the deck using a transit and another on a ladder using a ruler or other measuring device. (Tr. 1668; 1684-86; 1703-07). This subitem is affirmed.

Items 1B and 1E allege that employees using a man basket suspended from the garage walls on November 30 and December 2 were exposed to fall hazards; the basket was about 70 and 80 feet from the ground on those dates, respectively. CO Schrilla testified he saw an employee in the basket from about 40 feet away on November 30; the employee was tightening a bolt on a wall panel and had on a safety belt but no lanyard and Schrilla watched as the employee left the basket. Schrilla tried to photograph the incident, but his camera batteries had died. Schrilla told CO Donovan about the basket, and they saw it on the ground later that day and photographed it; Aiden Lynch then arrived, Donovan discussed the basket with him, and Lynch defended the use of the basket. CO Schrilla also testified that Robert Fadrowski advised him on December 2 that McNulty might use the basket again that day; he talked to Donovan and they decided Schrilla would video the operation from the roof of

the mall. Schrilla said the employee climbed over the wall and into the basket without tying off and that once in it he tied off only to the basket; he and Jack Centofani, the Whiting-Turner representative with him, shouted to Robert Weiss that the employee had to tie off independently, and Weiss responded they would take care of it. Weiss, who was on the tenth level from which the basket was suspended, also filmed part of the operation and Schrilla's videotaping. (Tr. 661-67; 674-86; 691-701; C-2; C-5; C-8; R-30).

CO Donovan testified his concern was how the basket was used, based on what CO Schrilla told him and C-2, its construction of welded rebar, which he said was inadequate, and his belief it was held in place only by its "arms" going over the top of the wall. (Tr. 91-93; 283-84; 549-54; 611-14; 642-46). Lawrence Weiss, Aiden Lynch and Leonard Messer, a licensed professional engineer engaged by McNulty, also testified about the basket. The essence of their testimony was that the basket had been used for many years without problems, that when utilized it was tied off to a lifting loop in addition to its arms being clamped to the interior side of the wall, and that it was made primarily of round bar, which is stronger than rebar, and was capable of supporting at least 400 pounds. They also testified about how the basket was tested in February 1995 by weighting it with 1100 pounds and suspending it for twenty-four hours, after which it exhibited no signs of deformation or stress. (Tr. 1066-72; 1307-17; 1335-37; 1374-76; 1587-97).

Based on the above, the basket's construction in my view has not been proven inadequate. CO Schrilla also testified the employees were not tied off when entering and/or exiting the basket. Lynch testified that the employee on December 2 tied off with one lanyard to a lifting loop on the structure before climbing into the basket and then tied off with a second lanyard to the basket itself. (Tr. 1320-34; 1371-74). However, Schrilla was emphatic that the employee did not tie off before getting into the basket, that he tied off only to the basket, and that there was no second lanyard attached to his waist. (Tr. 675-80). Moreover, although both witnesses testified with the aid of C-2 many of the details of their testimony cannot be discerned from the video, and Schrilla was actually viewing the operation with his video equipment, which had close-up ability, while Lynch was not even

present. (Tr. 1326-27). Finally, Schrilla's testimony about the response of Robert Weiss, who did not testify, also indicates the employee on December 2 was tied off only to the basket, and McNulty offered nothing to rebut the testimony of Schrilla about the November 30 instance other than the fact he was 40 feet away. These two subitems are affirmed.

Item 1C alleges employees on December 1 were working around the edge of the tenth level of the garage about 80 feet from the ground without protection. CO Donovan testified that C-2, the video taken by CO Schrilla from the roof of the mall, and photos C-3(e-k) and C-6(1-6) show these conditions, which depict employees engaged in various activities around the edge. The CO said the employees in the red jackets in C-6(4) and (6) were Jack Doyle and Robert Weiss, respectively; he noted both were at the very edge and that Weiss, who also was videoing, walked right up to the edge while filming. The CO also said workers could have tied off to the lifting loops on the columns and double tees shown in the photos or that free-standing weighted guardrails or other means could have been used to prevent exposure to the edge. (Tr. 20-25; 32-33; 46-49; 55-56; 95-101; 589-95).

McNulty contends, based on the testimony of Aiden Lynch, that the video and photos do not accurately show how far employees were from the edge as the roof of the mall was lower than the tenth-level deck. (Tr. 1270-71; 1276-77). I would agree it is difficult to discern how far from the edge the employees in C-3(e-h) were and for that reason the conditions in those photos will not be considered. However, the other photos appear to show employees sufficiently close to the edge such that they were exposed to fall hazards, and some, like C-6(3-6), appear to show employees right next to the edge. Further, CO Donovan testified there was a clear and accurate view of the work on the garage from the mall roof, CO Schrilla verified some of the cited conditions, and Lynch himself indicated that employees working on the perimeter cabling stanchions were about 3 feet from the edge. (Tr. 23-24; 586-88; 669; 1274-75; 1278). McNulty's contention is rejected.

McNulty also contends the deck was an erection area designated as a CAZ, that the workers were members of either the erection crew or the perimeter cabling crew, and that tying off or other fall protection on the deck was infeasible and/or a greater hazard and in any

case not required as the area was CAZ. I note first, based on the CO's testimony above, that none of the cited conditions involve employees who were guiding and landing the double tees, as shown in C-3(g-h); rather, they involve employees installing or working on stanchions at the perimeter, as in C-3(i-j) and C-6(1-2), employees working at columns near the perimeter, as in C-3(k) and C-6(3) and (5), and employees standing near the edge, as in C-6(4) and (6). I note also that the only photos showing overhead erection are C-3(g-h), which, as indicated above, will not be considered, and C-6(1-2), which shows an employee working near the perimeter with a double tee overhead. Although it would seem this employee was under the load and should not have been there, McNulty was not cited for this condition; therefore, for purposes of this subitem it will be assumed the employee was not under the load and the only condition that will be considered is his location near the perimeter.

McNulty presented a number of witnesses, including James Hinson, Lawrence Weiss, Aiden Lynch, and union and industry representatives, who testified about why standard fall protection cannot be used during erection; in sum, their testimony was that using guardrails and safety belts and lanyards during erection is infeasible as they interfere with guiding and landing concrete members and a greater hazard as they immobilize employees and prevent them from escaping in the event a piece falls while being lifted and moved into position or collapses before it is stabilized. However, as noted above, the conditions being considered in this subitem do not involve any employees performing actual erection but rather those who were working or standing near the edge of the already erected deck. Further, as previously indicated, that the area may have been designated a CAZ does not preclude a finding that fall protection was required; rather, McNulty's defenses will be considered in light of the extent to which employees were or could have been protected.

CO Donovan testified McNulty should have required employees working near the edge to tie off to the lifting loops on the double tees and columns or used free-standing weighted guardrails or otherwise prevented exposure to falls. The lifting loops, which are used to lift the pieces and are later removed, are depicted in the photos showing the cited

conditions and it is clear from the record the employees working at the columns and on the stanchions could have tied off to them. McNulty asserts doing so is a greater hazard and offered the testimony of James Hinson, its expert, in support of its position. Hinson testified tying off gives a false sense of security and is more hazardous as it leads workers to take more risks and creates greater exposure to falls. He said a worker can be injured when his lanyard stops his fall and can suffocate if not rescued quickly. He also said tying off should be done above the anchorage point and that tying off to the loops on the tees at foot level creates a tripping hazard and results in a longer fall and greater potential for injury. Hinson opined it is better to reduce exposure to falls by going into a kneeling position 6 feet from the edge and to kneel or sit facing the edge when it is necessary to work there. (Tr. 1757-64; 1770-92).

Steven Miller, the Secretary's expert, testified there should be 100 percent tie-off whenever possible on precast erection sites, that he had seen this done many times, and that it is far better to fall and be caught by an arrest system than to fall 80 feet. Miller said harnesses instead of belts can prevent the injuries Hinson mentioned and described other protection that could have been used, such as retractable lanyards and static lines. (Tr. 2000-13). However, it is not necessary to detail this testimony. First, Hinson agreed the greater risk of injury is falling 80 feet. (Tr. 1762-63). Second, Hinson testified that the main hazard of installing perimeter guarding is falling from the building, and while he first said he would not expect those employees to tie off he then said it would depend on whether they could tie off to a point above them rather than at their feet; he also said the hazard of tying off at one's feet could be mitigated by shortening the lanyard and indicated that other fall protection might have been possible. (Tr. 1775-82). I conclude the employees working at the columns and on the stanchions could have been protected by tying off to the loops and that McNulty has not shown it would have been more hazardous to do so. I also conclude that the employees standing right next to the edge, like Doyle and Weiss, simply should not have done so; Hinson himself indicated employees should not be within 6 feet of the perimeter without protection unless they go into a kneeling position, and, as the CO testified, if

employees had to be near the edge they could have tied off or used free-standing weighted guardrails. It is clear employees were not protected to the extent possible. It is also clear employees were not monitored as required by the CAZ provisions and that McNulty has not proved its affirmative defenses. This subitem is affirmed.

Item 1D alleges that an employee on December 1 stood on a wall on the eighth level of the garage about 76 feet from the ground without fall protection and dropped a bucket off the wall. CO Donovan testified that he, CO Schrilla and Robert Fadrowski observed this event from the roof of the mall as Schrilla was videoing McNulty's operations that day; the employee walked over to the wall by means of the scaffolding set up in the air shaft adjacent to the wall and then stepped up on the wall to drop the bucket. Donovan noted these events were shown in C-2, the OSHA video, and in photos C-3(l-n) and C-7, and took place in the presence of Robert Weiss, the person in the striped shirt and red jacket in C-3(l-n). (Tr. 20-21; 48; 56-57; 60-67; 101-02; 166; 170; 460-65; 595-601).

McNulty's contention would appear to be that the Secretary failed to prove that the person who dropped the bucket from the wall was one of its workers and that it lacked knowledge of the event. Aiden Lynch testified the occurrence was an unauthorized act and that he could not identify the individual as a company worker or see any management employees in C-2 at the time of the event. (Tr. 1284-86; 1290-91). However, he later testified that he was not denying that the employees in C-2 were those of McNulty. (Tr. 1372-73). In addition, it is clear the CO had a number of contacts with Robert Weiss during the inspection. The CO also identified Robert Weiss at the hearing and was adamant Weiss was present at the scene and that the employee dropped the bucket off the wall right in front of Weiss. (Tr. 48; 56-57; 60-65; 460-62). On the basis of the record, the Secretary has established the alleged violation. This subitem is affirmed.

All of the instances in this item have been affirmed. As noted above, this item alleges violations of 1926.95(a) and/or 1926.105(a). McNulty contends that 1926.95(a) is inapplicable in this case because its focus is to protect against environmental, chemical and like hazards. However, as the Secretary points out, the Commission has held 1910.132(a),

the general industry counterpart to 1926.95(a), to encompass fall hazards. *Bethlehem Steel Corp.*, 10 BNA OSHC 1470, 1982 CCH OSHD ¶ 25,982 (No. 79-310, 1982). The instances in this item are therefore affirmed as violations of 1926.95(a) and 1926.105(a). The discussion regarding the characterization of the violations is set out following the two remaining willful items.

Willful Citation 2 - Item 2

This item alleges three instances of unguarded floor openings in violation of 29 C.F.R. 1926.500(b)(1). Item 2A alleges there was an unguarded opening approximately 65 feet long by 10 feet wide on the second level of the garage on November 19 which exposed employees to falls of up to 19 feet. CO Donovan testified this opening was depicted on the far right side of R-34, a photo made from a slide he took showing a portion of the second-level deck.[6] The CO also testified he saw employees working within a foot of the opening and that they could have tied off to lifting loops or been protected by cabling or free-standing guardrails. (Tr. 34-35; 106; 128-29; 509-10; 515-20). R-34 shows no employees near the opening but does show equipment and equipment lines nearby, indicating employees were working in the area, and McNulty apparently does not dispute this was the case. It contends, rather, that the deck was a CAZ and that it was infeasible to put up cabling along the opening and a greater hazard for the employees to tie off. Aiden Lynch testified that the opening was due to a missing double tee which was put in the next day and that perimeter cabling could not be put up until the tee was in place. He further testified that the wall in R-34, which had just been erected and was in the process of being braced, was very unstable and that employees tying off in the area would be subjected to the greater hazard of being crushed if the wall collapsed. (Tr. 1132-57). However, the CO also testified that the employees working near the opening could have been protected by free-standing guardrails. It is McNulty's burden to prove that compliance was infeasible or a greater hazard and that there were no feasible alternatives, and the company presented no evidence to show free-standing guardrails could not have been used. This subitem is affirmed.

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[6]R-45 includes an enlarged copy of R-34.

Item 2B alleges that there was an unguarded shaft opening approximately 9 feet wide by 23 feet long on the fourth level of the garage on November 30, exposing employees to falls of up to 40 feet. The record establishes two employees were standing at the edge of the shaft and then guiding a load through it, as shown in photos C-9, and CO Donovan's opinion was the opening should have been protected by placing free-standing weighted guardrails around it. (Tr. 36;107-10; 124-25; 129; 554-58; 651; 1214-22). Aiden Lynch testified the workers' job was to connect the steel beams in the shaft that were coming up from below and that guardrails would have prevented them from doing this work; he also said that each level of the shaft was planked after the beams were installed, reducing any fall hazard to only 10 feet. (Tr. 1214-22). However, Lynch did not testify that guardrails could not have been used before the beam installation work. Moreover, it is clear the installation work would also have required the employees to work at the edge of the opening, exposing them, based on Lynch's testimony, to falls of 10 feet. Guarding the shaft may not have been feasible for this work, as Lynch stated. Regardless, Michael Willis, an OSHA CO with many years of steel and precast erection experience, testified the employees at the edge of the shaft could have been protected by tying off. (Tr. 1817-18). McNulty has the burden of proving compliance with the standard was infeasible and that there were no feasible alternatives. The company presented no evidence to show the employees could not have tied off. This subitem is therefore affirmed.

Item 2C alleges there was an unguarded floor opening about 20 feet wide by 44 feet long on the fifth level of the garage on December 8, exposing employees to falls of up to 10 feet. CO Donovan testified an employee was grouting at the base of a column on the fifth level of the garage with his back to the opening, that he observed this condition from the mall across from the garage, and that photos C-10(1-2) and C-24 show the condition; C-10(1) shows the employee grouting in a crouching position, C-24 shows him standing up by the column, and C-10(2) shows him walking away. The CO also testified that the cited condition was the employee's location as he was grouting, which he said was at the edge of the opening, and that he could have been protected by putting a lanyard around the column

and tying off or by placing guardrails around the opening. (Tr. 36-38; 110-12; 129-36; 619-27; 1943-45). McNulty's contention, based on the testimony of Aiden Lynch, is that the photos were taken from too far away to tell how far the employee was from the opening and that he was actually 6 feet from it.[7] (Tr. 1348-61). However, the CO was adamant the employee was at the edge of the opening, and the photos of the scene, particularly C-24, an enlargement of the area, further convince me the employee was exposed to the cited hazard. This subitem is affirmed. Willful Citation 2 - Item 3

This item alleges six instances of unguarded open-sided floors or platforms 6 feet or more above the adjacent floor or ground level in violation of 29 C.F.R. 1926.500(d)(1). Item 3A alleges that on November 19 there were unguarded open sides on the second level of the garage that exposed employees to falls of up to 19 feet. CO Donovan testified these conditions were depicted in photos C-3(d), C-11 and R-45; specifically, C-11(1) shows an employee standing about a foot from an open floor, C-11(2) shows two workers on the deck with an open floor behind them, C-3(d) shows the same floor in C-11(2) from the exterior, and R-45 shows Jack Doyle and Aiden Lynch walking away from the same edge depicted in C-11(1). The CO said he saw Doyle at the edge catching the yellow tape he had in his hand that someone below threw to him and that this occurred right before he took R-45 and his first meeting with Lynch; he also said the open-sided floors exposed employees to falls, that the hazard could have been abated by free-standing guardrails or perimeter cabling, and that Lynch agreed after they discussed it to put up perimeter cabling and had employees begin doing so. (Tr. 39; 45-46; 112-16; 480-91; 509-20; 1942; 1945-46; 1970-72). Aiden Lynch testified that the area was a CAZ because of the wall in C-11(2) being braced and the missing double tee on the south side which was put in the next day, that perimeter cabling would have interfered with this work, and that the cabling occurring after the CO spoke to him was pursuant to their normal procedure after erection in an area was complete. Lynch said that cabling was put on the north side shown behind Doyle and himself in R-45 and in

[7]Lynch testified he could not identify the employee in C-10(2) but then conceded that only McNulty workers should have been in that area at that time. (Tr. 1356-57).

the area under the wall brace shown in C-4(a) but not on the east side because of the missing tee.[8] He also said that he was 6 to 7 feet from the edge in R-45 and did not know if Doyle had been at the edge. (Tr. 1132-57; 1166-71; 1376-77; 2075-77; 2081-82).

It is concluded from the foregoing that employees, including Doyle and Lynch, were exposed to the open-sided floors and that McNulty could have prevented exposure to this hazard. Although Lynch testified about why perimeter cabling could not be put on the east side, the CO's testimony, which was not rebutted, was that free-standing guardrails could have been used on both of the open sides where the employees were located. In addition, it is apparent from Lynch's testimony that the only missing tee in the area was the one on the south side, that the floor on the north side was completed the day before, and that perimeter cabling could have been put on that side before employees began working on the second level on November 19. (Tr. 1166-71). It is also apparent that even assuming that McNulty made a decision to not put up cabling on the north side until after the wall bracing was completed it could nonetheless have monitored employees to ensure they were not exposed to the open-sided floor. This subitem is affirmed.

Item 3B alleges that on November 19 there was an unguarded work platform approximately 2 feet wide by 20 feet long across the top of an exhaust shaft on the second level of the garage that exposed employees to falls of up to 27 feet. The condition is depicted in photos C-11(2-3); C-11(3) shows two employees standing on the unguarded platform above the exhaust shaft, while C-11(2) shows one of them kneeling on the platform and the other straddling a shaft wall and leaning on the platform.[9] The record establishes the deck was about 12 feet below the employees while the shaft bottom was about 27 feet below; it also establishes the two employees were helping the worker sitting below them to attach the wall brace to the top of the outer shaft wall. CO Donovan testified that the employees were exposed to falls, that the condition could have been abated by a platform with

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[8]The opening created by the missing tee, the subject of item 2A, *supra*, is on the right side in the last photo in R-45.

[9]R-34 and R-45 also depict these scenes.

guardrails on it, and that if the employee straddling the wall had to be there he could have put a wire cable around the wall opening and tied off to the cable; he also testified that guardrails would not have kept the employees from doing their work or created a greater hazard. (Tr. 39; 45; 112-21; 509-15). Aiden Lynch and James Hinson, McNulty's expert, also testified about this condition. Taken together, their testimony was that guardrails would have kept the employees from doing their work, that the wall was unstable until braced and guardrails or tying off would have been a greater hazard because they would have prevented the employees from escaping had the wall collapsed, and that the work was being done safely under the circumstances. (Tr. 1132-57; 1765-70).

Upon consideration of the record, I find that McNulty has not met its burden of showing that compliance with the standard was infeasible or a greater hazard. I note first that Hinson did not say why guardrails would have kept the employees from doing their work, and while Lynch testified that guardrails would have prevented the worker on the platform from pulling the brace into position and holding it there, I fail to see, based on the photos, why this is so. (Tr. 1151-52). I note also that although both Lynch and Hinson opined the work was being done safely, it is clear from their testimony that they were addressing the scene in C-11(2), where one employee was kneeling on the platform and one was straddling the wall, and not the one in C-11(3), where both were standing on the unprotected platform. (Tr. 1152; 1770). Finally, their testimony that it would have been a greater hazard for the employees to have tied off or worked on a guarded platform because they could not have gotten away if the wall had collapsed is unpersuasive, particularly since doing so would have subjected them to falling to the deck or into the shaft, or possibly, if they were standing as in C-11(3), off the side of the building. This subitem is affirmed.

Item 3C alleges that on November 19 there was an unguarded work platform approximately 8 feet wide by 12 feet long across the open sides of a stair shaft adjacent to and above the second level of the garage that exposed employees to falls of up to 31 feet. CO Donovan testified this condition was depicted in photos C-12(1-2), that the ladder sitting on the platform and resting on the wall was used to access the top of the wall, and that he had

seen one employee on the edge of the platform exposed to a 31-foot fall into the shaft. The CO further testified the condition could have been abated by putting guardrails around the platform or on the platform itself. (Tr. 39; 112-24). Aiden Lynch testified the platform and ladder were also depicted in R-47, that they were the only means of getting employees up on the wall so the crane hook could be released, and that putting guardrails around the platform would have interfered with installing the brace that supported the wall. (Tr. 1172-77). It is clear employees used the platform and ladder to access the top of the wall, as shown in C-4(a-b), and that in doing so they were exposed to the cited condition. Although Lynch's testimony was that guardrails around the platform would have interfered with bracing the wall, no determination in this regard need be made. Based on my findings above in item 1A of this citation, employees could have released the crane hook from the interior side of the second-level deck by means of a longer ladder than the one shown in C-4(a). This subitem is affirmed.

Item 3D alleges that on November 30 an employee was working on an unguarded platform running from a scaffold located in a stairway landing between the ninth and tenth levels of the garage. CO Donovan testified the worker was a McNulty employee and that the platform, which was approximately 20 inches wide, exposed the employee to an 8-foot fall. He identified C-13 as a photo of the condition and noted that while it showed only the lower half of the individual he asked the employee his name, saw his union card, and verified he worked for McNulty through the company's payroll records; he also noted that there was another worker using the scaffold at the time, that the two identified themselves as McNulty employees Anthony Carino and Rafael Macchia, and that when he later brought the matter to Lynch's attention Lynch indicated his awareness of it. (Tr. 40; 126; 312-19; 558-60; 1923). Aiden Lynch testified the person in C-13 was not a McNulty employee because the company was not working in that area that day and that while the scaffold was McNulty's another contractor was using it to perform masonry patching work. (Tr. 1201-06). This testimony is unconvincing in view of that of the CO, particularly since McNulty presented no evidence the named employees did not work for it. This subitem is accordingly affirmed.

Item 3E alleges that on November 30 there was an unguarded open-sided floor adjacent to a stair shaft on the fourth level of the garage that exposed employees to falls of up to 40 feet. The basis of this instance is depicted in C-9(2), which shows two employees at the edge of a stair shaft. CO Donovan testified the open-sided floor was shown in C-9(2) on the other side of the employees, that one employee was right on the edge of the floor and the other was about a foot away, and that the floor could have been guarded with a free-standing weighted guardrail.[10] (Tr. 39; 107-10; 124-25; 129; 555-56). Aiden Lynch testified the opening was actually 20 feet away and that in any case it was not possible to put up perimeter cabling in that area until flooring was put over and walls were installed around the shaft. (Tr. 1220-22). I conclude, based on the CO's testimony and C-9(2), that the employees were exposed to the cited condition and that a guardrail of the type described by the CO could have been used to protect the employees. This subitem is affirmed.

Item 3F alleges that on December 8 there was an unguarded open side on the fifth-level deck of the garage that exposed employees to falls of up to 40 feet. The basis of this instance is depicted in photos C-10(2) and C-24, which show the open side of the fifth level and, in C-24, two employees standing near the edge of the open floor. CO Donovan testified that the employees were within a foot of the floor's edge and that they could have been protected by installing guardrails or placing free-standing weighted guardrails in front of the open side.[11] (Tr. 40; 127-28; 1943-45). It is clear the employees were exposed to the cited condition and that they could have been protected as described by the CO or by monitoring to ensure they were not exposed to the open side of the floor. McNulty offers no particular assertion with respect to this subitem. It is therefore affirmed.

Whether the Violations were Willful

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[10]The CO testified the photos comprising C-9, which were also the basis of item 2B, *supra*, related to item 3D; however, it is clear from the record that these photos relate to this item.

[11]Although the CO said that C-10(2), which also was the basis of item 2C above, related to item 3E, it is apparent from the record that C-10(2) relates to this item.

All of the violations alleged in citation 2 have been affirmed. To demonstrate a willful violation, the Secretary must show the employer had knowledge of the standard's requirements and either violated them intentionally or showed plain indifference to employee safety. *See, e.g., Carabetta Enter., Inc.*, 15 BNA OSHC 1429, 1432-33, 1991 CCH OSHD ¶ 29,543, p. 39,893 (No. 89-2007, 1991), and cases cited therein. The record contains final orders which include citations issued to McNulty that involve standards the same or similar to those in this citation. Specifically, a final order issued in 1976 includes a violation of 1926.28(a) for employees not wearing safety belts, final orders issued in 1980 and 1981 include violations of 1926.500(b)(1) and (d)(1), and final orders issued in 1987 and 1989 include violations of 1926.105(a).[12] The record also contains R-152, McNulty's written safety program for the site, which, as noted above, required safety belts and lines to be used when necessary and feasible where other protection could not be used and prompt cable guarding of open sides when erection in an area was complete. Finally, the record contains R-1, McNulty's contract in this matter, which required it to comply with OSHA requirements and provide perimeter, shaft and opening protection. R-1 additionally required McNulty to hold safety meetings at the site and to attend those of Whiting-Turner. The record shows McNulty did not attend Whiting-Turner's safety meetings, and while it did hold its own weekly meetings the only ones actually addressing fall hazards, as noted *supra*, had to do with ladder, scaffold and open hole safety. (Tr. 825; 884-85; R-149).

In addition to the above, the record contains C-14 and C-21. C-14 consists of a number of notices from Whiting-Turner representatives to Spancrete and McNulty advising of fall hazards that had been observed, including unprotected sides, stairs and wall and floor openings, and employees engaged in certain activities, like grouting and walking on walls, without fall protection; these date from August 19 to December 6, 1993, and some indicate work on the project would be stopped if the hazards were not corrected. C-21 consists of various letters from Liberty Mutual, the insurer of Spancrete and Whiting-Turner, advising

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[12]As the Secretary notes, all of these are contained in C-1 except for the 1976 order, which is a Commission decision reported at 4 BNA OSHC 1097.

of fall hazards its senior loss prevention consultant, David Melick, had seen in McNulty's work areas and his proposed solutions; these date from August 12 to November 9, 1993, are addressed to either Robert Jones of Whiting-Turner or Ivan Millett of Spancrete, and mention the same kinds of fall hazards cited in this case, and the September 27 letter specifically notes Aiden Lynch's attendance at the September 17 meeting discussing fall hazards and the agreement to begin using CAZ's. It is clear from C-14 and C-21 that McNulty had notice of the fall hazards at the site, particularly since Ivan Millett indicated he passed on all notices he received from Whiting-Turner and Liberty Mutual to McNulty. (Tr.1532-34; 1567).

CO Donovan testified the violations were willful because of the company's previous history, the number and severity of the fall hazards at the site, and the fact that various violations took place in view of or on the part of management. He considered the fall hazards on November 19 to be imminent danger conditions and said that while these and the other hazards he saw were abated after he brought them to McNulty's attention there were fall hazards every day of his inspection; Aiden Lynch and Robert Weiss also argued with him on November 19, telling him he didn't know what he was talking about when he discussed the fall protection that was required, and they told him at the December 22 meeting that all the employees were connectors, that connectors did not have to tie off, and that they used CAZ's. (Tr. 141-51; 169-71; 185-90; 196-204; 284-86; 359-67; 480-91; 627-29; 634-35; 639-42; 1937-43). David Melick, who was also present on November 19, testified he considered the conditions on the second level to be a severe fall exposure. (Tr. 795-801). Robert Fadrowski and Roger Cross, the Whiting-Turner representatives with the CO on November 19, agreed Lynch and Weiss argued with him, and, taken together, the testimony of Fadrowski, Cross and Gary Johnson, Whiting-Turner's top superintendent at the site, was that while McNulty usually corrected specific problems brought to its attention there was a general and continuing lack of safety practices and fall protection on its job site. (Tr. 228-62; 723-25; 742-43; 809-19; 825-29; 883-902; 919-20). Their testimony in this regard is supported by the fact that not only all of the willful instances, but also all of the serious and the repeat instances, *infra*, have been affirmed in this case.

Based on the record, I conclude the violations were willful. It is clear that McNulty had knowledge of the requirements of the cited standards, that it was aware both before and during the inspection that its work practices were exposing employees to fall hazards in violation of those standards, and that despite that awareness it did not change its work practices. It is also clear that McNulty's management not only observed a number of the cited conditions but also committed some of them. I have considered all of the evidence of record, including that presented by McNulty to show that it used CAZ's as an alternative to standard fall protection, that it performed the job safely, and that its work practices were in conformance with that of the industry. I note first that although McNulty did agree to use CAZ's, as indicated in the September 27 letter from Liberty Mutual contained in C-21, and evidently did cordon off work areas where erection was taking place, it did not monitor employees for unsafe acts or otherwise meet the intent and purpose of the CAZ provisions. I note also that while there were apparently no accidents on this particular job, McNulty did not, in view of the record, perform the work involved in the cited instances in a safe manner. Finally, I note that while McNulty witnesses Thomas Humphrey and Edward Cush, union officials with erection experience, testified to the effect that McNulty's work practices were in accord with industry practice, the Secretary's witnesses Charles Hardesty and Michael Willis, OSHA officials with erection experience, disagreed; in addition, McNulty witness Randall Davis, the vice-president of an erection company, testified that although the industry practice is to not tie off in the immediate erection zone his company policy is for employees who are stationary and on a stable structure, such as a welder working at the perimeter after the floor is complete, to tie off. (Tr. 929-67; 1615-1725; 1794-1913). The citation items are accordingly affirmed as willful violations.

The Secretary has grouped the instances in each of these three items and has proposed a single penalty for each, that is, a penalty of $29,400.00 for item 1, a penalty of $21,000.00 for item 2, and a penalty of $29,400.00 for item 3. CO Donovan testified about how the gravity of the violations was considered, as was the company's size, history and good faith,

in arriving at these penalties. (Tr. 171-72; 284-96). On the basis of this testimony I find that the proposed penalties are appropriate and they are therefore assessed.[13]

Serious Citation 1 - Item 1

This item alleges that parts of live electrical equipment operating at 50 volts or more were not guarded against accidental contact in violation of 29 C.F.R. 1926.403(i)(2)(i). CO Donovan testified that on November 30 he saw an electrical outlet on the ninth level of the garage that had been pulled out of its housing; the outlet had exposed live wires and the 50-foot extension cord plugged into it was being used to power an electric drill a McNulty employee was using. The CO identified C-16-17 as photos of the outlet and the employee standing on a ladder drilling on a wall. He said the employee footing the ladder was McNulty's foreman Paul Brady, who told him the cord had been plugged into the outlet in that condition. He also said the outlet was operating at 120 volts and was a serious hazard as anyone plugging the cord into it would have been within an inch of the exposed wires and could have contacted them and been electrocuted; the CO noted that while there was a ground fault circuit interrupter ("GFCI") on the outlet box itself this provided no protection from electrocution in the event of contact with the wires. One of electrical contractors on the site repaired the outlet after the CO brought it to McNulty's attention. (Tr. 302-11; 537-49; 1927-33).

McNulty contends the cited condition occurred after the cord was plugged in and that there was no credible evidence as to who had plugged the cord into the outlet. Aiden Lynch testified the outlet was pulled from its housing after the cord was plugged in and that the employees engaged in the drilling work were unaware of this fact as they were 50 feet away and could not see the outlet. (Tr. 1194-97; 1200). However, there is no evidence Lynch had any personal knowledge of what occurred before the CO saw the outlet, and, as the CO testified, if the outlet was pulled from its housing after the cord was plugged in the cover would still have been around the cord rather than on the ground as in C-16. (Tr. 651-53; 1927-29). Lynch further testified that as far as he could tell neither employee in C-16 was

[13]This same reasoning applies to the penalties assessed in citations 1 and 3, *infra*. (Tr. 287).

Brady, who was assigned to the southern half of the project and did not work in the area where the outlet was located. (Tr. 2079-80). Jack Doyle also testified Brady did not work in the area. (Tr. 2130). Regardless, CO Donovan's testimony is credited. The CO was adamant Brady was the person he talked to about the outlet, that Brady told him they had plugged the cord into the outlet in that condition, and that Brady was the person who unplugged the cord after the CO talked to him. (Tr.304-05; 309-11; 539-41; 1928-29). Also, the CO's narrative made from his inspection notes indicates he discussed the condition with Brady and Lynch. *See* C-20, p. 5. This item is affirmed as a serious violation, and the proposed penalty of $1,500.00 is assessed.

Serious Citation 1 - Item 2

This item alleges two instances of scaffolds without access ladders or equivalent safe access in violation of 29 C.F.R. 1926.451(a)(13). In the first instance, CO Donovan testified he observed two masons on November 30 working on an 8-foot-high scaffold set up in a stair landing between the ninth and tenth levels of the garage; the employees told him they accessed the scaffold from the unguarded 20-inch-wide platform leading to the scaffold and by climbing up the sides of the scaffold, and the CO saw one of the employees accessing the scaffold from the platform. The CO further testified that C-13 showed one of the employees on the platform and that both workers were exposed to an 8-foot fall hazard. (Tr. 40; 126; 312-19; 558-60; 1923). McNulty asserts the masons were not its employees, based on the testimony of Aiden Lynch. (Tr. 1201-06). However, it is clear that this subitem has the same factual background as item 3D of citation 2, *supra*, wherein it was found that the masons were McNulty employees. (Tr. 312-13; 1923). This subitem is affirmed.

The second instance of this item has the same factual background as item 1D of citation 2, set out above, wherein an employee walked across a scaffold set up in an air shaft next to a wall on the seventh level of the garage and then climbed up on the wall to drop a bucket off the wall. CO Donovan testified the employee had to step down about 3 feet to access the scaffold and then up 3 feet to egress it, as depicted in C-2 and C-3(l-m), and that an access ladder was required to safely access and egress the scaffold because the scaffold

platform was about 7 feet from the deck below. (Tr. 56-57; 62-65; 598-600). McNulty contends that the alleged violation did not present a hazard based on Aiden Lynch's testimony that the employee first stepped onto the top rung of the scaffold and that the scaffold platform was only 3 feet from the deck below. (Tr. 1286-89). However, the CO noted that most 3-foot scaffolds are Baker scaffolds and that McNulty used no Baker scaffolds at the site.[14] (Tr. 598-600). He also noted that the other employee working on the scaffold was tied off, as shown in C-3(l). (Tr. 56; 464-65; 469-70). Based on this testimony I find that the lack of an access ladder presented a serious fall hazard.[15] This subitem is affirmed.

The Secretary originally proposed a total penalty of $1,500.00 for these two grouped instances. However, this item has been amended to allege a repeat violation. A violation is properly characterized as repeat if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *See, e.g., R..G. Friday Masonry*, 17 BNA OSHC 1070, 1074, 1993-95 CCH OSHD ¶ 30,682, p. 42,579 (No. 91-1873, 1995). C-1 contains a final order which includes a previous violation of the same standard cited in this item. CO Donovan testified about how he calculated the penalty for the repeat violation alleged in citation 3, *infra*. (Tr. 307). On the basis of this testimony and the originally-proposed penalty, a total penalty of $3,000.00 is assessed for this item.

Serious Citation 1 - Item 3

This item alleges that a wall opening at the site did not have guardrails as required and that employees were exposed to falls of approximately 15 feet, in violation of 29 C.F.R. 1926.500(c)(1). CO Donovan testified employees were working near the opening in between

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[14]C-21 establishes that while McNulty initially used Baker scaffolds it removed them from the site after Liberty Mutual concluded they were unsafe.

[15]In so finding, I have noted Lynch's testimony that R-30, the video taken by Robert Weiss, shows that the scaffold platform was 3 feet from the deck below; however, R-30, in my opinion, does not show one way or the other the height of the scaffold. (Tr. 1301-04).

the two side walls of the air shaft on the second level of the garage on November 19. He said the opening was to the right of the orange-topped ladder depicted in photos C-11(2-3) and that the employees were exposed to 15-foot falls; the workers on the floor were exposed to the hazard, as had been the employee who was on the ladder, and he had seen one individual at the face of the edge. (Tr. 319-22; 509-10). Aiden Lynch testified the area was a CAZ because the wall in C-11 had just been erected and was being braced and that guarding the opening was infeasible; he said the brace had to be moved into place, as shown in C-11 and C-4(a), and that guarding the opening would have prevented this work. (Tr. 1132-57; 1166-70). However, it is clear from his testimony that guard cables were put up in the opening after the wall was braced. (Tr. 1166-70). Moreover, I am not persuaded, upon viewing the positions of the brace in the photos, that guard cables across the opening would have interfered with bracing the wall. This item is affirmed, and the proposed penalty of $3,000.00 is assessed.

Serious Citation 1 - Item 4

This item alleges that employees were allowed to work under precast concrete members as they were being lifted or moved into position in violation of 29 C.F.R. 1926.704(e). CO Donovan testified that on December 1 he, Robert Fadrowski and CO Schrilla, who was videotaping, were observing McNulty's operations from the roof of the mall when they saw an employee welding at the perimeter of the ninth-level deck of the garage while a double tee was being moved into position above him. Donovan further testified the double tee was the penultimate piece required to complete the tenth-level deck, that it was at times directly above the employee, and that if something had happened to the load it could have fallen and struck the employee or knocked him from the building. The CO pointed out several instances on C-2 where the load was above the employee and noted that until the tee was in place the welder was in sight of foremen Brady and Doyle, who were working on the tenth level. (Tr. 322-25; 580-87).

McNulty's contention, based on the testimony of Aiden Lynch, is that the tee was lifted over the tenth-level deck and then lowered into place and that it was not over the

welder because he was working near the perimeter of the completed ninth-level deck. (Tr. 1252-67). McNulty goes on to assert that because the tee was 10 feet wide and placed in an area at least 10 feet from the perimeter and the employee below was never more than 10 feet from the perimeter, the welder was not under the load. However, CO Donovan was adamant the welder was under the load, and CO Schrilla agreed. (Tr. 580-87; 669). In addition, McNulty's very assertion supports a conclusion that the welder was either directly beneath the load or in such proximity to it that he was in fact exposed to the cited hazard. This is particularly so in light of McNulty's position, set out *supra*, that one of the greatest hazards on a precast erection site is a load falling or swinging out of control and striking employees. I note Lynch's own testimony in this regard and his statement that even the employees who are not directly under the load are exposed to this hazard. (Tr. 2071-75; 2085-86). This item is accordingly affirmed, and the proposed penalty of $1,500.00 is assessed.

Serious Citation 1 - Item 5

This item alleges there were stairways at the site which were not equipped with handrails or guardrails in violation of 29 C.F.R. 1926.1052(c)(1). CO Donovan testified that on November 30 he saw two employees welding in a stairwell at the open face of a stairway that had no railings to provide protection from falls. He said C-18 showed one of the employees, who was exposed to a fall of 16 feet to the landing below, and that if the worker had been at the top of the stairs he would have been exposed to a fall of 24 feet. He also said the welders told him they worked for McNulty and that the condition was in plain view of foreman Brady, who verified the welders were McNulty's. (Tr. 325-29; 615-18; 1922-24). McNulty does not dispute the welders worked for it. It contends, rather, it had no knowledge of the condition based on the testimony of Aiden Lynch that he was not given the opportunity to accompany the CO and that while Donovan told him about the condition later he was never able to verify who the employees were; Lynch also testified it was the job of Whiting-Turner carpenters to put up the rails, that McNulty's policy was for the welders to work behind the carpenters so as to not be exposed to unguarded stairs, and that if he had

been able to learn who the welders were they would have been disciplined. (Tr.1206-14; 1246-47). McNulty's claim it was prevented from participating in the inspection was addressed and rejected *supra*. In addition, the CO testified that foreman Brady was also in the area. (Tr. 328-29; 618; 1922). Although Lynch disagreed, it is clear from the record the stairs were in the same area as the electrical violation set out above in item 1 of citation 1, wherein it was found that Brady was in fact working in the area. (Tr. 328-29; 1206-07; 1210; 2080). McNulty's contention it had no knowledge of the condition is rejected, this item is affirmed, and the proposed penalty of $3,000.00 is assessed.

Serious Citation 1 - Item 6

This item alleges that two 12-foot ladders used to gain access to walls on November 19 did not extend at least 3 feet above the walls and were not placed against the walls such that their rails were supported equally in violation of 29 C.F.R. 1926.1053(b)(1) and (b)(10). CO Donovan testified one of the ladders was depicted in C-11(2-3) and the other in C-12 and C-4(b), which showed that both ladders were supported by their top rungs rather than their side rails and that the ladders did not extend above the areas accessed by the employees. He further testified that ladder rails are designed to support ladders while the rungs are not and that ladders not extending over the area to be accessed present a fall hazard; he noted that the worker who used the ladder to access the top of the wall, as shown in C-4(b) and C-12, was exposed to an exterior fall of about 43 feet and an interior fall of about 24 feet, and that the worker who used the ladder to access the notch on which he sat, as shown in C-11(2-3), was also exposed to a fall hazard. CO Donovan said foremen Brady and Doyle were in the area at the time as was Aiden Lynch. (Tr. 117-18; 329-34; 430; 512-14; 1924-26).

Aiden Lynch testified that the uprights of the ladder depicted in C-12 engaged two faces of the wall, which gave it stability from sliding sideways. (Tr. 1172-73). However, CO Donovan specifically testified that the ladder shown in C-12 was supported by its top rung and not its side rails, his testimony is supported by C-4(b), and it is clear from C-4(b) that the ladder did not extend above the wall as required and that the employee using it was exposed to the fall hazard described by the CO. (Tr. 330-32; 1124-26). Lynch further

testified that the ladder in C-11(2-3) was braced by the employee footing it below and that if the ladder had extended up above the platform the employee sitting in the notch could not have done his work. (Tr. 1177-80). The CO agreed that footing the ladder was a safe practice but did not alter his opinion that the ladder being supported by its top rung was a hazard. Moreover, he disagreed that a ladder extending above the platform would have kept the employee from doing the work and said that the job could have been done more safely from a ladder. (Tr. 512-14; 1924-26). Regardless, it is clear from the record that the ladder was cited not because it did not extend above the platform but because it did not extend above the notch on the wall, which subjected the employee to a fall to the deck below. These items are affirmed, and the total proposed penalty of $3,000.00 for these items is assessed.

Serious Citation 1 - Items 7-9

Item 7 alleges a compressed gas cylinder containing acetylene did not have a valve protection cap in violation of 29 C.F.R. 1926.350(a)(1), and items 8 and 9 allege that compressed gas cylinders containing acetylene and oxygen were improperly secured and stored together in violation of 29 C.F.R. 1926.350(9) and (10), respectively. CO Donovan testified that on December 2 he saw one acetylene cylinder and two oxygen cylinders roped together across from the job trailer shared by McNulty and Spancrete. He identified C-19 as a photo of the cylinders and noted that the small cylinder on the left, the acetylene cylinder, had no valve protection cap. He also noted that employees were walking within 2 feet of the cylinders, which could have resulted in their being knocked over, releasing oxygen and acetylene and creating a fire hazard. The CO reported these conditions to Jack Doyle, who had them corrected. (Tr. 334-44).

The language of the cited standards clearly prohibits the conditions described by the CO. McNulty asserts the cylinders were secured to the barrel in front of them shown in C-19. However, McNulty points to no evidence in this regard other than C-19, which in my view does not establish its assertion, especially since the CO specifically testified that the cylinders were not secured to the barrel. (Tr. 609-10; 650-51). McNulty also asserts the cylinders were empty. Aiden Lynch testified that empty cylinders were stored at the site as

shown in C-19, while full cylinders were stored in another area in two separate stockpiles approximately 100 yards apart. Lynch also testified that the cylinders in C-19 were empty and were picked up later that day by the supplier. However, Lynch had no personal knowledge that the cylinders which were picked up were the same ones shown in C-19. In addition, R-151, a form signed by Robert Weiss indicating that two empty oxygen cylinders and one empty acetylene cylinder were picked up that day, was received in evidence subject to connection through the testimony of Robert Weiss that these were the cited cylinders and he was never called as a witness. (Tr. 1338-47). Even if he had been, compressed gas cylinders are presumed to contain at least enough residual gas to present a hazard unless there is evidence that the cylinders were so empty as to negate the possibility of injury. *Williams Enter. of Georgia, Inc.*, 7 BNA OSHC 1900, 1903, 1979 CCH OSHD ¶ 24,003, p. 29,138 (No. 13875, 1979). No such evidence was presented in this case, and McNulty's awareness of the hazard is shown by its own work rule requiring that oxygen and gas cylinders, whether empty or full, be kept at least 20 feet apart. *See* R-152, p. 18, item 9. These items are affirmed.

Item 9 is affirmed as a serious violation, and the Secretary's proposed penalty of $900.00 is assessed. Items 7 and 8 have been amended to allege repeat violations. As noted above, a violation is properly characterized as repeat if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. C-1 contains final orders which include previous violations of the same standards cited in items 7 and 8. These items are therefore affirmed as repeat violations. CO Donovan testified about how he calculated the penalty for the repeat violation alleged in citation 3. (Tr. 307). Based on this testimony and the originally-proposed penalties for items 7 and 8, a penalty of $1,800.00 is assessed for each item.

Repeat Citation 3

This citation, which alleges that a drill was energized through an extension cord plugged into an outlet that did not have the ground clip connected in repeated violation of 29 C.F.R. 1926.404(f)(6), has the same factual background as item 1 of citation 1 above. CO

Donovan testified that the drill and cord were both the three-wire type requiring grounding and that the outlet used to power them did not have a grounding wire. He said C-16 showed the outlet's positive and neutral wires as well as the third terminal screw to which a ground wire should have been attached. He also said he tested the other end of the extension cord with a uni-tester, which established that the equipment was not grounded. The CO noted the drill was not a double-insulated tool and that while the GFCI on the outlet box reduced the severity of the hazard the lack of grounding nonetheless exposed the employee using the drill to an electrical shock. (Tr. 301-11).

McNulty contends the fact the equipment was protected by a GFCI rendered the hazard of the condition insufficient to pose any danger to employees.[16] James Hinson, McNulty's expert witness, testified the situation did present a risk of exposure to an electrical shock but that the risk was acceptable because the GFCI would have reduced any such shock to 20 milliamps or less. (Tr. 1783). CO Donovan, however, testified that GFCI's work by cutting off the electrical current to equipment when levels between 5 and 7 milliamps are detected. He further testified that a shock of 5 milliamps would be sufficient to cause muscle contraction or loss of control, which in this case could have resulted in the employee operating the drill falling from the ladder and/or dropping the drill on the employee footing the ladder, either of which could have resulted in serious injury. (Tr. 543-44; 1933-35). McNulty offered no rebuttal to this evidence other than the testimony of Aiden Lynch that 5 to 7 milliamps would cause a "minimum" shock. (Tr. 2078-79). The Secretary has accordingly established a violation of the cited standard which could have resulted in serious injury.

The Secretary has characterized this citation as repeated based on a previous violation of 29 C.F.R. 1926.404(f)(7)(iv)(C)(1), and C-15 contains the final order in regard to this violation. The previously-cited standard requires the grounding of certain electrical

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[16]Aiden Lynch's testimony that McNulty provided another GFCI between the outlet and the drill was disputed by the CO; however, this issue need not be addressed since it is clear that the parties agree that the equipment was protected by a GFCI. (Tr. 542-43; 1197-99; 1929-31; 1970; 2077-78).

equipment, while the standard cited in this case requires the path to ground from circuits, equipment and enclosures to be permanent and continuous. The standards are sufficiently similar such that it is appropriate to affirm this citation as a repeated violation. The proposed penalty of $1,800.00 was essentially derived by doubling an initial penalty of $900.00 due to the repeated characterization. It is my conclusion this penalty is too high, particularly since the CO initially indicated it was based in part on the risk of a shock more severe than that described above. (Tr. 307). In addition, while the CO's testimony does establish that serious injury could have resulted from the violation, it is clear from C-16 that the employee operating the drill was only about 3 feet off the ground and that any injury occurring from his falling or dropping the drill would have been of lower gravity than if he had been further from the ground. A penalty of $900.00 for this citation is therefore assessed.

Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specifically and appear herein. All evidence of record and arguments of the parties, whether expressly mentioned or not, have been considered in determining the contested issues.

Conclusions of Law

1. Respondent A.J. McNulty & Company, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.350(a)(10), 1926.403(i)(2)(i), 1926.500(c)(1), 1926.704(e), 1926.1052(c)(1), 1926.1053(b)(1) and 1926.1053(b)(10).

3. Respondent was in willful violation of 29 C.F.R. §§ 1926.95(a), 1926.105(a), 1926.500(b)(1) and 1926.500(d)(1).

4. Respondent was in repeat violation of 29 C.F.R. §§ 1926.350(a)(1), 1926.350(a)(9), 1926.404(f)(6) and 1926.451(a)(13).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 1, 3, 4, 5, 6 and 9 of serious citation 1 are affirmed, and penalties of $1,500.00, $3,000.00, $1,500.00, $3,000.00, $3,000.00 and $900.00, respectively, are assessed.

2. Items 2, 7 and 8 of serious citation 1 are affirmed as repeat violations, and penalties of $3,000.00, $1,800.00 and $1,800.00, respectively, are assessed.

3. Items 1, 2 and 3 of willful citation 2 are affirmed, and penalties of $29,400.00, $21,000.00 and $29,400.00, respectively, are assessed.

4. Item 1 of repeat citation 3 is affirmed, and a penalty of $900.00 is assessed.

/s/

Irving Sommer
Chief Judge

Date: NOV 27 1996