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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Globe Energy Services, LLC, Respondent.	OSHRC Docket No. 14-0448

Appearances:

Mia Terrell, Esquire, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For the Secretary

Steven R. McCown, Esquire, and Kevin S. Mullen, Esquire, Littler Mendelson, PC, Dallas, Texas
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Globe Energy Services, LLC (Globe) provides oil well and tank servicing for the oil and gas industry. On August 23, 2013, the Occupational Safety and Health Administration (OSHA) inspected a Globe worksite located at County Road 415 in Henderson, Texas in response to a report of a fatality. A Globe employee was found deceased at the worksite on August 23, 2013. As a result of OSHA's inspection, on January 29, 2014, the Secretary issued a two-item Citation and Notification of Penalty (Citation) to Globe alleging a serious violation of the stairway railings standard found at 29 C.F.R. § 1910.23(d)(1) and a serious violation of the exit route standard found at 29 C.F.R. § 1910.37(a)(1). The Secretary proposed penalties in the total amount of $9,800.00 for the alleged violations. Although the inspection was initiated as a result

of the fatality, the Citation issued was not related to the fatality.[1] Globe timely contested the Citation.

A hearing was held in Dallas, Texas, on June 30, 2014. Thereafter, the parties submitted post-hearing briefs. For the reasons set forth below, the Court affirms Item 1; assesses a penalty of $4,900.00; and vacates Item 2.

Jurisdiction

The parties stipulated the Commission has jurisdiction pursuant to section 10(c) of the Act and Globe is an employer engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act (Tr. 14).

Background

OSHA initiated an inspection of Globe on August 23, 2013, in response to a report of a fatality discovered at the worksite that morning. On August 23, Globe driver Cesar Morales was assigned to service the Memorial Resource Development Craig Gas Unit No. 1 (Memorial Resource) worksite (Tr. 34-35). When he arrived at the worksite at 5:45 a.m. that morning, he noticed the truck of co-worker [redacted] was running (Tr. 35-37). After he turned around, he saw [redacted], deceased, on the ground with his head pointed toward the metal stairs and his feet halfway on top of the firewall [earthen berm] (Tr. 39). Morales noticed part of the gauge line was in [redacted]'s left hand (Tr. 36, 39). The cause of [redacted]'s death was not adduced as a part of the record in this matter. However, the parties agree the fatality was not related to the citations at issue here. OSHA Safety and Health Compliance Officer (CSHO) Deborah Coler, who conducted the inspection of the worksite for OSHA, testified she found no evidence [redacted] had fallen through or over the stair rails or that he had tripped on the concrete blocks which were placed over the berm (Tr. 34, 281). CSHO Coler found no evidence the items she found in violation had anything to do with [redacted]'s death (Tr. 281).

Once CSHO Coler arrived at the worksite on August 23 to conduct her inspection, she conducted an opening conference with Kim McDonald and Dub Harrison, management employees of Globe (Tr. 252). She then conducted a walk around inspection and took photographs that day and again on September 10, 2013 (Tr. 252-253). She also conducted interviews of employees and management (Tr. 234, 268, 275, 283). During her inspection,

[1] [redacted] was found deceased at the jobsite on August 23, 2013, by a Globe employee when he arrived at the site that morning for his shift. As the cause of the fatality was not at issue, the Secretary produced no evidence regarding the death of [redacted] (Tr. 18).

CSHO Coler observed concrete blocks embedded in the ground at the base of a stairway. One of the concrete blocks was broken, however when she returned to the inspection site on September 10, 2013, the broken concrete block had been replaced (Tr. 254; Exhs. C-1(g) and C-2). As a result of her inspection, CSHO Coler recommended the issuance of a two-item Citation. CSHO Coler proposed the issuance of a citation for Globe's failure to provide an intermediate rail on the stairway. She also proposed a citation for obstructions on the exit route used by Globe employees. These alleged violations form the basis for the two-item Citation issued in this matter.

Globe is an oilfield service company which services in excess of 300 locations in East Texas (Tr. 175, 243). It is comprised of several divisions, including a fluid service division. Fluid servicing involves removing saltwater which is a byproduct of oil production. Globe services oil tanks by syphoning the saltwater byproduct from the oil tanks and hauling it away for disposal (Tr. 80). In order to perform fluid servicing, Globe's employees must ascend to the top of stairs adjacent to oil tanks and drop a weighted line with a six-inch brass ball at its bottom down into the oil tank to determine how much fluid is in the oil tank (Tr. 44, 77, 96-98; Exh. C-1k). The weighted line contains dye which reacts when it makes contact with the oil (Tr. 44, 77). This gauges how much water needs to be drained from the oil tank (Tr. 44, 77). Once the water level is gauged, the employee returns to the ground and drains the water from the tank (Tr. 44, 77). After the water is drained, the employee gauges the tank again to ascertain the amount of oil left in the tank (Tr. 44, 77). The gauging and loading process takes approximately 20 to 30 minutes to complete (Tr. 51, 79).

Globe's employees who perform fluid servicing work in three primary locations: the yard where the servicing trucks are parked, the client's site for fluid servicing, and the saltwater disposal facility (Tr. 23-24). The employees who perform fluid servicing are called drivers. They work alone and typically work 50-60 hours per week (Tr. 34, 70, 81, 163).

At the time of OSHA's inspection, Globe was performing fluid servicing on oil tanks for its client, Memorial Resource. Globe provides fluid servicing for approximately 32 Memorial Resource sites (Tr. 190). On August 23, 2013, it was providing fluid servicing for Memorial Resource at the site located at County Road 415 in Henderson, Texas, which is known as the Craig Gas Unit 1 (Tr. 34-35).

The Crag Gas Unit 1 consists of a battery of eight large vertical tanks (Tr. 95, 198; Exhibit C-1e). A catwalk platform extends across the length of the tank battery and serves as a

work platform near the top of the tanks. The platform is located 20 feet above the ground and is 120 feet long (Tr. 99; Exh. C-1k). A set of metal stairs provides access to the platform and is located at one end of the platform (Tr. 42; Exh. C-1k). This stairway has 24 steps or risers with a stair rail on each side of the risers. The top rail of the stair rail had a vertical height of 40.5 inches. At the time of OSHA's inspection, the stair rail did not have an intermediate rail (or mid rail)(Tr. 268; Exh. C-1(i)). CSHO Coler determined the height of the stair rail and the missing mid rail were not in compliance with the standard addressing stair rails.

The battery of eight vertical tanks included two or three tanks which contained saltwater and were located at the end of the platform near the stairway. These two or three tanks were being serviced by Globe (Tr. 42-43, 75). Employees servicing the tanks at the Memorial Resource site worked in two 12-hour shifts per day (Tr. 80-81). Fluid servicing is a continuous process where drivers gauge the tank and unload the water several times during their shift (Tr. 78, 81). Approximately three to five loads were made on each shift (Tr. 95). Globe was paid for each load of water removed from the Memorial Resource site.

The tank battery and stairway were surrounded by a two to three foot berm of mounded earth which provided a containment area in the event of an oil or saltwater spill (Tr. 25, 198). It also functioned as a fire break in the event of a fire from an oil spill and was referred to by some as a firewall (Tr. 39, 53, 54, 231). Concrete blocks[2] were embedded in the ground just below the metal stairway and across the berm to form a path (Exhs. C-1g and C-1k). This path was used by Globe employees to access and exit the battery of tanks. As a result of her inspection, CSHO Coler determined the path was obstructed by the earthen berm and the alleged haphazard placement of the concrete blocks.

As a result of the improper height of the stair rail and the missing mid rail and because of the obstructed exit route, CSHO Coler recommended the issuance of the two-item Citation which is before the Court.

DISCUSSION

Elements of the Secretary's Burden of Proof

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

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to

[2] These concrete blocks were also referred to as cinder blocks.

> the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

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

Citation No. 1, Item 1

In Item 1 of the Citation the Secretary cites Globe for a violation of 29 C.F.R. § 1910.23(d)(1). The alleged violation description (AVD) of the Citation sets forth the specifics regarding how the Secretary contends Globe violated the standard and provides:

> 29 C.F.R. 1910.23(d)(1): Flights of stairs having four or more risers were not equipped with a standard railing as specified in paragraphs (d)(1)(i) through (v) of this section:
>
> The employer does not provide standard railings for every flight of stairs having four or more risers. This violation occurred on or about August 23, 2013, at a worksite located at CR 415, Henderson, Texas; where the stairway leading to the top of the salt water tanks had railings that did not have intermediate rails and the vertical heights from the surface of the treads to the upper surface of the top rails were more than 34-inches, exposing employees to fall hazards.

Section 1910.23(d)(1) is found in Subpart D of Part 1910 of the Standards which addresses Walking-Working Surfaces and provides:

> (d) *Stairway railings and guards*.
> (1) Every flight of stairs having four or more risers shall be equipped with **standard stair railings or standard handrails** as specified in paragraphs (d)(1)(i) through (v) of this section, the width of the stair to be measured clear of all obstructions except handrails:
> (i) On stairways less than 44 inches wide having both sides enclosed, at least one handrail, preferably on the right side descending.
> (ii) On stairways less than 44 inches wide having one side open, at least one stair railing on open side.
> **(iii) On stairways less than 44 inches wide having both sides open, one stair railing on each side.**
> (iv) On stairways more than 44 inches wide but less than 88 inches wide, one handrail on each enclosed side and one stair railing on each open side.
> (v) On stairways 88 or more inches wide, one handrail on each enclosed side, one stair railing on each open side, and one intermediate stair railing located approximately midway of the width.
> (Emphasis added).

The Secretary contends Globe did not provide the required stair rail because the stair rail did not comply with the cited standard since the top rail exceeded 34 inches in height and the

stair rail failed to include an intermediate rail. Globe does not dispute the factual allegations but contends the standard cited is not applicable because the standard does not require "standard railings," as alleged by the Secretary in the AVD of the Citation. Globe argues the standard requires "stair railings." (Globe's brief, pp. 4, 6-7). Because of this alleged defect in the AVD, Globe argues the standard is inapplicable. Globe also challenges the Citation by contending it could not have fixed the stair railing because it did not own or control the worksite (Globe's brief, p. 7).[3] The Court disagrees with Globe that the cited standard is not applicable. For the reasons set forth below, the Court finds the standard is applicable and the purported defect in the AVD of the Citation is inconsequential.

Applicability of the Standard

Globe's employees were engaged in work activities of syphoning water from tanks and transporting it to the disposal sites. This type of work is considered by OSHA to be general industry and not construction work (Tr. 251). As such, the general industry standards found in Part 1910 are generally applicable. Evidence adduced at the hearing shows the cited stairway used by the employees to perform their work consisted of metal stairs which provided access from the ground level to a platform or catwalk located 20 feet above the ground (Tr. 42; Exh. C-1k). The stairway had approximately 24 steps or risers which CSHO Coler measured to be 26 inches wide (Tr. 263-264). The stairway was open on both sides and stair rails were provided on each side (Tr. 264, 266; Exh. C-1). CSHO Coler measured the top rail and found it had a vertical height of 40.5 inches (Tr. 288, 294; Exh. R-2). She estimated the stairway was approximately 25 feet high by counting the number of steps on the stairway (Tr. 267, 296-297).

Based on the measurements, construction and formation of the stairway, CSHO Coler determined § 1910.23(d)(1)(iii) specifically applies to the stairway because it was open on both sides and had risers less than 44 inches wide (Tr. 264). The Court agrees. Globe was cited for a violation of §1910.23(d)(1) which includes five subsections, including subsection (iii). An analysis of the facts reveals the 26 inch width of the risers and the stairway being open on both sides supports a finding that the standard is applicable.

The Court is not persuaded by Globe's assertion that the "standard railings" language used in the AVD of the Citation renders the standard inapplicable. Although the AVD is confusing, when reading the language set forth in the AVD in its entirety, it is clear the Secretary

[3] The Court finds no merit in Globe's argument. An employer has a duty to protect its employees from hazards on the workplace, regardless of whether it has authority to correct the violative conditions.

was citing Globe for failing to meet the requirements for stair railings. In addition to providing the railings were not in compliance due to the absence of an intermediate rail, the AVD unquestionably also provides the railings were not in compliance because the vertical height exceeded 34 inches. This is the maximum height for stair railings as provided in Subpart D. The court agrees the AVD was not artfully written, nonetheless, the meaning of the violative condition is clear. Further, although the term "standard railings" has a specific meaning in Subpart D, as set forth below, stair railings must "be of construction similar to a standard railing…" § 1910.23(e)(2).

Violation of the Terms of the Standard

As shown above, the cited standard requires "standard" stair railings or standard handrails on flights of stairs with more than four risers. § 1910.23(d)(1). As defined in Subpart D, a standard railing "includes a top rail, intermediate rail and posts, and shall have a vertical height of 42 inches…" § 1910.23(e)(1). The Secretary cited Globe for not providing standard railings for every flight of stairs having four or more risers. Stair railing is described in § 1910.23(e)(2) which provides:

> A stair railing shall be of construction similar to a standard railing but the vertical height shall be not more than 34 inches nor less than 30 inches from upper surface of top rail to surface of tread in line with face of riser at forward edge of tread.

It is further defined in § 1910.21(a)(8) as "[a] vertical barrier erected along exposed sides of a stairway to prevent falls of persons."

Section 1910.23(e)(1) describes standard railings and provides in relevant part:

> A standard railing shall consist of top rail, intermediate rail, and posts, and shall have a vertical height of 42 inches nominal from upper surface of top rail to floor, platform, runway, or ramp level….the intermediate rail shall be approximately halfway between the top rail and the floor, platform, runway, or ramp…

Standard railings are further defined in § 1910.21(a)(6) as "[a] vertical barrier erected along exposed edges of a floor opening, wall opening, ramp, platform or runway to prevent falls of persons."

To clarify the standards' provisions, OSHA in a June 15, 2010, Letter of Interpretation stated "OSHA's standard at 29 CFR 1910.23(e)(1) states that, "[a] standard railing shall consist of top rail, intermediate rail, and posts…" Stair railings, in accordance with 29 CFR 1910(e)(2) must "be of construction similar to a standard railing…" Therefore a midrail is required."

Pursuant to these standards and OSHA's interpretations of the standards, the only difference between a stair railing and a standard railing is the vertical height. The vertical height of a stair railing must not exceed 34 inches. The vertical height of the stair railing here, as measured by CSHO Coler was 40.5 inches, which exceeds the requirements of the standard. The Court finds the terms of the standard were not complied with because the vertical height of the stair rail on the stairway exceeded the requirement of the standard; no intermediate rail was provided on the stair rail; and because the vertical height of the stair rail was 40.5 inches, it also failed to meet the standard requirement of 34 inches for handrails.[4] The Secretary has established the terms of the standard were violated.

Employee Access to the Violative Condition

The Secretary may prove employee access to the violative condition through either actual employee exposure, or by showing that "while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). The test of whether an employee would have access to the "zone of danger" is "based on reasonable predictability." *Id.; Kokosing Constr. Co., Inc.,* 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996) (citation omitted) (*Kokosing*).

Evidence adduced at the hearing shows Globe employees used the stairway during each shift to gauge the tanks. On August 23, 2013, Morales was assigned to service the Memorial Resource site. Morales testified it was his practice, when he arrived at the site, to retrieve his tools from the tool box, climb the stairs to the platform and gauge the tank (Tr. 37). In addition, a task order reveals [redacted] had gauged the tank at approximately 6 p.m. the evening before, August 22, 2013 (Exh. C-9, p. 26). When Morales found [redacted] at the Memorial Resource site the next morning, the gauging tool was in [redacted]'s hand indicating [redacted] was on his way to or from gauging the tank (Tr. 37). *See generally Manganas Painting Co.*, 21 BNA OSHC 1964, 1981 (No. 94-0588, 2007) (citations omitted) ("reasonable inferences can be drawn from circumstantial evidence"). It was reasonably predictable that Morales would use the stairway and that [redacted] used or intended to use the stairway to gauge the tank during their shifts on August 23, 2013. Employee access to the violative condition is established.

Knowledge of the Violative Condition

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[4] The standard found at §1910.23(e)(5) sets forth the requirements for handrails. Section 1910.23(e)(5)(ii) provides in relevant part "[t]he height of handrails shall be not more than 34 inches nor less than 10 inches…"

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Dun-Par Engineered Form Co.,* 12 OSHC 1962, 1965 (No. 82-928, 1986). Knowledge of a hazard may be established where the violative condition is in a conspicuous location or are otherwise readily observable. *Kokosing*, 17 BNA OSHC at 1871. "Actual or constructive knowledge can be imputed to the cited employer through its supervisory employee." *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) (citation omitted) (*Access*); *see also, Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979) (finding that knowledge of an employee with delegated supervisory authority was properly imputed to the employer). Constructive knowledge depends on "whether, with the exercise of reasonable diligence, [the employer] could have discovered the [violative condition]." *Donohue Indus., Inc.*, 20 BNA OSHC 1346, 1348-49 (No. 99-0191, 2003).

Here, the Secretary asserts Globe could have known of the non-compliant railing because it was plainly visible and not ephemeral in nature. The Secretary asserts constructive knowledge can be imputed through Globe's field supervisor, Kim McDonald. (Secretary's brief, pp. 10-11). The Court agrees.

As field supervisor, McDonald oversaw daily operations and supervised the fluid servicing drivers (Tr. 131, 220). He also was responsible for implementing Globe's safety policies (Tr. 225, 229). Globe's safety policy requires an intermediate rail on stairways, and McDonald testified an intermediate rail is an important safety feature on a 20-foot high stairway (Tr. 228-29). Also as a part of McDonald's duties, he reviewed drivers' daily task orders, which included the driver's onsite job safety analysis checklists (Tr. 126-27; R-12).

McDonald was familiar with the process utilized by drivers for fluid servicing and had visited the Memorial Resource site on several occasions (Tr. 52-53, 221-24). When Memorial Resource became a Globe client, McDonald conducted a general review of the Memorial Resource site at issue (Tr. 227-28). Evaluating the safety of the stairway was a part of that review (Tr. 228-29). McDonald testified that during his review he primarily checked the platform and stairway for signs of rust and missing bolts. He did not, however, check for or notice the absence of an intermediate rail on the stairway (Tr. 227-28).

The Court finds that with reasonable diligence McDonald could have discovered the lack of an intermediate rail. McDonald's constructive knowledge is imputed to Globe. Constructive knowledge is established.

The Secretary contends the violation of § 1910.23(d)(1) was properly classified as serious. The evidence shows the stairway extended to a height of 20 to 25 feet providing access for employees to the platform (Tr. 99). CSHO Coler testified that injuries resulting from a fall of 15 to 25 feet could result in injuries that could cause death (Tr. 266, 295). The injuries from such a fall could also result in broken bones (Tr. 99). Broken bones or death are serious injuries. The Court finds the violation is properly classified as serious.

The Secretary has proven all elements of his prima facie case. Item 1 of the Citation is affirmed.[5]

Citation No. 1, Item 2

The Secretary cited Globe in Item 2 of the Citation for a serious violation of § 1910.37(a)(3) which is found in Part 1910, Subpart E- Exit Routes and Emergency Planning. The Citation alleges:

> 29 CFR 1910.37(a)(3): Exit routes must be free and unobstructed. Materials or equipment were be [sic] placed, either permanently or temporarily, within the exit route. Stairs or a ramp were [sic] not provided where the exit route is not substantially level:
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> The employer does not keep exit routes free and unobstructed. This violation occurred on or about August 23, 2013, at a worksite located at CR 415, Henderson, Texas 75652; where employees exiting the staircase to the salt tanks were exposed to trip and fall hazards from an earthen berm and concrete masonry units that were embedded in the exit route.

The cited standard 29 C.F.R. § 1910.37(a)(3) specifically provides:

> Exit routes must be free and unobstructed. No materials or equipment may be placed, either permanently or temporarily, within the exit route. The exit access must not go through a room that can be locked, such as a bathroom, to reach an exit or exit discharge, nor may it lead into a dead-end corridor. Stairs or a ramp must be provided where the exit route is not substantially level.

The Secretary asserts Item 2 of the Citation was appropriately issued because the exit route used by employees was obstructed by an earthen berm which was not substantially level and was embedded with concrete blocks providing additional obstructions (Secretary's brief, pp. 17-18). Globe contends the cinder blocks in the earthen berm were stairs used by employees to

[5] Although Globe alleged the affirmative defense of unforeseeable employee misconduct in its Answer, it did not brief the defense in its post-hearing brief. Therefore, the Court deems the issue abandoned. *See Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991). The briefing order issued by the Court notified the parties that failure to brief an issue would result in it being deemed abandoned (Notice of Receipt of Transcript, July 18, 2014).

cross over the earthen berm, and were not obstructions as alleged by the Secretary (Globe's brief, pp. 5-6; 8-10).

Applicability of the standard.

As set forth above, § 1910.37(a)(3) is a general industry standard under Subpart E of the standards. Subpart E provides "[s]ections 1910.34 through 1910.39 apply to workplaces in general industry except mobile workplaces such as vehicles or vessels." § 1910.34(a). The Memorial Resource worksite was not a mobile worksite in that it was not a vehicle or vessel. Coverage for exit routes is also included in Subpart E. § 1910.34(b). Because Globe's employees were engaged in work activities involving syphoning water from tanks and transporting it to the disposal sites, they were engaged in general industry work activities and not construction work (Tr. 251).

Globe argues that the earthen berm was not a part of the exit route (Respondent's brief, p. 9). An exit route as "a continuous and unobstructed path of exit travel from any point within a workplace to a place of safety (including refuge areas)." 29 C.F.R. § 1910.34(c). Concrete blocks formed a path over the earthen berm. The earthen berm was consistently used as an exit route by employees gauging the tank and also by McDonald when he evaluated the site (Tr. 65-66, 93, 224, 230, 231). The earthen berm was a part of the exit route.

The Court finds § 1910.37(a)(3) is applicable.

Violation of the terms of the Standard.

The Secretary contends because the concrete blocks in the berm were "set at differing elevations in the path of the exit route" and were not substantially level, the standard was violated (Secretary's brief, p. 17). The Secretary asserts the concrete blocks "protrud[ed] up from the berm," were placed in an "ad hoc manner," did not have "slip resistant treads" and thus, were an obstruction in the exit route (Secretary's brief, pp. 17-18).

The standard requires an exit route to be unobstructed and, if not substantially level, to either have stairs or a ramp. It is not disputed the route was not substantially level. It contained an earthen berm. The earthen berm was estimated at two to three feet in height (Tr. 25, 198). The photographs admitted into evidence indisputably show the area was not level (Exhs. C-6(a)-(d)).

The photographs of the site adduced at the hearing do not support the Secretary's allegations the concrete blocks were obstructions in the exit route. Instead, a review of the photographs reveals the concrete blocks appear to be firmly embedded in the earthen berm and

arranged in a deliberately placed stair-like manner across the earthen berm, with two or three steps on each side of the earthen berm (Exhs. C-6(a)-(d)). These photographs support Globe's assertion that the concrete blocks formed stairs and were not obstructions in the exit route. A preponderance of the evidence shows stairs were provided on the substantially unlevel exit route.

In addition to the contending the concrete blocks were obstructions, the Secretary asserts they presented tripping hazards because of the holes in the sides of the blocks; one of the blocks was broken; and because work was performed at night (Secretary's brief, pp. 17-18). Morales confirmed the blocks had been in the same condition during the two months he had serviced the Memorial Resource site (Tr. 43-44). Morales' testimony supports the inference that the concrete block may have broken during [redacted]'s fatal incident or afterwards. The record fails to support the Secretary's other allegations by a preponderance of the evidence.

In further support of his position, the Secretary argues the stairs fail to comply with Globe's policy addressing width requirements for stairs (Exh. C-15, p. 84; Secretary's brief, p. 18). Although one would like for employers to follow their company policies, that Globe allegedly did not do so, does not form the basis for a violation of the standard cited here.

A preponderance of the evidence fails to establish the standard was violated. Item 2 is vacated.

PENALTY DETERMINATION

Under § 17(j) of the Act, the Commission must 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." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

In assessing the gravity of the violation cited in Item 1 of the Citation, OSHA determined the violation to be of high severity because a fall from 25 feet could result in death. The probability was rated at greater because of the multiple times each day employees utilized the stairway to gain access to the platform (Tr. 275-276). This high severity and greater probability resulted in a gravity based penalty of $7,000.00 (Tr. 275-277). OSHA policy precludes a good faith mitigation for violations with this gravity assessment (Tr. 278). No reduction was permitted for history. Globe had an inspection history prior to the instant inspection (Tr. 278).

Globe was allowed a 30% reduction for size, however, because it had only 75 employees (Tr. 277).

The Court agrees with OSHA's penalty considerations and finds they are appropriate. Therefore, upon due consideration of the statutory factors under § 17(j) of the Act, the Court assesses a penalty of $4,900.00 for Item 1 of Citation No. 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that:

1. Item 1 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1910.23(d)(1), is AFFIRMED and a penalty in the amount of $4,900.00 is assessed;
2. Item 2 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1910.37(a)(3), is VACATED and no penalty is assessed**.**

SO ORDERED.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Date: May 5, 2015