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

SECRETARY OF LABOR, Complainant, v. DOMINO WINDOW CLEANING, INC., Respondent.	OSHRC DOCKET NO. 11-0753

Appearances:

Allison L. Bowles, Esquire, Jeffrey S. Rogoff, Esquire
U.S. Department of Labor, Office of the Solicitor, New York, New York
For the Complainant.

Mouslim Fattakhov
Domino Window Cleaning, Inc., New York, New York
For the Respondent, *pro se*.

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On October 8, 2010, the Occupational Safety and Health Administration ("OSHA") inspected a worksite of Domino Window Cleaning, Inc. ("Domino" or "Respondent"), located in New York, New York. The inspection came about after OSHA learned of an accident in which an employee of Domino was washing windows on the fourth floor of a building and fell 40 feet to the sidewalk below. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Domino that alleged a single

violation of section 5(a)(1) of the Act. Domino contested the Citation, and the hearing in this matter was held in New York, New York, on March 27 and 28, 2012.1 Both parties have filed post-hearing briefs.

Background2

Mouslim Fattakhov has operated a window washing business in New York, New York since 2001. Mr. Fattakhov incorporated his business in January 2010, and Domino's office is located at 860 West 181st Street, Apartment #23, New York, New York. On October 8, 2010, Domino was hired to clean the inside and the outside of the windows of a building located at 484 Greenwich Street, New York, New York. The building, which has six stories, has both residential and commercial space.3 At about 1:00 p.m. on October 8, 2010, Mr. Fattakhov and two employees, Igor Vnuk and Ermeck Chayahmetov, began cleaning the windows of the building.4 After cleaning the windows on the sixth and fifth floors, Mr. Fattakhov and the two employees began cleaning on the fourth floor, which was part of the residential space. The employees were working in two adjacent bedrooms divided by a wall, with Mr. Fattakhov and Mr. Chayahmetov working in one bedroom and Mr. Vnuk working in the other bedroom. The fourth-floor bedroom windows were "double-hung tilting windows," which can be tilted to the inside to facilitate their cleaning. At about 3:30 p.m., Mr. Vnuk fell while he was cleaning a window. He was not wearing any fall protection. He fell 40 feet to the sidewalk below. An

1 This case was initially designated for the Commission's simplified proceedings, but those proceedings were discontinued as this matter involved a fatality. *See* Order of May 12, 2011. Further, while Domino had an attorney representing it for about a month, Domino ended the representation on November 21, 2011, for financial reasons and because the attorney was urging Domino to settle. (Tr.196-97, 255). *See also* Order of November 23, 2011. Finally, interpreters were utilized at the hearing to ensure that Mr. Fattakhov fully understood the proceedings.

2 The background consists of (1) evidence adduced at the hearing, (2) admitted facts, as set out in the parties' joint pre-hearing statement, and (3) admissions of Domino; Dennis L. Phillips, the Administrative Law Judge previously assigned to this matter, deemed the admissions admitted in orders dated November 22, 2011 and December 13, 2011, after the Secretary filed a motion to compel due to Domino's failure to file a timely response to the Secretary's request for admissions. My order of February 22, 2012, stated that Judge Phillips' prior orders remain in effect. (Tr. 23-24, 163-64). The admissions are in Exhibit CX-1, pages 3-10, and the admitted facts are in Exhibit CX-17, pages 6-8.

3 While the building owner has an office in the building, the rest of the building is a one-family residence. (Tr. 39, 312; CX-17, No.16).

4 At the hearing, Mr. Fattakhov stated that Mr. Chayahmetov's name was spelled Yermek. (Tr. 76; *see also* CX-1). Previously, at his deposition, Mr. Fattakhov stated that Mr. Chayahmetov's name was spelled Ermeck, with an E. (CX-9, p. 81:13-15). As Ermeck Chayahmetov was the spelling used by both parties in their pre-hearing statement of admitted facts (CX-17), that is the spelling used in this decision.

individual who had seen Mr. Vnuk working from across the street called "911" to summon help. (Tr. 39, 44, 106, 111, 127; CX-1, pp. 3-5; CX-9, pp. 56, 80, 84-85, 137; CX-17, pp. 6-8; RX-14).

Shortly after the accident, New York City Police Department ("NYPD") officers arrived. Based on their report of the accident, Mr. Vnuk was washing windows on the fourth floor, possibly leaning out of the window, when he fell.5 OSHA Compliance Officer ("CO") Idalia Rosa and Assistant Area Director ("AAD") Bob Stewart arrived at the site sometime after 4:15 p.m. Mr. Vnuk had already been taken to the hospital by ambulance, but an NYPD officer was still there. The OSHA officials met with the officer, who gave them the basic facts of the accident. They next met with the building owner, who took them to the fourth floor, where Mr. Fattakhov and Mr. Chayahmetov were. The OSHA officials presented their credentials, explained why they were there, and began their inspection. They viewed the fourth-floor bedrooms and noted that each had three windows, all of which were double-hung tilting windows that were 6 feet long and 3 feet wide. Mr. Fattakhov showed the OSHA officials how he had instructed his employees to clean this type of window; he climbed up on the windowsill, raised the bottom pane, lowered the top pane, and tilted the bottom pane towards him about 30 degrees so that its top part was inside the room.6 He then showed them how he would clean the outside of the bottom pane; he angled his body and leaned his arm and shoulder out through the opening, while holding onto a squeegee with a 3 to 4-inch handle, and he held onto the top edge of the bottom pane with his other hand. The AAD told Mr. Fattakhov that what he was doing was unsafe; he was standing in front of a very large window opening without fall protection, and he could fall out the bottom of the window.7 Mr. Fattakhov stated that this was the way he had instructed his employees and that it was safe. He also stated that he suspected Mr. Vnuk had been sitting on the outside window ledge, with his back to the street and holding onto the bottom part of the window, when he fell; he believed this was so as Mr. Vnuk had worked in this manner before. On October 9, 2010, OSHA learned that Mr. Vnuk died from his injuries. (Tr. 37-63,

5 Mr. Fattakhov was the "reporter" for the NYPD report. *See* CX-13.
6 The window Mr. Vnuk fell from was the third from the left, if one is facing the front of the building. As the NYPD had shut that window and cordoned off the room, Mr. Fattakhov's demonstration of how the windows were cleaned took place in the other bedroom. (Tr. 67-69; CX-11(9)).
7 The OSHA officials asked Mr. Fattakhov to show them how the cleaning was done, but they did not ask him to get up on the windowsill; as soon as he did so, the AAD told Mr. Fattakhov that was unsafe. (Tr. 50-51, 61-62, 82).

69-70, 77-84, 98-99, 139, 193; CX-1, p. 4; CX-3, CX-7-8, CX-10, CX-11(9), CX-12, CX-13, CX-17, p. 8; RX-1(i). *See generally* RX-16).8

Jurisdiction

As the Secretary points out, because Domino did not contest jurisdiction in its answer, jurisdiction is "deemed admitted." *See* Commission Rule 34(b)(2), 29 C.F.R. 2200.34(b)(2). Further, Domino admits that it is an employer with employees and that it is a corporation with an office and place of business at 860 West 181st Street, Apartment #23, New York, New York. (CX-17, Nos. 1-5, 7-11; RX-14). Domino also admits that it is insured and licensed to do business in New York City, the District of Long Island, Connecticut, and New Jersey. (Tr. 153-54; CX-2, CX-9, p. 188). Finally, Domino admits that it buys some supplies and equipment from a company in New Jersey and has also purchased supplies on the internet. (Tr. CX-9, pp. 24-25, CX-17, No. 39). I find, therefore, that Domino is an employer under sections 3(3) and 3(5) of the Act and that the Commission has jurisdiction of the parties and subject matter of this proceeding.

The Alleged Violation

The Citation alleges a violation of section 5(a)(1) of the Act, also called the general duty clause. Section 5(a)(1) requires each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *See* 29 U.S.C. § 654(a)(1). The Citation alleges a violation as follows:9

> Location: 484 Greenwich Street, New York, N.Y., 4th floor windows. On or about 10/8/10 window cleaners were cleaning double hung tilting windows from the window sill and/or the window ledge without fall protection and were exposed to falling through the 4th story window frame openings, which measured approximately 6 ft. high by 3 ft. wide, and/or falling off the window ledge.

8 The exhibits received in evidence at the hearing were reviewed with the parties, at the close of the hearing. (Tr. 321-28). Domino's Exhibit 16 is a ten-page collection of photos from the OSHA investigative file. (RX-16; Tr. 326). Hand-numbered pages 1-8 of RX-16 were incorrectly designated by the court reporter as RX-4. These photos are received as part of RX-16. As noted in the transcript, RX-4 was not received in evidence. (RX-4; Tr. 325). Further, the court reporter inaccurately designated RX-8 as received. It was not. (RX-8; Tr. 325).

9 As issued, the Citation alleged as follows: "On or about 10/8/10 a window cleaner was cleaning a double hung tilting window from the window sill without fall protection and was exposed to falling through the 4th story window frame opening which measured 6 ft. high by 3 ft. wide." By order of September 29, 2011, Judge Phillips granted the Secretary's motion to amend her complaint to read as set out above. (Tr. 23-24).

The Secretary's Burden of Proof

To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard, (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *See, e.g., Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004) (citation omitted). The Secretary must also establish that the employer knew, or with the exercise of reasonable diligence could have known, of the hazardous condition. *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1949 (No. 07-1899, 2010) (citations omitted).

Whether a Condition or Activity in the Workplace Presented a Hazard

The Secretary contends that two conditions presented a hazard at the site. First, Domino did not prevent an employee from working on a fourth-floor window ledge outside the building without fall protection. S. Brief, p. 14. Second, Domino instructed its employees to work on fourth-floor windowsills, next to wide-open, unguarded windows, without fall protection. S. Brief. 34.

Daniel Ramirez is a doorman who works at 497 Greenwich Street, which is across the street from the subject building. He testified he was at work the afternoon of the accident, standing outside of his building, when he saw a man cleaning a window on the fourth floor of the subject building; the man was sitting and cleaning from the outside of the building, with his back to Mr. Ramirez's building, and he had no fall protection.10 Mr. Ramirez also testified he saw the man cleaning for ten to fifteen minutes and then saw him fall. Mr. Ramirez was the person who called 911. (Tr. 100-12, 124-26).

Mr. Fattakhov attempted to rebut Mr. Ramirez's testimony during cross-examination. I found this attempt unpersuasive. (Tr. 113-35). Mr. Fattakhov also offered into evidence an excerpt from CO Rosa's inspection notes, in her handwriting. (RX-15). CO Rosa spoke to Mr. Ramirez after the accident and asked him "if he saw what might have happened." (Tr. 158-62). According to CO Rosa's inspection notes, Mr. Ramirez told the CO that he did not see "how he

10 Mr. Ramirez identified CX-6(a) as a photograph of the subject building and his building; he indicated the subject building with a "star," and wrote "497" on his building. (Tr. 104-07, 136-37).

fell," he just saw something fall on the sidewalk, realized it was a person, and called 911. (RX-15). CO Rosa testified that her conversation with Mr. Ramirez that day was brief and not actually an interview. (Tr. 158). Mr. Fattakhov stated at the hearing that Mr. Ramirez "didn't see anything," and he urges in his brief that Mr. Ramirez was not a reliable witness. (Tr. 116; R. Brief, pp. 4-5). I disagree. I find Mr. Ramirez to be a candid, credible witness.

During cross-examination, Mr. Ramirez candidly admitted that he no longer recalled some of the unimportant details from the day of the accident, more than a year before his testimony, such as the clothes people wore, the types of cars parked in the street, or exactly which window the person was cleaning. (Tr. 107-11, 113-30, 237-38). That said, Mr. Ramirez impressed me as having a vivid recollection of the significant events that took place on the day of the accident. Shortly before the accident that day, he clearly recalled seeing a window cleaner at the subject building leaning outside the building, cleaning the outside of the top window, with his back toward Mr. Ramirez. He clearly recalled that the window cleaner was cleaning one of the top building windows. He clearly recalled that this window cleaner was not wearing a harness or using safety equipment. Mr. Ramirez also recalled seeing something fall, that he immediately realized was a man, and called 911. (RX-15). His testimony at the hearing that he saw the person fall does not contradict his statement to CO Rosa. (Tr. 106-30). On the day of the accident, Mr. Ramirez told CO Rosa that he did not see "how he fell." (RX-15). This is not inconsistent with his hearing testimony. Mr. Ramirez did not testify as to "how" Mr. Vnuk fell or what exactly triggered his fall.

Significantly, nothing in the record refutes Mr. Ramirez's testimony that he saw a man cleaning a fourth-floor window from the outside of the building. I observed Mr. Ramirez's demeanor on the witness stand, including his facial expressions and body language, and I found him to be sincere and credible. Mr. Ramirez also has no personal interest in the outcome of this matter, and he did not particularly want to be at the hearing. (Tr.101-02). For all of these reasons, I find that Mr. Vnuk was cleaning the fourth-floor window from the ledge outside of the building without fall protection.11 This condition was an obvious hazard, as demonstrated by the accident.

11 This finding is supported by the fact that Mr. Fattakhov himself told the OSHA officials that he suspected Mr.

The second condition the Secretary contends was a hazard was Domino's instruction to its employees to work on fourth-floor windowsills, next to wide-open, unguarded windows, without fall protection.12 S. Brief, p. 34. CO Rosa testified that Mr. Fattakhov demonstrated how he had instructed employees to clean windows like those at the worksite. He got up on the

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Vnuk had been working in this manner at the time of the accident and that Mr. Vnuk had done so before. (Tr.70). Likewise, on the day of the accident, Mr. Fattakhov reported to the NYPD that, when he fell, Mr. Vnuk was "possibly leaning out the window." (CX-13; *see also* footnote 5 above).

Further, in view of his statements to OSHA and the NYPD on the day of the accident, Mr. Fattakhov's assertion that Mr. Vnuk's fall from the window was a possible suicide is categorically rejected. Mr. Fattakhov made this assertion in his notice of contest, and he has repeated it in his answer, in his letter of April 13, 2012, discussed below, and in his post-hearing brief. (Tr. 273-75). There is no support in the record for Mr. Fattakhov's assertion, and it is noted that he first made this unsubstantiated claim months after the day of the accident. In addition, the NYPD report of the accident contains nothing to indicate a possibility of suicide. *See* CX-13.

12 On April 12, 2012, after the hearing, the Secretary's counsel ("Counsel") filed a letter with my office alleging that, unknown to Counsel, Domino changed Stipulation No. 26 contained in the parties' joint pre-hearing statement of admitted facts ("statement"), received in evidence at the hearing as CX-17. Counsel explains that before preparing the statement, she sent Mr. Fattakhov a draft list of facts she believed the parties could agree upon. As drafted, Stipulation No. 26 read: "The fourth-floor windows at 484 Greenwich Street can be cleaned safely from inside the apartment with the cleaner's feet on the floor."

Counsel notes that the parties exchanged multiple drafts of the statement before submitting it into evidence at the hearing. She notes that the drafts were sent to Mr. Fattakhov as Word documents so that he could add his list of witnesses, exhibits, and objections to the documents. Twice, Mr. Fattakhov returned the draft list of admitted facts to Counsel indicating agreement with Stipulation No. 26, as originally drafted. Counsel asserts that at some point during these exchanges, Mr. Fattakhov changed Stipulation No. 26, without advising her, by adding to the end of Stipulation No. 26 the phrase "and an interior window sill/ledge."

Exhibit CX-17 contains the revised Stipulation No. 26, including the phrase "and an interior window sill/ledge." Counsel offered CX-17 into evidence and provided the necessary copies. (Tr. 17-19, 27-29). By letter of February 27, 2012, Counsel submitted to my office the parties' pre-hearing statement, together with the Secretary's addendum to the statement, noting corrections to alleged unilateral changes Domino made to the statement before returning it to Counsel for submission to my office. No mention is made of Stipulation No. 26 in the addendum.

Counsel requests, in light of the above, that Stipulation No. 26 be stricken from the record, or, alternatively, that Domino be sanctioned by receiving into evidence the original version. Counsel contends that Domino will not be prejudiced by admitting the original version because Domino twice agreed to this version before the hearing.

On April 13, 2012, Domino filed a response to the Secretary's letter. In this response, it is unclear whether Mr. Fattakhov is agreeing that he made the change to Stipulation No. 26, as the Secretary asserts, or if he is simply stating that he agrees with Stipulation No. 26, both as originally written and as revised.

Regarding the proper remedy, it appears that Counsel could have discovered the alteration in Stipulation No. 26 before the hearing, had greater diligence been exercised. (Tr. 18-19, 27-29). That said, it appears that Domino did not specifically alert Counsel to its revision of Stipulation No. 26. Importantly, review of the record as a whole, including the parties' briefs, reveals that both parties understood that an issue remained in this case regarding whether it was safe for window cleaners to clean the fourth-four windows when standing on an "interior window sill/ledge." This question remained a point of disagreement between the parties. In other words, the record shows that the revised Stipulation No. 26 does not reflect facts upon which the parties agree.

I conclude that the appropriate remedy is to strike Stipulation No. 26 from the record. Accordingly, Stipulation No. 26 is stricken from the record. Having done so, I note that in view of Domino's admissions in this case, striking the stipulation has virtually no effect on the outcome of this matter. *See* CX-1, Nos. 8-11.

windowsill, raised the bottom pane, lowered the top pane, and tilted the top of the bottom pane towards him about 30 degrees; to clean the outside of the bottom pane, he angled his body and leaned his arm and shoulder out through the opening, while holding onto a squeegee with a 3 to 4-inch handle, and he held onto the top edge of the bottom pane with his other hand. (Tr. 50, 56-61). CO Rosa also testified that the window was 6 feet long and 3 feet wide and that the windowsill was 33.5 inches long, 11 inches deep, and about 2 feet off the floor.13 (Tr. 48-51). She said Mr. Fattakhov stood sideways on the sill, and, in raising and tilting the bottom pane, he created an opening at the bottom of the window of about 2.5 feet. (Tr. 51-52, 60). She also said the opening was large enough to fall through and that the window, which was unstable, could have tilted even further. She noted the employees were using soapy water to clean, which made slipping and falling through the opening even more likely. (Tr. 60-63, 83, 259). When the AAD told Mr. Fattakhov that what he was doing was unsafe, Mr. Fattakhov responded that this was how he had instructed his employees and that it was safe. (Tr. 61-62). At the hearing, CO Rosa identified various photographs she took at the site that showed the hazardous condition. (Tr. 55-59; CX-1, Nos. 8-11, CX-3, CX-11(9), CX-12).

CO Rosa testified that the foregoing method was the only one that Mr. Fattakhov demonstrated at the worksite. (Tr. 61, 82). Mr. Fattakhov testified as to his belief that he had demonstrated two methods, one in which he showed how the windows could be cleaned while standing on the floor and the other as CO Rosa described.14 (RX-1(i), RX-16). He admitted, however, that he could not refute CO Rosa's testimony about his demonstration as he could not recall what he had said or done at the time because he was so upset after the accident. (Tr. 213-17, 226-27). Also, Mr. Fattakhov's testimony was unclear, confusing, and contradictory as to what he showed OSHA and how the fourth-floor windows could have been cleaned.15

13 CO Rosa testified that she and the AAD measured the window and the windowsill. (Tr. 49-51).
14 Respondent offered into evidence photos, to illustrate his testimony. (Tr. 203-204; RX-1(c), 1(d)). As these photos were not taken at the subject building, on the day of the accident, and do not show double hung tilting windows, they are not helpful in resolving the issues presented and are accorded no weight.
15 Mr. Fattakhov indicated there were two techniques for cleaning the subject windows, *i.e.*, one from the floor and one from the windowsill. (Tr. 213-15, 226-27). He first indicated the windows could be cleaned from the floor. (Tr. 215). He then indicated both techniques had to be used, due to the type of windows at the site and/or the fact the building was older and the windows were more difficult to open. (Tr. 214-17, 226-27, 231). In its brief, Domino states that the windows could be cleaned by means of these two techniques. R. Brief, p. 1. As the Secretary notes, however, Domino stated in its notice of contest and in its answer that the fourth-floor windows

Regardless, because Mr. Fattakhov admitted that he could not refute the CO's testimony, her testimony will be accepted as fact. (Tr. 213-14). I find, therefore, that Mr. Fattakhov's demonstration of how he had instructed his employees to clean the subject windows was as CO Rosa described.16 I further find that this method of cleaning was unsafe, based on the CO's observing it and explaining specifically why it was unsafe. (Tr. 60-63, 142). In this regard, I note her testimony that AAD Stewart told Mr. Fattakhov that what he was doing was unsafe. (Tr. 61-62). I also note that Domino's admissions in this case establish the employees at the site cleaned the windows in the manner the CO described, which exposed them to a 40-foot fall hazard. *See* CX-1, Nos. 8-11, 17.

Based on the foregoing, the Secretary has met her burden of proving that the two conditions discussed above presented a hazard at the worksite.

Whether Domino or its Industry Recognized the Hazard

The record shows that Domino recognized the above-noted conditions as hazards. As to washing a window from the outside ledge, Mr. Fattakhov testified at his deposition that cleaning from the outside requires fall protection and that he would never sit on an outside ledge without a belt because he is "not a pigeon." (CX-9, pp. 48, 136). In addition, as the Secretary notes, the ANSI-IWCA standard 1-14.1, 2001, entitled "Window Cleaning Safety," states that:

> Fall protection … shall be provided for all work areas (with the exception of working from a ladder supported at grade or using a window cleaner's belt and window cleaner's belt anchors) that expose a worker to a fall hazard when approaching within 6 feet (1800 mm) of an unguarded edge or unguarded skylight….

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could be cleaned while standing on the floor. S. Brief, pp. 22-23. (Tr. 274-75). Further, CO Rosa, who saw how the windows worked, testified the outside of the windows could have been cleaned from the floor by using a "long pole extension device." (Tr. 66). For the reasons set out in the next footnote, the CO's testimony is credited over that of Mr. Fattakhov.

16 I observed CO Rosa's demeanor on the stand and found her a credible and convincing witness. Her testimony revealed her firm recollection of the events on the accident day, during her investigation. CO Rosa's testimony will be credited over that of Mr. Fattakhov where their testimony differs. Mr. Fattakhov admitted having a poor recollection of the events on the day of the accident. (Tr. 213-17, 226-27). Further, some of Mr. Fattakhov's contentions were unreliable, apparently created after the fact in an effort to avoid responsibility for the alleged violation. For example, Mr. Fattakhov asserted, as noted above, that Mr. Vnuk's death was a possible suicide. This assertion has no support in the record. Mr. Fattakhov also asserted that washing the windows as he demonstrated to OSHA on the day of the accident complied with a New York State Code Rule ("Rule") and that he had trained his employees in the Rule. (Tr. 259-60; R. Brief, pp. 1-2). His later testimony, however, revealed that he did not learn of the Rule until more than a year after the accident. (Tr. 262-82). These unsupported contentions color, as unreliable, the rest of Mr. Fattakhov's testimony.

CX-4, p. 13, § 3.8. As the Secretary also notes, ANSI standards are admissible and probative evidence of industry recognition of hazards, and the above ANSI-IWCA standard shows industry recognition that cleaning from an outside window ledge without fall protection is hazardous.17 *See* S. Brief, p. 18. *See generally*, *The Boeing Co*., 5 BNA OSHC 2014 (No. 12879, 1977). I agree and find that the Secretary has established that both Domino and its industry recognized the above condition as a hazard.

As to washing the subject windows in the manner Mr. Fattakhov demonstrated to the OSHA officials, CO Rosa's testimony about his demonstration is set out in detail above. The CO testified that the opening at the bottom of the window was large enough to fall through, that the window was unstable and could have tilted even further, and that employees were using soapy water to clean, which made slipping and falling through the opening even more likely. She also said that it was "very, very obvious" that what Mr. Fattakhov was doing was unsafe. (Tr. 60-63). Further, one of Domino's admissions shows that Domino recognized that cleaning the windows as Mr. Fattakhov demonstrated exposed employees to a fall hazard. (CX-1, No. 11). As the Secretary points out, the above ANSI-IWCA standard also shows industry recognition of this particular hazard. Section 5.10 of the standard, entitled "Cleaning The Exterior Surfaces of Operable Windows From Inside the Building," states as follows:

> 5.10.1 Exterior surfaces of operable windows may be cleaned from inside the building when:
> a) they can be safely accessed;
> b) all the glass surfaces can be cleaned with only one arm (the part of the body below the worker's shoulder) of the window cleaner extended beyond the outermost glass plane when his or her feet are firmly on the floor or safe working surface without the use of a ladder or other access device;
> c) the height of the sill prevents the worker from falling through the opening;
> d) the window and all its appurtenances are sound and in proper working order;
> e) the worker is protected from falling through the opening, in a manner that complies with Section 3.8 of this Standard.

17 ANSI is the American National Standards Institute, and IWCA is the International Window Cleaning Association. *See* CX-4, pp. 1-2.

CX-4, p. 25, § 5.10.1. Domino also relies on section 5.10 of this ANSI-IWCA standard. (Tr. 229-31). It is clear that Mr. Fattakhov's demonstration did not meet the provisions above.18 In particular, Mr. Fattakhov leaned his arm and shoulder out through the opening; soapy water was used to clean, making slipping on the sill and falling through the opening more likely; the height of the sill would have facilitated, not prevented, an employee from falling through the opening; and no fall protection was used. (Tr. 60-63). S. Brief, pp. 38-39.

Domino has asserted that its employees were cleaning the windows at the worksite in compliance with New York State Code Rule 21 ("Rule 21") and that Mr. Fattakhov had trained his employees in Rule 21.19 (Tr. 259-60; R. Brief, pp. 1-2). The Secretary notes that Domino's argument that it complied with Rule 21 is without merit, as compliance with an applicable state law does not create an exemption from the general duty clause. *Coleco Indus., Inc.*, 14 BNA OSHC 1961, 1967-68 (No. 84-546, 1991), citing to *Puffer's Hardware v. Donovan*, 742 F.2d 12, 16 (1st Cir. 1984). S. Brief, pp. 46-47. She also notes that Domino did not in fact comply with Rule 21. The Secretary is correct. Rule 21.5 concerns "working from safe surfaces or cleaning from the inside." Rule 21.5(c) states that "[w]hen cleaning from the inside the cleaner shall not place or extend more of his body than one arm beyond the window sash." As found above, in his demonstration, Mr. Fattakhov leaned his arm and shoulder out through the top opening. (Tr. 60). S. Brief, pp. 48-49. Rule 21.5(e) states that a cleaner "shall not work from a surface on which there is snow, ice or other slippery substance." As the CO testified, Domino's employees used soapy water to clean, making slipping on the sill and falling through the bottom opening more likely. (Tr. 61). Finally, Domino's assertion that it had trained its employees in Rule 21 is not supported by the record. It was clear from Mr. Fattakhov's testimony that he did not even know about Rule 21 until more than a year after the accident. (Tr. 262-82; *see also* footnote 16). Domino's assertions in regard to Rule 21 are rejected.

For all of the above reasons, I find that the Secretary has established that Domino and its industry recognized the hazard of cleaning windows in the manner Mr. Fattakhov demonstrated.

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18 As discussed above, CO Rosa's testimony is credited, over Mr. Fattakhov's testimony, regarding the events during the OSHA investigation on the day of the accident.

19 Mr. Fattakhov offered part of Rule 21 into evidence at the hearing. The Secretary objected, as only part of the rule was being offered. The objection was sustained, but Mr. Fattakhov was advised that judicial notice would be taken of Rule 21. (Tr. 217-24). Rule 21 is codified at N.Y.Comp. Codes R. & Reg. tit. 12 § 21.

Whether the Hazard Was Likely to Cause Death or Serious Physical Harm

The record in this case clearly shows that the cited hazards were likely to cause death or serious physical harm. Cleaning the window as Mr. Vnuk did, from the outside ledge, resulted in his falling 40 feet and sustaining fatal injuries. And cleaning from the inside windowsills, as Mr. Fattakhov and Mr. Chayahmetov apparently did, could have resulted in their falling 40 feet to the sidewalk or street below and being seriously or fatally injured. The Secretary has met her burden of proving this element of the general duty clause.

Whether Feasible and Effective Means Existed to Eliminate or Materially Reduce the Hazard

The Citation sets out three means of abatement: (1) clean the windows' exterior when the employee's feet are firmly on the floor and when the sill's height prevents a fall through the opening, and, if an extension cleaning pole is used, train the employee in the safe use of the pole; (2) if working from the floor is not practical, protect employees from falling through the opening by use of a personal fall restraint system; and (3) train and instruct all employees in all safe working procedures and proper use of safety equipment.20

I found above that the windows could have been cleaned from the floor, based on the statements of Domino in its notice of contest and answer and on the testimony of CO Rosa that the exterior of the windows could have been cleaned from the floor by using a "long pole extension device." (Tr. 66; s*ee also* footnote 15). Mr. Fattakhov testified that an extension pole does not achieve a quality cleaning and is unsafe, since the squeegee can fall out and hit a passerby below. (Tr. 232). In light of my credibility findings above, Mr. Fattakhov's testimony is not credited. In addition, section 5.1.2 of the ANSI-IWCA standard, discussed above, specifically provides for the use of extension devices. The Secretary has shown the first abatement means to be feasible.

As to the second means, CO Rosa testified that a boatswain's chair, which is like a one-person scaffold, could have been used to clean the outside of the windows. She said the person wears a harness while sitting in the chair, which is attached to a secure anchorage above. CO Rosa went up to the roof during the inspection and saw an anchorage point that could have been

20 The Citation sets out the relevant provisions of ANSI-IWCA standard 1-14.1, 2001, as to each of the three means of abatement; CX-4, as noted above, is the ANSI-IWCA standard. The CO researched the ANSI standards after the inspection and found the means of abating the cited hazards in the provisions of 1-14.1. (Tr. 63-65).

used for this purpose. The CO further testified that employees could have used safety harnesses and lifelines and worked on the windowsill by tying off to a secure anchorage point inside the building. She identified the end-posts of the steel stairs on the fourth floor as such an anchorage point. During the OSHA inspection, CO Rosa took a photograph that shows the fourth-floor stairs. (CX-19). She noted that it was a direct path with no obstructions from the stairs to the window. (Tr. 66-67, 143-44, 301-04, 307-09; CX-19). Mr. Fattakhov agreed that he had used a boatswain's chair to clean the outside of one or two windows at the site. (Tr. 252-53). He disagreed, however, that employees could have tied off inside the building. He said that while his employees have safety belts that are IWCA-approved, and while some buildings have anchor points that can be used for tying off, there were no anchor points on the subject building and there was nowhere to tie off inside. He asserted that it was "illegal" to tie off on handrails or stairs, as the CO had testified, and he indicated that tying off in that manner, which was horizontal instead of vertical, would not have protected the employees. (Tr. 232-34, 237, 303-05). *See also* R. Brief, pp. 3-4.

I find that the Secretary has shown the feasibility of the second abatement means. Mr. Fattakhov admitted that he had used a boatswain's chair to clean the outside of one or two windows at the site. (Tr. 252-53). Mr. Fattakhov's other testimony, that the employees could not tie off inside, as the CO indicated, was simply not persuasive. The CO's testimony on this point was convincing, and, based on my credibility findings, her testimony will be credited over that of Mr. Fattakhov. Also, as the Secretary notes, Domino has admitted that it "could have used fall protection when cleaning the fourth floor apartment windows" and that there were "several secure anchorage points at the building from which Domino could have tied off personal fall restraint systems." *See* CX-1, Nos. 15-16. S. Brief, p. 24. The Secretary has met her burden of establishing that the second means of abatement was feasible.

In regard to the third abatement means, it is clear that Mr. Fattakhov could have trained and instructed his employees in safe working procedures and proper use of safety equipment. That he failed to do so is illustrated in the discussion that follows, as to Domino's knowledge of the cited conditions. The Secretary has shown the feasibility of the third abatement means.

Whether Domino Knew or Could Have Known of the Cited Conditions

As the Secretary notes, an employer will be charged with knowledge of a hazard if it knew, or with the exercise of reasonable diligence could have known, of the presence of the violative condition. *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684-85 (No. 00-0315, 2001) (citations omitted). Whether an employer was reasonably diligent "involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations." *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1949 (No. 07-1899, 2010) (citation omitted). S. Brief, p. 25. I agree with the Secretary that Domino could have known that its employees were working unsafely at the site on October 8, 2010.

Based on Mr. Ramirez's testimony, Mr. Vnuk was sitting on the outside ledge and cleaning for ten to fifteen minutes before he fell. (Tr. 110). Mr. Fattakhov did not see Mr. Vnuk cleaning, as he and Mr. Vnuk were working in adjacent rooms that were separated by a wall. (Tr. 44; CX-9, pp. 84-86, 137-38, CX-17, Nos. 30, 33). Mr. Fattakhov, however, could have known of Mr. Vnuk's proclivity to work unsafely had he exercised reasonable diligence. As Domino's owner and manager, Mr. Fattakhov was in charge of the employees at the site. (CX-17, No. 7). While he gave the employees general instructions, such as what to do next, he gave them no safety instructions on that day because he had trained them when they first began working for him. He said they were "specialists" who knew "how to work and what to do when they are on the worksite."21 (Tr. 212-13; CX-9, pp. 38, 79). He also said that Mr. Vnuk had been a window cleaner for four years and knew what to do. (CX-9, p. 79). As to supervision, Mr. Fattakhov goes to worksites with his employees and works alongside them when the job requires it, but his supervision consists of monitoring the quality of their work.22 (CX-9, pp. 35-37). As to supervising their safety, Mr. Fattakhov stated that the employees are not "in kindergarten" and that they already know how to work safely. He noted he tells his employees to be "careful," and to not go outside without a belt, but he does not tell them these things every day as "they are not children, and they don't have to be told it every time." (CX-9, pp. 37-39).

21 Mr. Fattakhov did tell the employees to be "careful," to "try not to damage anything….It's a very wealthy household, so make sure that you don't break anything…." (CX-9, p. 190).
22 Mr. Fattakhov said that Mr. Vnuk was one of his first employees and that he usually had two employees working for him; however, at the time of the inspection, he had four employees. (Tr. 74, 189; CX-9, pp. 33-34).

Mr. Fattakhov believed supervision was not necessary and regularly sent employees to work sites on their own. (Tr. 190; CX-9, pp. 35-40, 100).

In regard to training, Mr. Fattakhov provided ten days of training when a new employee began working for him.[23] He showed the new hire the different types of windows, and how to open, close, and clean windows. He also went over the equipment to use, including the safety belt to be used for working outside.[24] He instructed new employees in other matters, *i.e.*, to not use cell phones or speak Russian on the worksite, to not use client phones without permission, and to not engage in inappropriate behavior like theft or drinking on the job; further, employees were not to be tardy and were to be careful with equipment. Mr. Fattakhov said that his training was verbal, that there were no written safety rules, and that prior to 2010 he did not have employees sign anything. Mr. Fattakhov explained that in September 2009, he fired Mr. Vnuk after learning he had walked on a skylight and had also sat on a window ledge to work without fall protection. He rehired Mr. Vnuk in March 2010, but he required him and his other employees to sign a statement indicating they had been trained in Domino's safety rules and that they would follow those rules and use the necessary safety equipment.[25] Mr. Fattakhov did not retrain Mr. Vnuk when he rehired him; rather, he asked Mr. Vnuk if he "remember[ed] everything," after which Mr. Vnuk said he did and signed the statement. (Tr. 70, 75, 190-94, 282-85, 292-94; CX-9, pp. 37-40, 150-52, 165-66; CX-10; CX-17, No. 36).

I do not agree with the Secretary that Mr. Fattakhov should have been aware of what Mr. Vnuk was doing on the day of the accident; this is due to the short period of time Mr. Vnuk was working outside without fall protection and the fact that Mr. Fattakhov was working in an adjacent room and could not see what Mr. Vnuk was doing. *See* S. Brief, pp. 25-28. In my view, the more significant point is that Mr. Fattakhov learned of Mr. Vnuk's unsafe work habits

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23 At the hearing, Mr. Fattakhov indicated that he trained new hires for one month, followed by another month of on-the-job training, before they could work on their own. He admitted, however, that at his deposition he stated that he provided new employees with ten days of training, after which they could begin cleaning "easy" windows. (Tr. 190, 212, 253-57; CX-9, p. 37).

24 Mr. Fattakhov indicated it was up to the employee to decide if a particular job required a belt, but he testified that wearing a belt was required for cleaning outside, in order to prevent falls. (CX-9, pp. 45-48, 135).

25 The statement, which is in English, is attached to Domino's answer. The record indicates Mr. Vnuk could not speak or read English when he first began working for Domino; but, by 2010, he could speak English. The record also indicates Mr. Fattakhov explained the statement to Mr. Vnuk in Russian. (Tr. 193, 286-95; CX-9, pp. 165-66). *See also* RX-9.

in 2009 and fired him, but then rehired him in 2010 without taking the necessary steps to ensure that Mr. Vnuk's future work for Domino was done safely. (Tr. 192-93). As set out above, all Mr. Fattakhov did when he rehired Mr. Vnuk was ask if he "remembered everything," after which he had Mr. Vnuk sign a statement indicating that he had been trained and that he would follow Domino's safety rules. Mr. Fattakhov explained the statement to Mr. Vnuk in Russian because, in all likelihood, Mr. Vnuk otherwise would not have understood the statement. Mr. Fattakhov should have retrained Mr. Vnuk in the requirement to use fall protection when working outside and he should also have told Mr. Vnuk that his rehire and continued employment were contingent upon his meeting this requirement. Further, Mr. Fattakhov should have reminded Mr. Vnuk of the fall protection requirement on a regular basis, and he also should have conducted unannounced "spot checks" of Mr. Vnuk's work to ensure he was working safely. There is no record evidence that Mr. Fattakhov did any of these things, and, for this reason, I find that Mr. Fattakhov could have been aware of Mr. Vnuk's continued unsafe work practices had he exercised reasonable diligence.26

I further find that Mr. Fattakhov's actions with respect to employee safety generally were deficient. While he trained his employees when they were first hired, he had no written safety rules and evidently never held any safety meetings to remind employees of the rules. In fact, it is not clear what the safety rules were, other than the rule to use a belt when working outside. That he occasionally told employees to "be careful" and to use fall protection when working outside was insufficient. He did not supervise his employees, other than to monitor the quality of their work. He did not make unannounced visits to sites to ensure they were working safely. When Mr. Vnuk was rehired, Mr. Fattakhov could have taken that opportunity to retrain all of his employees in relevant safety rules, with particular attention to the fall protection requirement. Mr. Fattakhov did not do so. Instead, he simply had Mr. Vnuk and his other employees sign the statement discussed above.

26 While it is unclear why Mr. Vnuk chose to work as he did on the day of the accident, an excerpt from a hearing before the Workers' Compensation Board of New York State, held on March 21, 2011, in regard to Mr. Vnuk's death, provides a possible explanation. (CX-10). Mr. Fattakhov attended the hearing. *See* CX-17, No. 37. When the judge at that hearing asked Mr. Fattakhov why Mr. Vnuk would have sat on an outside ledge without fall protection, Mr. Fattakhov replied: "To clean better and faster."

Domino's lack of specific safety instructions and its decision to leave the worksite safety evaluation to the individual employees is contrary to the intent and purpose of the Act. Responsibility for compliance with the Act's requirements remains an affirmative duty of the employer and cannot be shifted onto the individual employees. *See Ace Services*, 7 BNA OSHC 2225, 2227-28 (No. 78-0625, 1979).

Finally, I find that Mr. Fattakhov could have known that how he instructed his employees to work at the subject site, *i.e.*, by standing on the windowsills to clean, was unsafe. Mr. Fattakhov was evidently unaware of the ANSI-IWCA standard and Rule 21, discussed above, until well after the accident. As set out above, both the ANSI-IWCA standard and Rule 21 prohibited cleaning windows in the manner in which the Domino employees were performing this work at the subject site. Mr. Fattakhov was engaged in the window washing business, and he could have known of the requirements of both the ANSI-IWCA standard and Rule 21 with the exercise of reasonable diligence. Further, as the Secretary notes, Domino admitted that it recognized that cleaning the fourth-floor windows in the manner Mr. Fattakhov demonstrated to the OSHA officials exposed the employees at the site to a fall hazard. *See* CX-1, Nos. 8-11.

For all of the foregoing reasons, Domino could have known of the cited conditions with the exercise of reasonable diligence. The Secretary has met her burden of proof with respect to demonstrating all of the elements of a violation of the general duty clause. Accordingly, the violation is affirmed as a serious violation, because it is clear that a fall of 40 feet from a window to the street below could result in serious injury or death.

Other Arguments of Domino

Most of the arguments in Domino's brief have been addressed above. One that has not is Domino's assertion that because Mr. Vnuk's earlier safety infractions occurred when Mr. Vnuk worked for Mr. Fattakhov, at Domino Window Cleaning, before Domino was incorporated, these safety infractions should not be considered in this matter. R. Brief, p. 2. A 2001 Business Certificate states that Mr. Fattakhov was conducting or transacting business under the name Domino Window Cleaning. Mr. Fattakhov testified that his business was incorporated in 2010. (Tr. 188-89, 191-192; s*ee also* RX-14). Commission precedent has held that a change in an employer's legal identity does not preclude attributing the violation history of the predecessor

company to the successor company. *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1295-97 (No. 00-1401, 2010). While the circumstances in *Sharon & Walter* were different from those here, the principle espoused in *Sharon & Walter* applies equally in this case. Domino's assertion is rejected. Further, as discussed above, Mr. Fattakhov's prior work experience with Mr. Vnuk alerted Mr. Fattakhov to Mr. Vnuk's unsafe work habits.

Domino also suggests that a diagram it has included with its brief indicates that Mr. Vnuk intentionally jumped from the window and did not fall as Mr. Ramirez testified. R. Brief, pp. 4-5. I have already rejected Domino's assertion that Mr. Vnuk's death was a possible suicide, and I found that Mr. Ramirez was a believable witness, whose testimony I credit. I also advised Mr. Fattakhov at the end of the hearing that any exhibits that had not been received in evidence at the hearing could not be utilized in his arguments in his brief. (Tr. 319, 321). Therefore, the diagram attached to Domino's brief is rejected.27

Penalty Determination

The Secretary has proposed a penalty of $4,200.00 for the violation in this case. In determining an appropriate penalty, the Commission is required to give due consideration to the gravity of the violation, and to the size, history, and good faith of the employer. *See* section 17(j) of the Act. CO Rosa testified that the severity of the violation was high, in that employees were exposed to falls of 40 feet; a fall of that distance would result in serious injury or death. She also testified that because there were three employees working unsafely at the site, the probability was greater. The CO said that Domino had a total of four employees, not including Mr. Fattakhov, and that Domino was given a reduction in penalty for the company's small size. Domino had no previous history of OSHA violations, so its history had no effect on the penalty. No reduction in penalty was given for good faith because Domino had no written safety plan and the employer had instructed its employees to work in a manner that exposed them to falls of 40 feet. (Tr. 71-75). I find the proposed penalty appropriate. A penalty of $4,200.00 is assessed.

Findings of Fact and Conclusions of Law

27 Domino also attached several other documents to its post hearing brief. These documents were not received in evidence at the hearing, and they are rejected. Further, exhibits referenced in Domino's post hearing brief that were not received into evidence at the hearing, are not part of the record in this case, and have not been considered.

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

ORDER

Citation 1, Item 1, alleging a violation of section 5(a)(1) of the Act, is AFFIRMED, and a penalty of $4,200.00 is assessed.

/s/

Carol A. Baumerich
Judge, OSHRC

Dated:August 16, 2012
Washington, D.C.