UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BEAR ERECTORS, INC., Respondent.	DOCKET NO. 96-1273

Appearances: For Complainant: Luis Micheli, Esq., Office of Solicitor, U.S. Department of Labor, New York, N.Y., For Respondent: Craig A. Warner, Pro Se, Rochester, N.Y.

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). The record establishes that Respondent, Bear Erectors, Inc., at all times relevant to this action maintained a workplace at the Wesley Gardens Addition, 16 North Goodman Street, Rochester, N.Y., where it was engaged in the business of construction and steel erection.[1] Construction work affects interstate commerce because it is in a class of activity that as a whole affects commerce. Additionally, there is an interstate market in construction materials and services. *Atlanta Forming Company, Inc.*, 11 BNA OSHC 1667, 1668 (No. 80-6925, 1983). Respondent admits that it is an employer. Accordingly, Respondent is engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 6, 1996, Compliance Safety and Health Officer ("CO") Michael T. Scime drove by the subject construction site and observed from the public road what he believed were serious hazards. Upon notifying his office of his observations, he was directed to conduct an inspection (Tr. 8)[2]. As a result of this inspection, on August 9, 1996, Respondent was issued a citation alleging serious violations with a proposed total penalty in the amount of $18,000.00, amended via the Complaint to $15,000.00. By timely Notice of Contest, Respondent brought this proceeding before the Review Commission. A hearing was held before the undersigned on March 20, 1997. Both parties were given the opportunity to file a Post-Hearing Brief. Only the Complainant has filed a brief.

[1] In the Answer to Complaint, Respondent denies that it maintained at worksite at said address. However, Respondent acknowledged its employees presence in the photographs and video offered into evidence at the hearing of this matter. The photographs and video depict the subject location.

[2] The term "Tr." refers to the hearing transcript page.

Thus, this matter is ready for disposition.

BACKGROUND

The subject worksite was an adult nursing facility, which involved both demolition of the existing building and new construction of an addition. Respondent's employees were involved in the steel erection at both locations of the project (Tr. 10). Upon CO Scime's arrival at the site, he took a five minute videotape of the worksite (Tr. 9). On the day of the inspection, Respondent's employees were walking around the fifth floor level of the new addition while erecting steel beams on the sixth floor. Respondent also had employees performing demolition work - removing precast concrete panels - on the existing structure (Tr. 10). CO Scime conducted an opening conference with Respondent after having been introduced by the general contractor to Respondent's foreman, Dean Winspear. He took photographs during the course of his walkaround. Both the general contractor and Mr. Winspear informed him that the employees performing the structural steel work were Respondent's employees (Tr. 10-11). The photographs and video depict Respondent's employees engaged in steel erection activities at both locations without fall protection (Exhs. C-1 to C-7)[3]. He calculated the fall distances described within his citation. CO Scime testified that he measured from the first floor down, and the referred to the structural drawings for the additional floor measurements (Tr. 65). These drawings indicated that the overall height of the new construction portion of the worksite ranged from 59 to 69 feet (Tr. 46-47, 62, 65). The fall distance from the platform on which the demolition work was occurring ranged from 24 to 36 feet (Tr. 66, 69).

SECRETARY'S BURDEN OF PROOF

> The Secretary has the burden of proving his case by a preponderance of the evidence. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

DISCUSSION

Citation 1, Item 1a: Alleged Violation of §1926.21(b)(2)

The standard provides:

> *Employer responsibility.* (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The Secretary's Citation sets forth:

> A) Wesley Gardens Addition: Employees were not instructed in the hazards associated with the erection of structural steel and the safe operating procedures necessary to avoid those hazards.

The undersigned finds that the cited standard is applicable because employees were exposed to fall hazards while engaged in steel erection. "An employer complies with section 1926.21(b)(2)

[3] The term "Exh." refers to the Exhibits introduced into evidence at the hearing,

when it instructs employees about the hazards they may encounter on the job and the regulations applicable to those hazards." *L & M Lignos Enterprises*, 17 BNA OSHC 1066, 1067(No. 92-1746, 1995), citing *Concrete Constr. Co.,* 15 BNA OSHC 1614, 1619 (No. 89-2019, 1992). The Review Commission and Courts have held that an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware. *See Pressure Concrete Construction Co.,* 15 BNA OSHC 2011 (No. 90-2668, 1992) and cases cited therein. CO Scime testified that he recommended this violation because during the course of his inspection, he interviewed four employees of Respondent whom he had observed exposed to various fall hazards - Todd Warner, Bert Hill, Byron Walker and Phil Larkin. During his interviews, he asked them if Respondent had provided any training in the hazards associated with steel erection, or the methods to eliminate these hazards and how to comply with the OSHA requirements on fall protection (Tr. 51-52). It was his testimony that their responses and the actions he had observed indicated that Respondent had not provided any training (Tr. 52).

Mr. Craig Warner, Vice-President of Respondent presented testimony on behalf of Respondent. Mr. Warner testified that his employees were ironworkers who had worked out of the union hall and had been trained by other employers. Thus, it was his testimony that they did not need anyone to indicate to them the hazards of the job (Tr. 101). Mr. Warner also introduced into evidence at the hearing a letter dated August 25, 1996 from C.Y. Concepts, which indicated that in September 1995, "[t]hree of the five Bear Erector's employees [had] received the 10-hour OSHA Outreach Construction Course at Ironworker's 33." (Exh. R-1). The employees Phil Larkin, Todd Warner and Bert Hill had received one-hour presentations on steel erection and fall protection by OSHA 500 instructors.

Review Commission precedent establishes that the law requires this training be given all employees whether or not they are out of union halls and no matter how experienced. Furthermore, training by former employers does not fulfil this requirement. *See Supermason Enterprises Inc.*, 16 BNA OSHC 1446, 1448 (No. 92-2235, 1993); *Aqua-Stop Waterproofing & Painting Corp.*, 13 BNA OSHC 2024, 2025 (No. 87-1152, 1988). The record also establishes that the three employees whom Respondent alleges had been provided the 10-hour OSHA training, were the same employees exposed to fall hazards on June 6, 1996. Thus, their conduct certainly indicates that any training they may have received did not fulfill their employer's obligation to provide training on workplace hazards. Moreover, the record reveals that the training which Respondent alleges met the requirements of the regulation, did not include all of Respondent's employees. Of the four employees OSHA interviewed, Respondent readily admitted that he did not know if one employee, Byron Walker, had received any training by the union (Tr. 121, 123). Mr. Walker's name was not mentioned in the August 25 letter. Furthermore, the record is void of any evidence of safety meetings or tool box talks wherein Respondent carried out its obligation to instruct employees in the recognition and avoidance of unsafe conditions and the regulations applicable to their work environment. The undersigned also finds that CO Scime's testimony was credible with respect to the statements employees provided him. The record reveals that these employee statements were made at the time said employees were employed by Respondent and concerned matters within the scope of their employment. Thus, they were properly admitted into evidence within the scope of Federal Rule of Evidence 801(d)(2). The Review Commission has acknowledged that "[a]lthough admissions under Rule 801(d)(2)(D) are not inherently reliable, there are several factors that make them likely to be trustworthy, including: (1)

the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted. 4 D. Louisell & C. Mueller, *Federal Evidence* §426 (1980 & Supp. 1990)." *Regina Construction Co.,* 15 BNA OSHC 1044, 1048 (No. 87-1309, 1991). The undersigned further finds that the conduct which the compliance officer observed Respondent's employees engaged, fully supports and adds credence to his testimony regarding the employee statements regarding the lack of training. Accordingly, the Secretary has established noncompliance and exposure.

To satisfy the element of knowledge, the Complainant must prove that a cited employer either knew, or with the exercise of reasonable diligence could have known of the presence of the violative condition.[4] *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1320-1321 (No. 86-351, 1991). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corporation*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). *See also Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer's foreman can be imputed to the employer).

The undersigned finds that the record also unequivocally establishes that the foreman, Dean Winspear, was on site at the time the video was taken and at the time of the walkaround (Tr. 11, 63-64, 137). The violations which CO Scime observed were obvious and in plain view. The undersigned finds that the foreman's presence on the worksite was indicative of his knowledge of each of the cited violative conditions. Employers have been found to have constructive knowledge, where a cited condition is readily apparent to anyone who looked. *See A. L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) and cases cited therein. Furthermore, the nature of these violations was indicative of the lack of reasonable diligence which the foreman exercised over the subject worksite. Furthermore, it is evident that he did not take any measures to ensure that the employees recognized the hazards associated with steel erection or took any measures to prevent the alleged violations. His knowledge is imputed to the Respondent. Additionally, Mr. Warner's testimony about the experience and 10-hour training some of his employees had received indicates

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[4] In *Pride Oil Well Service,* 15 BNA OSHC 1809 (No. 87-692, 1992), the Review Commission set forth criteria to be considered when evaluating reasonable diligence.

> Reasonable diligence involves several factors, including an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co*., 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981) . . . Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe. (citations omitted).

Id. at 1814.

that he had constructive knowledge of the violation. His failure to implement an adequate training program for all employees was indicative of his lack of reasonable diligence. Accordingly the Complainant has established a prima facie case of a violation of the cited standard.

Citation 1, Item 1b: Alleged Violation of §1926.503(a)(1)

The standard sets forth:

> *Training Program* The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

The Secretary's Citation sets forth:

> A) Wesley Gardens Addition: Employees erecting pre-cast floor panels were exposed to falls of up to 59 feet. Employees were not trained in the hazards associated with performing leading edge work and the safe work practices necessary to avoid those hazards.

The undersigned finds that the standard is applicable because employees who were engaged in erecting precast panels were exposed to fall hazards. CO Scime testified that he observed two employees exposed to fall hazards while removing pre-cast panels. (Tr. 67; Exhibits C-2 to C-4). During his interviews, he asked these employees if they had received any training in the awareness and avoidance of fall hazards or in the development and implementation of a fall protection plan for their work. The employees informed him that they had not received such training in the awareness and avoidance of fall hazards (Tr. 55). He also testified that he asked the employees who had completed work that morning on the installation of the concrete plank on the 5th floor, if they had used any method of fall protection. He was informed that no fall protection had been used (Tr. 71). Again, Mr. Warner's assertion that his employees were aware of fall protection as a result of their experience in steel erection, is inadequate and does not met the requirements of the Act. Mr. Warner attempted to support his position with an explanation of Mr. Phil Larkin's conduct captured in the video (Exhibit C-1). He explains that in spite of his close proximity to the edge of the building - within six feet - Mr. Larkin was very deliberate about where he walked. He testified that when Mr. Larkin did come to the edge of the building, he held onto the column to reach around to signal the crane operator (Tr. 115). Mr. Warner explained that although accidents do happen, Mr. Larkin would not do anything to cause himself to fall (Tr. 116). The undersigned finds that Mr. Warner's testimony and his observations strongly support the Complainant's position that the employer provided no training on fall hazards. This testimony demonstrates that Respondent did not recognize its obligation to provide its employees training and appeared to place the burden upon the employee to make a judgement as to the use of fall protection.

The undersigned finds that CO Scime's testimony establishes noncompliance and employee exposure. As discussed *supra*, the undersigned also finds that the foreman's presence on the jobsite established knowledge of the violative condition. Accordingly the Complainant has established a prima facie case of a violation of the cited standard.

Citation 1, Item 2: Alleged Violation of §1926.105(a)

The standard sets forth:

> 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.

The Secretary's Citation sets forth:

> A) Wesley Gardens, East Side Addition. Employees erecting structural steel were exposed to falls of up to 69 feet to the exterior of the building. Fall protection was not utilized.

The undersigned finds that the standard is applicable because Respondent's employees were exposed to exterior falls up to 69 feet while engaged in steel erection. *See Peterson Brothers Steel Erection Co.*, 16 BNA OSHC 1196 (No. 90-2304, 1993), *aff'd.* 26 F. 3d. 573 (5th Cir, 1994). CO Scime testified that he observed employee, Phil Larkin performing structural steel erection work, i.e., setting and bolting-up beams, on the outside column of the building. Because he was not tied off and no other means of fall protection including nets was present, he was exposed to a fall of 69 feet to the exterior of the building (Tr. 46- 47). CO Scime based his measurement of 69 feet upon his measurement of the first floor down to the existing grade and his review of the structural drawings (Tr. 64-65). The video depicts Mr. Larkin sitting and sliding down the outside column line of the building with no means of fall protection in use, i.e. safety line or personal fall arrest system and no nets erected (Tr. 56-57). CO Scime provided unrebutted testimony that based upon his experience it would have been feasible to have utilized a Cantilever netting system or personal fall arrest system as a means of fall protection (Tr. 65).

Review Commission precedent established that "section 105(a) does not require the use of nets; it requires the use of one of the enumerated methods of fall protection, leaving nets as a last resort if none of the other methods can be used." *RGM Construction Co.*, 17 OSHC 1229,1232 (No. 91-2107, 1995). Respondent argued that while his employees were performing connecting work they could not tie off until the beams were in place and connected (Tr. 109, 113-114). However, Respondent's argument falls short of establishing why nets or any other means of protection could not have been employed. The Secretary establishes a prima facie case upon a showing that employees were exposed to a fall hazard in excess of 25 feet and none of the protective measures were utilized. *Quinlan*, 17 BNA OSHC 1194 (No. 92-0756, 1995). The Complainant presented unrebutted evidence that the employee was exposed to the hazard of an exterior fall of 69 feet during the course of steel erection. The video depicts employee exposure - an employee working near the exterior of the building without the utilization of any of the safety devices or nets. As discussed *supra,* the undersigned also finds that the foreman's presence on the jobsite established employer knowledge. Accordingly the Complainant has established a prima facie case of a violation of the cited standard.

Respondent has failed to establish either the greater hazard or infeasibility affirmative defenses to the section 1926.105(a) citation. To establish the greater hazard affirmative defense, the employer must prove that: (1) the hazards caused by complying with the standard are greater than those encountered by not complying, (2) alternative means of protecting employees were either used or were not available, and (3) application for a variance under section 6(d) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. S 655(d) would be inappropriate. *Peterson Bros.* 16 BNA OSHC at 1204. Respondent's argument that the hazards caused by complying with the standard are greater than those presented by not complying is not reached because Respondent presented no evidence to establish that alternative means of fall protection could not be safely

implemented. "Before an employer elects to ignore the requirements of a standard because it believes that compliance creates a greater hazard, the employer must explore all possible alternatives and is not limited to those methods of protection listed in the standard." *Quinlin,* 17 BNA OSHC at 1196, citing *State Sheet Metal Co*., 16 BNA OSHC 1155, 1159 (No. 90-2894. 1993). Respondent also failed to indicate why application for a variance would have been inappropriate.

An employer who raises the affirmative defense of infeasibility must prove that: (1) literal compliance with the requirements of the standard was infeasible under the circumstances and (2) either an alternative method of protection was used or no alternative means of protection was feasible. Respondent has the burden of showing that alternative forms of protection were used or that no alternative form of protection was feasible, just as it must do to prove the greater hazard affirmative defense. *Quinlin, supra.* Respondent presented no evidence that alternative forms of protection would have been infeasible and thus fails to establish the defense.

Citation 1, Item 3: Alleged Violation of §1926.501(b)(1)

The standard provides:

> *Unprotected sides and edges* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

The Secretary's Citation sets forth:

> A) East side addition: Employees working on the 4th and 5th floors are exposed to falls of 48 feet 6 inches, and 59 feet to the ground below. Guardrails, covers, or personal fall arrest systems were not utilized to protect employees from falls through the 18 foot 8 inches by 8 foot 8 inch wide stairway opening.
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> B) Demolition area. Employees were exposed to falls of 24 feet to the east side of the platform and 36 feet to the south side of the platform where employees were removing existing concrete floor panels. No fall protection was utilized.
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> C) New addition on the east side of the building: Perimeter fall protection cable was not provided on the 4th and 5th floors exposing employees to falls of 47 feet 4 inches and 59 feet from the exterior of the building to the ground below.

The undersigned finds that the standard is applicable because Respondent's employees were observed walking and working in areas with unprotected sides which were more than 6 feet above the lower level. CO Scime testified that he observed three instances of this violation during his inspection. In Instance "A", he observed Phil Larkin, who was not wearing any fall protection, walking on the fifth floor deck exposed to a fall between 48 feet and 59 feet through the adjacent 18 foot by 8 inch stairway opening. The opening was not guarded, covered or netted (Tr. 48, 66; Exh. C-1). Instance "B" is depicted in Exhibits C-2, C-3, and C-4. CO Scime observed two employees, Bert Hill and Byron Walker, working near the edge of the unprotected platform where they were involved in the removal of precast concrete planks. There no guards at the perimeter of the platform and they wore no personal protective equipment thereby exposing themselves to falls of 24 feet on one side of the unprotected platform and 36 feet on the other side of the unprotected platform (Tr. 66-69). Instance "C" is depicted in Exh. C-1, at the time Phil Larkin was at the outside edge of the building directing a crane. He wore no personal fall equipment and was exposed to a fall of 59 feet

from the unguarded edge of the floor (Tr. 70).

Mr. Warner attempted to rebut Complainant's evidence when he testified that these employees were not within 6 feet of either edge (Tr. 104). However, this testimony does not establish a legitimate defense to this standard, and tends to uncover Mr. Warner's misunderstanding of the requirements of the standard. Mr. Warner also attempted to establish that the employees in Instance "B" were prevented from falling the 36-foot distance along the long portion of the structure by the same pre-cast plank which they were removing, and that the employees were not exposed to the 24-foot fall off the short portion of the structure because there was an adjoining structure 8 to 9 feet below the short portion which prevented the fall (Tr. 103-105). However, on rebuttal CO Scime established that the structure which Mr. Warner testified was adjoining and below the short portion of the working platform was actually a separate, free-standing structure located approximately 8 feet away. This was sufficient space for an employee to fall through (Tr. 144-145). Additionally, the photographs taken by CO Scime show a ladder running through the space from the ground to the top level of the platform and one of the employees walking near the unprotected edge (Exhs. C-2 to C-4).

The undersigned finds that the violations and employee exposure were in plain view. The testimony and exhibits unequivocally establish unprotected sides or edges of walking/working surfaces in excess of 6 feet from the surface below. As discussed *supra,* the undersigned also finds that the foreman's presence on the jobsite established employer knowledge. Accordingly the Complainant has established a prima facie case of a violation of the cited standard.

Citation 1, Item 4 : Alleged Violation of §1926.501(b)(2)(i)

The standard sets forth:

> *Leading edges.* Each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

The Secretary's Citation sets forth:

> A) Building addition on the east side of the building, floors 1-5. Employees installing a pre-cast concrete floor deck are exposed to falls of 10 feet 8 inches to the next floor level. Fall protection was not utilized nor was a fall protection plan implemented.

The undersigned finds that the standard is applicable because Respondent's employees had just completed erecting pre-cast concrete panels for the 5th floor, and while performing this work they had no fall protection and were exposed to fall hazards in excess of 6 feet. CO Scime testified that during the course of his walk-around, he interviewed employees about the method of fall protection used during the recent erection of the concrete plank floor of the fourth and fifth levels (Tr. 71-72). He testified that these employees informed him that they had recently completed the 5th floor that morning and that no fall protection had been used (Tr. 71-74). Exhibit C-7 clearly depicts a ladder going up to the 5th floor and no fall protection in place. Additionally, Mr. Warner corroborated the fact that the distance between the floors was 8 to 9 feet. The employee interviews

and photographs establish a violation and employee exposure. As discussed *supra,* the undersigned also finds that the foreman's presence on the jobsite established actual and constructive employer knowledge. Accordingly, the Complainant has established a prima facie case of a violation of the cited standard.

Citation 1, Item 6[5] : Alleged Violation of §1926.750(b)(2)(i):

> The standard in pertinent part sets forth:
> Where skeleton steel erection is being done, a tightly planked and substantial floor shall be maintained within two stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed...

The Secretary's Citation sets forth:

> A) New addition on the east side of the building. Employees were exposed to falls of up to 69 feet 8 inches to the ground below through the 8 foot 8 inch by 18 foot 8 inch wide stairway opening which runs from the first through sixth floors. The opening was not planked nor were nets installed in the openings.

The undersigned finds that the cited standard is applicable because Respondent's employee was erecting structural steel and exposed to the cited fall hazard through an unguarded stairway opening. CO Scime testified that he observed an employee, Todd Warner, putting in bolts to complete a structural steel connection at the sixth level. He was working directly above the 8 foot 8 inch by 18 foot 8 inch wide stairway opening which ran from the 5th floor down to the ground level (Tr. 40-41, 44-45, 75, Exhibit C-1). This employee was not tied off and thus, exposed to an interior fall of 69 feet through this uncovered opening which was not covered, netted or protected in any way (Tr. 75). The record reveals that there was no floor within two stories or 30 feet below where Mr. Warner was working. It is also clear from the record that where floors were not present, nets had not been installed. The violation and employee exposure were in plain view and clearly shown in Exhibit C-1. As discussed *supra,* the undersigned also finds that the foreman's presence on the jobsite established actual and constructive employer knowledge. Accordingly the Complainant has established a prima facie case of a violation of the cited standard.

CLASSIFICATION OF VIOLATIONS

Section 17(k) of the Act, 29 U.S.C. § 666(k) of the Act, provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result" from the violation. In order to establish that a violation should be characterized as serious, the Secretary need not establish that an accident is likely to occur, but must show that an accident is possible and it is probable that death or serious physical harm could occur. *Flintco Inc.*, 16 BNA OSHA 1404, 1405 (No 92-1396, 1993). The Complainant appropriately classified the cited violations as serious. The record reveals that an accident was likely to occur as the result of working without fall protection. An accident was also likely to occur as a result of the failure to provide training to employees exposed to fall hazards which would have enabled them to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards. It was probable that death or serious physical harm would result from the fall hazards created by the fall distances presented by each of the instant violations.

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[5] Complainant vacated Citation 1 Item 5 and grouped the instance as Instance "C" in Item 3.

PENALTY

Pursuant to §17 (j) of the Act, 29 U.S.C. § 666(j), the Commission is authorized to assess for each violation an appropriate penalty, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. *Merchant's Masonry, Inc.*, 17 BNA OSHA 1005, 1006-07 (No. 92-424, 1994). The most significant of these factors is the gravity of the violation, which includes the number of exposed employees, the duration of exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Id.*

In considering the gravity of the cited violations CO Scime classified each with a high severity and greater probability. With respect to each violation, a finding of high severity is appropriate because the fall exposure was no less than 24 feet and up to 69 feet which would likely result in death or serious injury. The probability was appropriately assessed as greater because in each instance the employee was observed right at the point of exposure to falls. Furthermore, Mr. Warner's testimony indicated a lack of understanding of the requirements of several of the cited standards which substantially increases the likelihood of the occurrence of an accident. Accordingly, a gravity based penalty in the amount of $5,000.00 is appropriate. The gravity based penalty was appropriately adjusted for size and history. The compliance officer testified that a 30% reduction was given for Respondent's small size and an 10% reduction was given for history - the Respondent did not have any history of serious violations in the past three years (Tr. 79). The Respondent was not credited with any good faith. The Respondent alleges that it had a written safety program with a fall protection program in it. The undersigned finds that Respondent's reliance upon the union's 10 -hour OSHA course and its failure to adequately train all of its employees on fall protection demonstrates a lack of good faith to employee safety and health. Accordingly, the undersigned finds that the assessed penalty of $3,000.00 for each affirmed violation is appropriate. The undersigned finds however, that Citation Item 3 [§1926.501(b)(1)] and Item 4 [§1926.501(b)(2)(I)] involve similar violative conduct, and that abating one item would effectively abate the other.[6] Accordingly, these items are combined into a single violation for penalty purposes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

Citation 1, Item 1a , alleging a serious violation of §1926.21(b)(2) and Citation 1 Item 1b, alleging a serious violation of §1926.503(a)(1) are AFFIRMED with a grouped penalty of $3,000.00.

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[6] As noted within the standard there is a presumption that it is feasible and will not create a greater hazard to implement at least one of the three listed conventional methods of fall protection, i.e. guardrail systems, safety net systems or personal fall arrest systems. The Respondent presented no evidence that it was infeasible or created a greater hazard to use one of the three conventional methods of fall protection for its leading edge work. Thus, the three conventional methods of fall protection set forth in §§1926.501(b)(1) and .501(b)(2)(I) would be available in both Items 3 and 4.

Citation 1, Item 2, alleging a serious violation of §1926.105(a), is AFFIRMED with a penalty of $3,000.00.
Citation 1, Item 3, alleging a serious violation of §1926.501(b)(1) and Item 4 alleging a serious violation of §1926.501(b)(2)(i) are AFFIRMED with a grouped penalty of $3,000.00.
Citation 1, Item 6 alleging a serious violation of §1926.750(b)(2)(i) is AFFIRMED with a penalty of $3,000.00.
Accordingly, a penalty in the amount of $12,000.00 is assessed.

Covette Rooney
Judge, OSHRC

Dated:

Washington, D.C.