Some personal identifiers have been redacted for privacy purposes.

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. THE REYBOLD GROUP OF COMPANIES, INC., Respondent.	OSHRC Docket No. 15-0175

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For the Respondent

Before: Keith E. Bell
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 451 (the Act). The Occupational Safety and Health Administration (OSHA) conducted an inspection of a worksite located at 700 Roger Chaffee Square, Meridian Crossing (the worksite) Unit 725, Bear, Delaware on or about July 14, 2014. As a result, on January 9, 2015, OSHA issued a Citation and Notification of Penalty (Citation) to The Reybold Group of Companies, Inc. (Respondent or Reybold), alleging two violations of the Act. Citation 1, Item 1, alleges that Respondent violated 29 C.F.R. § 1926.503(a)(1) for exposing employees to a fall of greater than 11 feet without training. This violation is classified as "serious" and a penalty in the amount of $7,000 is proposed for this item. Citation 2, Item 1, alleges a violation of 29 C.F.R. § 1926.501(b)(13) because an employee was allowed to work 11 feet above ground along the leading edge of a balcony without fall protection. This violation is classified as "willful" and a penalty in the amount of $70,000 is proposed for this item. Respondent timely contested the Citation. A hearing was held on May 31 through June 1, 2016, in Philadelphia, Pennsylvania. For the reasons discussed below, Citation 1, Item 1 is AFFIRMED as issued and Citation 2, Item 1 is AFFIRMED as "serious". The proposed penalty for Citation 1, Item 1 is assessed while a modified penalty, based on a finding of "serious" rather than "willful", is assessed for Citation 2, Item 1.

Jurisdiction

The parties have stipulated to the Commission's jurisdiction over this proceeding and coverage under the Act. (Tr. 12-13). The parties have also stipulated that Reybold is a Delaware corporation. Admitted Fact No. 1. The record establishes that at all times relevant to this case,

Reybold was an "employer" engaged in a "business affecting commerce" within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). The evidence supports a finding that the Act applies and the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c).

Admitted Facts[1]

1. Respondent, The Reybold Group of Companies, Inc., is a Delaware Corporation, with its principal place of business at 116 E. Scotland Drive, Bear, Delaware 19701.

2. Respondent had a worksite at Roger Chafee Square, Meridian Crossing, Bear, Delaware 19701 (the worksite) on July 14, 2014.

3. [redacted] was a Reybold employee on July 14, 2014.

4. Reybold hired [redacted] pursuant to a cooperative arrangement with St. George's Technical High School.

5. [redacted] was issued a Delaware Department of Labor Child Labor Work Permit for Minor in order to work for Respondent.

6. [redacted] began working at the worksite on June 12, 2014.

7. Greg DaPron was Respondent's Project Manager at the worksite.

8. Lloyd Baker was Respondent's Site Superintendent at the worksite.

9. Greg DaPron was at the worksite on the morning of July 14, 2014.

10. Lloyd Baker was on a scheduled vacation and did not report to the worksite on July 14, 2014.

11. On July 14, 2014, [redacted] performed work for Respondent at the worksite.

12. On July 14, 2014, [redacted] fell from the second floor balcony of Unit 725 at the worksite.

13. The distance from the ground to the second floor balcony at Unit 725 at the worksite is 11 feet, 2 inches.

[1] In their Joint Prehearing Statement, the parties agreed to and admitted the following facts in this matter (Nos. 1-13).

The following fact was admitted by stipulation at the hearing:

14. [redacted] called to clarify that he would be working on July 14, 2014. Tr. 119-21.

The following facts were admitted by ruling at the hearing:[2]

15. The doors leading to the unguarded balconies were not shut with 2x4s on the day of [redacted]'s fall.

16. No signs were posted concerning unguarded balconies.

17. Keenan Benson stated they would always move the debris by handing it down from the third floor to the second floor.

18. Reybold Project Manager, Greg DaPron, told the OSHA Compliance Officer that the building was protected at the time of the incident when, in fact, it was not.

Background

Respondent, Reybold, is a company involved in real estate which includes construction of properties that it maintains. Reybold has been involved in construction for 34 years. Tr. 143. On July 14, 2014, Reybold had a worksite at Roger Chafee Square, Meridian Crossing located in Bear, Delaware. Admitted Fact No. 2. Meridian Crossing is a mixed development of homes, apartments, and townhomes. Tr. 337.

Reybold has a co-op program through which it hires students from St. George's Vocational and Technical School (St. George's). Tr. 53. Reybold chose to work with students from St. George's because they have training. Tr. 358. Reybold hired [redacted] pursuant to its co-op arrangement with St. George's. Admitted Fact No. 4. St. George's highly recommended [redacted] and confirmed that he had received the OSHA 10-hour training which included a

[2] At the hearing, the undersigned granted the Secretary's motion for sanctions, under Rule 52(f)(1) of the Federal Rules of Civil Procedure, related to a last-minute production of documents that were responsive to an earlier discovery request made by the Secretary. One of the sanctions requested was the admission of certain facts as established. The facts are contained in a document marked CX-20 and admitted into evidence though counsel for the Secretary only sought to have four facts listed above (15-18) as "established." Although the Secretary also sought relief in the form of an adverse inference, the undersigned finds no basis to impose such a sanction here. Tr. 313-14. Fed. R. Civ. P. 52.

segment on fall protection. Tr. 364-65.

[redacted] began working for Reybold on June 12, 2014, and was assigned to Meridian Crossing where large condominiums were being built. Admitted Fact No. 6; Tr. 57. At the time of hire, [redacted] was 17 years old and had just completed his junior year of high school at St. George's. Tr. 56, 85. During his employment with Reybold, [redacted] mainly worked in the 700 building. Tr. 57. [redacted]'s primary duties included sweeping and moving debris out of the way of the working crew. Tr. 59. Debris often accumulated on the balconies because things would get loaded onto them (plastic, empty buckets, wood shavings etc.). Tr. 61. Utility closets were also located on the balconies from which debris needed to be removed. *Id*. [redacted] put the debris into a box then disposed of it by tossing it from a balcony into the dumpster positioned in front of the balconies on the ground below. Tr. 62. [redacted] accessed the balconies every day by simply walking through an adjoining door which was usually open to keep air flowing. Tr. 63. Lloyd Baker was Reybold's Site Superintendent at Meridian Crossing and he was [redacted]'s immediate supervisor. Admitted Fact No. 8; Tr. 58.

Day of the Accident

Lloyd Baker, [redacted]'s immediate supervisor, was on scheduled vacation and did not report to the worksite on July 14, 2014 --- the day of the accident. Admitted Fact No. 10. Though it is unclear whether [redacted] was scheduled to work on the day of the accident, at some point, he called to clarify that he would be working on July 14, 2014. Tr. 119-21. During a conversation between [redacted] and Reybold's HR Manager, Collyne Figgs, she informed him that if he wanted to work on July 14th, he would need approval by a manager because his supervisor (Lloyd Baker) wouldn't be working that day. Tr. 382. Reybold Project Manager,

Mike Clineff[3] gave the approval for [redacted] to work on the day of the accident. RX-39 at 2. Mr. Clineff then called Reybold's Commercial Project Manager, Greg DaPron, on the morning of July 14th stating that [redacted] was on site and needed something to do. Tr. 389; RX-39 at 2. Mr. DaPron was surprised by this because he believed that [redacted] was scheduled to be off. *Id.* In any case, Mr. DaPron stopped by the worksite and assigned [redacted] and another employee, Keenan Benson, to clean up the third floor. Tr. 87-88, 389-90. At some point, [redacted] was standing on the second floor balcony of Unit 725 receiving trim from his work partner, Keenan Benson, who was passing it down from the third floor balcony. Admitted Fact No. 12; Tr. 92. While reaching for a piece of trim, [redacted] fell approximately 11 feet to the ground below and struck his head. Tr. 91. [redacted] was hospitalized due to injuries sustained from his fall. *Id*.

OSHA Investigation

OSHA Compliance Officer (CO), Timothy Louden received a phone call from the local police on July 14, 2014, notifying him of an accident at Meridian Crossing. Tr. 180. As a result, an investigation was initiated. *Id*. CO Louden arrived on site at Meridian Crossing in the early afternoon on the day of the accident. Tr. 181, 205. Upon arrival, he encountered Reybold employees Frank Bailey and Greg DaPron. *Id.* After receiving an update from the police on site, CO Louden conducted an investigation that included taking photos, statements, and making observations of the accident site. Tr. 182-83. Initially, CO Louden interviewed Reybold employees Frank Bailey and Greg DaPron. *Id*. During his interview, Mr. DaPron told CO Louden that the building where the accident occurred was protected at the time of the accident when, in fact, it was not. Admitted Fact No. 18. CO Louden's interview of accident victim,

[3] In the transcript (pgs. 137 & 389), this individual whose first name is Mike is referenced with the last name "Klinen" and "Kline". However, Reybold's report of the July 14, 2014, fall incident refers to him by the name Mike Clineff. RX-39 at 2.

[redacted], took place approximately a month after the accident due to injuries sustained by [redacted]. Tr. 206. CO Louden's investigation of the accident revealed that the doors leading to the unguarded balconies were not shut by 2x4s on the day of the accident. Admitted Fact No. 15. Additionally, no signs were posted concerning the unguarded balconies. Admitted Fact No. 16.

Discussion

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). A preponderance of the evidence is "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

Alleged Violations of 29 C.F.R. § 1926.503(a)(1)

Citation 1, Item 1a alleges a violation of 29 C.F.R. § 1926.503(a)(1) which states:

> *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.

Specifically, Citation 1, Item 1 alleges that on or about July 14, 2014, employees were exposed to fall of greater than 11 feet and were not trained.

Reybold does not dispute the applicability of this standard. Instead, Reybold makes two arguments in its defense: 1) that the training [redacted] received from his vocational school was sufficient for the work he was expected to do; and 2) Reybold's Safety Policies and Procedures Manual (Safety Manual) put [redacted] on notice that he was required to wear fall protection when working from certain heights. Resp't Br. 15-16. The record is clear that on July 14, 2014, [redacted] was exposed to a fall hazard. The cited standard applies.

The terms of this standard require training that covers (1) recognition of hazards of falling; and (2) training on procedures to minimize such hazards. However, the standard does not set forth specific requirements to achieve the stated goals. When the language of a training standard is general and potentially subjective, the Commission and courts have applied a reasonableness standard. That is, to establish non-compliance, the Secretary must prove that the cited employer failed to provide the instructions that a *reasonably prudent employer* would have given in the same circumstances. *El Paso Crane and Rigging Co., Inc.*, 16 BNA OSHC 1419, 1426 (No. 90-1106, 1993). (emphasis added).

Reybold's Safety Officer, Frank Bailey, testified that he didn't provide fall protection training to [redacted] because he believed the training provided by the vocational school was adequate. Tr. 507. [redacted] testified that he received OSHA 10-hour training. Tr. 118. This training was confirmed by the production of his training card. RX-21. According to [redacted], his OSHA 10-hour training was computer-based training that consisted of a slide presentation. Tr. 118. [redacted] also testified that the training covered fall protection. *Id*. He further testified that his vocational school training included information on fall protection and how to use it. Tr. 72-73, 100. It is established that Reybold's Safety Manual was provided to [redacted] who signed a form receipt thereby acknowledging his responsibility to familiarize himself with its contents.

RX-47, at 8. This Safety Policies and Procedures Manual addresses fall protection. CX-10, at 40. The evidence shows that [redacted] received some fall protection training at school and a copy of a fall protection policy and procedures statement from Reybold. However, there is no evidence that this training was adequate to prepare him to recognize the fall hazards he encountered at the worksite. For example, [redacted] testified that it was common for Reybold employees/contractors to toss debris from the balconies into the dumpsters below. Tr. 86. He also saw trim being passed from one floor to another by way of the balcony as if it was an "established method" for moving the trim. Tr. 99. Further, he testified that he didn't see anyone wearing fall protection. Most importantly, he testified that he didn't feel empowered to challenge these methods because he was so young. Tr. 96. Interestingly, Reybold's Chief Operating Officer and Executive Vice President testified that he believed co-op students, like [redacted], needed more detailed instruction. Tr. 167. Apart from the training [redacted] received from his school and the material on fall protection provided to him in Reybold's Safety Manual, he may have received further safety instructions from his immediate supervisor Lloyd Baker. However, Mr. Baker did not testify so we will never know. What we do know is that, according to [redacted], he wasn't aware of any work rule regarding balconies and no one at Reybold went over fall protection with him or proper procedures for working on balconies. Tr. 103, 110.

Frank Bailey also testified that [redacted] wasn't expected to do work in areas that would expose him to fall hazards. Tr. 460. This assertion seems incredulous in view of the fact that [redacted] was assigned to work in a multi-level building. The real question is whether a reasonably prudent employer would have relied on the training provided by [redacted]'s vocational school without offering supplemental on-site training on fall protection. Notably, at

the time of the accident, [redacted] was only 17 years old and still in high school. Tr. 56, 85. [redacted]'s age and impressionability seemingly influenced how he performed his duties based on his testimony that "…there's a lot of older guys, you know, I just did what I saw. I was just 17 at the time and young, and I was just doing what everybody else was doing at the jobsite." Tr. 85. The evidence reveals that, in the absence of proper training on fall hazards present at the worksite, [redacted] was susceptible to and likely picked up unsafe work habits from others.

Given [redacted]'s age, the fact that he was still in high school, had no practical/hands on training and was assigned to work on an active construction site where he was exposed to elevated/unguarded work platforms, it was not reasonable for Reybold to rely on the training he received from St. George's. In fact, it defies all logic that any reasonably prudent employer would have failed to give hands on training and detailed instruction to a teenager on all hazards likely to be encountered on a construction site. Even Reybold's sub-contractor, Alan Coryell, testified that despite the fact that he provided safety harnesses to his employees, he couldn't guarantee that they used them when he wasn't on site. Tr. 429. Mr. Coryell highlighted this point when he testified about a time when he was off site and received notification that one of his employees refused to wear his harness. Tr. 429. Alan Coryell's testimony further underscored the importance of fall protection training at this worksite. Reybold's arguments in defense of its failure to provide fall protection training to [redacted] are unpersuasive. The evidence supports a finding that Reybold failed to comply with the requirements of the cited standard.

Employee Exposure

The facts regarding employee exposure/access to the hazard of a fall are the same for both standards cited (training and fall protection). Therefore, the discussion of employee exposure is consolidated here.

[redacted] testified that "[he] was on balconies every day." Tr. 63. He accessed balconies using doors that were usually open. *Id*. He testified that the doors to the balconies were usually left open to keep the air flowing because it was summertime. *Id*. [redacted]'s testimony regarding balcony doors being left open is supported by the testimony of Reybold's sub-contractor, Alan Coryell, who stated that "it was next to impossible to keep them closed." Tr. 440. [redacted] also testified that no temporary railings were installed during the time when he was on site. Tr. 65-66. In fact, according to [redacted], the balconies were left unguarded until permanent railings were installed. Tr. 66. [redacted]'s account is supported by statements made to CO Louden by Reybold's Project Manager at Meridian Crossing, Greg DaPron, that temporary railings were not installed because they didn't want to damage the vinyl siding for potential homeowners. Tr. 219, 388. Photographs of the accident site taken by OSHA CO Louden reveal that the balcony from which [redacted] fell was unguarded. CX-9. The facts reveal that [redacted] accessed the balconies to toss debris into the dumpster below. Tr. 70. Further, the facts reveal that [redacted] was never provided fall protection and didn't use any. *Id*. Prior to the accident, [redacted] observed other workers moving pieces of wood trim from one floor to the other by "shimmying" the trim up or down to someone standing on another balcony who would grab it and pull it in. Tr. 78-79. On occasion, [redacted]'s supervisor, Lloyd Baker, asked him to move trim. Tr. 81, 83. There is no evidence to refute [redacted]'s claims that he was repeatedly exposed to unguarded balconies without fall protection. Employee exposure to the fall hazard is established.

Employer Knowledge

The violative conditions that resulted in alleged violations at this worksite are the same for both standards cited (training and fall protection). Therefore, the discussion of employer

knowledge is consolidated here.

Here, the facts reveal that Reybold had both actual and constructive knowledge of the violative conditions. Frank Bailey, Reybold's Safety Officer, participated in an inspection with a representative of Reybold's insurer on November 20, 2012. Tr. 136. During the inspection, they observed balconies with buckets stored on them and no guardrails. *Id*. Shortly after the inspection, on the same day, Reybold's insurer sent a letter, via email, to Frank Bailey recapping hazardous conditions observed to include unguarded balconies. CX-11. The letter suggested that balconies should either be guarded or that access should be restricted by the use of warning signs, locked doors, or temporary guardrails. *Id*. As a result of the inspection and receipt of the letter from Reybold's insurer, Frank Bailey sent an email to Messrs. Lloyd Baker (Site Superintendent), Greg DaPron (Project Manager), and Mike Clineff (Project Manager) notifying them of the fall hazard presented by the unguarded balconies. Tr. 137, CX-12. Although the insurer's inspection occurred more than a year before the accident, the record is void of any credible evidence that Reybold changed its practice of leaving balconies unguarded and accessible to employees. The collective knowledge of these Reybold managers (Bailey, Lloyd, DaPron and Clineff) concerning the hazard of falling present at this worksite is imputed to Reybold. *See, Dover Elevator Co. Inc.*, 16 BNA OSHC 1286-87 (No. 91-862, 1993) quoting *Baytown Constr. Co*., 15 BNA OSHC 1705, 1710 (No. 88–2912S, 1992), *aff'd*, 983 F.2d 282 (5th Cir. 1993) (unpublished) (holding that although the Secretary has the burden to establish employer knowledge of the violative conditions, when a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program.). Moreover, Reybold's own Safety Manual addresses

fall protection thereby acknowledging the possibility of such a hazard. CX-10 at 40. In February 2014, Reybold's Safety Committee minutes reflect that a meeting took place with the building construction management team to address supervisors' responsibility for monitoring safety on a worksite. RX-35. The implementation of such a proactive safety policy should have resulted in the discovery of violative conditions such as unguarded and accessible balconies as well as unsafe work practices such as those that led to [redacted]'s accident. According to [redacted], he has communicated with Site Superintendent Lloyd Baker while standing on a balcony. Tr. 69. [redacted] also testified that he would frequently see Mr. Baker walking around the worksite. *Id.* Inspections such as those performed by Safety Officer Frank Bailey (RX-29) should have recorded these violative conditions along with any corrective measures to be taken. The photographic and testimonial evidence of the conditions giving rise to the alleged violation establishes that they were in plain view of both managers (Baker and Lloyd) and should have been discovered if either had been following the company's safety monitoring policy. The Commission has held that an employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Constr. Inc.,* 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994).

Although Reybold claims that [redacted] was not provided fall protection training, in part, because he was not expected to do work that would require such training, this argument is without merit because [redacted] was assigned to work in a multi-level unit with unguarded balconies. Therefore, the hazard of falling was always present. It has been held that an employer "cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous working practices." *A/C Elec. v. Occupational Safety & Health Review Comm'n.*, 956 F.2d 530, 535 (6th Cir. 1991). Reybold's knowledge of the

violative conditions that led to [redacted]'s accident is established.

Serious Classification

To prove a violation was "serious" under section 17(d) of the Act, 29 U.S.C. § 666(d), the Secretary must show there was a substantial probability that death or serious physical harm could have resulted from the cited condition and that the employer knew or should have known of the condition; the likelihood of an accident occurring is not required. *Spancrete Ne., Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991). The facts reveal that [redacted] fell and hit his head. Tr. 90. As a result of the fall and injuries sustained, he was hospitalized. Tr. 91. The record is clear that Reybold had knowledge of the fall hazard. The Secretary has met his burden of proving that the violation alleged in Citation 1, Item 1 is properly classified as serious.

Alleged Violation of 29 C.F.R. § 1926.501(b)(13)

Citation 2, Item 1 alleges a violation of 29 C.F.R. § 1926.501(b)(13), which states, in pertinent part, that:

> *Residential Construction.* Each employee engaged in residential construction activities 6 feet or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system…

Specifically, the Citation 2, Item 1 alleges that on or about July 14, 2014, an employee working along the leading edge of the second floor balcony, approximately 11 feet above ground was not protected from a fall hazard.

The facts establish that Meridian Crossing was a residential construction site. Tr. 57. On July 14, 2014, [redacted] was employed by Reybold when he fell from the second floor balcony of Unit 725 at the worksite. Admitted Fact Nos. 3 & 12. The distance from the ground to the second floor balcony at Unit 725 at the worksite is 11 feet and 2 inches. Admitted Fact No. 13.

At the time of his fall, [redacted] was moving pieces of wood trim by way of a second floor balcony. Tr. 91. There was no guardrail in place on the second floor balcony where [redacted] fell. Tr. 65-66, CX-9. The cited standard applies.

The record is clear that [redacted] was exposed to a fall hazard on the day of the accident. Further, [redacted] testified that "[he] was on balconies every single day." Tr. 63. According to [redacted], his supervisor, Lloyd Baker, never told him to stay off the balconies. Tr. 64. He stated that he was frequently instructed to remove objects and debris from the balconies although he doesn't say exactly who gave these instructions. Tr. 65. [redacted] also stated that no temporary railings were installed during his time on the site and the balconies remained unguarded until permanent railings were installed. Tr. 66. [redacted]'s testimony concerning the unguarded balconies is supported by photographs taken at the worksite as part of CO Louden's investigation. CX-9. There is no evidence that the worksite was equipped with a safety net system. Finally, [redacted] was not given a personal arrest (fall protection) system and didn't use any. Tr. 70. The evidence supports a finding that Reybold violated the standard.

Unpreventable Employee Misconduct Defense

In its Answer, Reybold asserted the affirmative defense of unpreventable employee misconduct. Resp't Answr. 4. In its post-hearing brief, Reybold specifically alleges that the July 14, 2014, accident may have been caused by the misconduct of [redacted]'s immediate supervisor, Lloyd Baker.[4] Resp't Br. 29-31.

An employer may defend itself against the Secretary's allegation that it committed a violation by establishing the affirmative defense of unpreventable employee misconduct. To establish this

[4] At the hearing, counsel for the Secretary objected to Reybold's affirmative defense of unpreventable supervisory employee misconduct. The basis for the Secretary's objection is Reybold's failure to specifically assert supervisory misconduct in its answer. It is well established that pleadings before the Commission are to be liberally construed and easily amended. *Nat'l Realty and Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973).

defense, the employer is required to prove that "[it] has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered." *Pa. Power & Light Co. v. Occupational Safety & Health Review Comm'n,* 737 F.2d 350, 358 (3d Cir. 1984) (emphasis omitted) (quoting *Marson Corp.,* 10 BNA OSHC 1660, 1662 (No. 78–3491, 1982).

At the time of the accident, Reybold had a written fall protection policy set forth in its Safety Manual. Reybold's fall protection policy establishes the following fall protection protocol for its employees when working in an area that is 6 feet or more above a fixed platform or floor:

> Full body harness with "D" ring located in rear between the shoulder blades;
> An approved 6-foot lanyard with a tear away portion for relieving shock;
>
> The lanyard is to be connected to the "D" ring and the other end to a fixed point either level with or over the head of person wearing it;
>
> In times that a person has to work along a lateral surface the use of a retractable is suggested. For 100% Fall Protection use a double lanyard. Connect one in forward movement and disconnect one in rear "leap frog style." One should be connected at all times. CX-10, at 40.

Notwithstanding the existence of Reybold's fall protection policy, [redacted] testified that he didn't see anyone using fall protection when working on balconies. Tr. 86. In response to an inspection of the worksite on November 20, 2012, that revealed unguarded balconies at Meridian Crossing where the accident occurred, Reybold's Safety Officer, Frank Bailey, sent an email to Commercial Project Manager, Greg DaPron telling him that anyone accessing balcony areas had to be wearing fall protection or the balcony had to be guarded. Tr. 470. Additionally, Reybold's Safety Committee established a "tool box talk" to remind employees and supervisors about safety and accountability in construction. RX-34, 35. Greg DaPron testified that the doors were

screwed shut or barricaded by 2x4 pieces of wood to prevent access to any area where a fall hazard was present and no guardrails were installed. Tr. 413. He further testified that he didn't check to see if the doors were screwed shut on the day of the accident. Tr. 414. By contrast, [redacted] testified that he never saw a balcony door blocked by wooden pieces, screwed shut, or with warning signs posted. Tr. 109-10. Although subcontractor Alan Coryell testified that he and his crew would put a screw in the door after installation, he also stated that the screws were easily removed due to the number of people accessing the balcony areas for loading and unloading purposes. Tr. 439. Further, referencing the doors leading to the balconies, Mr. Coryell candidly stated that, "it was next to impossible to keep them closed." Tr. 440. The evidence establishes that Reybold had established work rules designed to prevent this violation; however, they were not always followed.

According to [redacted], he was given orientation by Reybold's Human Resources Manager, Collyne Figgs. Tr. 55. His orientation included going over a lot of paperwork, procedures, and manuals. *Id*. Sometime later, he met with Reybold's Safety Officer on site. *Id*. Ms. Figgs testified that when she met with [redacted], she reviewed Reybold's personnel manual along with its policies and procedures manual and provided him with a safety manual. Tr. 365. Reybold's exhibit no. 47, page 8 confirms that [redacted] received a copy of Reybold's Safety Manual. Ms. Figgs also testified that she was present when [redacted] and the other co-op students received their safety orientation. Tr. 373, 385. During the safety orientation, Reybold's Safety Officer, Frank Bailey, reviewed the Safety Manual with the students. *Id*. However, Frank Bailey testified that he did not provide fall protection training to [redacted] because he was not expected to do work where fall protection would be required. Tr. 460, 507. Although Reybold's Safety Committee discussed the implementation of "tool box talks" to reinforce workplace safety,

according to [redacted], he never had a tool box talk and didn't even know such a thing existed. Tr. 117. He further testified that no one from Reybold communicated to him proper procedures for working on balconies. Tr. 103. Lloyd Baker is the Reybold employee who would likely be able to dispute [redacted]'s claims; however, he didn't testify. Based on the foregoing, the undersigned finds that Reybold failed to adequately communicate its work rules regarding fall hazards to [redacted].

Reybold's President, Jerome Heisler, testified that Frank Bailey drove around the worksite on a regular basis and was involved in inspections of the worksite. Tr. 343. Annual inspections were conducted by Reybold's insurer. *Id*. Additionally, Frank Bailey testified that he conducted regular inspections at the worksite where the accident took place --- Meridian Crossing. Tr. 461. The last inspection he conducted at that worksite was within a week of the accident. *Id*. Reybold's exhibit no. 29, pg. 18 reflects an inspection conducted by Frank Bailey on July 2, 2014, a little more than a week prior to the accident. On page 2 of the July 2nd inspection sheet, a box was checked denoting no violations found during the inspection. RX-29 at 19. Despite his testimony concerning regular inspections and the July 2, 2014, inspection sheet, Frank Bailey also testified that he was unaware that there were unguarded balconies. Tr. 460. Frank Bailey's lack of knowledge concerning this condition of unguarded balconies in plain view undermines the trustworthiness of his inspections. Greg DaPron also testified he didn't notice whether the second floor had guardrails on the balconies. Tr. 390. Greg DaPron further testified that he never saw an employee working on a balcony without fall protection. Despite the evidence concerning inspections performed by Reybold managers, it seems that the inspections were either not frequent enough or thorough enough to reveal the dangerous work practice that led to [redacted]'s accident. In fact, the Constructive Action Report issued to Greg DaPron following

the accident states, "…it is reasonable to expect that Greg, as a Project Manager, should have recognized the potential hazard and addressed it immediately." CX-15. While the evidence shows that Reybold did take some steps to discover violations, it also reveals that those actions were inadequate.

Reybold offered no evidence of enforcement of its policies and procedures regarding fall hazards and fall protection prior to the July 14, 2014 accident. Following the accident, Greg DaPron received a written reprimand titled "Constructive Action Report Performance Counseling and Documentation" for failing to identify and address the fall hazard. CX-15. Reybold subcontractor Alan Coryell testified that he worked for Reybold for six years. Tr. 424. As a sub-contractor, he was familiar with Reybold's safety policies and procedures. Tr. 425. Mr. Coryell recounted an instance when he received a phone call telling him that an employee was on a balcony without a harness. He responded by threatening to send the employee home if he did not put on his harness. Tr. 429. Mr. Coryell also testified that he provided harnesses to all of his employees who would be working on patios/balconies and that he never saw a Reybold employee on unguarded balconies. Tr. 428. The evidence supports a finding that Reybold enforced the rules concerning fall hazards once discovered. However, the evidence doesn't conclusively show that such enforcement was effective.

Reybold's defense of unpreventable employee misconduct by Site Superintendent Lloyd Baker fails, in large part, because it didn't adequately communicate the established work rules on the use of fall protection when working on unguarded and elevated surfaces to [redacted]. Moreover, its inspections designed to uncover violations were ineffective and inadequate.

Willful Classification

Citation 2, Item 1 in this case is classified as "willful". "A willful violation is one committed

with either intentional disregard of or plain indifference to the requirements of the Act or a standard." *J.A. Jones Constr. Co*., 15 BNA OSHC 2201, 2209 (No. 87-2059, 1993).

> [I]t is not enough for the Secretary to show than an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation .... A willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference.

Hern Iron Works, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

The Secretary has not established that Reybold's violation of 29 C.F.R. § 1926.501(b)(13) was willful. Although [redacted]'s fall was unfortunate and could likely have been avoided if the balcony had been guarded, it was more the result of a confluence of factors that made for a perfect storm.

The Secretary makes compelling arguments that Reybold's knowledge of the cited standard along with the findings of an inspection conducted by its insurer in November 2012, referencing the fall hazard(s) created by the unguarded balconies put Reybold on notice and should have created a "heightened awareness" of these conditions. Sec'y Br. 21-22. However, to establish the willful characterization, the Secretary must show that, at the time of the violative act, the employer was either actually aware that the act was unlawful or "that it possessed a state of mind such that if it were informed of the standard, it would not care." *Propellex Corp*., 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999). Such is not the case here.

It is established that [redacted]'s immediate supervisor was not working on the day of the accident. As a result, the responsibility for giving him a work assignment fell on the Project Manager, Greg DaPron. Mr. DaPron wasn't at the worksite when he received notification that [redacted] showed up for work and needed an assignment. Yet, he took the time to travel to the worksite to give [redacted] and Keenan Benson a work assignment which was to clean up the

third floor unit(s). Ironically, the permanent railings for the third floor balconies where Mr. DaPron assigned [redacted] to work on the day of the accident had already been installed. Tr. 65-66, CX-9 at 1-4, 6, 8-10. Mr. DaPron testified that he had never seen [redacted] working on a balcony nor had he seen any Reybold employee working on a balcony without fall protection. Tr. 390. Also, Mr. DaPron testified that his instruction to Site Superintendent Lloyd Baker was that "all the balconies were to be protected at all times, which in this [sic] phase of the construction meant that either the doors were screwed shut or there was a two by four across the door." Tr. 408. Therefore, Mr. DaPron had no way of knowing that either [redacted] or Keenan Benson would be exposed to a fall hazard on that day. In hindsight, even Mr. DaPron conceded that, given [redacted]'s need for constant supervision, it would have been a better decision to send [redacted] home on the day of the accident. Tr. 399. Nevertheless, his failure to do so can be characterized as negligent or a lack of diligence at best. *See, Beta Constr. Co*., 16 BNA OSHC 1435, 1444 (No. 91-102, 1993) (holding that it is not enough to show that Reybold was merely careless or displayed a lack of diligence.).

In reaching the conclusion that Reybold's violation of 29 C.F.R. §1926.501(b)(13) was not willful, the undersigned also considered the company's overall attitude toward safety. The record reveals that Reybold had a full-time Safety Officer (Frank Bailey) employed at the time of the accident Tr. 127. Also, Reybold had a written safety policy on fall protection at the time of the accident which had also been provided to [redacted] prior to the accident. CX-10. Additionally, Reybold had a Safety Committee in place at the time of the accident and the Committee attempted to address issues related to workplace safety prior to the accident. Tr. 336, 356; RX-34, 35. In sum, the weight of the evidence does not support a finding of "willful". Accordingly, Citation 2, Item 1 is modified from "willful" to "serious".

Penalty Determination

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2213-14 . These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

In this case, counsel for Reybold stipulated to the proposed penalties based on the undersigned's findings regarding classification. Tr. 172, 311. Accordingly, the proposed penalty of $7,000 for Citation 1, Item 1 is undisputed. Likewise, the modified penalty of $7,000 for Citation 2, Item 1 is undisputed. This modified penalty is based on a finding that Citation 2, Item 1 is properly classified as "serious" rather than "willful" as originally classified by the Secretary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing 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 ORDERED that:

1. Citation 1, Item 1 alleging a violation of 29 C.F.R. § 1926.503(a)(1) is AFFIRMED as issued and a penalty in the amount of $7,000 is imposed.

2. Citation 2, Item 1 alleging a violation of 29 C.F.R. §1926.501(b)(13) is AFFIRMED as modified (from "willful" to "serious") and a penalty in the amount of $7,000 is imposed.

/s/Keith E. Bell
Keith E. Bell
Judge, OSHRC

Dated: April 11, 2017
Washington, D.C.