THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

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. OTIS ELEVATOR COMPANY, Respondent.	Docket No. 10-1057

APPEARANCES:

Christine T. Eskilson, Esquire, U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Paul J. Waters, Esquire, Akerman Senterfitt
Tampa, Florida
For the Respondent.

BEFORE: John H. Schumacher
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 March 19, 2010, the Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, Otis Elevator Company ("Respondent" or "Otis"). The site was located in Hartford, Connecticut, and the inspection resulted in Respondent receiving a two-item serious citation. Item 1 alleged a violation of 29 C.F.R. 1926.451(g)(1)(ii), and Item 2 alleged a violation of 29 C.F.R. 1926.451(g)(3)(i). Respondent contested the citation and

the proposed penalties. The hearing in this matter took place in Hartford, Connecticut, on January 19, 2011.[1] Both parties have filed post-hearing briefs and reply briefs.

The OSHA Inspection

Respondent, Otis Elevator Company, manufactures, installs and services elevators, escalators and moving walks. On March 19, 2010, Union Business Manager Steven Bruno filed a complaint with OSHA about the fall protection system at an Otis work site located in Hartford, Connecticut. Otis was in the process of installing a three-story elevator in a parking garage at the site. OSHA Compliance Officer ("CO") Rick Yurczyk went to the site on March 19, 2010, at about 8:30 a.m. There were no Otis employees there at the time, as the two-person crew was at the warehouse getting together materials for the job. The CO held an opening conference with the general contractor's superintendent at the site, who gave him permission to inspect Otis's work area. (Tr. 16-18, 26, 51-56, 109).

CO Yurczyk took photos of what he observed at the site. C-4 shows the elevator platform that was in place in the elevator pit, the guardrail system around the platform, and the Tirak hoisting system that would be used to raise and lower the platform. C-5 is another view of the platform that shows, on the left side, the safety device attached to the elevator's guiderail system. C-6 is a close-up of the Tirak system. C-7 depicts the elevator shaft with a section of guiderails installed on either side; two more sections of guiderails needed to be installed on each side to reach the top. C-7 also depicts the suspension system for the platform. In particular, C-7 shows the beam at the top of the shaft to which the Tirak system and the employees' safety lines were attached. C-8 shows one of the installed guiderails bolted to the wall of the elevator shaft. C-9 is the CO's photo of a diagram of the elevator shaft, and C-10 is his photo of various "Notes" pertaining to the hoist way and the safety beam at the top of the shaft.[2] (Tr. 56-64).

After the CO took his photos, the Otis crew that was doing the installation arrived. The CO learned the crew members were usually protected by the platform's guardrails

[1] On October 28, 2010, the Secretary's motion to allege, as to Item 2, a violation of 29 C.F.R. 1926.502(d)(15) in the alternative, was granted. At the beginning of the hearing, the Secretary amended the proposed penalty to $2,125.00 for each item; the original penalty for each item was $4,500.00. (Tr. 6-7).

[2] C-1 and C-2 are two photos that Mr. Bruno took at the site. C-1 shows the elevator platform and the Tirak hoisting system. C-2 shows the beam at the top of the elevator shaft to which the Tirak system and various other lines, including the employees' safety lines, were attached. Mr. Bruno's concern was that the safety lines were attached to the same anchorage point as the other lines. (Tr. 19-26).

when they were working on the platform. If the guardrails had to be removed, however, the employees would tie off their harnesses and lanyards to the safety lines attached to the overhead beam. The CO determined that this system violated OSHA's fall protection requirements. The CO believed the elevator platform with the Tirak system was a one-point or two-point suspension scaffold, which required the use of both guardrails and personal fall protection at all times. He noted the employees used either the guardrails or personal fall protection, but not both at once. He further noted that the employees could also climb up on the guardrails to reach something, at which point, if they did not tie off, they would be exposed to a fall hazard. The CO additionally believed that the safety lines being attached to the same anchorage point as the Tirak hoisting system was a hazard. He noted that OSHA requires such lines to be attached to a separate anchorage point. He also noted that the elevator shaft was about 30 feet high. (Tr. 56, 60-62, 65-70, 99).

The CO was at the site for about an hour and a half, and the Otis crew did not do any work when he was there. He also did not see the platform move, and he did not know if the employees had used it yet. After the CO had spoken to the crew members, two Otis managers arrived at the site.[3] The CO asked the managers why the safety lines were not tied off to an independent system, and he told them that he "wasn't leaving the site until they were tied to an independent line." The CO asked if there was something that would support a 5,000 pound load, and, before he left, the safety lines were tied off to columns located at the top of the elevator shaft. (Tr. 56, 66-67, 80-81, 92-93).

Jurisdiction

Respondent admits in its answer that jurisdiction of this matter is conferred upon the Commission under section 10(c) of the Act. It also admits it is a corporation with an office in East Hartford, Connecticut, and that it is engaged in manufacturing, installing and maintaining elevators. *See* Answer, ¶¶ 1, 2. The record shows that Otis has 8,000 to 9,000 employees in the United States alone. (Tr. 75). In view of the foregoing, I find that the Commission has jurisdiction of the parties and subject matter in this case.

The Secretary's Burden of Proof

[3] The two crew members were Alan Marshall, the lead elevator mechanic on the job, and Robert Dube, an apprentice. The CO did not recall the names of the managers. (Tr. 56, 66, 102-03, 129).

To prove a violation of an OSHA standard, the Secretary must show that: (1) the standard applies, (2) its terms were not met, (3) employees were exposed to the cited condition, and (4) the employer either knew of the condition or could have known of it with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Citation 1, Item 1

This item alleges a violation of 29 C.F.R. 1926.451(g)(1)(ii), which provides:

> Each employee on a single-point or two-point adjustable suspension scaffold shall be protected by both a personal fall arrest system and guardrail system.

As the Secretary states, the threshold issue in this case is whether the subject platform, which was raised and lowered by the Tirak system, was a scaffold within the meaning of the standard. The Secretary contends that the platform was a single-point suspended scaffold as it was suspended from the overhead beam by a cable. She notes that a scaffold is "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." *See* 29 C.F.R. 1926.450(b). She also notes that a suspension scaffold "means one or more platforms suspended by ropes or other non-rigid means from an overhead structure." *Id*. The Secretary points out that in the preamble to the scaffolding standard ("Preamble"), OSHA stated, in its discussion of suspended scaffolds, that guardrails would be inadequate fall protection if the suspension rope for the scaffold failed. *See* 61 Fed. Reg. 46066 (1996) ("Personal fall arrest system protection is also necessary for single-point systems, because the fall hazard related to suspension rope failure is as serious as it is with the two-point scaffold"). The Secretary further points out that although the platform was not a "false car," it had taken the place of a false car in elevator construction.[4] As OSHA stated in the Preamble, "elevator false cars fit the definition of a 'scaffold' in final rule 1926.450(b) in that they are temporary elevated work platforms used for supporting employees." *Id*. at 46028. S. Brief, pp. 5-8.

Otis contends that the Secretary's position is incorrect, based on OSHA Interpretation Letter #20071002-8005, dated March 2, 2010, relating to "Fall protection

[4] The Secretary states that "OSHA specifically discussed the use of 'false cars' in elevator construction that are equipped with safeties that ride on fixed guiderails and are operated by a hoisting rope." S. Brief, p. 6.

requirements for employees working on an elevator car frame." R. Brief, pp. 8-12. Otis has attached the letter to its post-hearing brief as "Exhibit A."[5] The question in Exhibit A relevant to this citation item is "**Question (1)**, which reads as follows:

> Scenario: employees are engaged in construction work while on a platform in an elevator hoistway. The platform sits directly on top of the elevator's car frame. The car frame moves along permanently fastened guide rails, which are the same guide rails that the finished passenger elevator will ride. There are 4 to 6 cables attached to the car frame, with the number depending on the size of the particular car frame. The cables are the permanent cables, which will be used to operate the finished passenger elevator. The other end of each cable is permanently attached to a motor/hoist, which is used to raise and lower the car. The platform that sits on the car frame is equipped with guardrails. Is the employer required to provide personal fall protection in addition to the guardrails for the employees working on the platform (while inside the guardrails)?
>
> **Answer (1):** No. Title 29 CFR part 1926, Subpart M, applies because the employees are working on a walking/working surface while exposed to a fall hazard.
>
> Subpart M, §1926.500(b) defines a "walking/working surface" as:
>
>> [A]ny surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers on which employees must be located in order to perform their job duties.
>
> Fall protection requirements for walking/working surfaces are contained within 29 CFR 1926.501(b)(1):
>
>> 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.

[5] Respondent's counsel submitted the questions in Exhibit A to OSHA on behalf of another client. (Tr. 10). Exhibit A was not admitted into evidence. Both parties, however, addressed it during the hearing, and both parties discuss it in their post-hearing briefs. S. Brief, p. 6 n.1; R. Brief, pp. 8-10. Further, the letter is an official standard interpretation letter of OSHA, and it is available on OSHA's website. Specifically, it is accessed by going to OSHA's "Home" page on its website, clicking on the "A to Z Index" at the top of the page, and clicking on "Interpretations of OSHA Standards" under "I." The interpretation letters are set out by date, and the subject letter is accessed by clicking on its date of March 2, 2010.

> Under these provisions of Subpart M, the use of only guardrails to protect the employees from falling here is permissible.

There is also a footnote at the end of the **Answer (1)** paragraph set out above. That footnote, which is footnote 1, states as follows:

> Section 1926.450(b), in Subpart L (Scaffolds), defines a scaffold as any "temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." The employees are not working on a scaffold here because the platform that they are working from is directly connected to the top of the elevator's car frame. In other words, it is not an *elevated* platform." (Emphasis added).

In view of the foregoing, it is necessary to examine the evidence of record relating to the subject platform and the elevator being installed, to determine whether the platform was a single-point suspension scaffold, as the Secretary contends, or a walking/working surface, as Otis contends. The relevant evidence is summarized below.[6]

The elevator being installed at the site was the Otis Gen2-L ("G2L") elevator. The G2L was new technology, with production units first being installed around June 2009. The G2L had several design changes from older elevator designs. First, it operated with a redesigned machine that permitted it to be mounted in the hoist way, such that a machine room was not needed on the roof. The G2L was thus a "machine room-less" or "MRL" elevator. Second, the G2L's platform was redesigned to be an integral part of the elevator's car frame. Third, the G2L's design did away with certain parts of a traditional car frame, *i.e.*, the crosshead and the side stiles. As a result, the G2L's elevator car frame included the permanent elevator platform, the permanent safety plank welded to the platform, and the permanent rail safeties. The G2L's car frame was lighter and more efficient than a traditional car frame, but it served the same purpose. (Tr. 18-19, 35-38, 105, 148-53). *See also* R-4 and R-3, diagrams of the G2L and its predecessor.

[6] This evidence is based on the testimony of Mr. Bruno, the CO, Mr. Marshall and David Riley, another Otis employee. While I found all of these witnesses credible, I found the testimony of Mr. Marshall and Mr. Riley to be particularly helpful in the resolution of this item. Mr. Marshall, an elevator mechanic, has worked in elevator construction for over 15 years. (Tr. 103). Mr. Riley, currently in product development and field support, has been in the elevator industry for over 35 years. He started out in the field but worked his way up through the ranks and held various supervisory positions. He is essentially the process owner for the installation process of Otis's Gen2-L elevator, the elevator at issue. (Tr. 144-45).

When the CO saw the platform, the Otis employees had already installed the first permanent section of guiderails in the elevator pit and had lowered the platform onto landing blocks in the pit. The platform was at the bottom of the pit and had not yet moved from that position. The platform would never be removed from the hoist way, and it was the same platform the public would use when the elevator was finished and put in service. The Otis employees had not yet ridden on the platform, but they would do so to finish the elevator construction work. In particular, they would work from the platform to install the permanent elevator guiderails, the plumb and sturdy structure on which the elevator would travel. The employees would move the platform up the hoist way to install the rest of the guiderails. Once the guiderails were installed, they were final and needed no adjustment. The CO agreed that the guardrails on the platform were a fully compliant guardrail system. (Tr. 38-39, 61, 81-82, 85, 110-12, 131-32, 148; C-4-5).

As noted above, the platform had its permanent safety plank and bottom roller guides installed. The safety plank contained the rail safeties. The safeties, when activated, would create a strong hold between the rails and the elevator safety plank and platform, locking it into the rails and preventing any further movement. When the safeties were activated, the guiderails would support the platform's entire weight. (Tr. 44-45, 83-84, 113-14, 118-19, 125, 132). Mr. Marshall testified that he would rest the platform on the safeties, with no weight on the overhead beam, when he would work in an area for an extended period or hoist an object while on the platform. He also testified, and Mr. Riley agreed, that the attachment of the platform and the safeties to the guiderails was the same at this stage as it would be in the finished elevator. (Tr. 114, 118-19, 152-53).

Besides the safety plank and the rail safeties, the elevator platform had additional protection from falling in the form of two other safety devices. The Tirak hoist itself had an internal BlocStop centrifugal safety, and there was a second, redundant BlocStop centrifugal safety that was installed on a second, separate cable that was attached to the overhead beam. The elevator platform consequently had two more safeties that protected it than the finished elevator would have; the finished elevator would rely solely on the safety plank and rail safeties. Each safety device was inspected and tested every day, before the elevator platform was used, to ensure that it was working properly. The Otis

employees used a written checklist that came with the G2L platform components for their inspections. (Tr. 41-45, 82-84, 96, 114-20, 124-25, 141-42, 147-48, 153). *See also* R-1.[7]

As indicated *supra*, the platform moved in the hoist way by means of the Tirak hoist mounted on it, which climbed on a suspension cable. The end of the suspension cable was attached to the steel beam that had been installed at the top of the hoist way. The steel beam had been manufactured to Otis's specifications by Capco Steel, an ironworking company.[8] Capco ironworkers had installed the beam before Otis ever arrived at the site, and Otis has no involvement in installing such beams. The ironworkers welded the beam to steel imbedded plates that were part of the building's precast concrete walls. The beam was thus a permanent structural part of the building and would not be removed when the elevator construction was finished. The beam was the property of the building owner. If it had had to be removed for some reason, the building owner would have been responsible for doing so.[9] (Tr. 48-49, 90-92, 107-09, 114-15, 130).

The definitions for "scaffold" and "suspension scaffold" are set out above, on page 4 of this decision. The definition for a "single-point adjustable suspension scaffold" is not included in the Secretary's post-hearing brief. Such a scaffold is:

> [A] suspension scaffold consisting of a platform suspended by one rope from an overhead support and equipped with means to permit the movement of the platform to desired work levels.

The foregoing definition does not, in my opinion, describe the G2L platform. The CO himself admitted that a typical suspension scaffold is one used for window washing or masonry work on the exterior of a building. He agreed that these scaffolds literally "hang in space" and are "not supported by rails." (Tr. 93-94). He also admitted that such scaffolds do not have safeties on them that are affixed to rails and that support the platform in case of a system failure. (Tr. 96). Otis notes that the Preamble explained the reason for both guardrails and personal fall protection on such scaffolds, as follows:

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[7] Exhibit R-1 is the checklist that Mr. Marshall and Mr. Riley referred to in their testimony. The bottom portion of the exhibit admitted at the hearing was illegible, however, and Respondent's counsel stated that he would provide a legible copy after the hearing. That copy appears in the exhibit binder behind the Exhibit R-1 that was admitted at the hearing. (Tr. 120-23, 153-54).

[8] Lou DeLoreto, Otis's senior manager of safety and health, testified that Otis's construction engineering department developed the specifications for the steel beam. (Tr. 158-59).

[9] The record indicates the beam would only be removed if there was not a clearance of 4 inches above the beam to attach a safety line. Without the necessary clearance, the beam would have to be removed before the elevator was put into service. *See* C-10, Note 2. The subject beam was never removed. (Tr. 49, 131).

> The requirement to have guardrails and personal fall arrest systems on two-point scaffolds, which carries forward language in 1926.451(i)(8) of the existing rule, is based on the fact that a guardrail system alone does not provide adequate fall protection when a suspension rope fails and causes the scaffold to tip or hang from only one end. Personal fall arrest system protection is also necessary for single-point systems, because the fall hazard related to suspension rope failure is as serious as it is with the two-point scaffold.

61 Fed. Reg. at 46066. R. Brief, p. 14.

Otis points out that the risk of the G2L platform tipping or hanging from one end simply does not exist. Mr. Marshall explained that the roller guides prevent the platform from tipping any more than a quarter of an inch left to right and that the platform would not tip or become unbalanced in any case because the guiderails keep it from doing so. (Tr. 125-26). Otis further points out that the platform would not fall if the Tirak suspension cable were to fail. As Mr. Marshall testified, there was an internal BlocStop in the Tirak system that would grab onto the cable to stop the platform. If that BlocStop failed, the secondary BlocStop would grab onto a second cable, which would also stop the platform. If the secondary BlocStop failed, the third BlocStop would grab a third cable and pull up on an activating arm that would lock the elevator safeties into the rails.[10] The weight of the platform would then be resting on the rails. (Tr. 114-16, 125). In light of this evidence, I find that the Secretary's assertion that the G2L platform is a single-point suspension scaffold is not supported by the record.

The Secretary also asserts, as set out *supra*, that the G2L platform, while not a false car, has taken the place of false cars in elevator construction. She notes that R-1, the G2L checklist that Mr. Marshall and Mr. Riley referred to, states, in the section entitled "Check the Secondary Automatic BlocStop," as follows:

> If the automatic BlocStop is working properly, the hoist rope will become slack and the weight of the *false car* will be transferred to the automatic BlocStop. (Emphasis added).

Mr. Marshall, however, testified that a false car is a temporary platform that is used to run up and down the hoist way to perform the necessary work without having to have the permanent elevator car sling and permanent platform in the hoist way. He also

[10] Mr. Marshall viewed C-2 to identify the lines and cables he was referring to. (Tr. 114-16).

testified that the false car is later removed, while the G2L platform is never removed, and that a false car does not have the same capacity as the G2L platform. Mr. Marshall said that he had installed false cars before and that they are "not meant to go lock into the rails on safeties at any kind of major speed with any major weight." (Tr. 133-34).

I have considered the use of the term "false car" in R-1 and the Secretary's suggestion that the G2L platform, while not a false car, is substantially similar. I conclude, however, that the use of the term "false car" in R-1 was more than likely simply a mistake made when Otis utilized a previous checklist to develop the current checklist for the G2L platform. That this is so is supported by the fact that the section in R-1 following the section indicated above has a sentence that reads as follows:

> If the safeties are working properly, the hoist rope and motor will become slack and the weight of the *G2L running platform* will be transferred to the safeties. (Emphasis added).

I have also considered the Secretary's statement, set out in footnote 4 above, that in the Preamble, "OSHA specifically discussed the use of false cars in elevator construction that are equipped with safeties that ride on fixed guiderails and are operated by a hoisting rope." S. Brief, p. 6. *See also* 61 Fed. Reg. 46028. I have reviewed this part of the Preamble, and it does in fact address false cars. In particular, an individual from the elevator industry submitted a comment suggesting that false cars be excluded from the requirements of Subpart L. The comment stated that "An elevator false car operates on fixed guiderails … equipped with safeties that ride on the guiderails … and are operated automatically by the slackening of the hoisting rope." *Id*. OSHA rejected the proposal and concluded that false cars fit the definition of "scaffold" in the final rule. *Id*. This discussion does indicate some similarities between a false car and the G2L platform. Regardless, I conclude that the discussion contains insufficient information to make a finding that a false car is substantially similar to the G2L platform, such that the cited standard applies to that platform. In this regard, I note the above testimony of Mr. Marshall about false cars. I observed Mr. Marshall's demeanor on the stand, and I found him to be a sincere, convincing and knowledgeable witness. I find, therefore, that a false car does not have the same capacity as the G2L platform and that a false car is not intended to lock into the rails on safeties at any significant speed with any significant weight. (Tr. 133-34). Based on this finding, and the other evidence of record, I conclude

that the Secretary has not met her burden of proving that the G2L platform was a "scaffold," such that the cited standard applies in this case.

The Secretary's position that the cited standard applies is also undermined by Exhibit A, the OSHA interpretation letter discussed above. In comparing the evidence of record to Exhibit A, there are certain differences between the G2L platform and the platform described in Exhibit A. For example, the G2L platform is permanently attached to the bottom of the car frame, while the temporary platform in Exhibit A sits on top of the frame. Also, the G2L's Tirak suspension cable is temporary, and the cables noted in Exhibit A are permanent. On the other hand, Exhibit A describes the car frame as moving "along permanently fastened guide rails, which are the same guide rails that the finished passenger elevator will ride." *See* **Question (1)**, set out *supra*. In addition, footnote 1, set out at the end of **Answer (1)**, states: "The employees are not working on a scaffold here because the platform that they are working from is directly connected to the top of the elevator's car fame. In other words, it is not an "*elevated* platform." Upon careful consideration of the entirety of Exhibit A and the evidence of record as to the G2L platform, I agree with Otis that Exhibit A supports a conclusion that the G2L platform is not an elevated platform and is thus not covered by the cited standard.[11]

Because the Secretary has not demonstrated the applicability of the cited standard, Item 1 of Citation 1 is hereby vacated.

Citation 1, Item 2

This item alleges a violation of 29 C.F.R. 1926.451(g)(3)(i), which states:

> When vertical lifelines are used, they shall be fastened to a fixed safe point of anchorage, shall be independent of the scaffold, and shall be protected from sharp edges and abrasion. Safe points of anchorage include structural members of buildings, but do not include standpipes, vents, other piping systems, electrical conduit, outrigger beams, or counterweights.

In Item 1, *supra*, I found that the Secretary had not proved that the G2L platform was a scaffold. In view of that finding, the standard cited in Item 2 does not apply to the platform. The alleged violation of 29 C.F.R. 1926.451(g)(3)(i) is therefore vacated.

[11] I also agree with Otis that, even if the G2L platform is a scaffold, it is a scaffold "not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section," such that employees may be protected by either a personal fall protection system or a guardrail system. *See* 29 C.F.R. 1926.451(g)(1)(vii).

This item also alleges, in the alternative, a violation of 29 C.F.R. 1926.502(d)(15). That standard states as follows:

> Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 KN) per employee attached, or shall be designed, installed, and used as follows: (i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and (ii) under the supervision of a qualified person.

The record in this case demonstrates that the steel beam installed at the top of the elevator shaft had a number of lines or cables connected to it. These included two safety lines (one for each employee on the crew), two lines for hoisting equipment, the cable for the Tirak system (including the first BlocStop), and two more cables for the second and third BlocStops. (Tr. 21-24, 114-16; C-2, C-7). The Secretary contends that the standard required the employee safety lines to be attached to anchorage points that were independent of the steel beam that was used to support or suspend the G2L platform. S. Brief, pp. 9-11. Otis contends that because all of the equipment was attached to different locations on the steel beam, which constituted different points of anchorage, it was not in violation of the standard. R. Brief, pp. 25-27. Both parties rely on Exhibit A, the OSHA interpretation letter discussed in Item 1, in support of their respective positions.

I have fully considered all of Otis's arguments in defense of this item. I agree with the Secretary, however, and I find that Exhibit A supports her position and not that of Respondent. The relevant part of Exhibit A is **Question (2)**, which reads as follows:

> When employees are working on the same platform as described in question 1 but are working outside the protection of the guardrails, are they required to tie off to an anchorage point other than the cables that are supporting the elevator car frame?
>
> **Answer (1):** Section 1926.502(d)(15) prohibits tying off to the cables used to support the elevator car frame….[12]
>
> Under this provision, the employees must be tied off to an anchorage point that is independent of the cables used to support the platform. This requirement ensures that the strength of the lifeline preventing an employee's fall is not compromised by its simultaneous use for another load-bearing purpose.

[12] Answer 1 goes on to quote the cited standard in its entirety.

Following the word "purpose" is a footnote (footnote 2), which states that:

> Your letter suggests that tying off to the elevator car frame's cables is sufficient here because the fall protection system as a whole would exceed the minimum safety factor of two required by section 1926.502(d)(15)(i). Even if the fall protection system satisfies section 1926.502(d)(15)(i)'s minimum safety factor requirement, it violates an essential element of section 1926.502(d)(15), which prohibits employees from tying off to the same anchorage point that supports the platform.

In support of its position, Otis notes that Mr. DeLoreto, Otis's senior manager of safety and health, testified that Otis's construction engineering department developed the steel beam's specifications and that the beam's safety factor exceeded two to one. (Tr. 158-59). Otis also notes the CO's testimony that the beam, once installed, was part of the building's structure. (Tr. 92). Finally, it notes the testimony of Mr. Bruno that he knew of no failures of such beams in Otis elevator construction projects and Mr. Marshall that he felt "pretty comfortable" working on the platform. (Tr. 49, 129). Despite this evidence, however, the plain language of the cited standard, together with footnote 2 of Exhibit A, demonstrates that Otis was in violation of the standard because it did not require the employees to tie of to an anchorage point that was independent of the steel beam.[13]

Otis also argues that there was no violation of the standard as there was no actual or potential exposure to any fall hazard while the alleged violative condition existed. R. Brief, pp. 6-7. The record shows that when the CO conducted his inspection, the platform had not yet moved from its position at the bottom of the hoist way and the employees had not yet ridden on the platform. (Tr. 110-11, 130-31). The record also shows that, at the CO's insistence, the safety lines were moved from the overhead beam to columns at the top of the hoist way. (Tr. 66-67, 93). As the Secretary points out, however, in the normal course of installing the G2L elevator, Otis employees attach their lifelines to the same overhead beam to which the Tirak hoisting system is attached. (Tr. 105-06). *See also* R-2, which, on page 3 of "Phase 9," states: "1. Install the Tirak 2 to 1sheave and hoist cable at the center of the overhead safety beam." I agree with the Secretary that Otis's operating procedures for the G2L elevator clearly contemplate that the overhead beam in the shaft

[13] As stated above, the alleged violation of 29 C.F.R. 1926.451(g)(3)(i) was vacated because of the Secretary's failure to prove that the G2L platform was a scaffold. Even if the platform was a scaffold, and section 1926.451(g)(3)(i) did apply, I would find that Otis violated that standard, despite Otis's arguments to the contrary, for essentially the same reasons given as to the violation of 29 C.F.R. 1926.502(d)(15).

is the anchorage point to be used for both the Tirak system and the employee lifelines. Accordingly, "it is reasonably predictable either by operational necessity or otherwise … that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prod.*, 18 BNA 1072, 1074 (No. 93-1853, 1997) (citations omitted).

As the Secretary also points out, this case did not involve a situation such as OSHA intervening before employees entered an unprotected trench or before employees went up on a roof without any fall protection. And, the record shows that the abatement the CO secured was agreed to only to assuage OSHA's concerns at the subject site and that Otis intended to continue constructing the G2L elevator in the same manner as described in the record. In this regard, Mr. Bruno testified that an Otis supervisor questioned the employees about why they were using a different support beam for their safety lines. (Tr. 29-30). And, while Mr. Marshall indicated that he had not needed to tie off to his safety line to do his work at the site, it is clear from the record that tying off is contemplated for the construction of the G2L elevator. (Tr. 136-37). I find that the Secretary has shown the element of employee exposure to the cited hazard.

Based on the above, Otis was in violation of the cited standard. This item is affirmed as serious, due to the potential for falls and serious injuries. (Tr. 73-74). The proposed penalty of $2,125.00 is found appropriate. The CO testified that the severity of this item was high and that the probability was lesser. No reduction for size was given, but a reduction for history was given. (Tr. 74-76). The proposed penalty is assessed.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered that:

1. Citation 1, Items 1 and 2, alleging violations of 29 C.F.R. 1926.451(g)(1)(ii) and 29 C.F.R. 1926.451(g)(3)(i), respectively, are vacated.

2. Citation 1, Item 2, alleging a violation of 29 C.F.R. 1926.502(d)(15) in the alternative, is affirmed, and a penalty of $2,125.00 is assessed.

___/s/_____
JOHN H. SCHUMACHER
Judge, OSHRC

Dated: 6 May 2011
Washington, D.C.