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.	:	OSHRC DOCKET NOS. 02-2021
	:	& 02-2022
INTERSTATE INDUSTRIAL CORP.,	:	
	:	
Respondent.	:	

Appearances:

Esther D. Curtwright, Esquire	Joseph P. Paranac, Jr., Esquire
U.S. Department of Labor	St. John & Wayne, L.L.C.
New York, New York	Newark, New Jersey
For the Complainant.	For the Respondent.

Before: Chief Judge Irving Sommer

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. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's workplace in Newark, New Jersey from March 26, 2002 through September 24, 2002. As a result, Respondent was issued one Citation and Notification of Penalty ("Citation") alleging a willful violation of 29 C.F.R. 1910.1200(h)(1) and an "other" violation of 29 C.F.R. 1910.134(c)(2)(i); Respondent was issued a further Citation alleging serious violations of 29 C.F.R. 1926.404(f)(6), 29 C.F.R. 1926.501(b)(1), and 29 C.F.R. 1926.501(b)(3).[1] Respondent contested all of the alleged violations, and these two matters were consolidated for hearing. The hearing in these two cases was held in New York, New York on June 12 and 13, 2003, and on October 14 and 15, 2003. Both parties have submitted post-hearing briefs.

[1]No. 02-2021 relates to the first Citation, while No. 02-2022 relates to the second.

Background

The subject site was a construction project involving the building of a new jail for Essex County on Doremus Avenue in Newark, New Jersey. The site consisted of 24 acres, and the structure itself consisted of three housing units, each four stories high, and an administrative building, which went from three to five stories; the four buildings were set out in a cloverleaf design.[2] Essex County Improvement Authority contracted with Gilbane Building Company ("Gilbane") to serve as the site manager for the project, and Edward Squibb was Gilbane's senior project safety manager at the site during 2001 and 2002; his job was to audit the performance of the contractors at the site for compliance with the project safety plan. Interstate Industrial Corp. ("Interstate") was one of 12 prime contractors at the site, and its main job was the casting and placement of concrete; Edward Cohen was Interstate's safety officer at the site during 2001 and 2002, and he was responsible for administering Interstate's safety plan, conducting safety orientations, performing safety audits, and providing safety training for employees.[3] Interstate hired J.W. Rufolo & Associates ("Rufolo"), a consulting firm, to monitor its compliance with safety requirements. Gary Solecki was Rufolo's representative at the subject site during the latter half of 2001 and all of 2002; his job was to correct safety deficiencies, conduct safety training, hold tool box safety talks, and attend safety meetings held by Gilbane. (Tr. 10-11; 59; 97-99; 246-50; 311-13; 371-74; 378-79).

No. 02-2021 - Willful Citation 1 - Item 1

This item alleges a violation of 29 C.F.R. 1910.1200(h)(1), which is part of OSHA's hazard communication ("HAZCOM") standard. The cited standard provides as follows:

> Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (*e.g.*, flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and materials safety data sheets.

[2]The project began in 1998 and was ongoing at the time of the hearing. (Tr. 249-50).

[3]When Cohen began work at the site in May 2000, he was a site superintendent. (Tr. 372).

OSHA Compliance Officer ("CO") Sean Dinburg testified that he went to the site on April 22, 2002, to do air sampling of another company's work area.[4] He and Edward Squibb were en route to that area when they heard a loud noise. The CO and Squibb entered the building that was the source of the noise and saw two workers using an air gun to chip away at a concrete wall. The CO then spoke with two representatives of Interstate, Edward Cohen and Gary Solecki, who were about 30 feet away from the workers. The CO held an opening conference with Cohen and Solecki and obtained permission to talk to the workers, who, he learned, were George Placencia and Daniel Lynch; as he approached them, the CO noted that both workers were wearing respirators, safety glasses, safety helmets, earplugs and gloves. The CO explained to the workers that he was concerned about the silica dust and the respirators, and he asked if they had had hazard communication training, if they were aware of the health effects of silica, and if they were required to wear the respirators. Both workers said "no" to the first two questions; however, as to the respirators, the workers said they were told they needed to wear them and that they were also told the dust was bad for them. The CO conducted air sampling and watched the employees work for about 4.5 hours; his sampling showed silica levels to be under the permissible exposure level ("PEL"). The CO also examined the respirators, which he found to be N–95 respirators; the workers said they had gotten the respirators out of the gang box.[5] (Tr. 134-43; 147; 169; 178-82; 191-93; 213; 476-80).

After his sampling, CO Dinburg spoke to Cohen, who told him the employees had been doing the same work for four days.[6] The CO asked Cohen if Interstate had a HAZCOM program and if employees were given HAZCOM and silica training; the CO also asked about respirators. Cohen said that Interstate had a HAZCOM program and that training had been done; however, when the CO

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[4]The record shows the CO went to the site due to a report of silica exposure at the project. The record also shows that OSHA's inspection of the project had begun earlier that year after a fatal accident involving an employer other than Interstate. (Tr. 35-36; 302-03; 410-11).

[5]The CO took photos C-8 and C-9, which show the workers; C-9 shows the equipment one was wearing. The CO testified the respirators the workers were using could be appropriate, depending on silica levels, but that they needed to be fit tested, and Lynch indicated the CO told them to remove the respirators they were using and to use the dust masks that were also at the site. (Tr. 138-39; 142; 178-81; 193; 306-11; 477).

[6]The employees told the CO they had been "chipping" for about a week. (Tr. 477).

asked for the program and training records, Cohen said they were not on site and that he would have to get them to the CO. The CO returned to the site on June 10, 2002, and again asked Cohen about respirators and about HAZCOM and silica training. This time, Cohen said that no training had been done; he also said he knew the requirements of the standard and knew that silica was hazardous and was considered a carcinogen. Cohen told the CO that he knew the chipping operation caused silica exposure and that while he had not done air sampling he had observed the operation to determine silica concentration levels. The CO made another visit to the site on June 28, 2002, and, while he was there, Solecki[7] gave him R-4, a copy of Interstate's safety and health plan that included a respiratory program and a HAZCOM program; however, the CO found the HAZCOM program inadequate as it was not site specific and it contained no material safety data sheets ("MSDS's").[8] Cohen told the CO he had read the program "somewhat" and that he was aware he was the person named in the program to maintain it; he also told the CO that although he knew of the existence of an MSDS for silica he had never read through it. Cohen said he had not given HAZCOM training in silica because the stairwell where the employees were working had cross ventilation and silica levels were not high enough; he also said he had worked at another site with the same operation and that air monitoring for silica had been done. (Tr. 147-66; 220-22; 225-27; 234-36; 240; 473).

CO Dinburg held a telephonic closing conference with Cohen and Solecki on September 24, 2002 and explained the citation that was being issued; he noted the specific violations he had found, and the fact he had received no documentation of training, and Solecki said nothing about his having trained the employees in silica. The citation was issued on September 25, 2002, and on October 18, 2002, Joseph W. Rufolo, the president and CEO of Rufolo, attended an informal conference at the OSHA area office; at the conference, Mr. Rufolo advised that he had a record indicating the training violation was not valid as employees had been trained, whereupon the OSHA official asked him to

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[7]During his visits to the site, the CO also spoke with Solecki. (Tr. 216).

[8]At some point during the inspection, Squibb gave the CO a HAZCOM program for Interstate that was site specific; it named specific chemicals and had MSDS's. Squibb also gave the CO Interstate's silica exposure control plan; Rufolo mailed it to Squibb on June 10, 2002, and Squibb faxed it to the CO on July 9, 2002. (Tr. 166; 221-22; 225-27; 235-36; 240; C-7).

provide that record.[9] In November 2002, CO Dinburg received in his office R-1, a document entitled "Tool Box Safety Meeting" that addressed the topic of eye and face protection. The document was dated April 10, 2002, Solecki had signed it as the trainer, and a number of Interstate employees, including Placencia and Lynch, had also signed it as attendees; among the items discussed, according to R-1, were chipping, grinding and protective equipment, and written in hand following the heading of "Special Items or Concerns for this Jobsite" was the following: "chipping & welding, silica dust, working with chemicals, read MSDS's before using chemicals." CO Dinburg called Lynch and Placencia, on November 19 and 20, 2002, respectively, to ask if they attended the tool box meeting reflected in R-1; both said they did, but both indicated they had not been told about silica until after the CO appeared at the site.[10] (Tr. 143-49; 156-57; 184-97; 200-02; 232-34; 237-40; 473-75; 478).

To demonstrate a violation of a specific OSHA standard, the Secretary has the burden of proving that (1) the cited standard applies, (2) there was a failure to comply with the standard, (3) employees had access to the violative condition, and (4) the employer either knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The Secretary asserts that she has met her burden of proving the alleged violation, based on the testimony of CO Dinburg, while Interstate asserts that the Secretary has not met her burden, in view of the testimony of its witnesses. I conclude the Secretary has proved all four of the elements above to show the alleged violation, for the following reasons.

First, the testimony of Cohen and Solecki about the CO's visits to the site was simply not believable. Cohen testified he did not recall CO Dinburg ever asking him about a HAZCOM program or training in silica; according to Cohen, the CO's questions had to do with Cohen's capacity at the site and who made decisions about what work took place. (Tr. 414-15; 452-55). Solecki testified he overheard the CO asking the employees on April 22, 2002 if they knew anything about silica, to which they said "yes," but that he did not hear the CO ask for a HAZCOM program or training

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[9]The record indicates Solecki also attended the conference. CO Dinburg was not at the conference, but he testified about it from the diary sheet in the OSHA file. (Tr. 197-202; 336).

[10]Solecki apparently called the CO in November, advising that he wanted to drop off R-1. The CO did not recall the exact date he received R-1 in his office, but he said that he called both of the employees within a week of receiving R-1. (Tr. 144-45; 187; 475-79).

records on that date. Solecki further testified that while he recalled the CO asking him for a copy of a HAZCOM program sometime in June 2002, the CO never requested any training records or asked him anything about the employees being trained; according to Solecki, the issue of training never came up until the informal conference in October 2002. (Tr. 335-36; 343-48).

I find it incredible that the CO, after monitoring the workers for exposure to silica, would not have asked for Interstate's HAZCOM program and its silica training records on April 22, 2002. I also find it incredible that the CO would not have requested the training records before recommending the subject citation item, since the very basis of the item was the failure to train employees in the hazards of silica. The CO testified that he requested the HAZCOM program and training records on April 22, 2002, and that he renewed his request on June 10, 2002, at which time Cohen told him no training in silica had been done. The CO also testified that, during the closing conference on September 24, 2002, he advised Cohen and Solecki of the specific violations he had found and that he had received no documentation of training, and Solecki said nothing about having trained the employees in silica. (Tr. 157-59; 473-74). I observed the CO's demeanor on the witness stand and found him a sincere and believable witness. His testimony is therefore credited over that of Cohen and Solecki.

Second, other testimony of Cohen was also not credible, in light of the CO's testimony, and tends to supports a conclusion that Interstate was in violation of the cited standard. For example, Cohen testified that he kept two copies of the HAZCOM program with the required MSDS's in Interstate's job trailer, that a copy was also kept in Gilbane's trailer, and that he discussed the program during the orientations he held for new hires. (Tr. 373-76; 386-89). The CO, however, testified that when he asked for the HAZCOM program on April 22, 2002, Cohen told him it was not on site, that it was in "the office," and that he would have to get it to the CO; the CO further testified that the HAZCOM program Solecki finally gave him on June 28, 2002 was not site specific, in that it did not name specific chemicals or include MSDS's.[11] (Tr. 157; 220-22; 235-36). Cohen also testified that the chipping work done on April 22, 2002 was a "one-time task" that took the employees two half days to complete, although he agreed that he had observed chipping done at other times on the site

[11]The CO was unsure whether Cohen's reference to "the office" meant Interstate's office or Rufolo's office; in any case, as set out *supra*, Edward Squibb of Gilbane ultimately provided the CO a HAZCOM program for Interstate that was site specific. (Tr. 157; 166; 220-22; 235-36).

during 2002. (Tr. 409; 419; 469-70). The CO, on the other hand, testified that Cohen told him that the workers had been chipping for four days, which is consistent with the employees telling the CO they had been chipping for a week. (Tr. 165; 477). Finally, Cohen's testimony that water was used on the walls to keep dust to a minimum was contrary to the CO's testimony that he observed the operation for 4.5 hours and the employees did not water down the area. (Tr. 410; 464; 476-77). Although Solecki, Lynch and Nick Cocozza, a carpenter foreman with Interstate who worked at the site, also testified that water was used to wet down the walls before the chipping took place, their testimony is not credited in view of the CO's testimony. (Tr. 301-02; 333; 364).

Third, I have considered the testimony of Cohen, Solecki, Lynch, Cocozza and Michael Fitzpatrick, the laborer foreman who supervised Lynch and Placencia, that the tool box meeting shown in R-1 was held before the chipping work began at the site; however, I find their testimony not credible.[12] Solecki and the other witnesses all testified to the effect that weekly tool box meetings were held at the site, that R-1, dated April 10, 2002, was one of those meetings, and that Solecki was the person who conducted the meeting. These witnesses identified their respective signatures on R-1 and testified that the meeting had addressed the topics set out therein, including the hazards of silica dust and the protective equipment to be worn when silica dust was present, and that Lynch and Placencia had both attended the meeting. The witnesses further testified that R-3, a handout about silica, was given to the attendees at the meeting, and Cohen and Solecki noted that the meeting was held at that particular time because of the concrete chipping and grinding work that was to take place shortly. All of the witnesses indicated that they were sure that the meeting had occurred before the chipping work being done on April 22, 2002. (Tr. 296-306; 313-19; 322-27; 329-34; 360-70; 402-09).

In finding the foregoing testimony not credible, I note first that it is contrary to the CO's testimony, set out above. In particular, it is contrary to Cohen's statement to the CO on June 10, 2002, that no training in silica had been done at the site; it is also contrary to Lynch's statement to the CO on April 22, 2002, that he had not had HAZCOM training and was unaware of the health effects of silica, and his further statement to the CO on November 19, 2002, that he was not told about silica

[12]In so doing, I note that all of the Interstate employees who testified, other than Lynch, were still employed by Interstate at the time of the hearing; I also note Lynch's testimony that he would work for Interstate again if out of work and offered a job. (Tr. 294-95; 303 360; 366; 371).

until after the CO had appeared at the site. (Tr. 141-42; 159; 232-33). I note also that while all but one of the witnesses above testified that R-3, the handout about silica, was given out at the meeting, the CO testified that R-3 was not included when he received R-1 in his office. (Tr. 474-75). Finally, I note that if R-1 had in fact existed at the time of CO Dinburg's inspection, then Cohen or Solecki would surely have provided it to the CO when he asked for documentation of training in silica.

In concluding that the employees were not trained as required, I have considered the fact that Lynch and Placencia both told the CO on April 22, 2002 that they had not had HAZCOM training and were unaware of the health effects of silica; on the other hand, they also said that they had been told that the dust was bad for them and that they needed to wear the respirators. (Tr. 141-43; 181-82; 192). I have also considered the fact that what Lynch and Placencia told the CO about the meeting reflected in R-1 and when they were told about silica was somewhat equivocal. In particular, both employees said that they had attended the meeting shown in R-1 but that they had not been told about silica until after CO Dinburg showed up at the site.[13] (Tr. 143-47; 186-97; 232-34; 237-40). Based on what the employees said on April 22, 2002, I conclude that their supervisor told them before they began the chipping work that the dust was bad for them and that they needed to wear the respirators; however, such instruction clearly did not meet the requirements of the standard. I further conclude that while the employees apparently did in fact attend the meeting reflected in R-1, either (1) it did not occur on the date indicated but rather sometime after CO Dinburg had appeared at the site or (2) it took place on the date indicated but instruction in the hand-written topics near the bottom of R-1, that is, chipping and welding, silica dust, chemicals and MSDS's, was provided to employees at some point after the CO's arrival at the job site, after which those topics were added to R-1. For all of the foregoing reasons, Interstate was in violation of the cited standard.

This citation item has been classified as serious/willful. CO Dinburg testified this item was classified as serious because the employer did not provide training to employees who were exposed to silica, a known carcinogen. The CO further testified that this item was also classified as willful

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[13]According to the CO, Lynch said during their phone conversation on November 19, 2002, that he was not sure about the exact time when he was told about silica but that it was "definitely" after the CO's arrival at the site. (Tr. 232-33). Further, in addition to his phone call to Placencia on November 20, 2002, the CO also met personally with Placencia, on June 12, 2003, to show him R-1 and to confirm what he had said before. (Tr. 190-91; 232-34; 237-38).

because Cohen knew the standard's requirements, knew that silica is a carcinogen, and knew that the chipping work caused silica dust; however, rather than performing air sampling as required, Cohen simply observed the operation and concluded that silica levels were not high enough to train employees, thereby substituting his own judgment for that of the standard. (Tr. 167-69).

The Secretary has shown the violation was serious. The employees were exposed to silica, a known carcinogen, without being given the required information about its hazards; as noted *supra*, being told that the dust was bad for them and that they were to wear respirators was insufficient. Further, that the air sampling showed silica levels to be below the PEL does not affect my finding, as the levels could have been just as easily over the PEL. Finally, that the employees were wearing protective equipment does not change my finding, especially since they were using respirators without first having been provided the necessary information. *See* "Other" Citation 2, *infra*. In any case, dust masks, and not respirators, were indicated for the work at the site. *See* footnote 5, *supra*.

In regard to the willful classification, the Secretary must demonstrate that the violation in this case was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987) (citation omitted). As *Williams* further explains:

> It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting a violation....A willful violation is differentiated by a heightened awareness–of the illegality of the conduct or conditions–and by a state of mind–conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete. *Id*. at 1256-57.

The record in this case clearly establishes that Cohen, Interstate's safety officer at the site, told CO Dinburg that he knew the requirements of the cited standard; he also told the CO that he knew that the chipping operation produced silica dust and that he knew that silica was a hazardous material

and a carcinogen. Despite this knowledge, Cohen did not perform air sampling of the chipping work, as required, to determine silica concentration levels; instead, he simply observed the operation and concluded that silica levels were not high enough to require training. Cohen told the CO that the silica concentration was at a safe level because the employees were working in a stairwell that had cross ventilation; however, he also told the CO that he had worked on a prior job involving the same chipping operation and that monitoring for silica had been done at that site. (Tr. 157-66).

In my view, the foregoing is sufficient to demonstrate that the violation was willful because of Cohen's knowledge of the requirements of the cited standard and his conscious disregard of those requirements. However, other evidence in the record supports the finding of a willful violation.

First, the CO's testimony establishes that Interstate did not have a HAZCOM program or MSDS's available when he first went to the site on April 22, 2002. In fact, Interstate did not provide the CO with a HAZCOM program until his third visit on June 28, 2002, and that one was not satisfactory because it did not name any specific chemicals or include any MSDS's. Edward Squibb of Gilbane ultimately provided the CO with a HAZCOM program for Interstate that was site specific and did include MSDS's. (Tr. 157; 166; 220-22; 225-27; 235-36; 240).

Second, and similar to the above, Interstate did not have a respiratory protection program or a silica exposure control plan at the site when the CO first visited the job, despite the chipping work that was taking place then; C-7, a letter from Rufolo to Squibb dated June 10, 2002, included the silica plan and noted that the respiratory program had been given to Squibb on May 20, 2002. The respiratory program was provided to the CO with the HAZCOM program on June 28, 2002, and Squibb faxed the silica plan to the CO on July 7, 2002. (Tr. 226-27; 240).

Third, despite the testimony of Interstate employees, *supra*, that tool box meetings were held weekly at the site, Respondent offered into evidence records of only 13 such meetings taking place between April 10, 2002, and September 4, 2002; specifically, R-1 is dated April 10, 2002, and R-2C through R-2N are dated from April 18, 2002 to September 9, 2002. Cohen testified that these weekly meetings were required. (Tr. 395). Thus, by my count, a total of 21 meetings should have occurred during this period. However, not only were the required number of meetings not held, there was a gap of three to four weeks between some meetings. *See* R-2C-N. Although the testimony of Cohen, Solecki and Lynch indicated that Cohen and foremen sometimes conducted the tool box meetings,

R-1 and R-2C-N all show Solecki as the trainer.[14] (Tr. 296-97; 314; 396). Further, the two foremen who testified in this regard, that is, Cocozza and Fitzpatrick, stated that Solecki was the individual who conducted the meetings. (Tr. 361; 366). It is possible, of course, that other tool box meetings were held and that no records were kept or the records were lost or misplaced. Without further documentation, however, and especially under the circumstances of this case, I am unwilling to conclude that any additional tool box meetings took place. I find that the failure to hold these meetings as required is another indicia of the employer's lack of concern for safety and health.[15]

Having found the violation to be willful, I turn now to an appropriate penalty for this item. The Commission, in assessing penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. CO Dinburg testified that the severity of the violation and the probability of an injury occurring were low, because of the silica levels being under the PEL. He further testified that no reduction in penalty was given for size, in view of the number of Interstate's employees, and that while a 10 percent reduction for history was given, due to the company's lack of an OSHA history in the past three years, no reduction was given for good faith because of the willful classification. The CO noted that although the penalty based on his calculations was $40,000.00, this amount was reduced at the discretion of the OSHA area office director for a total proposed penalty of $10,000. (Tr. 168-72; 214). Upon considering the foregoing, I conclude that the proposed penalty is appropriate. A penalty of $10,000.00 is therefore assessed.

No. 02-2021 - "Other" Citation 2 - Item 1

This item alleges a violation of 29 C.F.R. 1910.134(c)(2)(i), which provides as follows:

> An employer may provide respirators at the request of employees or permit employees to use their own respirators, if the employer determines that such respirator use will not in itself create a hazard. If the employer determines that any voluntary respirator use is permissible, the employer shall provide the respirator users with the information contained in Appendix D to this section ("Information for Employees Using Respirators When Not Required Under the Standard")....

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[14]Cohen also testified that an individual from a company called On Site also held tool box meetings at the site. (Tr. 396). His testimony in this regard is not credited, since none of the other witnesses for Interstate mentioned such an occurrence.

[15]My findings relating to the fall protection items in Docket No. 02-2022, *infra*, are a further indicia of Interstate's lack of concern for employee safety and health.

CO Dinburg testified that when he asked Daniel Lynch on June 18, 2002, if he was using the respirator at the site on a voluntary basis, Lynch said "yes." The CO further testified that when he asked Lynch if Interstate had provided him with Appendix D of the respiratory protection standard, Lynch told him that he had not been given the appendix. (Tr. 143; 172).

The discussion relating to the willful citation, *supra,* establishes that respirators were not required for the chipping work being done at the site, and Lynch's response to the CO's question in that regard on June 18, 2002, further supports a conclusion that the use of the respirators was in fact voluntary. Lynch's additional response to the CO, that Interstate had not given him Appendix D, supports a conclusion that the cited standard was violated. Appendix D contains information to enable an employee using a respirator to make sure that such use does not become a hazard. For example, the appendix advises the employee to read and heed all the instructions provided by the respirator's manufacturer, to choose a respirator that is certified for what the employee will be using it for, and to not use the respirator for contaminants it is not designed to protect against. The record in this case shows that Interstate did not even have a respiratory protection program until one was provided to Gilbane on May 20, 2002, which was a month after the CO saw the employees using the respirators on April 22, 2002. (Tr. 226-27; 240; C-7). Moreover, despite Interstate's contention to the contrary, there is nothing in the record to show that it ever provided the employees who were using the respirators with any information like that set out in Appendix D. The evidence of record demonstrates the alleged violation, and this citation item is consequently affirmed as an other-than-serious violation. No penalty was proposed for this item, and none is assessed.

No. 02-2022 - Serious Citation 1 - Item 1

Item 1 alleges a violation of 29 C.F.R. 1926.404(f)(6), which states that:

> The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

Chester Lloyd, another CO who was assigned to inspect the project, testified that he went to the site on June 20, 2002, where he met with his supervisor, Michael Glowatz, and Edward Squibb of Gilbane.[16] This group proceeded to the third floor of Building 1, where they came upon Gary Solecki, Interstate's safety consultant. These four individuals observed an employee of Interstate who

[16]Glowatz was the assistant area director of the OSHA area office. (Tr. 58).

was using a portable hand-held circular saw. In looking at the saw, the CO noticed that the power cord plug was missing the ground pin, and C-4 is his photo of the plug. The CO spoke to the employee and Solecki about the saw, and Solecki told him that he had been in the same area earlier in the day, that he had seen a similar saw that was also missing its ground pin, and that he had taken that saw out of service. Glowatz also spoke to Solecki about the saw. (Tr. 56-62; 71-75).

Solecki testified that he was present when the CO observed the saw. He agreed that the saw was depicted in C-4, and he said that it was the same one he had seen earlier and had had removed from service. He stated that when he noted the problem with the saw earlier, he told a laborer in the area to take it to Interstate's job trailer, where damaged equipment was kept until it was taken to be repaired; he further stated that the laborer evidently had not followed his instruction, in that the saw was there later that day, when OSHA observed it, and that this was the first time that an employee had not obeyed him when he had given such an instruction. Solecki said that he had explained what had happened to the CO at the time of the inspection. (Tr. 337-41).

Interstate contends that it did not violate the standard, in light of the foregoing testimony of Solecki. CO Lloyd, however, testified that when Glowatz had spoken to Solecki, Solecki had told him that the other saw that he had removed from service earlier was about 5 feet away. The CO further testified that while he himself did not participate in that conversation, Glowatz had told him about it; in addition, the CO said Glowatz had set down the conversation he had had with Solecki in his inspection notes, and the CO read from the relevant portion of those notes at the hearing. (Tr. 87-91). I observed the demeanor of CO Lloyd as he testified on the witness stand, and I found him to be a sincere and believable witness. Moreover, CO Lloyd's testimony is supported by the inspection notes of Glowatz, his supervisor. For these reasons, and based on my credibility findings with respect to Solecki in No. 02-2021, *supra*, the testimony of CO Lloyd is credited over that of Solecki. Accordingly, I find that the Secretary has established a violation of the cited standard.[17]

CO Lloyd testified that the violation was serious because an employee using an electrical saw without a ground pin could receive a shock. (Tr. 68). Further, Robert Paradiso, an electrical engineer

[17]I find the Secretary has shown the knowledge element based on the CO's testimony that Solecki was in the area when he and Glowatz arrived, that the saw was the only one in use in that area at that time, and that Solecki had discovered a saw with the same defect earlier. (Tr. 62).

and a CO from another OSHA office, testified that an electrical saw without a ground pin was a serious hazard, even if it was plugged into an outlet with a ground fault circuit interrupter ("GFCI").[18] He explained that a shock in such a situation could cause the employee to jerk violently and hit something, fall from an elevation or drop the saw on himself; he also explained that a shock traveling through the body could cause serious injury if, for example, it passed through the heart. (Tr. 125-33). Based on CO Paradiso's testimony, which Interstate did not rebut, this item is affirmed as serious.

The Secretary has proposed a penalty of $1,350.00 for this item. CO Lloyd testified that he considered the gravity of the violation low, resulting in a gravity-based penalty of $1,500.00, and that this amount was reduced by 10 percent due to Interstate's lack of OSHA history, resulting in the proposed penalty of $1,3500.00. (Tr. 68). I find the proposed penalty appropriate. A penalty of $1,350.00 is accordingly assessed.

No. 02-2022 - Serious Citation 1 - Item 2

Item 2 alleges two instances of violation of 29 C.F.R. 1926.501(b)(1), which states as follows:

> 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.

Item 2a alleges that two employees working at an unguarded edge in Building 4 were exposed to falling 42 feet. Ronnie Byrd, a third CO assigned to inspect the project, testified that he was at the site on May 14, 2002, standing outside of Gilbane's office with Edward Squibb and Edward Cohen, when he saw a powered industrial truck delivering a bucket of cement to two employees on the roof of Building 4; the employees were 42 feet up in the air and were wearing no fall protection, and, as the CO videoed them, they removed the guardrails at the edge of the roof to receive the bucket, after which they replaced the guardrails.[19] CO Byrd further testified that Cohen identified the workers as

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[18]The Secretary presented CO Paradiso because of Interstate's claim that the condition was not serious since the outlet the saw was plugged into had a GFCI. (Tr. 128).

[19]CO Byrd testified that the employees were about a foot from the edge when they were removing and replacing the guardrails. He further testified that he could see that the employees were not wearing any fall protection both with and without his video camera. The CO identified C-1A, B and C as photos made from his video showing what he had seen. (Tr. 14-17; 23).

Interstate employees, after which Cohen had the employees come down at the CO's request; the two employees were Daniel Lynch and Arthur Nozab, and, when the CO asked them if anyone had told them that they needed to wear fall protection, both said "no." The CO also asked them why they had not been wearing fall protection, but they did not answer, and when the CO asked Cohen the same question, Cohen stated that they "were Union workers." In response to further questions, Cohen said that he did not "have time for this," and he then told the employees to go back to work. CO Byrd called Cohen the next day to ask him what he meant by the Union comment, and Cohen simply repeated that the employees were Union workers. (Tr. 12-22; 33-42).

Interstate does not dispute that the employees were not tied off. Rather, Interstate contends the Secretary has not established employee exposure, noting that the CO did not go up on the roof to observe the condition and asserting that his testimony that the employees were about a foot from the edge was speculation. Interstate also contends that R-7, the video from which the CO's photos were made, refutes the CO's testimony. I disagree. The CO's video and photos show the upright guardrail posts to be essentially at the roof's edge. The video and photos also show the employees very close to the edge. In particular, the last frame in C-1A depicts an employee who appears to be right at the edge of the unguarded roof, while C-1B and C-1C depict the employees replacing a mid-rail, a task that would place them quite close to the edge given the location of the guardrail posts. Cohen indicated that one of the employees was 5 to 6 feet from the edge when he went from behind the guardrails shown to the right in the video and photos to signal the truck operator. (Tr. 437). However, his testimony does not refute that of the CO, and I find, based on the CO's testimony and his video and photos, that the Secretary has demonstrated the alleged violation.[20]

Item 2b alleges that an employee working on a platform with two unguarded edges in Building 3 was exposed to falling 11 feet and 5 inches from one edge.[21] CO Lloyd testified that after addressing

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[20]As the Secretary points out, one of Interstate's own tool box meeting records supports a conclusion that the employees were required to tie off. R-7D addresses guardrails, and a drawing on the right side of the exhibit shows an employee putting up guardrails at the edge of a floor; the employee is tied off, and a notation to the left of the drawing advises that workers should be tied off when building or repairing guardrails.

[21]As issued, Item 2b also alleged a hazard of falling 31.5 feet from the other unguarded edge; however, the Secretary withdrew that part of Item 2b at the hearing. (Tr. 81-82; 430-31).

the saw hazard on June 20, 2002, he noticed an employee on a platform 11 to 12 feet above where he and the others were located. He, Glowatz and Solecki went up a stair ladder to the area where the employee, Tyrone Jones, was working; he saw that Jones was kneeling on a platform that was on an unfinished deck and that Jones was taking form work measurements. The CO further testified that the platform Jones was on was about 4 feet wide, that to Jones' right was an unguarded edge that was about 4 feet from the side of the platform, and that Jones, who was not tied off, could have fallen 11 to 12 feet to the concrete floor below.[22] CO Lloyd identified C-5 as his photo of the condition, and he noted that if Jones had stood up and stepped off the platform, he could have tripped and fallen and gone right over the unguarded edge. The CO said that Jones tied off after their conversation and that he (Lloyd) also spoke to Solecki about the condition. (Tr. 62-66; 75-78; 82-85).

Edward Cohen testified that he had seen Jones working in the area shown in C-5, which was a stairwell, and that the platform Jones was on was 5 to 6 feet from the unguarded edge. Cohen further testified that although C-5 did not show it, there was a 36-inch-wide platform below the unguarded edge that workers stood on to do form work. He said the plank showing in the bottom left corner of C-5, which he marked with an "X," was one of two planks running along that side of the stairwell wall so employees could stand on them to work. He also said there were two more identical planks that ran along the wall below the unguarded edge; each plank was 12 inches wide, and the planks were 6 inches from the wall and were set 6 inches apart, for a total platform width of 36 inches. Cohen noted that the platforms in the stairwell were 4 to 5 feet below the tops of the walls, so that someone falling from the cited edge would only have fallen 4 to 5 feet. (Tr. 422-29; 444-52).

Interstate contends that Item 2b should be vacated, in view of the testimony of Cohen. I do not agree, for the following reasons. First, I have already found CO Lloyd to be a credible witness, as set out above in Item 1 of this Citation. Second, I have also determined the credibility of Cohen's testimony, as set out in the discussion relating to the willful citation, *supra*. Third, Cohen's testimony relating to this citation item is not believable for an additional reason. CO Lloyd testified that when he went to measure the fall distance, which he did from the bottom of the wall up to the lip of the unguarded edge with his steel tape measure, there was no platform below the unguarded edge. (Tr.

[22]The CO measured the fall hazard to be 11 feet, 5 inches after talking to Jones. (Tr. 471).

471-72). The CO's testimony is accordingly credited over that of Cohen, and, in light of the CO's testimony, I conclude that the Secretary has proved the alleged violation.

Based on the foregoing, Items 2a and 2b are affirmed.[23] In addition, these items are found to be serious, as CO Byrd and CO Lloyd both testified that falls from the cited areas could result in serious injuries or death. (Tr. 22-23; 70). The CO's also testified that the total proposed penalty for these items was $4,500.00; this amount was the result of a gravity-based penalty of $5,000.00 reduced by 10 percent due to Interstate's lack of OSHA history. (Tr. 70-71). I conclude that a total penalty of $4,500.00 for Items 2a and 2b is appropriate. The proposed penalty is therefore assessed.

No. 02-2022 - Serious Citation 1 - Item 3

Item 3 alleges a violation of 29 C.F.R. 1926.501(b)(3), which provides that:

> Each employee in a hoist area shall be protected from falling 6 feet (1.8 m) or more to lower levels by guardrail systems or personal fall arrest systems. If guardrail systems, [or chain, gate, or guardrail] or portions thereof, are removed to facilitate the hoisting operation (e.g., during landing of materials), and an employee must lean through the access opening or out over the edge of the access opening (to receive or guide equipment or materials, for example), that employee shall be protected by a personal fall arrest system.

This item alleges that an employee working at an unguarded hoist way in Building 4 was exposed to falling 10.5 feet. CO Byrd testified that when he was at the site on March 26, 2002, he saw an employee standing in a hoist way with half of his left foot protruding over the edge of the hoist way; the employee was not tied off, and the fall distance to the ground, which the CO determined from the architectural drawings of the building, was 10.5 feet. The CO videoed the employee standing in the hoist way, and he identified C-2 and C-3 as photos he made from the video showing the condition.[24] CO Byrd further testified that he spoke to Edward Cohen about the condition about six weeks later and that Cohen identified the employee as Nick Cocozza, a carpenter foreman. When the CO showed the video to Cocozza in Cohen's presence, Cohen made no comment; Cocozza, however,

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[23]That portion of Item 2b alleging a fall hazard of 31.5 feet is vacated. *See* footnote 21.

[24]The CO agreed C-3 showed a debris pile on the ground in front of the building, but he said that the pile was not close to the building; there was a roadway that went around the entire facility and right by the hoist way, and the pile was not in the roadway because deliveries were made to the hoist way. (Tr. 46-49; 55).

told the CO that he had his "hand on the wall" and that he had been "doing this type of work for 10 years." The CO stated that the condition was a serious violation because a fall from that height could have resulted in serious injury or death. (Tr. 24-30; 43-49; 55).

The testimony of CO Byrd, which Interstate did not rebut, establishes the alleged violation. This item is therefore affirmed as a serious violation. The Secretary has proposed a penalty of $4,500.00 for this item. CO Byrd testified that he considered the violation to be of high gravity, which resulted in a gravity-based penalty of $5,000.00, and that this amount was reduced by 10 percent due to Interstate's lack of OSHA history, resulting in a proposed penalty of $4,500.00. (Tr. 30-31). I conclude that the proposed penalty is appropriate. A penalty of $4,500.00 is thus assessed.

Conclusions of Law

1. Respondent Interstate was in willful violation of 29 C.F.R. 1910.1200(h)(1), as alleged in Item 1 of Willful Citation 1, in Docket No. 02-2021.

2. Respondent Interstate was in non-serious violation of 29 C.F.R. 1910.134(c)(2)(i), as alleged in Item 1 of "Other" Citation 2, in Docket No. 02-2021.

3. Respondent Interstate was in serious violation of 29 C.F.R. 1926.404(f)(6), as alleged in Item 1 of Serious Citation 1, in Docket No. 02-2022.

4. Respondent Interstate was in serious violation of 29 C.F.R. 1926.501(b)(1), as alleged in Item 2 of Serious Citation 1, in Docket No. 02-2022, except for that part of Item 2b alleging a fall hazard of 31.5 feet, which was withdrawn.

5. Respondent Interstate was in serious violation of 29 C.F.R. 1926.501(b)(3), as alleged in Item 3 of Serious Citation 1, in Docket No. 02-2022.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Item 1 of Willful Citation 1, in Docket No. 02-2021, is AFFIRMED as a willful violation, and a penalty of $10,000.00 is assessed.

2. Item 1 of "Other" Citation 2, in Docket No. 02-2021, is AFFIRMED as an "other" violation. No penalty was proposed, and none is assessed.

3. Item 1 of Serious Citation 1, in Docket No. 02-2022, is AFFIRMED as a serious violation, and a penalty of $1,350.00 is assessed.

4. Item 2 of Serious Citation 1, in Docket No. 02-2022, is AFFIRMED as a serious violation, except for that part of Item 2b alleging a fall hazard of 31.5 feet, which is VACATED. A total penalty of $4,500.00 is assessed for Item 2.

5. Item 3 of Serious Citation 1, in Docket No. 02-2022, is AFFIRMED as a serious violation, and a penalty of $4,500.00 is assessed.

/s/

Irving Sommer
Chief Judge

Dated: April 12, 2004
Washington, D.C.