

SECRETARY OF LABOR, :
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 Complainant, :
 :
 v. :
 :
 EPERNAY DESIGN AND :
 CONSTRUCTION, LLC, :
 :
 Respondent. :

DOCKET NO. 03-0693

Appearances:

James Glickman, Esquire
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Scott K. DeMello, Esquire
Newton, Massachusetts
For the Respondent.

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Procedural Background

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 a high school additions and renovations project in Westwood, Massachusetts during October 2002 after a 55-foot steel column collapsed at the site right after it was set in place; the column collapsed on October 1, 2002, and OSHA began its inspection on October 4, 2002. As a result of the inspection, OSHA issued a one-item willful citation, alleging a violation of 29 C.F.R. § 1926.755(b)(1), to Epernay Design and Construction, LLC (“Epernay”). Epernay filed a timely notice of contest, bringing this matter before the Commission. Following a hearing in this case in Boston, Massachusetts, both parties have submitted post-hearing briefs and the Secretary has submitted a reply brief.

Jurisdiction

At all times relevant to this action, Epernay maintained a work site at the Westwood High School in Westwood, Massachusetts, where it was the concrete and foundation subcontractor for the additions and renovations project taking place at the school. The Commission has held that construction is in a class of activity that as a whole affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). In addition, Epernay admits in its Answer that it is a business subject to the Act and that the Commission has jurisdiction of this matter. I find, therefore, that Epernay is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, and I conclude that the Commission has jurisdiction of this action.

Factual Background

The essential facts are as follows.¹ The Westwood High School project involved the construction of a new school building and the renovation of the existing building. Kaestle Boos Associates (“KBA”), an architectural firm, was engaged to design the project and to provide construction administration services. Laurence Trim, a project architect for KBA, was responsible for the entire project from start to finish. Other KBA employees involved were Edward Monahan, the construction administrator, and Edward Cifune, the “job captain.” Monahan was responsible for the project’s paperwork and for recording and transcribing the minutes of the weekly job meetings held at the site, while Cifune was responsible for assisting Trim. Trim, Monahan and Cifune attended the weekly job meetings and also usually walked the project to observe its progress when they went to the site for the job meetings. (Tr. 38-39, 311-12, 315-18, 330-31, 399-405, 449-55).

KBA hired Odeh Engineers (“Odeh”), an engineering firm, to provide the structural design and drawings for the project. Larry Marini, a senior structural engineer with Odeh, was the structural engineer of record for the project. Marini developed most of the structural design for the project, and he and others in his office developed the drawings. Marini was also responsible for conducting site inspections, answering questions from KBA and the contractors, and reviewing and approving shop drawings and requests for changes submitted by the contractors. (Tr. 35-41, 45-48, 69-76).

¹Although Epernay disputes certain of these facts, my determination that these are the essential facts in this case is based on the record as a whole and on my credibility findings set forth in the discussion relating to Willful Citation 1, Item 1, *infra*. Furthermore, all findings of fact necessary for a determination of all relevant issues have been made in this decision, *see* Fed. R. Civ. P. 52(a), and any proposed findings of fact inconsistent with this decision are denied.

Allan Miller was the “clerk of the works” for the project.² His duties involved walking the site on a continuous basis, recording the daily events that took place during the project, and attending the weekly job meetings. Miller was also responsible for maintaining a full set of the plans and specifications for the project, marking them as changes were made during construction, and verifying that the requirements of the plans and specifications were being met. (Tr. 496-501, 507).

Alexandra Construction (“Alexandra”) was the general contractor of the Westwood High School project, and the Alexandra employees involved with the project included Ronald Collins, the project manager, David Pilcher, the on-site project manager, Daniel Campbell, the job superintendent, Tahir Dizdari, the assistant superintendent, Daniel Turcotte, the job site foreman, and Edmund Norton, the safety manager. Alexandra subcontracted the concrete and foundation work to Epernay Design and Construction (“Epernay”), and William Baldwin was Epernay’s foreman at the site. Alexandra subcontracted the structural steel fabrication and erection work to Trimax Steel (“Trimax”); Trimax, in turn, subcontracted the steel erection work to Construction Welding Services (“CWS”), and Mo Luckern was Trimax’s representative at the site. At some point in September 2002, both CWS and Luckern left the project, after which Trimax hired Northern Construction Dynamics (“NCD”) to perform the steel erection. Marc Chauvin is NCD’s president. (Tr. 800-01, 807-08, 896-97, 903, 973, 989). *See also* Stip. Nos. 1-4, 15-16.³

When excavation of the site began in March of 2002, it was discovered that much of the soil was “unsuitable.”⁴ That soil thus had to be removed and replaced with suitable soil, and, while Alexandra was compensated for this work, it caused the project to be set back three to five months. Further, when the foundation work began, Baldwin and his foundation crew made measuring errors, causing certain concrete walls and piers to be poured in the wrong places in Area A.⁵ The errors also

²The Permanent Building Committee of the town of Westwood hired Miller to be the clerk of the works; the committee also hired KBA to work on the project. (Tr. 315, 498-99).

³The parties’ amended joint pre-hearing statement includes, on pages 9-12, a number of agreed-upon facts; in this decision, each of these is referred to as “Stip. No. ____.”

⁴All dates herein will refer to the year 2002, unless otherwise stated.

⁵The project consisted of seven areas, referred to as Areas A through G; Area A was the auditorium and the music and art rooms. The discussion herein relates to Area A. (Tr. 39).

caused anchor bolts in at least 20 column areas to be set in incorrect locations. One of these was the Column M-1 area (“M-1”), which was located at the rear of the auditorium, stage right; the four anchor bolts at M-1 were in the wrong locations as the pier had been poured 2 inches too short.⁶ (Tr. 52, 77-82, 97, 332, 386-88, 454, 500-01, 545, 744-45, 811-12, 815-18). *See also* Stip. Nos. 5-6, 12.

Anchor bolts are the structural components that serve to attach a steel column to the concrete foundation, and anchor bolts are particularly important during erection, when they are the only things holding up the column. The design for the project required the anchor bolts to be set into the piers when the concrete was poured, and their precise placement was essential for the steel to be erected properly.⁷ It was also essential to use the anchor bolts specified, which, in the case of M-1, were 30 inches long (to be embedded 26 inches in the concrete) with a 4-inch threaded top and a head at the bottom to prevent the bolt from being pulled out; the column to be set at M-1, however, was one of the largest and tallest of the columns to be used at the site, and specifications for the anchor bolts varied at different locations, depending upon the size of the column and the load it would bear. (Tr. 41-43, 54-66, 92-94, 366-67, 570).

Baldwin’s crew made repairs to the anchor bolts in at least the 20 locations referenced above. This was accomplished by cutting off the anchor bolts and placing threaded rod or cut anchor bolts, along with epoxy, into newly-drilled holes in the proper locations; the newly-placed bolts were much shorter than the original 30 inches, and the repairs at M-1 resulted in two of the bolts being set at depths of only 3.75 inches and 5.5 to 6 inches, respectively. In regard to the two other bolts at M-1, two new 30-inch anchor bolts were placed in the proper locations in a 2-inch-wide grout extension that was added on to the pier. The grout, a form of concrete, was not tested for compressive strength prior to the accident on October 1. (Tr. 112-13, 123, 130-31, 596-97, 635-40). *See also* Stip. Nos. 5-6.

⁶Column M-1 is the column that fell on October 1, 2002; it was one of four 55-foot columns that formed the back of the auditorium. *See* Stip. No. 12.

⁷Also used at the site were leveling plates, which would be put on the piers to denote precisely where the columns would go, and a base plate welded onto the bottom of the column would sit on top of the leveling plate. The leveling and base plates at M-1 were to be the same size (1 foot 2 inches square), and both had corresponding holes through which the anchor bolts would fit; further, the bolts were to be 1.5 inches from the leveling plate edges. (Tr. 42, 56-59).

The repairs that Baldwin's crew made to the anchor bolts were structural in nature, and, according to the project's procedures, KBA and Odeh were required to approve structural repairs. Exhibit 26, the manual for the project, states at section 05120, paragraph 3.2D: "Do not field cut or alter structural members without approval of Architect." Similarly, Exhibit 92, Alexandra's field manual for superintendents, states on page 13 that "[i]f it should become necessary to cut a structural element, no action is to be taken by any Company personnel and no authorization is to be given to any subcontractor without the prior written approval of the specific cutting by the Owner, Architect and the Owner's or Architect's Engineer." Thus, a contractor intending to deviate from the structural plans and specifications was to propose the modification, usually in the form of a "request for information" ("RFI"), and to provide a sketch or a written description. The RFI went first to KBA, where it was reviewed; the RFI next would go on to Marini, who would review it and approve it or not, after which it would go back to KBA and then on to the contractor. (Tr. 69-75, 78-79, 90, 101-02, 108, 130, 258, 264-65, 324-30, 367-68, 383-85, 504-05, 935-36).

Marini made his first site visit on August 1. He saw several problems he had not been told about, one of which was a concrete wall poured in the wrong place and anchor bolts that were too close to the wall edges; in Exhibit 7, his report to Trim dated August 1, he advised how the contractor should address this problem and the others he had seen.⁸ Monahan had also noticed some problems with anchor bolts at the site, and, at the August 8 job meeting, he asked Alexandra to provide "as-built locations for any [anchor bolts] that [Alexandra] knows are out of tolerance." Further, Miller had seen some cut-off anchor bolts that looked "suspect," prompting him to ask, at the August 22 job meeting, "that Odeh's field inspection include footings, walls, piers, and [anchor bolt] locations." Alexandra did not provide the information that Monahan had requested before the collapse of Column M-1 on October 1. (Tr. 77-89, 407-08, 511-13; Exh. 34, p. 11, No. 17.17; Exh. 38, p. 11, No. 17.17).

Marini's next visit was on August 28, when he saw two items he should have been told about; one was a concrete patch on some foundation work that did not meet the structural plans and specifications, and the other was concrete that had been added onto the side of a footing. Marini also

⁸Marini generally spoke to a representative of the contractor about any problems he saw before leaving the site; in addition, the field reports that he gave to KBA were passed on to the contractor. (Tr. 79, 84-86).

looked at M-1 and discussed it with Baldwin, who proposed using a smaller leveling plate to take care of the fact that the M-1 pier had been poured 2 inches too short. Marini replied that he would consider the idea; however, Trimax rejected the idea later that same day, and Marini was aware that Trimax had done so. The grout extension to the M-1 pier was not there on August 28, and Baldwin and Marini did not discuss such an extension. (Tr. 98-111, 255).

On September 5, Monahan and Cifune were at the site and saw Baldwin and a laborer adding a grout extension to the M-1 pier. Monahan and Cifune asked what they were doing, and Baldwin said that they were fixing the foundation and that they were told to perform the work. Monahan and Cifune informed Baldwin that the work was a structural repair and that Marini should be involved. Later that day, Monahan and Cifune talked to Collins about the work they had seen; they told him that it was a structural repair, that KBA had not gotten anything about it, and that the repair did not look proper. Collins responded that he would look into it. (Tr. 409-10, 413-14, 455-63, 473).

Marini made another visit to the site on September 12. He saw that a grout extension had been added to the M-1 pier and that two anchor bolts had been set into the extension; in addition, the four original anchor bolts at M-1 had been cut off, and two more bolts had been drilled into new locations on the pier. Marini had not been told about these fixes and had not approved them. Further, because the work was not done pursuant to the plans and specifications, and because he could not tell what type or how long the new bolts were or what kind of reinforcing steel, if any, was inside the extension, he concluded that the repair work was unacceptable. Marini saw a number of other problems, including about a half dozen more column locations where all four anchor bolts had been cut off and bolts had been drilled into new locations. (Tr. 111-25).

Later that day, Marini wrote Exhibit 17, a field report about his site visit, and sent it to Trim at KBA; Trim faxed the report and his own cover letter to Collins at Alexandra on September 16. In his report, Marini set out 14 bulleted items detailing the construction problems he had observed. Item 8 addressed the repair work at M-1 and noted it had been done without the general contractor first having submitted sketches of the proposed repair work to the architect/engineer for approval; the item also noted that the repair work appeared unacceptable.⁹ Item 14 addressed the various anchor bolts

⁹This item and three other items specifically stated that “[t]he General Contractor must submit sketches to the Architect/Engineer for review and approval of all repair work to correct

that had been cut off and replaced with drilled-in bolts and stated that the “Architect/Engineer must be informed of all field corrections such as these before any repairs are made.” The last page of the report stated that the quality of the foundation construction needed to be improved and recommended that the general contractor provide greater supervision of the concrete contractor; the report also recommended an anchor bolt survey prior to erection. Trim’s cover letter requested that Alexandra’s plan for correcting “the deficient work” be forwarded to KBA within seven days. In addition, Monahan sent Pilcher an e-mail on September 24, requesting that Alexandra “get something underway as soon as possible re: sketches etc. for any locations where there are problems w/ A.B.’s” and that it “address the issues brought up in Odeh’s site visit as quickly as possible.” (Tr. 126-36, 344-45, 423-24, Exhs. 18, 27).

Alexandra responded to the 14 items in Marini’s report in a memo signed by Pilcher and sent to KBA on September 23, 2002; the memo included a sketch for M-1 that proposed two additional anchor bolts, for a total of six, two of which would be set in the grout extension. Baldwin and Dizdari assisted Pilcher with the response, and Campbell reviewed it before it was sent. Marini did not receive the response until October 1 and, accordingly, did not address it until after Column M-1 had fallen. Marini in any case did not agree with the proposed fix set out in the sketch for M-1, particularly since two of the anchor bolts were still shown as being set in the grout extension. Marini also did not have a favorable reaction to the response as to the cutting of anchor bolts and replacing them with drilled-in bolts; the response did not include M-1 in the list of locations, and it had insufficient information for him to be able to give his approval. (Tr. 138-44, 250, 907-09, 921, 936-37; Exh. 19).

On September 26 and 27, NCD, the steel erection company that had replaced CWS, was on site. Chauvin, NCD’s president, was also on site, and he and his crew were using a large crane to unload the steel and to place it in the locations where it was going to be erected.¹⁰ The steel columns that were placed in the auditorium stage area, where M-1 was located, were about 55 feet in length.

construction mistakes or errors.”

¹⁰On September 26, Pilcher advised Monahan that NCD and Chauvin would be doing the erection and that some steel had been delivered and unloaded. On that same day, when Monahan was at the site and was at M-1 with Campbell, Monahan told Campbell to inform the erector of the conditions at M-1 before any erection took place there. (Tr. 389, 415-16; Exh. 28).

Chauvin introduced himself to Campbell and Pilcher, and he also met Collins, who indicated to Chauvin that NCD “needed to get going.” Chauvin and Campbell walked Area A, and Chauvin told Campbell where he would start erecting, which was in the auditorium stage area, and to keep the trade workers out of the fall radius of the columns. Chauvin then asked if the anchor bolts were where they belonged, and Campbell indicated that they were except for some that were not in the same area where erection was to begin. (Tr. 513-15, 553-64; Exhs. 1, 41-42). *See also* Stip. Nos. 7, 12.

On October 1, NCD began steel erection. Prior to starting, however, Chauvin asked Campbell for a letter certifying the anchor bolts were in accord with the plans, or, if they were not, specifying the modifications performed and approved; Chauvin also asked for a letter certifying the concrete strength. Campbell asked how to do the letters, and Chauvin told him how. Campbell then told Chauvin that he would prepare the letters, to “go ahead and erect,” and that Chauvin was “all set.” Chauvin then began erecting the steel, without being aware of any problems with the anchor bolts in the area where he was working. NCD erected four columns without incident, with Chauvin operating the crane, but the fifth column erected, Column M-1, fell about 30 seconds after it was detached from the crane. All four of the anchor bolts that had been installed at M-1, that is, the two in the grout extension and the two in the actual pier, pulled out when Column M-1 fell. Fortunately, no one was injured when the column collapsed. (Tr. 564-70; Exh. 1). *See also* Stip. Nos. 8-13.

On October 2, Campbell gave Chauvin a handwritten letter that stated that “all base plates and anchor bolt modifications have been completed with the approval of the structural engineer of record in Area A, except (M-1, D-1, D-4, D.9-14 and C-12.9). The five for mentioned [sic] anchor bolts and plates are awaiting approval.” The same letter, in typewritten form, was sent to Trimax on October 3. On October 2, Campbell sent a letter to Trimax stating that “[a]ll concrete in area A of the building ... has reached or surpassed 75% of the compressive strength per spec.” All of Campbell’s letters in this regard, including the handwritten one, were addressed to Danny Savoie at Trimax; Trimax, however, sent copies of the letters it had received from Campbell to Chauvin’s office by facsimile. (Tr.153-59, 587-91; Exhs. 20-21, 52-54).

A structural steel preconstruction meeting was held on the site on October 3.¹¹ At the meeting, the collapse of Column M-1 was discussed, as was the requirement that any proposed structural repairs be approved by Marini; also discussed was the need for the contractors to provide details on any proposed structural repair sketches sufficient for Marini to determine if the proposed repair was acceptable. On October 7 and afterwards, pullout testing, which tests if an anchor bolt will hold when a specified force is exerted upon it, was done of the modified anchor bolts at the site. Certain of the modified anchor bolts failed the pullout testing. (Tr. 152-53, 349-54, 913-15; Exhs. 28, V-2).

Despite the foregoing, Marini saw drilled-in anchor bolts and rebar in new locations on October 10, and these repairs had been done without sketches being submitted. Monahan also noticed new repairs, of which KBA had had no prior notice, after the date the column fell; the repairs included numerous anchor bolts that were cut off and a repair involving angle iron at the auditorium entrance. Marini and KBA documented the continuing problem of unauthorized repairs and sketches that were missing necessary information. Alexandra ultimately submitted acceptable sketches for M-1 and the other the repairs at issue, which were approved on October 22. In addition, on November 1, Campbell sent new notification letters to Chauvin with respect to anchor bolt modifications and concrete compressive strength. (Tr. 165-66, 171-73, 430-31; Exhs. 23, 25, 29-32, 55-56).

Willful Citation 1 - Item 1

This item alleges a willful violation of 29 C.F.R. 1926.755(b)(1), which states that:

Anchor rods (anchor bolts) shall not be repaired, replaced or field modified without the approval of the project structural engineer of record.

To establish a violation of a specific OSHA standard, the Secretary has the burden of proving by a preponderance of the evidence 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 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).

Epernay contends that it did not violate the cited standard because the standard does not require written approval and Marini verbally approved the anchor bolt modifications made at the site. Epernay

¹¹The structural steel preconstruction meeting should have been held before steel erection began at the site. (Tr. 346-47).

asserts that an OSHA compliance directive relating to structural steel erection specifically states that the engineer's approval need not be in writing and, moreover, that the approval need only occur prior to erection. (R. Brief, p. 11). Even assuming *arguendo* that the Secretary is bound by the statements made in the compliance directive, Epernay's contention is not relevant because, based on my findings below, verbal approvals of anchor bolt and other structural repairs were not permitted on the subject project and Marini did not give such approvals.¹²

The required procedure on the subject project, for when a contractor intended to deviate from the structural plans, is set out on page 5 of this decision. Marini and Trim testified in this regard, and Miller, the clerk of the works, confirmed their testimony about the procedure. (Tr. 69-75, 78-79, 90, 101-02, 108, 130, 324-27, 367-68, 504-05). Alexandra's field manual for superintendents is consistent with the testimony of Marini, Trim and Miller, stating that "[i]f it should become necessary to cut a structural element, no action is to be taken by any Company personnel and no authorization is to be given to any subcontractor without the prior written approval of the specific cutting by the Owner, Architect and the Owner's or Architect's Engineer." (Tr. 935-36, Exh. 92, p. 13). Marini, Trim and Miller all testified to the effect that a contractor could not make structural changes in the field without the written approval of the architect and engineer and that this was the standard procedure in the construction industry. (Tr. 69-75, 258-59, 264-65, 324-27, 367-68, 505).

Marini's testimony about his three visits to the site, and the modifications he saw that he had not been told about and had not approved, including the modifications at M-1, is set out on pages 5 and 6 of this decision. (Tr. 77-89, 98-125, 255). The testimony of Marini in this regard is supported by the testimony of Monahan, Miller and Cifune. (Tr. 407-14, 455-63, 473, 511-13). Marini's September 12 visit to the site resulted in Exhibit 17, his report about that visit, the details of which are described on pages 6 and 7 of this decision. The report sets out 14 items addressing the problems Marini had seen, including the repair work at M-1 and other locations where anchor bolts had been cut off and replaced with drilled-in bolts. Item 8, the item relating to M-1, and three other items state that "[t]he General Contractor must submit sketches to the Architect/Engineer for review and approval of

¹²At the hearing, Epernay presented Exhibit rr, a draft of the compliance directive, and Exhibit ss, the actual directive. Exhibit rr was received in evidence, but Epernay never sought admission of Exhibit ss. (Tr. 1006-09, 1037-40).

all repair work to correct construction mistakes or errors.” Item 14, the item pertaining to the other locations where anchor bolts had been cut off, states that “[t]he Architect/Engineer must be informed of all field corrections such as these before any repairs are made.” Marini specifically testified that he had not approved the repairs addressed in Items 8 and 14 before October 1. (Tr. 145-46).

Epernay disputes Marini’s testimony, noting Baldwin’s testimony that he discussed repairs with Marini either on the phone or in the field and that Marini verbally approved such repairs; Baldwin also testified that he never made any repairs, including those at M-1 and the other anchor bolt repairs, without first consulting Marini and that he had not had to submit sketches or written proposals.¹³ (Tr. 817-30, 835-39, 855, 886). In support of Baldwin’s testimony, Epernay presented phone records showing numerous phone calls during the relevant period between Odeh’s office and either Alexandra’s site phone or Baldwin’s cell phone. *See* Exhibits W-1-7.

As a preliminary matter, I agree with the Secretary that the phone records noted above are not probative of the content of conversations that took place between Odeh and either Baldwin or Alexandra personnel; the project was a large one, the calls could have involved any number of topics, and while it is clear that Marini spoke to Baldwin and Alexandra representatives on the phone and when he was at the site, and that he gave them verbal direction, these facts do not prove that Marini gave verbal approvals as Epernay claims. (Tr. 79, 231-33, 237, 276; Exh. 7, p. 1) At most, the importance of otherwise unidentified telephone calls between the two numbers amounts to a minor quodlibet. Beyond that, I conclude that Epernay’s contention simply makes no sense, in light of the evidence of record. As the Secretary points out, if Marini had been verbally approving the repairs at the site, then Epernay and Alexandra would surely have protested upon receiving Exhibit 17, Marini’s September 12 report, which clearly expressed Marini’s disapproval of how both Epernay and Alexandra were proceeding at the site and stated four times the requirement that the contractor submit sketches and obtain the engineer’s approval for all repair work. There is no evidence of any such protest in the record, including in Exhibit 19, Alexandra’s response to Exhibit 17. As the Secretary also points out, Alexandra’s own field manual for superintendents prohibited the cutting of structural elements without the “written approval” of the architect or engineer. (Exh. 92, p. 13). Further, the

¹³Baldwin testified that he also discussed repairs with Monahan. (Tr. 817-19, 825, 835).

Secretary points out that Epernay's answer to Interrogatory No. 11, relating to anchor bolt repairs, was as follows:

Depending on the repairs being performed, prior to September 16, 2002 the requested fix was either communicated verbally or in writing to Larry Marini or Ed Monahan, and RFI was sent or a fix would be provided by Larry Marini in his field reports. After September 16, 2002 Larry Marini requested sketches of proposed repairs and these would be submitted for approval. (Tr. 1035; Exh. 93, Ans. #11).

Turning to some of the specifics of Baldwin's testimony, Baldwin testified that he had asked Marini at the very beginning what the standard procedure was for fixing anchor bolts on the project. Baldwin said he had always made anchor bolt repairs by drilling down 8 to 10 inches, cleaning the hole thoroughly, and then setting the bolt into the hole along with the approved epoxy; he also said that he had advised Marini of this method and that no one had ever told him before October 1 that it was not an approved fix for anchor bolts. Baldwin further testified that when he discovered that the wall at M-1 was 2 inches too short, he spoke to Marini and Monahan and suggested adding a grout extension and installing two anchor bolts in the grout and two more in the correct locations on the pier. As a result of his discussions with Marini and Monahan, this repair work was done, but, according to Baldwin, he concluded upon viewing the repair that "it was just a shoddy piece of work." He again contacted Marini, telling him he was not comfortable with the repair, and he asked Marini to visit the site to look at it. Marini visited the site for that purpose, although Baldwin was not sure of the date, and while Marini and Baldwin talked about other possible fixes, such as adding two more anchor bolts, the matter was not resolved. Baldwin was "vaguely" familiar with Exhibits 17 and 19, Marini's September 12 report and Alexandra's response to the report, respectively, and he indicated he might have gone over some of the items in the documents with Pilcher; he also stated that page 3 of Exhibit 19 showed the two additional bolts he and Marini had discussed. Baldwin indicated that his manner of dealing with Marini, that is, calling him to get approval for a fix over the phone or having Marini look at a particular problem at the site and then getting his verbal approval to fix it, was consistent with his experience on previous projects. (Tr. 817-30, 835-39).

I find the foregoing testimony not credible for several reasons. First, Baldwin's testimony about getting verbal approvals from Marini for repair work at the site is directly contrary to the testimony of Marini, Trim and Miller, to the statement from Alexandra's manual for superintendents, and to

Epernay's answer to Interrogatory No. 11, all of which are set out *supra*; similarly, Baldwin's indicating that the verbal approvals he allegedly received on the project were consistent with how he had worked at other sites is contrary to the testimony of Marini, Trim and Miller that written approval was the standard procedure in the construction industry. Second, Baldwin's testimony indicating there was a standard procedure for anchor bolt fixes contradicted the testimony of Marini and Trim that proposed "typical" anchor bolt fixes were not acceptable because a particular column, even if it looked similar to a column next to it, could have different loads bearing on it and the engineer had to evaluate the fix for the specific column.¹⁴ (Tr. 92-94, 366-67). Third, Baldwin's "vague familiarity" with Exhibits 17 and 19 is at odds with Campbell's testimony that Baldwin and Dizdari had assisted Pilcher to provide the answers in Exhibit 19.¹⁵ (Tr. 907-09, 921, 937). Fourth, Baldwin's testimony about how the M-1 repairs came about is at odds with the testimony of Marini, Monahan and Cifune; their testimony in this regard is on page 6 of this decision. (Tr. 111-25, 409-10, 413-14, 455-63, 473).

In addition to the above, I observed the demeanors of Marini and Baldwin as they testified, as well as the demeanors of Trim, Cifune, Monahan and Miller. In so doing, I noted their facial

¹⁴Marini approved essentially the same repair that Baldwin described for the anchor bolts noted in his report of August 1, and on October 11 he approved this repair for M-1 and the other modified anchor bolts at the site. Marini said the October 11 approval included the epoxy to use, an embedment depth of 9 inches, and a pullout strength of 11,120 pounds; he also said an anchor bolt repair done with epoxy could have in certain cases a lesser embedment than a bolt that was set in concrete as per the original specifications. (Tr. 270-74, 291-92; Exh. F). Although Epernay points to this evidence in support of its position, I have found Marini and Trim to be believable witnesses, as set out *infra*, and I therefore credit their testimony that the engineer had to evaluate the fix for the particular column. That this is so is apparent from the faulty repairs at M-1, where the extension was added to the pier, and the accident that occurred; stated another way, an anchor bolt fix could entail more than simply cutting off the bolts and re-drilling them in new locations. Moreover, Marini testified that the repair requirements set out in his October 11 approval were "what would be acceptable," thereby setting out the minimum requirements for the anchor bolt repairs, and it is reasonable to infer he based those requirements on his professional engineering judgment. (Tr. 291-92). Finally, that Marini ultimately approved a single fix for the many anchor bolts that required repair does not support Epernay's contention that he gave verbal approvals, in view of the other evidence of record, and had no effect on Epernay's obligation to obtain written approval from Marini before performing anchor bolt repairs at the site.

¹⁵On cross-examination, Baldwin first denied any familiarity with Exhibit 19, but he then said that Pilcher "may have" talked to him about it. (Tr. 877-78).

expressions, attitudes, tones of voice, eye contact, posture and body movements. I also noted the consistency and reasonableness of their testimony, or lack thereof, in view of the record as a whole, as well as the motivation of each witness for testifying in a particular way. I found Marini, Trim, Cifune, Monahan and Miller¹⁶ to be credible and convincing witnesses, and their testimony is also supported by documentary evidence in the record.¹⁷ On the other hand, I found significant parts of Baldwin's testimony evasive and/or equivocal, besides being contrary to that of other witnesses and documentary evidence. In sum, I found Baldwin an unreliable witness, and his testimony, to the extent that it is inconsistent with that of other witnesses or documentary evidence, is not credited.

For all of the foregoing reasons, I conclude the Secretary has met her burden of proof in regard to this item. Specifically, I find that the standard applies and that its terms were violated. Besides the evidence noted *supra*, Baldwin admitted at the hearing that the fix at M-1 was not an approved condition when erection began; he also admitted that he had stated at the preconstruction meeting on October 3 that he knew the M-1 location was not ready to have a column erected.¹⁸ (Tr. 851, 879; Exh. 28, Item PCSS-14). I further find that employees were exposed to the cited hazard; in this regard, Epernay has stipulated that employees of NCD were exposed within the fall radius of Column M-1 in Area A at the project on October 1. (Tr. 8). Finally, I find that Epernay had knowledge of the cited conditions. Baldwin, Epernay's foreman, clearly knew of the repairs at M-1 and the other anchor bolt

¹⁶In finding Miller a credible witness, I have noted the fact that he was hired by the town of Westwood. I have further noted his considerable experience and the fact that his professional duty lay in having the work on the project done correctly. (Tr. 496-501).

¹⁷In finding Marini a credible witness, I have considered and rejected all of Epernay's arguments that he was not. In particular, I have noted that Marini agreed that a number of errors were made in the project drawings. *See, e.g.*, Tr. 190-208. He also testified, however, that there were "thousands and thousands" of items on any given project and that the number of errors he made was not unusual considering the size and complexity of this project. (Tr. 300-04). Further, on this record, Marini has not been shown to have made errors of judgment. I have also noted the many e-mails in the record that, according to Epernay, support its position that Marini did give verbal approvals in this matter. Given the substantial evidence in the record that is contrary to Epernay's position, as set out above, the e-mails are accorded little weight.

¹⁸In addition, Campbell admitted, in his October 2 letter to Chauvin of NCD, that anchor bolt modifications had not been completed with the approval of the structural engineer of record at M-1 and four other locations in Area A. *See* Exhibit 52.

modifications, and Campbell testified that Baldwin had helped Pilcher prepare Exhibit 19, Alexandra's response to Exhibit 17, Marini's September 12 field report. (Tr. 907-09, 921, 937). Baldwin was a foreman with Epernay, and his knowledge of the violative conditions is imputable to Epernay.

In regard to the willful classification of the violation, it is the Secretary's burden to show that the violation 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. *Id.* at 1256-57.

It is reasonable to infer that Epernay, as a subcontractor at the subject site, was aware of the prohibition in the project manual against the cutting or altering of structural members without the approval of the architect. (Exh. 26, § 05120, ¶ 3.2.D). It is also reasonable to infer that Baldwin, who had many years of construction experience, was aware that the standard practice in the industry was for contractors to make no structural changes in the field without the written approval of the architect and engineer, as Marini, Trim and Miller testified. (Tr. 69, 326, 505, 799-807). Despite this awareness, Baldwin's crew made modifications to anchor bolts in numerous locations at the site before October 1 without first obtaining Marini's approval. (Tr. 115-16, 145-46, 511-13; Exh. 17; Stip. No. 5). Further, on September 5, Monahan and Cifune saw Baldwin and a laborer adding the grout extension to the M-1 pier, and Monahan and Cifune told Baldwin the work was a structural repair and that Marini should be involved. Later that day, Monahan and Cifune talked to Collins, Alexandra's project manager, about the work at M-1, noting that it was a structural repair, that KBA had not gotten anything about it, and that the repair did not look proper; Collins told them he would look into it. (Tr. 409-10, 413-14, 455-63, 473). Notwithstanding these circumstances, Marini knew nothing about the repair work at M-1 until he saw it during his site visit on September 12. Marini specifically referred

to the repairs at M-1 as “unacceptable” in his September 12 field report, and Baldwin was aware of that report because he assisted Pilcher with the responses to the report. (Tr. 111-15, 907-09, 921, 937; Exhs. 17, 19). Baldwin himself testified that the grout repair at M-1 was a “shoddy piece of work,” and he stated at the preconstruction meeting on October 3 that he knew that the M-1 location was not ready to have a column erected. (Tr. 826, 851; Exh. 28, Item PCSS 14).

In addition to the foregoing, the record shows that Baldwin did not properly supervise the anchor bolt repairs. Baldwin testified that he assigned Epernay employee Robert Mercurio to make the repairs by cutting off the misaligned bolts and installing new bolts in the proper locations by drilling down 8 to 10 inches, cleaning the holes out thoroughly, and then setting new threaded rods in the holes with epoxy.¹⁹ He also testified that Mercurio told him he had performed anchor bolt repairs before and that he “knew what he was doing.” Baldwin admitted, however, that he had not reviewed Mercurio’s work, that he had not actually known whether Mercurio had repaired anchor bolts before, and that he was at fault for assuming that Mercurio would do the work properly. He also admitted that he had worked with Mercurio a total of only about two weeks; he had supervised him a day or two at a previous site and about two weeks at the subject site. Finally, he admitted that he had known that Mercurio had hit rebar about 3 inches down when trying to install an anchor bolt at M-1. Baldwin said he viewed M-1 after the accident, at which time he discovered that Mercurio had drilled the holes down only about 3 inches and had not adequately cleaned them out.²⁰ He confronted Mercurio the day after the accident about the repairs and then fired him. (Tr. 839-47, 887-88, 893-94).

In view of Baldwin’s awareness of the requirement that he was to obtain Marini’s approval before making anchor bolt repairs and that he and his crew nonetheless made such repairs without that approval, I conclude that Epernay had knowledge of the cited requirement and consciously disregarded it. I further conclude that Baldwin’s handling of the anchor bolt repairs at the site is best described as gross negligence and that, therefore, Epernay acted with plain indifference to employee safety. There is also an additional reason for finding that this item was willful. At the preconstruction meeting on

¹⁹Although the transcript refers to Mercurio as “Bobby McKeon” and “Mr. Mecurio,” Robert Mercurio is the correct name of the individual. (Tr. 839-47, Exh.84).

²⁰The two drilled holes were actually 3.75 inches and 5.5 to 6 inches deep. (Tr. 640).

October 3, Marini reiterated the requirement that any repair needed must have a sketch showing the proposed repair and that the proposed repair had to be approved before it took place. (Exh. 28, Item PCSS-08). During a site visit on October 10, however, Marini saw drilled-in anchor bolts and rebar in new locations, and these repairs had been done without sketches being submitted. (Tr.165-66, Exh. 23, Item 1). Monahan also noticed new repairs, of which KBA had not had previous notice, after the date the column fell; these included numerous anchor bolts that were cut off and a repair involving angle iron at the auditorium entrance. (Tr. 430-31). Trim wrote several letters to Alexandra following the October 3 meeting. Exhibits 29 and 30, both dated October 8, addressed, respectively, the continuing problem of unauthorized repairs and anchor bolts and base plates being out of tolerance. Exhibit 31, dated October 10, stated that proposed repairs must be on a case-by-case basis, that “typical” repairs would not be reviewed, and that, as noted previously, no anchor bolts were to be cut or removed unless directed by Odeh. Exhibit 32, dated October 15, noted that sketches Alexandra had submitted as proposed solutions for various columns were incomplete and could not be properly evaluated. Alexandra ultimately submitted acceptable sketches for M-1 and the other repairs at issue, and these were approved on October 22. (Tr. 171-73, Exh. 25).

Based on the above, I find that Epernay continued to make unauthorized repairs to anchor bolts and other structural members at the site after the accident and after the October 3 meeting, which Baldwin attended. *See* Exhibit 28. This conduct exhibited both conscious disregard of the cited standard and plain indifference to employee safety. Item 1 of Willful Citation 1 is accordingly AFFIRMED as a willful violation; the violation was also serious, in that it clearly could have caused death or serious injury.²¹ *See* section 17(k) of the Act.

Penalty Assessment

In assessing penalties, the Commission must give “due consideration” to the four criteria set out in section 17(j) of the Act, that is, the size of the employer’s business, the gravity of the violation, and the employer’s good faith and previous history of OSHA violations. These criteria are not

²¹I have noted Epernay’s contention that it relied on Mo Luckern, Trimax’s representative at the site, to tell the erector about the anchor bolt conditions before erection began at the site and that it (Epernay) did not know that Luckern had left the project when Trimax replaced CWS with NCD. (R. Brief, pp. 22-23). This contention is not relevant, however, in light of the manner of disposition of this item.

necessarily accorded equal weight, and the gravity of the violation is usually the primary factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001 (No. 0004, 1972). I find the gravity of the violation in this case to be high. Epernay performed anchor bolt repairs at the site that it knew were not authorized, and, in particular, it performed the repairs at M-1, which it knew were unacceptable. Epernay also failed to supervise properly the employee who performed the anchor bolt cutting and redrilling work, and Epernay continued to make unauthorized changes to anchor bolts and other structural members after the accident and the October 3 preconstruction meeting. The condition at M-1 clearly could have resulted in death or serious injury, and Chauvin and his crew of five to eight employees were exposed to the hazard of the M-1 column falling; fortunately, however, the column injured no one when it fell. (Tr. 558). I find that a reduction in penalty for the employer's relatively small size is appropriate but that no reduction is appropriate for good faith or history. (Tr. 761-70). I also find that the Secretary's proposed penalty of \$56,000.00 for the violation is appropriate. A penalty of \$56,000.00 is consequently assessed for Item 1 of Willful Citation 2.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made within the text above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent Epernay was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Act.
2. The Commission has jurisdiction over the parties and the subject matter.
3. Respondent Epernay was in violation of section 5(a)(2) of the Act in that it failed to comply with 29 C.F.R. § 1926.755(b)(1), as alleged in Willful Citation 1, Item 1.
4. The violation found above was willful and serious within the meaning of the Act.
5. A total civil penalty of \$56,000.00 for the violation affirmed in Item 1 of Willful Citation 1 is appropriate.

ORDER

1. Item 1 of Willful Citation 1 is AFFIRMED.
2. A total civil penalty of \$56,000.00 is assessed.

/s/

Michael H. Schoenfeld
Judge, OSHRC

Dated: April 23, 2004
Washington, D.C.