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 NO. 07-0585
	:	
TOWER PAINTING CO., INC.,	:	
	:	
Respondent.	:	

Appearances:

Margaret A. Temple, Esquire
Office of the Solicitor
U.S. Department of Labor
201 Varick Street
New York, New York 10014
For the Secretary.

George A. Marco, Esquire
George A. Marco PLLC
140 Broadway, 46th Floor
New York, New York 10005
For the Respondent.

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

Background

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). Between September 11, 2006 and October 3, 2006, the Occupational Safety and Health Administration ("OSHA") inspected work sites of Respondent, Tower Painting Co., Inc. ("Respondent" or "Tower Painting"). As a result of the inspections, on March 9, 2007 OSHA issued to Tower Painting one serious citation containing ten items and one willful citation containing two items. The total proposed penalty for the citation items is $85,200. On May 29, 2007, Respondent contested the citations and the penalties proposed therefor pursuant

to § 10(c) of the Act. *See* Joint Pre-Hearing Statement, dated July 2, 2008, § G, nos. 3-5, at p. 14.

Citation 1, Item 1a alleged that on or about September 11, 2006, bridge painters performing manual and power tool paint removal and cleanup personnel at the work site at Livonia Street (MTA #3 subway tracks), Brooklyn, New York (Livonia Street jobsite) were exposed to airborne lead levels above the permissible exposure limit (PEL) and were required to wear half-face tight fitting air-purifying respirators (APR's). The employer allegedly did not implement its written respiratory protection program with work site specific procedures. The proposed penalty for Citation 1, Item 1, is $2,100.

Citation 1, Item 1b, alleged that on or about October 3, 2006, at the Livonia Street jobsite, bridge painters performing manual and power tool paint removal were exposed to lead and were required to wear half-face tight fitting APR's. Five employees allegedly had facial hair that came between the sealing surface of the face piece and the face.

Citation 1, Item 1c, alleged that on or about October 3, 2006, at the Livonia Street jobsite, bridge painters performing manual and power tool paint removal and cleanup inside and outside the containment were exposed to airborne lead levels above the PEL and were required to wear half-face tight fitting APR's. Employees were allegedly observed wearing respirators that were not cleaned prior to donning, with facial hair or not wearing respirators at all. The employer allegedly did not provide effective training annually to all employees who were required to wear respirators.

Citation 1, Item 2a, alleged that on or about September 11, 2006, at the Livonia Street job site, Tower Painting employees used and were exposed to lead paint, primers and fuel. The employer allegedly did not implement and maintain its written hazard communication program which described how the criteria specified in 29 C.F.R. § 1910.1200(f), (g), and (h) would be met. The proposed penalty for Citation 1, Item 2, is $1,200.

Citation 1, Item 2b, alleged that on or about September 11, 2006, at the Livonia Street jobsite, Tower Painting employees used and were exposed to lead paint, primers and fuel. The employer allegedly did not create a chemical inventory list for the hazardous chemicals known to be present.

Citation 1, Item 2c, alleged that on or about September 11, 2006, at the Livonia Street jobsite, Tower Painting employees used and were exposed to lead paint, primers and fuel. The employer allegedly did not maintain Material Safety Data Sheets for all substances at the job site.

Citation 1, Item 2d, alleged that on or about September 11, 2006, at the Livonia Street jobsite, Tower Painting employees used and were exposed to lead paint, primers and fuel. The employer allegedly did not train employees on the hazardous chemical in their work area at the time of the initial assignment or whenever a new hazard was introduced.

Citation 1, Item 3, alleged that on or about September 11, at the Livonia Street jobsite, Tower Painting employees performing cleanup were exposed to a Time Weighted Average (TWA) concentration of lead at 0.057 mg/m3, above the PEL of 0.050 mg/m3. Employees allegedly wore street clothes consisting of jeans, sweatshirts, et cetera. The employer allegedly did not ensure that coveralls were worn to protect the employee's clothes. The proposed penalty is $2,100.

Citation 1,Item 4, alleged that on or about September 11, 2006, at the Livonia Street job site, Tower Painting employees were exposed to lead above the PEL by using manual and hand tools to remove lead paint from metal subway structures. Employees allegedly stored dirty and clean clothing in the same lockers. The employer allegedly did not ensure that changing areas were equipped with separate storage facilities for work clothing and for street clothing to prevent cross-contamination. Surface wipe samples taken on September 11, 2006 allegedly indicated the presence of 1760 ug of lead on a locker's base. The proposed penalty is $2,100.

Citation 1, Item 5, alleged that on or about September 11, 2006, at the Livonia Street job site, Tower Painting employees were exposed to lead above the PEL as they performed manual and power tool paint removal from a metal structure and cleaning of the work area. Employees allegedly ate on the sidewalk approximately 70 feet from the active containment. The employer allegedly did not provide lunchroom facilities or eating areas for employees whose airborne exposure to lead was above the PEL, without regard to the use of respirators. The proposed penalty is $1,200.

Citation 1, Item 6, alleged that on or about September 11, 2006, at the Livonia Street job site, Tower Painting employees performing manual and power tool removal of lead paint and

sweeping of lead paint chips were exposed to a TWA concentration of lead at 0.079 mg/m3 and 0.094 mg/m3, respectively (above the PEL of 0.050 mg/m3). The employer allegedly did not provide training to all employees exposed above the action level. The proposed penalty is $2,100.

Citation 1, Item 7, alleged that on or about September 11, 2006, at the Livonia Street job site, bridge painters working on a catenary scaffold were exposed to falls from approximately 15 feet while disconnecting harnesses between connection points. The proposed penalty is $2,100.

Citation 1, Item 8, alleged that on or about September 11, 2006, at the Livonia Street job site, employees working in the basket of aerial lifts were not tied to the basket and were exposed to falls from greater than 10 feet. The proposed penalty is $2,100.

Citation 1, Item 9, alleged that on or about October 3, 2006, at Livonia Street (at Amboy Street, MTA #3 subway tracks), Brooklyn, New York (Amboy Street jobsite), employees dismantling the catenary scaffolds while on top of a truck box were exposed to falls from greater than 10 feet. The sides of the truck box were allegedly not protected with guardrails, safety nets or personal fall arrest systems.

In the alternative, Citation 1, Item 9, alleged that on or about October 3, 2006, at the Amboy Street jobsite, employees dismantling catenary scaffolds while on top of a truck box were exposed to falls from greater than 10 feet. The sides of the truck box were allegedly not protected with guardrail, safety nets or personal fall arrest systems. The proposed penalty for Citation 1, Item 9, is $2,100.

Citation 1, Item 10, alleged that on or about September 11, 2006, at Livonia Street (at Rockaway Parkway, #3 subway tracks), Brooklyn, New York (Rockaway Parkway jobsite), bridge painters working 10 to 15 feet high on catenary scaffolds and in aerial lifts wore harnesses and lanyards that were deteriorated and damaged. The employer allegedly did not ensure that personal fall arrest systems were inspected prior to each use and that defective components were removed from service. The proposed penalty is $2,100.

Citation 2, Item 1a, alleged that on or about October 3, 2006, at the Amboy Street jobsite, an employee performing sweeping of lead paint chips was exposed to a TWA concentration of lead at 0.057 mg/m3 over the PEL of 0.050 mg/m3. The employer allegedly did not perform

initial monitoring to determine the exposure of its employees. The proposed penalty for Citation 2, Item 1, is $33,000.

Citation 2, Item 1b, alleged that on or about September 11, 2006, at the Decontamination Unit, Junis and Blake Streets, Brooklyn, New York, Tower Painting employees were exposed to lead above the PEL by using manual and power tools to remove lead paint from metal subway structures. Wipe samples of the floor of the clean side decontamination unit revealed 11,700 ug near the door and 6,470 ug behind the shower. Dirty site floor wipes revealed 7,760 ug of lead. Wipe samples taken from the bench in the dirty side of the Decontamination Unit and on the exterior of a water cooler near the nozzle revealed the presence of 4,850 ug and 246.6 ug of lead, respectively. The employer allegedly did not ensure that all surfaces were maintained as free as practicable of accumulation of lead.

Citation 2, Item 2, alleged that on or about September 11, 2006 at the Rockaway Parkway jobsite, the catenary-style scaffold planks were only secured on one end. The employer allegedly did not ensure that platforms were equipped with hook-shape stops to prevent them from slipping off the wire ropes. The proposed penalty is $33,000.

Together Citation 1, Items 1 through 10, and Citation 2, Items 1 though 2, described herein are together referred to as the "Citation Items at issue."

On July 5, 2007, the Complainant filed her Complaint. On July 24, 2007, Respondent filed its Answer.

Complainant's Amended Complaint was accepted by the Court as filed on April 1, 2008 (Amended Complaint). The Amended Complaint alleged that Respondent violated § 5(a)(2) of the Act and the standards promulgated pursuant to § 6 of the Act in the manners contained in the citations. The Amended Complaint further alleged that the violations alleged in Citation 1 were serious violations within the meaning of § 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the conditions alleged to exist and Respondent knew, or could with the exercise of reasonable diligence have known, of the presence of the violations. The Amended Complaint also alleged that the violations alleged in Citation 2 were willful within the meaning of § 17(a) of the Act in that the Respondent willfully violated the requirements of § 5 of the Act and the cited standard, rule, or order promulgated pursuant to § 6 of the Act, or a regulation prescribed pursuant to the Act. The Amended

Complaint further alleged that several of Respondent's employees were affected by the violations reflected in the Amended Complaint and underlying citations. *See* Amended Complaint at §§ V-VII, X, at pp. 3-4.

The Amended Complaint also alleged that in determining the amount of the proposed penalty, $85,200, due consideration was given to the size of the Respondent's business, the gravity of the violation, the good faith of the employer and the history of previous violations, as required under § 17(j) of the Act. *Id.* at § VIII, at pp. 3-4.

On April 1, 2008, the Court granted the Secretary's motion to compel and ordered Respondent to make full and complete answers to the Secretary's discovery requests. On June 5, 2008, the Court found that the award of expenses and fees, including attorney's fees, in the amount of $567.52 associated with the Secretary's motion to compel was appropriate as a sanction against Respondent permitted under Fed. R. Civ. P. 37(a)(5)(A).[1]

On June 19, 2008, the Complainant filed her Motion to Dismiss Respondent's Notice of Contest (Motion to Dismiss) based upon the Secretary's assertion that Respondent would not defend in the matter and that it has essentially abandoned the case. On June 24, 2008, during a conference call with the Court, the Secretary withdrew her Motion to Dismiss at Respondent's counsel's request based upon his representation that Respondent would defend the matter at the upcoming hearing.

The hearing in this matter was held in New York, New York, on July 22, 2008 as scheduled.

The Cited Standards

Citation 1, Item 1a, alleges a serious violation of 29 C.F.R. § 1910.134(c)(1), which states that:

> (1) In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures. The program shall be updated as necessary to reflect those changes in workplace conditions that affect respirator use. The employer shall include in the program the following

[1] Respondent duly paid the Secretary the amount of $567.52.

provisions of this section, as applicable:

> (i) Procedures for selecting respirators for use in the workplace;
>
> (ii) Medical evaluations of employees required to use respirators;
>
> (iii) Fit testing procedures for tight-fitting respirators;
>
> (iv) Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;
>
> (v) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;
>
> (vi) Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators;
>
> (vii) Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations;
>
> (viii) Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance; and
>
> (ix) Procedures for regularly evaluating the effectiveness of the program.

Citation 1, Item 1b, alleges a serious violation of 29 C.F.R. § 1910.134(g)(1)(i)(A), which states that:

> (1) *Facepiece seal protection*. (i) The employer shall not permit respirators with tight-fitting face pieces to be worn by employees who have:
>
> > (A) Facial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function; or

Citation 1, Item 1c, alleges a serious violation of 29 C.F.R. § 1910.134(k), which states that:

> (k) *Training and information.* This paragraph requires the employer to

> provide effective training to employees who are required to use respirators. The training must be comprehensive, understandable, and recur annually, and more often if necessary. This paragraph also requires the employer to provide the basic information on respirators in Appendix D of this section to employees who wear respirators when not required by this section or by the employer to do so.

Citation 1, Item 2a, alleges a serious violation of 29 C.F.R. § 1910.1200(e)(1), which states that:

> (e) *Written hazard communication program*.
>
> (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:
>
> (i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and,
>
> (ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

Citation 1, Item 2b, alleges a serious violation of 29 C.F.R. § 1910.1200(e)(1)(i), which states that:

> (e) *Written hazard communication program*.
>
> (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:
>
> (i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data

> sheet (the list may be compiled for the workplace as a whole or for individual work areas); and,

Citation 1, Item 2c, alleges a serious violation of 29 C.F.R. § 1910.1200(g)(1), which states that:

> (g) *Material safety data sheets.*
>
> (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.

Citation 1, Item 2d, alleges a serious violation of 29 C.F.R. § 1910.1200(h)(1), which states that:

> (h) *Employee information and training*.
>
> (1) 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 material safety data sheets.

Citation 1, Item 3, alleges a serious violation of 29 C.F.R. § 1926.62(g)(1)(i), which states that:

> (g) *Protective work clothing and equipment*--
>
> (1) *Provision and use.* Where an employee is exposed to lead above the PEL without regard to the use of respirators, where employees are exposed to lead compounds which may cause skin or eye irritation (*e.g*. lead arsenate, lead azide), and as interim protection for employees performing tasks as specified in paragraph (d)(2) of this section, the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment that prevents contamination of the employee and the employee's

garments such as, but not limited to:

(i) Coveralls or similar full-body work clothing;

Citation 1, Item 4, alleges a serious violation of 29 C.F.R. § 1926.62(i)(2)(ii), which states that:

(i) *Hygiene facilities and practices.*

(2) *Change areas*.

(ii) The employer shall assure that change areas are equipped with separate storage facilities for protective work clothing and equipment and for street clothes which prevent cross-contamination.

Citation 1, Item 5, alleges a serious violation of 29 C.F.R. § 1926.0062(i)(4)(i), which states that:

(i) *Hygiene facilities and practices.*

(4) *Eating facilities.*

(i) The employer shall provide lunchroom facilities or eating areas for employees whose airborne exposure to lead is above the PEL, without regard to the use of respirators.

Citation 1, Item 6, alleges a serious violation of 29 C.F.R. § 1926.62(l)(1)(ii), which states that:

(l) *Employee information and training--*

(1) *General*.

(ii) For all employees who are subject to exposure to lead at or above the action level on any day or who are subject to exposure to lead compounds which may cause skin or eye irritation (*e.g*. lead arsenate, lead azide), the employer shall provide a training program in accordance with paragraph (l)(2) of this section and assure employee participation.

Citation 1, Item 7, alleges a serious violation of 29 C.F.R. § 1926.451(g)(1)(i), which states that:

> (g) *Fall protection*.
>
> > (1) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1) (i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.
>
> Note to paragraph (g)(1): The fall protection requirements for employees installing suspension scaffold support systems on floors, roofs, and other elevated surfaces are set forth in subpart M of this part.
>
> > (i) Each employee on a boatswains' chair, catenary scaffold, float scaffold, needle beam scaffold, or ladder jack scaffold shall be protected by a personal fall arrest system;

Citation 1, Item 8, alleges a serious violation of 29 C.F.R. § 1926.453(b)(2)(v), which states that:

> (b) *Specific requirements.*
>
> (2) *Extensible and articulating boom platforms.*
>
> > (v) A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.
> >
> > Note to paragraph (b)(2)(v): As of January 1, 1998, subpart M of this part (§ 1926.502(d)) provides that body belts are not acceptable as part of a personal fall arrest system. The use of a body belt in a tethering system or in a restraint system is acceptable and is regulated under § 1926.502(e).

Citation 1, Item 9, alleges a serious violation of 29 C.F.R. § 1926.501(b)(15), which states that:

> (b)(15) *Walking/working surfaces not otherwise addressed.* Except as provided in §1926.500(a)(2) or in § 1926.501 (b)(1) through (b)(14), each employee on a

> walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system.

In the alternative, Citation I, Item 9, alleges a serious violation of 29 C.F.R. § 1926.451(g)(2), which states that:

> (g) Fall protection.
>
> > (2) Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

Citation 1, Item 10, alleges a serious violation of 29 C.F.R. § 1926.502(d)(21), which states that:

> (d) *Personal fall arrest systems.* Personal fall arrest systems and their use shall comply with the provisions set forth below. Effective January 1, 1998, body belts are not acceptable as part of a personal fall arrest system. Note: The use of a body belt in a positioning device system is acceptable and is regulated under paragraph (e) of this section.
>
> > (21) Personal fall arrest systems shall be inspected prior to each use for wear, damage and other deterioration, and defective components shall be removed from service.

Citation 2, Item 1a, alleges a willful violation of 29 C.F.R. § 1926.62(d)(1)(i), which states that:

> (d) *Exposure assessment–*
>
> > (1) *General.*
> >
> > > (i) Each employer who has a workplace or operation covered by this standard shall initially determine if any employee may be exposed to lead at or above the action level.

Citation 2, Item 1b, alleges a willful violation of 29 C.F.R. § 1926.62(h)(1), which states that:

(h) *Housekeeping–*

(1) All surfaces shall be maintained as free as practicable of accumulations of lead.

Citation 2, Item 2, alleges a willful violation of 29 C.F.R. § 1926.62(r)(2), which states that:

(r) *Catenary scaffolds*.

> (2) Platforms supported by wire ropes shall have hook-shaped stops on each end of the platforms to prevent them from slipping off the wire ropes. These hooks shall be so placed that they will prevent the platform from falling if one of the horizontal wire ropes breaks.

Jurisdiction

The parties have agreed and stipulated that the Commission has jurisdiction of this matter. They have also agreed and stipulated that, at all relevant times, Tower Painting was engaged in a business affecting commerce within the meaning of §§ 3(3) and 3(5) of the Act, and was an employer within the meaning of § 3(5) of the Act. *See* Joint Pre-Hearing Statement, dated July 2, 2008, § G, nos. 1-2, at p. 13. I find, therefore, that the Commission has jurisdiction of the parties and the subject matter in this case.

The Secretary's Burden of Proof

To prove a violation of a specific standard, the Secretary must demonstrate by a preponderance of the evidence that: 1) the cited standard applies, 2) the terms of the standard were not met, 3) employees had access to the cited condition, and 4) the employer knew, or could have known with the exercise of reasonable diligence, of the cited condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

The Hearing

At the start of the projected four day hearing, Respondent's counsel advised the Court that his client was not present, he had no witnesses and no defense to present. Respondent's counsel stated that "Tower has defaulted." Respondent counsel further informed the Court that he had

consulted with his client and had told his client "that if he didn't appear under the rules a default could be entered against him." Respondent's counsel stated that he understood that the Government had the burden of proof in the case. Understanding this, Respondent's counsel agreed that Respondent was conceding that default was appropriate and that the Secretary did not need to put on her case.

Respondent's counsel further conceding that all of the citations and the proposed penalties amounting to $85,200 should be affirmed by the Court. Thereafter, without an objection, the Court granted the Secretary's motion for a default judgement. The Court stated that it would enter a default order affirming all of the citations, items, and proposed penalties as alleged by the Secretary (Tr. 18-20).

Discussion

Commission Rule 64 states that the failure of a party to appear at a hearing "may result in a decision against that party." 29 C.F.R. § 2200.64(a). A failure to appear may be excused where good cause is shown, but a request for reinstatement must be made within five days of the hearing. 29 C.F.R. § 2200.64(b). Respondent has made no such request.

"A defaulting party 'is taken to have conceded the truth of the factual allegations in the complaint as establishing the grounds for liability as to which damages will be calculated.'" *Ortiz-Gonzalez v. Fonovia*, 277 F.3d 59, 62-63 (1st Cir. 2002)(quoting *Franco v. Selective Ins. Co.*, 184 F.3d 4, 9 n.3 (1st Cir. 1999). As a result of the default, the factual allegations of the complaint relating to liability are taken as true. *Dundee Cement Co. v. Howard Pipe & Concrete Products*, 722 F.2d 1319, 1323 (7th Cir. 1983). When entering a default judgment, factual allegations set forth in a complaint are sufficient to establish a defendant's liability. *Trustees of the Iron Workers District Council of Tennessee Valley and Vicinity Pension Fund et al. v. Charles Howell*, No. 1:07-cv-5, 2008 WL 2645504, * 6 (E.D. Tenn. July 2, 2008); *National Satellite Sports, Inc. v. Mosely Entertainment, Inc.*, No. 01-CV-74510-DT, 2002 WL 1303039, * 3 (E.D. Mich. May 21, 2002).

The Secretary's Amended Complaint and underlying citations sufficiently state the description of the alleged violations and a reference to the standards allegedly violated.[2] The Complain

[2] § 9(a) of the Act (a citation must "describe with particularity the nature of the violation, including reference to the provision of the Act, standard, rule, regulation, or order

ant has satisfied any burden of showing that she is entitled to an entry of judgment by default against Respondent.[3]

I find that the Secretary has adequately shown the applicability of the cited standards for each of the alleged violations. I further find that the Secretary has sufficiently established that the terms of the cited standards were not met by Respondent in each of the alleged violations. I also find that Respondent's employees had access to the cited conditions. Lastly, the Secretary has adequately proved that Tower Painting either knew or should have known of the cited conditions. The Citation Items at issue are all affirmed, in their entirety, as alleged by the Secretary.

Penalties

The Secretary has proposed a total penalty of $85,200 for the Citation Items at issue. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, prior history of violations and good faith. 29 U.S.C. § 666(j); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the principal factor in penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14. Based on the record of this case and Respondent's default, I find that the Secretary properly considered the statutory factors in her penalty proposals. I find the total proposed penalty of $85,200, along with the classification of the violations as alleged by the Secretary, for the Citation Items at issue to be appropriate, and the proposed penalties are assessed.

alleged to have been violated.").

[3] *See also* Fed. R. Civ. P. 55(b)(2). Any notice requirement has been satisfied by Respondent's counsel's presence at the hearing and statement of no objection to the entry of default.

Findings of Fact and Conclusions of Law

All finding of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 1a of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.134(c)(1).

2. Item 1b of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.134(g)(1)(i)(A).

3. Item 1c of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.134(k). A penalty of $2,100 is assessed for Citation 1, Item 1a through c.

4. Item 2a of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.1200(e)(1).

5. Item 2b of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.1200(e)(1)(i).

6. Item 2c of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.1200(g)(1).

7. Item 2d of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.1200(h)(1). A penalty of $1,200 is assessed for Citation 1, Item 2a through d.

8. Item 3 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.62(g)(1)(i) and a penalty of $2,100 is assessed.

9. Item 4 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.62(i)(2)(ii) and a penalty of $2,100 is assessed.

10. Item 5 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.0062(i)(4)(i) and a penalty of $1,200 is assessed.

11. Item 6 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.62(l)(1)(ii) and a penalty of $2,100 is assessed.

12. Item 7 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.451(g)(1)(i) and a penalty of $2,100 is assessed.

13. Item 8 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.453(b)(2)(v) and a penalty of $2,100 is assessed.

14. Item 9 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.501(b)(15). In the alternative, Item 9 of Citation I is affirmed as a serious violation of 29 C.F.R. § 1926.451(g)(2). A penalty of $2,100 is assessed for Citation 1, Item 9.

15. Item 10 of Citation 1 is affirmed as a serious violation of 29 C.F.R. 1926.502(d)(21) and a penalty of $2,100 is assessed.

16. Item 1a of Citation 2 is affirmed as a willful violation of 29 C.F.R. § 1926.62(d)(1)(i).

17. Item 1b of Citation 2 is affirmed as a willful violation of 29 C.F.R. § 1926.62(h)(1). A penalty of $33,000 is assessed for Citation 2, Item 1a through b.

18. Item 2 of Citation 2 is affirmed as a willful violation of 29 C.F.R. § 1926.62(r)(2) and a penalty of $33,000 is assessed.

/s/
Dennis L. Phillips
U.S. OSHRC Judge

Date: September 2, 2008
Washington, D.C.