OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. C.B. ROOFING & CONSTRUCTION, INC. Respondent.	OSHRC Docket No. 07-1701

APPEARANCES:

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For the Employer

BEFORE: Irving Sommer
Chief Judge

DECISION

This matter is before the Commission pursuant to a timely Notice of Contest filed by the employer pursuant to the Occupational Safety and Health Act of 1970; 29 U.S.C. §§651-678 ("the Act").

On July 7, 2007 an OSHA compliance officer (CO) conducted an inspection of Respondent's worksite at 4 Falcon Court, South Barrington, Illinois, where Respondent

was constructing a tile roof on a single family home. The pitch of the roof ranged from 10.5:12 to 12:12[1]. (Tr. 20). The CO testified that, when he arrived at the site, he observed an employee walking around a roof without fall protection, approximately 30 feet above the ground (Tr. 10, 17, Photo Exhibits C-2: B-D) He also observed two employees working from a pallet elevated by an all-terrain forklift without fall protection approximately 23 feet above the ground (Tr. 10, 17, Ex. C-2: G-J). Roofing tiles were stacked on the roof. (Tr. 14)

Also, a metal box meant to be mounted on a wall, was being used as a four outlet extension cord (Tr. 18, Ex. C-2: T,V). The extension cord was plugged into a ground fault circuit interrupter in the permanent wiring of the home. (Tr. 19)

As a result of that inspection, the Secretary issued three citations alleging various violations of the Act. A hearing was held on April 9, 2008 in Chicago, Illinois. The parties have fully briefed this case and the matter is ready for decision.

The Violations

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the violation with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991)

Citation 1, Item 1a and 1b allege a serious violations of 29 C.F.R. §1926.602(2)(d) (which apply the requirements of 29 C.F.R. §1910.178(l)) on the grounds that (a) Respondent did not ensure that each powered industrial truck operator was competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in 29 C.F.R.

[1]A 12/12 pitch is equivalent to a 45 degree angle. (Tr. 21)

§1910.178(l)(1(i)[2]; and (b) the employer did not certify that the Pettibone Model B-66 all terrain forklift operator had been trained and evaluated as required by 29 C.F.R. §1910.178(l)(6)[3], with certification records at the facility. A combined penalty of $1000 is proposed for these alleged violations.

Respondent's forklift was operated by Jeff Testa, who was also the foreman on the job. (Tr. 23) According to the CO, Mr. Testa informed him that he had previously been trained on the forklift, but that his employer did not evaluate him. (Tr. 25) Mr. Testa did not provide an estimate of when that training took place. (Tr. 25) The inspection report indicates that in a conversation with the CO, Respondent's owner, Charles Bitten, indicated that Mr. Testa "was highly qualified to operate the forklift, had many years of experience operating it and had a CDL license." (Ex. C-5, p.2) Respondent was not able to produce any document certifying that Mr. Testa had been properly trained.

There is no dispute that these standards apply to Respondent. Moreover, Respondent clearly was aware that Mr. Testa was not formally trained in operating the forklift. (Tr. 55) Finally, the Secretary has established that employees were exposed to the hazard posed by an untrained operator. Not only were employees working in the area around the forklift, but the forklift was also being used to lift a platform with employees on it (Tr. 37)

Respondent makes three arguments in defense. First, it contends that it was not

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[2]The standard states:
The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).

[3]The standard provides:
Certification. The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certifications shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

aware that it was required to have a written certification of training for its forklift operator. It argues that the forklift was purchased before the adoption of the cited standards and that it was not notified by the Secretary when the rule was adopted. Moreover, it argues that the Secretary failed to show that the standards were published. Respondent's argument is wholly without merit. I take judicial notice that, when adopted, the standard was published in the Federal Register[4] and has been included in the Code of Federal Regulations since its adoption. Therefore, public notice of the rule was properly provided. When a rule is properly published in the Federal Register, employers are charged with knowledge of the rule and are responsible for compliance. Ignorance of the law is not an excuse for noncompliance. *Ed Taylor Construction Co. v. OSHRC* 938 F.2d 1265, 1272 (11th Cir. 1991)

Respondent next argues that, after the inspection, it provided the Secretary with a certification prepared after the inspection (Resp. Opening Brief at 8, Ex. C-10). While the document *might* constitute abatement of the violation, it does not absolve Respondent of the violation.

Finally, Respondent contends that it did not need to formally train Mr. Testa because of his long experience in operating the forklift. It contends that to force Mr. Testa to undergo training and certification after 19 years of operating the machine would only be duplicative. The Commission cannot question the wisdom of a standard. *E.g. Carabetta Enterprises, Inc.*, 15 BNA OSHC 1429, 1432 (No. 89-2007, 1991); *Fabricraft, Inc*. 7 BNA OSHC 1540, 1542 (No. 76-1410, 1979) Moreover, an employer is required to follow the requirements of a standard, even if it believes that its own policy is wiser. *Martin v. C.F.& I Steel Corp*. 941 F.2d 1051, 1059 n.10 (10th Cir. 1991) The standard plainly requires that the operator undergo formal training. To allow "on the job training" to substitute for such formal training would be to improperly question the wisdom of the

[4]63 Fed. Reg. 66274 (De. 1, 1998)

standard. I note that §1910.178(l)(5) allows an employer to avoid duplicative training. That standard, however, presumes that the operator has received formal training on specific topics and that the operator has been evaluated and found competent to operate the equipment. Here, there has been no formal training or evaluation. Therefore, contrary to Respondent's assertion, to require that Mr. Testa receive formal training would not be duplicative.

The Secretary alleges that the violation was serious. Under section 17(k) of the Act, 29 U.S.C. §666(k), a violation is serious if there is a substantial probability that death or serious physical harm could result. This does not mean that the occurrence of an accident must be a probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur. *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1824 (No. 88-2572, 1992). Respondent argues that employees were not subjected to any dangerous conditions by not having documented training records. (Resp. Opening Brief at 10). I disagree. I recognize that Mr. Testa operated the forklift for many years without incident. However, that an accident did not occur that could have been prevented by proper training is a fortuity. At the time of the citation, the likelihood of an accident was low, but had an accident occurred, especially with employees riding on a platform held aloft by the forklift, the results could have been death or serious physical harm.

The Secretary proposed a combined penalty of $1000 for the two violations. When considering the propriety of a penalty the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations. *R.G. Friday Masonry Inc.*, 17 BNA OSHC 1070, 1075 (No. 91-2027, 1995); 29 U.S.C. §666(j). The evidence demonstrates that the Secretary considered the severity of the violation to be sever because injuries could result in death or serious physical harm. However, she also considered the gravity to be low because of the low likelihood that an accident would occur (Tr. 36, Ex. C-5 pp.

1-4). The record also demonstrates that the Secretary gave a substantial discount to her gravity based penalty (60%) because of Respondent's small size (Tr. 35). No discount was given for history because Respondent received a previous citation within three years of the instant citation. (Tr. 35). Similarly, no discount was given for good-faith because, according to the Secretary, Respondent did not have a good safety program (Tr. 35)

Under the Act, a serious violation can carry a penalty of up to $7000 per violation. 29 U.S.C. §666(b), Section 17(b) of the Act. On this record, I find that a combined penalty of $1000 is appropriate.

Citation 1, Item 2 alleges a serious violation of 29 C.F.R. §1926.100(a)[5] on the grounds that employees were not wearing protective helmets while working below an employee performing roofing work. The Secretary proposes a $1000 penalty for this violation.

The evidence is undisputed that the three employees at the site were not wearing protective helmets. (Tr.14-15, 28, 36-37, Ex. C2: G, H, J, I,K, L, M, N, O, P) According to the CO, Mr. Testa informed him that, though he wasn't wearing one, he had his own hard hat at the site. (Tr. 28) In its defense, Respondent argues that there was no need for protective helmets because there was no chance of anything falling on an employee's head. Specifically, Respondent argues that Mr. Testa was not working underneath the other workers and, therefore, that there was no exposure to any hazard. (Resp. Opening Brief at 2, Ex. C-2L) It also argues that the employees on the platform were situated only slightly below the worker on the roof and, therefore, that they too were not exposed to any hazard. In this regard, Respondent points out that the tiles were neatly stacked and did not posed a hazard to employees working below. (Resp. Opening Brief at 3-4)

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[5]The standard provides:
Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

Respondent's arguments have no merit. The standard requires that employees wear protective helmets "where there is a possible danger of head injury." The record clearly establishes that employee's were exposed to such a possible danger. Mr. Bitten testified that employee Gotto was the only employee that ever set foot on the roof and that the other two employees remained on the pallet. The photo exhibits clearly demonstrate that these two employees were below the Mr. Gotto who was installing tile and that the tiles were piled in the vicinity. (Ex. C-2: A-E, G, H, J, K) At a minimum, it was "possible" that a tile could have been kicked or dropped onto an employee's head. Similarly, Mr. Testa, who was walking in the area (Tr. 15, 36), could have been impacted. Even without a falling tile, there were tools on the roof which could have been dropped onto an employee's head[6]. Exposure was demonstrated and the violation established.

The record also demonstrates that the Secretary properly characterized the violation as serious. (Tr. 36-37) A roofing tile or a tool falling onto the head of an employee could cause death or serious physical harm. The Secretary proposes a $1000 penalty for this violation. The record demonstrates that, in arriving at this citation, the Secretary properly considered the statutory factors. I find the proposed penalty to be appropriate.

Citation 1, Item 3a alleges a serious violation of 29 C.F.R. §1926.451(c)(2)(v)[7] on the grounds that a platform elevated by a Pettibone Model B-66 all terrain forklift was not attached to the forks. A combined penalty of $2000 is proposed for items 3a and 3b.

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[6]Respondent asserts that, at the time of the inspection, the employee was on the roof to retrieve a tool. (Tr. 77)

[7]The standard provides:
Fork-lifts shall not be used to support scaffold platforms unless the entire platform is attached to the fork and the fork-lift is not moved horizontally while the platform is occupied.

The record is clear that employees were standing on a platform which was held aloft, but not attached to the forks of the forklift. (Tr. 13, 25, 37, Ex C-2: R, S,U) It is undisputed that the standard applies, that the terms of the standard were violated, and that Respondent, through its foreman and forklift operator, Mr. Testa, knew of the condition. Accordingly, the Secretary has established a *prima facie* violation.

In its defense, Respondent first contends that because the platform was up against the building, it could not slip off the end of the forklift's forks. Moreover, even if a hydraulic hose broke, the slow movement of the lift would give employees ample time to safely leave the platform. (Resp. Opening Brief at 12)

That the platform was up against the building might have reduced the likelihood that the platform could have slipped off in that direction. It did not, however, prevent it from slipping off toward the sides. Moreover, the suggestion that attachment was not necessary because, in the event of an hydraulic failure, employees would have been able to safely leave the platform is an argument undeserving of serious consideration. Suffice it to say that the standard's requirements are mandatory and require that a platform be attached to the forklift regardless of the configuration of the forklift or the athletic ability of the employees.

Respondent also argues that the failure to tie off the platform was the result of supervisory misconduct. (Tr. 13) Mr. Bitten testified that it was company policy that the platform be tied to the forklift. (Tr. 84) He also testified that, prior to the citation, every time but once when he visited the site, the forklift was tied off. On that one occasion when the platform was not attached, Mr. Bitten stated that he ordered that the platform be properly attached. (Tr. 84-85)

A claim of unpreventable supervisory misconduct is an affirmative defense for which the employer carries the burden of proof. *Danis Shook,* 19 BNA OSHC 1497, 1502 (No. 98-1192); *aff'd* 319 F.3d 805 (6th Cir. 2003). To establish the defense, the employer is required to prove that it (1) has established work rules designed to prevent the

violation; (2) has adequately communicated those rules to its employees; (3) has taken steps to discover the violations; and (4) has effectively enforced the rules when violations have been discovered." *Id.* When the misconduct of a supervisor is involved, the proof of unpreventable misconduct is more rigorous and the defense more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. *L.E. Myers Co.*, 16 BNA OSHC 1037, 1041 (No. 90-945, 1993).

For a workrule to be adequately enforced, especially where the employee responsible for the violation is a supervisor, the employer must demonstrate that there existed a disciplinary program to ensure compliance by employees. *Id* at 1041-42 The evidence establishes that Respondent had a workrule[8] that required that platforms be attached to a forklift, but there is no evidence that the rule was effectively enforced. Here, the record demonstrates only that Mr. Bitten had the employees correct the problem on the one occasion where he found that a platform was not properly attached to the forklift. However, there is no evidence that any employees were disciplined for that infraction. Indeed, Respondent has produced absolutely no evidence that the company had any sort of disciplinary or enforcement program. Accordingly, the defense fails.

Had the platform slipped off the forklift, two employees would have been subject to a fall of 23 feet and could have been struck by material being stored on the platform. Clearly, such an incident could lead to death or serious physical harm. (Tr. 38) Therefore, the Secretary properly characterized the violation as serious.

Citation 1, Item 3b alleges a serious violation of 29 C.F.R.§1926.451(g)(1)[9] on

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[8]The record demonstrates only an oral workrule. However, a workrule may be oral or written. The key is whether that rule is clearly and effectively communicated. *GEM Industrial Inc.*, 17 BNA OSHC 1861, 1863 n.5, *aff'd*, 149 F.3d 1183 (6th Cir. 1998)

[9]The standard provides in pertinent part:
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.

the grounds employees were exposed to the hazard of falling approximately 23 feet while working from an unprotected scaffold platform elevated by a Pettibone Model B-66 all terrain forklift.

The evidence is undisputed that two employees were working on the scaffold platform, approximately 23 feet above the ground without any fall protection. (Tr. 16-17, 37, Ex. C-2: N-P, R) Respondent asserts that there was a rail system that was removed from the forklift without the employer's knowledge. (Tr. 86) As noted, *supra*, to establish the affirmative defense of unpreventable employee misconduct, the employer must demonstrate that it had a workrule prohibiting the violative conduct and that it had a method of enforcing that rule. Not only is the record totally devoid of any evidence that would support the defense, but when asked about the company's safety program, Mr. Bitten told the CO that "he kind of, sort of had one," and provided no further details. (Tr. 29) Accordingly, the defense fails and the violation has been established.

The Secretary demonstrated that a fall from the platform could have resulted in death or serious physical harm. (Tr. 39) Accordingly, the violation was properly characterized as serious.. The record establishes that, in proposing a combined penalty of $2000 for Citation 1, items 3a and 3b, the Secretary properly considered the statutory factors. (Tr. 38-39, Ex. C-5, pp. 7-11) I find the proposed penalty to be appropriate.

Citation 2, Item 1 alleges a Repeat violation of 29 C.F.R. §1926.501(b)(13)[10] on

[10]The standard provides:
Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net systems, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph

the grounds that an employee performing roofing work on a single family home where the pitch was 12:12 was not protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems. The ground to eave height was approximately 26 feet. The citation notes that Respondent was previously cited for a violation of this standard on March 6, 2007 and that the citation became a final order of the Commission on or about April 5, 2006. The Secretary proposes a penalty of $4000.

The undisputed evidence establishes that Respondent's employee, Rocco Gotto, was working on a roof with a 12:12 pitch, approximately 26 feet above the ground, without any form of fall protection. (Tr. 10, 17, 20-21, 26-27, 30, 39, 52-53, Ex. C-2: C-E, H, K, N). The employee was in plain view. According to the CO, Mr. Testa told him that the fall protection was with another crew and that there was no fall protection at the site. (Tr. 27). The Secretary, therefore, has established that the standard was applicable, that its requirements were violated, and that Respondent, through its foreman, had knowledge of the violation. Accordingly, the Secretary has established a *prima facie* violation of the standard.

Respondent asserts that Mr. Gotto was on the roof only to retrieve a tool. (Tr. 77) Moreover, Mr. Bitten testified that the employee was in no danger of falling because he could hold or grip the wood strips of the stick grid system used to install the tiles, and was nowhere near the edge of the roof or the eave. (Tr. 78). Respondent asserts that the use of the harness would have exposed Mr. Grotto to a greater hazard because he would have had to navigate around the stacked tile. (Ex C-2 C) It argues that the time he would have spent tying off the harness would have doubled the exposure that he had by just going to

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(k) of §1926.502.

NOTE: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with §1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

the roof and retrieving the tool. (Tr. 78)

To establish the "greater hazard" defense, the burden is on the employer to demonstrate (1) that the hazards caused by complying with the standard are greater than those encountered by not complying, (2) that alternative means of protecting employees were either used or were not available, and (3) that application for a variance under section 6(d) of the Act would be inappropriate. *Quinlan, John H, d/b/a/ Quinlan Enterprises*, 17 BNA OSHC 1194, 1196 (No. 92-0756, 1995).

Respondent has failed to establish the defense. First of all, Respondent's assertion that Mr. Grotto was on the roof only to retrieve a tool is contrary to the evidence. According to the CO, prior to the taking of the photographs, Mr. Grotto was walking around the roof. (Tr. 12-12) There is no evidence that Respondent provided fall protection to Mr. Grotto at any time that day. To the contrary, Respondent does not dispute the CO's testimony that there were no safety harnesses at the site (Tr. 27) and Mr. Bitten testified that they would normally use fall protection in that situation and that "[i]f we could use fall protection, I would." (Tr. 77). Furthermore, reliance on the wood slats on the roof were no substitute for guardrails or safety harnesses. While the slats might have helped provide somewhat surer footing, they provided no protection in the event of a fall and, therefore, cannot be considered a viable alternative means of fall protection. Finally, there is no evidence that Respondent sought a variance from the standard or that such a variance would have been inappropriate.

Accordingly, the Secretary has established the violation.

The Secretary characterized this violation as repeated based on a prior violation of the same standard that alleged that employees were working on a 12:12 pitch roof while exposed to a fall of 11 feet[11], without the protection of a guardrail system, safety net system or personal fall protection system. (Ex. C-7 pp. 1-5) That citation was issued on

[11]Mr. Bitten testified that the height was 12 feet. (Tr. 82)

March 6, 2006 and became a final order of the Commission on or about April 5, 2006 (Ex. C-8, pp. 1-3)

A violation is "repeated" under section 17(a) of the Act, 29 U.S.C. §666(a) if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. The Secretary may establish a *prima facie* case that a violation is repeated by showing that there was a violation of the same standard, or if not the same standard, that the violations were substantially similar. *Midwest Masonry, Inc*., 19 BNA OSHC 1540, 1542 (No. 00-0322, 2001). By demonstrating that Respondent was previously cited for a violation of the same standard, the Secretary has made a *prima facie* showing that the violation was repeated.

Respondent argues that the violation should not be characterized as repeated because (1) in the first instance, three employees were exposed to a 12 foot fall rather than only one employee being exposed to a 26 foot fall in the instant case and (2) in the underlying citation employees were installing shingles while here they were installing tile (Tr. 82) These are differences without substance. Whether installing tile or shingles, whether three or one employee was exposed, or whether the fall was 12 feet or 26 feet, the salient point is that employees were working on a roof without benefit of fall protection.

Respondent further argues that the violation was not repeated because, in the underlying citation, employees had protective equipment, but chose not to use it. Here, however, the foreman directed employees not to wear protection and, instead, directed them to use alternative means of protection. The purpose for characterizing a violation as repeated, together with their higher penalties, is to induce an employer to comply where the penalties assessed by the original violation failed to attain compliance. Here, Respondent asserts that this violation should not be characterized as repeated because,

after the initial citation, which might have been the result of employee misconduct[12] , Respondent made a deliberate decision to ignore its safety obligations. It seems that Respondent is operating in reverse.

The evidence also establishes that the violation was serious. Clearly, a 26 foot fall off a roof would likely result in death or serious physical harm. (Tr. 40). The Secretary proposes a $4000 penalty. I find that the Secretary properly considered the statutory factors in arriving at the penalty, (Tr. 40, Ex. C-5, p.13) and that the penalty is appropriate given the seriousness of the violation and its characterization as a repeated violation. Accordingly, the proposed $4000 penalty is assessed.

Citation 3, Item 1 alleges an Other Than Serious violation of 29 C.F.R.§1926.403(b)(2)[13] on the grounds that a metal electric outlet box with a flexible cord was being used as a four outlet extension cord which is not in accordance with the listing and labeling of the equipment. No penalty was assessed for this violation.

The CO testified that a metal electrical box designed to be permanently mounted on a structure was being used as a four outlet extension cord. (Tr. 18, Ex C-2: T) The cord was then plugged into another extension cord which, in turn, was plugged into a ground fault circuit interrupter that was part of the permanent wiring of the home under construction. (Tr. 19, 41, Ex. C-2 V) The CO testified that, while the use of the box as an extension cord exposed employees to the hazard of electric shock if not properly grounded. (Tr. 18) However, according to the CO, because the box was connected to a

[12]I note that, despite Respondent's assertion, there is no evidence in this record to support the claim that the original citation was the result of employee misconduct. Regardless, the assertion is without merit.

[13]The standard provides:
Listed, labeled, or certified equipment shall be installed and used in accordance with instructions included in the listing, labeling, or certification.

ground fault circuit interrupter, the hazard was minimized. (Tr. 19, 41)

It is undisputed that the standard applies and that its terms were violated. However, Respondent asserts that the item should be vacated because there was no danger or exposure to employees. Although the CO testified that the hazard was "minimal" because the box was plugged into a ground fault circuit interrupter, he did not testify that there was no hazard to employees. Moreover, the standard, by its terms assumes that a hazard exists when an electrical device is not used in accordance with its listing, labeling, or certification. Where the standard does not incorporate a requirement that a hazard be shown to exist, such a showing is not part of the Secretary's *prima facie* case. *Trinity Industries Inc.*, 15 BNA OSHC 1481, 1486 (No. 88-2691-1992); *StanBest, Inc*. 11 BNA OSHC 1222, 1231 (No. 76-4355, 1983). Respondent does not dispute that the box was used by its employees. Therefore, they were exposed to the hazard.

The Secretary asserts that the violation was not serious and did not warrant the assessment of any penalty. I agree.

ORDER

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

1**. Citation 1, Items 1a and 1b, 2, 3a and 3b** are **AFFIRMED** as Serious violations and a total penalty of $4000 is **ASSESSED;**

2. **Citation 2, item 1** is **AFFIRMED** as a Repeated violation and a penalty of $4000 is **ASSESSED;**

3. **Citation 3, item 1** is **AFFIRMED** as other than serious and no penalty is assessed.

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Irving Sommer
Chief Judge

Dated: August 22, 2008
Washington, D.C.