



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

TORRE MACKLE GROUP, LLC,

Respondent.

OSHRC Docket No. 12-0318

### **FINAL ORDER**

Former Administrative Law Judge Ken S. Welsch issued a Decision and Order in this case affirming the citation item at issue, and subsequently, that decision was directed for review. On August 15, 2014, the Respondent notified the Commission of its decision to withdraw its notice of contest of the citation and proposed penalty pursuant to Commission Rule 102, 29 C.F.R. § 2200.102. Because the Respondent has withdrawn its notice of contest in this case, the Commission vacates the Administrative Law Judge's Decision and Order.

SO ORDERED.

BY DIRECTION OF THE COMMISSION

Dated: August 20, 2014

/s/ \_\_\_\_\_  
John X. Cervený  
Executive Secretary



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building – Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant  
v.  
Torre Mackle Group, LLC,  
Respondent.

OSHRC Docket No. **12-0318**  
Simplified Proceedings

**Appearances:**

Brooke D. Werner McEckron, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia  
For Complainant

Vincent F. Vaccarella, Esquire, Law Office of Vincent Vaccarella, Fort Lauderdale, Florida  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

Torre Mackle Group, LLC (TMG) is a construction managing company located in Coral Gables, Florida. On November 16, 2011, a safety compliance officer with the Occupational Safety and Health Administration (OSHA), in response to a referral from the police department, initiated an inspection into a secretary's head injury at the Mt. Sinai Medical Center in Miami, Florida. At the time of the injury on November 15, 2011, the secretary was sitting at her desk in the Office of Human Resources while a TMG employee, standing on a ladder in an adjacent office, attempted to catch a concrete core in a bucket that had been drilled through the roof. Instead, the employee lost control of the 29-pound concrete core and it fell through the tile ceiling above the secretary's desk. It struck the secretary on top of the head; causing bleeding.

As a result of the OSHA inspection, TMG received a serious citation on December 27, 2011. The citation alleges that TMG violated 29 C.F.R. § 1926.501(c)(3) for failing to barricade the area where employees were exposed to falling objects such as a concrete cylindrical core. The

citation proposes a penalty of \$ 3,000.00. TMG timely contested the citation.

The Secretary of Labor's motion, filed May 9, 2012, to allege, in the alternative, a violation of 29 C.F.R. § 1926.100(a) for failing to provide protective helmets, was granted at the hearing. The amendment did not change the nature of the alleged violation and hazard (Tr. 9, 13). *Paschen Contractors, Inc.*, 14 BNA OSHC 1754, 1757 (No. 84-1285, 1990). Also, TMG was unable to show prejudice as evident by it not needing the record kept open to offer additional evidence (Tr. 19, 200).

The hearing, designated for simplified proceedings pursuant to 29 C.F.R. § 1926.2200 *et Seq.*, was held on May 15, 2012, in Miami, Florida. The hearing was reconvened on June 26, 2012 to receive the testimony of the Director of Human Resources who was unable to attend the May 15 hearing because of a personal emergency (Tr. 19). The parties stipulated jurisdiction and coverage (Tr. 5). The parties filed post-hearing briefs on July 26, 2012.

TMG denies the alleged violation. It argues that the cited standards do not apply to the working conditions and the medical center employee was not a covered employee. Also, TMG claims the required safety measures were impermissible and inappropriate. As an affirmative defense, TMG asserts unpreventable employees misconduct.

For the reasons discussed, TMG's serious violation of § 1926.501(c)(3) is affirmed and a penalty of \$ 3,000.00 is assessed.

#### *The Inspection*

TMG is in business as a general construction manager. In 2011, the Mt. Sinai Medical Center contracted TMG to manage the replacement of windows and a new roof for the Ascher Building. The Ascher Building is two stories and contains the medical center's administrative offices including Payroll and Human Resources offices on the second floor. TMG assigned a project manager to oversee the project and contracted subcontractors to perform the work. TMG also assigned two full-time employees to work on the project (Tr. 71, 95, 148, 161-162, 188).

As part of the new roof project, additional pipes needed to be installed through the concrete roof to increase the drainage of rainwater. TMG contracted a core drilling contractor to drill several holes through the roof and a plumbing contractor to install the new drain pipes (Tr. 46, 172).

On November 7, 2011, TMG's project manager e-mailed the medical center's construction

manager that it would “commence the chipping/core drilling of the roof drains starting Monday, November 14<sup>th</sup>” (Exh. C-9). The e-mail also stated that a TMG employee assisting in the core drilling (identified as “our superintendent”) “should be getting in contact with each of the departments on the 2<sup>nd</sup> floor and trying to work out a plan of action to see what times work best for the individuals affected by the work.” The e-mail advised that the work would last one week, “with the majority of the noisy work (chipping/core drilling) being completed by Tuesday.” Pursuant to its agreement with the medical center, if an employee needed to be temporarily evacuated from the area, the TMG employee was to speak directly with the affected employee, the supervisor, or contact the hospital’s construction manager (Tr. 150).

On November 14, 2011, the core drilling work began. While the core drilling contractor drilled three holes through the roof, the plumber, on the second floor, standing on a 6-foot ladder held by the TMG employee, caught the drilled concrete core (a cylindrical concrete block) in a 5-gallon bucket (Tr. 68, 76). During this process, there is no evidence that any employee was exposed to a falling core or what, if any, precautions were taken to prevent employee exposure.

On November 15, 2011, because the plumber was unavailable, the TMG employee who had assisted him was assigned by TMG’s project manager to catch the concrete core while the other TMG employee held the ladder (Tr. 51, 67, 194-195). As determined by the plumber, the core hole drilled in the roof this day was located directly above the secretary’s desk in the Office of Human Resources (Exh. C-2; Tr. 46). Because her desk could not be moved, the two TMG employees decided to set up in the adjacent Director’s office (Exh. C-1; Tr. 43, 72, 229). After removing the nearest ceiling tile to the wall, the TMG employee stood on top of the 6-foot ladder holding the bucket underneath the concrete roof where the core was expected to be drilled (Tr. 73). The employee had to lean over the wall that separated the Director’s office and the secretary’s work area, holding the bucket against the roof (Tr. 42). The office ceiling was 9-feet above the floor and there was an additional 4 feet from the office ceiling to the roof (Tr. 97).

After the hole was drilled, the TMG employee lost control of the concrete core when it dropped into the bucket. The core fell through a ceiling tile above the secretary’s desk. As described by the TMG employee, the “bucket knocked out of my hand when the concrete core fell – The impact was so great that it didn’t come down, but rather it flew away from me – it went into the bucket, but when it landed, it never really came on a vertical plane, but rather it flew on a

horizontal plane away from me” (Tr. 62). He claimed that his “arms were getting tired from holding them up too long because it was taking too long for it to come thru, much longer than before” (Tr. 77).

The secretary, who was sitting at her desk on the other side of the wall, was struck on the left side of the head; causing bleeding. She was taken to the medical center for treatment (Tr. 228, 231). The concrete core measured 7 ¾ inches in diameter, 6 ¾ inches in length, and weighed 29 pounds (Exhs. C-6, C-7; Tr. 101-102). The accident occurred at approximately 9:30 a.m. (Tr. 193).

The TMG employee testified that he had not been trained on how to perform the task. “I saw what Pablo [the plumber] did before, so that’s about where I placed the bucket, according to what I experienced the day before” (Tr. 79). Also, he claimed that he told the secretary that “we’re going to drill. You need to remove yourself from this area and we’ll let you know when we’re done” (Tr. 79). According to his testimony, he advised the secretary at least twice to leave the area but she kept returning to her desk (Tr. 54-55). The secretary denied receiving any instruction to leave her desk (Tr. 130).

On November 16, 2011, based on a referral from the Miami Police Department, an OSHA safety compliance officer initiated an inspection (Tr. 88). After arriving at the Ascher Building, the compliance officer photographed the Human Resources offices and interviewed the medical center and TMG employees (Tr. 90). The tile above the secretary’s desk had been replaced and the area cleaned up (Tr. 90-91).

As a result of the OSHA inspection, TMG received the serious citation at issue on December 27, 2011 for failing to place a barricade at the secretary’s work area.

## **DISCUSSION**

The Secretary has the burden of proof.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employee access to the violative conditions, and (d) the employer’s actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

TMG stipulates that the construction standards are applicable to the core drilling work performed on November 15, 2011. If a violation is found, TMG also agrees the violation is properly classified as serious and the penalty of \$ 3,000.00 is reasonable (Conference Order dated May 8, 2011; Tr. 5).

**SERIOUS CITATION**

**Alleged Violation of § 1926.501(c)(3)**

The citation alleges that “[O]n or about 11/15/2011, the company did not barricade an area where employees were exposed to falling objects such as concrete debris and a concrete cylindrical core.”

Section 1926.501(c)(3) provides:

(c) *Protection from falling objects.* When an employee is exposed to falling objects, the employer shall have each employee wear a hard hat and shall implement one of the following measures.

\* \* \* \* \*

(3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.

In the alternative, the Secretary alleges that “[O]n or about 11/15/2011, the company did not protect an employee with a protective helmet when that employee was working in an area where there was a possible danger of head injury from a falling concrete cylindrical core.”

Section 1926.100(a) 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.

There is no dispute the medical center secretary was struck on the head by the concrete core that had been drilled through the roof. The location of the core drilling was directly above the secretary’s desk. The door between the Director’s office and the secretary’s work area was open (Exh. C-2; Tr. 248). The Director, who sat at her desk near the opposite wall from the drilling, could not see the secretary (Tr. 238). There were no barricades placed around the secretary’s desk (Tr. 51-52, 233).

*Application of § 1926.501(c)(3) or § 1926.100(a)*

The standard at § 1926.501(c)(3) is more specific to the alleged unsafe condition at issue than § 1926.100(a) and therefore deemed the appropriate standard. *McNally Construction & Tunneling Co.*, 16 BNA OSHC 1879, 1880 (No 90-2337, 1994) (If the same hazard is addressed by two standards, the more specific standard preempts the application of the other standard). Both standards address the potential for head injuries from falling objects. However, § 1926.100(a) applies to other hazards to the head from flying or falling objects, impact, and electrical shock and burns. The standard requires protective helmets to protect against such hazards.

Section 1926.501(c)(3), on the other hand, addresses only injuries to the head from falling objects. It requires a hard hat and the implementation of additional measures such as barricades to protect employees from such hazard. The standard addresses more closely the hazard identified by OSHA in this case, *i.e.* a falling concrete core and the means of abatement, *i.e.* a barricade.

Section 1926.501(c)(3) is the applicable standard.

*TMG was the Responsible Employer*

The only employee exposed to the alleged overhead hazard on November 15, 2011, was the medical center secretary who was struck on the head by the concrete core (Tr. 17-18, 27-28, 111-112).<sup>1</sup> A central issue in dispute is whether TMG, as construction manager, should be held responsible for the safety of an employee of the property owner who contracted TMG to perform the drainage work. No Review Commission cases were identified that specifically addressed the issue.

On November 15, 2011, TMG employees were directly involved in supervising and performing the core drilling work above the secretary's desk. An employer engaged in construction activities is responsible for both those hazardous conditions to which its own employees at the site are exposed and those hazardous conditions to which it either creates or

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<sup>1</sup> The Secretary of Labor's inclusion of the Human Resource Director and the TMG employee holding the bucket as exposed employees is rejected as beyond the scope of the hearing and prejudicial to TMG based on lack of notice. The Secretary's counsel at the hearing made clear that the only alleged exposed employee was the office secretary (Tr. 17-18, 27-28, 111-112). Also, even if included, the record fails to show that the Director was exposed to the hazard or that TMG should have known its employee was not wearing a hard hat. The Director who remained at her desk throughout the core drilling operation was not reasonably expected in the zone of danger of the secretary's desk. The TMG employee, who was not wearing a hard hat while holding the bucket, was issued one by TMG and was required to wear it (Tr.50, 66). The employee took it off to work in the tight area above the ceiling tile.

controls and to which employees of other employers are exposed. *McDevitt Street Bovis, Inc.* 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000). This employer's responsibility has been extended to protect employees exposed to hazards on non-construction multi-employer worksites. *Harvey Workover, Inc.*, 7 BNA OSHC 1687, 1689 (No. 76-1408, 1979) (The safety of all employees can be achieved if each employer at multi-employer worksites has the duties to (1) abate hazardous conditions under its control and (2) preventing its employees from creating hazards). Therefore, it stands to reason that a project related non-construction employer's employee, who is exposed to a construction hazard and is required to work in the same work area, is afforded the same protection from hazards created or controlled by a general contractor as a subcontractor's employees. Such application does not imply that passers-by or unrelated third parties exposed to construction hazards are covered under the Occupational Safety and Health Act (Act).

In this case, the medical center contracted TMG to perform the drainage work as part of the roof project. The secretary was employed by the medical center and worked in the Human Resources Office where TMG's core drilling work was performed. The secretary was an employee at a construction worksite during the time of the core drilling. Her workplace was the same as TMG's construction worksite. She was exposed to an overhead hazard.

Under the contract with the medical center, TMG controlled the construction work at the Ascher Building and was responsible for the safe removal of the concrete core in the secretary's work area. The TMG employee in charge knew the work area was accessible to the secretary and that she was exposed to an overhead hazard. TMG's contract held it responsible to keep medical center employees safe when performing construction work (Tr. 164). TMG outlined the work plan and determined when and where the work would take place (Tr. 39, 117, 163, 171). TMG in this case had a duty to protect from a construction hazard the employee of the building owner who worked in the unsafe work area controlled by TMG.

TMG's employees also created the unsafe condition on November 15, 2011 by working over the head of a non-construction employee. TMG assumed the responsibility to complete the core drilling. TMG, in the absence of the plumber, became responsible for the protection of the exposed secretary who worked in same work area. It was responsible for securing the concrete core and assuring the secretary's work area was safe from the overhead hazard. The secretary's desk was located directly underneath the core drilling (Exh. C-2). The TMG employee, without



first-hand experience, made the decision to work from the adjacent office, stand on top of a 6-foot ladder, and to use a bucket to catch a 29-pound concrete core. He was in charge of the core drilling and supervised the work. He knew the process was “unsafe” (Tr. 50). He decided not to place a barricade although there was no clear view of the secretary’s desk.

The Act’s “focus of the compliance duty imposed on an employer is the employer’s workplace, not any specific employees.” *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010). Once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect employees who work in its workplace. The secretary was in TMG’s workplace and exposed to a hazard created or controlled by TMG. It was a common worksite. The secretary’s employer, the medical center, contracted TMG to perform the drainage work. TMG, as an employer, owed a duty not only to its own employees but to other employees at the same worksite when it created and/or controlled the cited conditions. A construction employer, TMG has a duty to protect the place of employment including other employees who work at the place of employment, so long as the employer also has employees at the place of employment.

TMG, as the creating and controlling employer, was responsible to provide the medical center secretary a safe workplace during the core drilling.

#### *Failure to Comply*

There is no dispute that there were no barricades placed around the secretary’s work area, deterring entry into the danger zone during the core drilling (Tr. 52). Section 1926.501(c)(3) requires in this case a hard hat and a barricade.<sup>2</sup> If the secretary was allowed to work at her desk (zone of danger) during the core drilling, a hard hat was required. If she did need to work at the desk, a barricade deterring access to the desk area was required by the standard. A barricade would prevent her exposure to a falling object.

There is no showing that TMG offered a hard hat or installed a barricade. Its argument that the use of a hard hat and barricade were impermissible and inappropriate is rejected.<sup>3</sup> The

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<sup>2</sup> A barricade is defined as “an obstruction to deter the passage of persons or vehicles.” *See*, §1926.203(a).

<sup>3</sup> To the extent TMG’s argument asserts an impossibility defense, the claim is denied as not properly plead. *National Engineering & Contracting Co.*, 16 BNA OSHC 1778, 1779 (No 92-73, 1994) (If not raised by a party, fairness directs that the affirmative defense should not be considered). During the simplified proceeding conference call, TMG did not identify impossibility as a defense (Order dated May 8, 2011).

standard requires them as the means of abatement. There is no showing that TMG advised the medical center or the Director about the need to keep the secretary away from the desk or made a request for a barricade or a hard hat. There is no showing the medical center objected to the abatement. The Director testified that a rope (barricade) could be placed around the secretary's desk without interfering with access to her office (Tr. 237).

Although no barricade was installed, TMG argues that the secretary was asked to leave her desk by its employee in charge of the core drilling. The TMG employee testified that he repeatedly told the secretary to leave her area (Tr. 79). The secretary denied receiving any instructions to leave (Tr. 130).

Having considered the witnesses' demeanor and responsiveness, the secretary's denial is given weight as more credible. Her denial is corroborated to an extent by the Director's testimony (Tr. 231-232). The Director did not hear her secretary given an instruction to leave the desk although the door was open between her office and the secretary's work area (Tr. 232-233, 248). She could not see her secretary, but she could hear her at her desk (Tr. 230). "I could hear her out there" (Tr. 238). "I think she was there most of the time, but she gets up, she's up and down, she answers the phone, she goes out front. She may not have been just sitting there the whole time, but she's usually there because she answers my phone" (Tr. 238). The Director testified that she allowed the secretary to remain at her desk because the TMG employees were in her office and she did not know the secretary was in the zone of danger (Tr. 234). "I had no idea that [the secretary] might be exposed to any dangerous conditions that day" (Tr. 234). TMG's earlier e-mail to the medical center only described the work as "noisy" (Exh. C-9).

Also, the circumstances support the secretary's testimony. It is hard to imagine a reason why the secretary would remain at her desk if she knew TMG's work was being performed directly overhead and she was asked to leave the area. The TMG employee, however, had a reason to misstate what transpired because of the injury to the secretary. Also, the employee acknowledges the secretary repeatedly returned to her desk despite his instruction. This shows the inadequacy of an instruction and increases his awareness that the secretary would be at her desk during the core drilling (Tr. 55). Even knowing she had repeatedly returned to her desk, the Director was not asked by the TMG employee to keep her away (Tr. 234, 250). Regardless, the standard requires a barricade, not an alleged instruction.

TMG's argument that the standard did not apply because the falling object from the core drilling was intentional and not accidental is rejected. The standard does not distinguish between an intentional and an accidental falling object. It applies to any falling object.<sup>4</sup>

The terms of § 1925.501(c)(3) were violated.

#### *Employee Exposure*

The secretary was exposed to the hazard of a falling concrete core. The location of the core drilling was directly above the secretary's desk (Exh. C-2; Tr. 45-46). Her desk was in the zone of danger of a falling object. On November 15, 2011, the secretary, sitting at her desk, was struck on the head from the falling concrete core. The core which struck her weighed approximately 29 pounds and fell approximately 13 feet (Tr. 97, 101).

#### *TMG's Knowledge*

As the last element of the Secretary's *prima facie* case, TMG, through its employee, knew or should have known with an exercise of reasonable diligence of the violative condition. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). The TMG employee directed the work and as a supervisor, his knowledge is imputed to TMG. It is sufficient to establish TMG's knowledge. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

The employee was assigned by the TMG project manager the task of catching the concrete core and assuring the area was kept clear of employees. TMG knew the core drilling procedure was unsafe (Tr. 50-51, 176). Although the employee identified his job as laborer, he was placed in charge of the work by TMG (Tr. 70, 176). On November 15, 2011, he was delegated supervisory authority at least temporarily. In an e-mail to the hospital, the employee was referred by TMG as "our superintendent" in the core drilling process (Exh. C-9). The TMG project manager described the employee as a field supervisor or superintendent who was in charge when he was not present (Tr. 95, 189, 190). He expected the employee to "use his judgment" and he had the authority to stop work if it was unsafe (Tr. 191). He directed the work of the other TMG

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<sup>4</sup> Other arguments raised by TMG are also rejected including a claim of employee misconduct on the part of the secretary and the failure to show that the medical center was in a business affecting commerce (TMG Brief pp. 8, 22). The secretary is not a TMG employee upon whom it can assert the affirmative defense. Also, OSHA does not need to show the employer of an exposed employee was in a business affecting commerce unless that employer received a citation.

employee. The unsafe condition caused by the core drilling was in plain view.

An employee who has been delegated authority over other employees, even if only temporarily, is considered a supervisor for the purposes of imputing knowledge to the employer. *A.P. O'Horo*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991) (laborer designated as working foreman) *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHA 1379, 1382 (No. 76-4271, 1981) (plasterer functioned as a supervisor).

The employee's knowledge of the core drilling operation and the failure to place a barricade is imputed to TMG.

#### *Unpreventable Employee Misconduct*

TMG argues that if a violation is found, it was due to its employee's misconduct. TMG asserts unpreventable employee misconduct if the employee failed to instruct the secretary to leave the area. The employee knew that he was to instruct workers to leave the area while the work was performed (Tr. 176).

In order to establish the affirmative defense of unpreventable employee misconduct, TMG must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

There is no showing TMG had a work rule on core drilling or placing barricades. The employee had not received any training by TMG on the core drilling process. He had only observed the plumbing contractor perform the job on the previous day (Tr. 79). He had never performed the job himself. There is no evidence the prior core drilling involved employees exposed to a hazard. Also, despite the project manager's trips to the project once or twice a day for about an hour, there is no showing that he monitored the employees to assure compliance with TMG's safety procedures involving the core drilling process. There is a lack of evidence of enforcing safety rules through a disciplinary program.

TMG's unpreventable employee misconduct defense is rejected.

#### **Serious Classification**

TMG's violation of § 1926.501(c)(3) is classified as serious. A serious violation under §17(k) of the Act, is where there is a substantial probability of death or serious physical harm that

could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation.

There is no dispute that a concrete core, weighing 29 pounds and falling 13 feet, could cause serious injury. The secretary was struck on the head, causing bleeding, and she needed emergency room treatment (Tr. 228). The employee's knowledge, as a supervisor regarding the failure to place a barricade, is imputed to TMG. TMG has stipulated and the record supports a finding that TMG's violation § 1926.501(c)(3) was serious under the Act (Tr. 5).

#### **PENALTY CONSIDERATION**

The Review Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission considers the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

A penalty of \$ 3,000.00 is reasonable for the violation of § 1926.501(c)(3). One employee was exposed to a head injury from a 29-pound concrete core. The record supports and TMG stipulates that a penalty of \$ 3,000.00 was reasonable in this case (Tr. 5).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

#### **ORDER**

Based upon the foregoing decision, it is ORDERED that

#### **Serious Citation No. 1:**

1. Item 1, alleged serious violation of § 1926.501(c)(3), is affirmed and a penalty of \$3,000.00, is assessed.

SO ORDERED.

/s/

**Date: August 9, 2012**

**KEN S. WELSCH**  
Administrative Law Judge