SECRETARY OF LABOR,

Complainant,

v.

HACKENSACK STEEL CORP.,

Respondent.

OSHRC Docket No. 97-0755

DECISION

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

Hackensack Steel Corp. ("Hackensack") is in the business of steel erection. Over the course of eight different dates from October 24, 1996 - April 18, 1997, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of a worksite at the Hackensack Medical Center in Hackensack, New Jersey, where Hackensack was working as the steel erection subcontractor. Following the inspection, the Secretary of Labor ("Secretary") issued a citation alleging four violations of the Occupational Safety and Health Act ("the Act"), 29 U.S.C. §§ 651-678.

All the citation items on review involve events that took place on October 24, 1996, the first day of the OSHA inspection: a serious and repeat violation of 29 C.F.R. § 1926.105(a) for failure to have exterior fall protection; a serious violation of 29 C.F.R. § 1926.701(b) for exposing employees to unprotected rebar; a willful, repeat, and serious violation of 29 C.F.R. § 1926.100(a) for not wearing hardhats; and a willful, repeat, and serious violation of 29 C.F.R. § 1926.750(b)(2)(i)[1] for not having temporary decking

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[1] Hackensack was cited under the steel erection standard applicable in 1996. The steel erection standard has since been significantly revised, effective January 18, 2002. *See* 66

below the employees in case of an interior fall. Administrative Law Judge Covette Rooney affirmed all four items and assessed the penalties proposed by the Secretary.

For the reasons below, we affirm all four items as alleged by the Secretary and affirmed by the judge. However, we group the two violations involving fall hazards for penalty purposes and assess a single penalty of $70,000. We affirm the judge on the penalty amounts assessed for the other two violations.

BACKGROUND

At the Medical Center worksite, Hackensack raised the steel in tiers, two stories at a time, and by October 24, 1996, the first tier had been erected. Hackensack had contracted to have decking, to be used as interior fall protection, delivered at 7:00 that morning. However, the decking did not arrive at the scheduled time. Around 9:30 a.m., Hackensack's crew began working on the second level, erecting two-story vertical columns from the second floor to the fourth floor. While they were erecting the columns, the employees worked at a height of 24 feet; thus, they were working below the height at which OSHA's fall protection standards require interior and exterior fall protection.

Hackensack's foreman testified that because it was a windy day, he was concerned that the steel columns that had been erected would not be stable and might fall on the employees of other employers working at the site or into a nearby apartment building. The foreman testified that due to his concerns, and in order to stabilize the columns, he instructed the two employees (the "connectors") who had been erecting the columns to connect them with 8 beams on the third level and to put in wind bracing columns. This task involved working above 25 feet with neither a temporary floor to protect against interior falls nor any protection against exterior falls. As Hackensack acknowledges in its brief on review, the foreman made the decision to tie in the columns above the 25-foot level after he learned that the decking would not arrive. In addition, the two connectors' hardhats fell off some time during the connecting work. The hardhats were not returned until the connectors went down to the ground for their lunch break.

Fed. Reg. 5196 (2001), *as amended by* 66 Fed. Reg. 37,137 (2001).

OSHA Compliance Officer Charles Triscritti ("CO Triscritti") drove by Hackensack's worksite, which he had been assigned to inspect, between 8:00 and 8:30 a.m. on October 24. At that time, he observed that skeletal steel had been erected to the second story, but he did not see any employees up on the steel. At approximately 11:00 a.m., he returned to the job site to conduct his inspection. Upon his arrival, he observed that the columns had risen two stories above the second story and there were beams connecting some of the columns at the third story level. As CO Triscritti walked up to the worksite, he saw two connectors without hardhats on the third story, about 43 feet from the ground.

As CO Triscritti watched, a crane brought in steel columns within a couple of feet of the connectors' heads. The connectors then put in bolts to join the steel. The employees were not tied off to prevent a fall to either the exterior or the interior of the structure. On the exterior, there were no ladders, catch platforms, safety nets, or scaffolding. On the interior, there was no decking within 30 feet or two stories of where the employees worked. As the connectors approached the outside of the steel, which CO Triscritti believed to be at heights between 27 to 43 feet, they had no fall protection whatsoever. CO Triscritti observed the two connectors sliding down a column from the 43-foot level to the 27-foot level also without fall protection. In addition, he noted that at the ground level directly under the connectors, there were more than 100 vertical protruding reinforcing rods that were neither protected nor bent.

After observing the connectors' activity for approximately ten minutes, CO Triscritti proceeded to the general contractor's office. On his way, he watched as another column was brought in to continue the steel erection process. The connectors installed this column in the same manner as the others. When CO Triscritti met with the general contractor and reviewed the plans that the general contractor produced, he learned that the distance from the ground level to the first level of steel was 11 feet; from the first level of steel to the second level of steel was 16 feet (for a total of 27 feet); and from the second level of steel to the 12 columns that had been installed on the third level of steel was 16 feet (for a total of 43 feet off the ground). After the lunch break, CO Triscritti also met

with Hackensack's foreman. The foreman indicated that there were ten Hackensack employees on site that day and that he had been on the ground that morning directing the crane operator to hoist the steel up to the connectors working on the skeletal steel.

THE FALL PROTECTION AND HARDHAT VIOLATIONS

Hackensack does not dispute the essential facts regarding the alleged violations of 29 C.F.R. § 1926.750(b)(2)(i) (failure to use temporary flooring), 29 C.F.R. § 1926.105(a) (failure to use any of the fall protection abatements specified by this standard), and 29 C.F.R. § 1926.100(a) (failure to use hardhats). Essentially, Hackensack's arguments as to the fall hazard allegations are that tying in the columns was necessary because of wind conditions at the worksite and it would have been hazardous to leave them untied; and the use of safety belts would have constituted abatement under both fall protection standards but the connectors engaged in employee misconduct by not using them. Hackensack also argues that it had no knowledge that its employees were not using their personal fall protection equipment or that their hardhats had fallen off while they were connecting the columns with beams. According to Hackensack, the foreman on site was engaged in selecting the connecting beams and did not have the two connectors in sight at the time the compliance officer observed the cited conditions. We conclude that these arguments lack merit.

The Fall Protection Items

The Secretary has on occasion cited employers under the fall protection standards cited in this case. *See, e.g., Donovan v. Daniel Marr & Son Co.*, 763 F.2d 477 (1st Cir. 1985); *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1993-95 CCH OSHD ¶ 30,052 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994). The Secretary's policy has been to cite unprotected fall hazards to the exterior of the steel under section 1926.105 and fall hazards to the interior under section 1926.750 when temporary floors were not established within 30 feet or two stories, whichever is less, beneath the workers. Abatement under section 1926.105(a) allows the employer to use a number of alternative forms of protection including the use of personal fall arrest equipment. However, section 1926.750(b)(2)(i) prescribes the use of temporary floors as fall protection. Personal protective equipment is not mentioned as an alternative to temporary floors.

Hackensack does not dispute that at the time of the inspection, it did not have the temporary decking in place as required by the steel erection fall protection standard. Similarly, it does not dispute the fact that two of its connectors were working without using their fall protection equipment at the third level of the steel in order to install connecting beams and wind bracing columns. The two connectors were exposed to a 43-foot fall hazard both to the exterior and the interior of the steel. Accordingly, Hackensack failed to comply with the terms of either section 1926.750(b)(2)(i) or 1926.105(a).

The Hardhat Item

The Secretary charged Hackensack with a willful violation of § 1926.100(a) in that the two connectors were not wearing hardhats while on the steel. Although they were wearing them when they went up on the steel, the helmets fell off as they were connecting the columns. The connectors testified that they called out to the signalman that they had lost their hardhats, and the record establishes that the hats were returned when the two connectors descended the steel for lunch. One of the connectors testified that he received five or six pieces of steel after his hat fell off, and the other connector testified that he worked on an additional two beams and two columns after his hat fell off.

Hackensack argues that the connectors were not exposed to overhead hazards while they performed their work, but CO Triscitti testified that he observed the crane bringing the steel within a few feet of a connector. While it may be that the hazard of being struck by the beams was remote and that hardhats may not have offered much protection from such a hazard, we believe that the Secretary through the testimony of the compliance officer has adduced sufficient evidence to make out a *prima facie* case for exposure.

Knowledge of the Cited Conditions

Hackensack argues that it did not have knowledge of either the safety belt violation or the hardhat violation. According to Hackensack, its foreman did not observe the connectors and could not have known they were not wearing their personal fall protection equipment or hardhats. There is conflicting testimony in the record concerning whether the foreman had actual knowledge of the violative conditions, but it is not necessary to resolve this conflict since we find, for the following reasons, that Hackensack could have discovered the violations had it exercised reasonable diligence.

Hackensack's foreman sent the connectors onto the steel knowing that the working conditions did not comply with the steel erection fall protection standard. The foreman knew that this meant the connectors had to use personal protective equipment as protection against fall hazards, instead of temporary floors. He also knew that they were required to wear hardhats. Despite this, the foreman took himself out of position to monitor the connectors' work. Under the circumstances and given Hackensack's lengthy history of OSHA citations for failure to use safety belts and hardhats, as discussed below, we believe that the foreman should have done more to discover safety hazards than he did. This is not to suggest that he had to monitor the connectors the entire time they were on the steel. However, we find that it is reasonable to expect him to have checked them from time-to-time or to direct another employee – such as the signalman, who was in visual contact with the connectors – to apprise him of the situation. *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387, 1980 CCH OSHD ¶ 24,495, p. 29,926 (No.

76-5089, 1980) (employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work"). *Cf. Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050-51, 1993-95 CCH OSHD ¶ 30,652, pp. 42,525-27 (No. 91-3467, 1995) (only reasonable monitoring efforts are required).

We note that Hackensack is no novice to allegations of the kind in this case. Hackensack should have perceived a need for increased monitoring based on the six final orders for violations of section 1926.105(a) it received from October 1986 to April 1993, as well as the eight prior final orders it received for violating section 1926.100. *See Pace Constr. Co.*, 14 BNA OSHC 2216, 2222, 1991-93 CCH OSHD ¶ 29,333, p. 39,432 (No. 86-758, 1991) ("failure to enforce fall protection requirements was a long-standing problem"). Effective implementation of a safety program requires a diligent effort to discover and discourage violations of safety rules. *Propellex Corp.*, 18 BNA OSHC 1677, 1682, 1999 CCH OSHD ¶ 31,792, p. 46,590 (No. 96-265, 1999). Furthermore, the foreman here conceded that he was involved in a previous citation issued to Hackensack in October 1991, involving both a hardhat and a section 1926.105(a) violation.[2] The foreman was apparently unaware of two other citations issued to Hackensack in 1993 involving worksites where he was the foreman, including one involving a violation of section 1926.105(a).[3] The foreman's testimony that he was unaware of these citations is compelling evidence that Hackensack has not been reasonably diligent about eliminating safety violations since it failed to even inform the individual in charge of safety on the site that there were safety problems that needed to be corrected.

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[2] Hackensack did not contest the 1991 citation and paid the associated penalties.

[3] The foreman initially testified that he had not received an OSHA citation between October 1991, and the current inspection. However, the Secretary introduced evidence that he had been foreman at two jobs cited in 1993. One involved a hardhat violation, which Hackensack did not contest and paid the associated penalties; the other involved a violation of section 1926.105(a), for which Hackensack entered into an informal settlement. When confronted with this evidence, the foreman testified that he recalled the inspection at one site but had not been informed that any citation had been issued.

In view of Hackensack's numerous prior OSHA citations for violations of the cited standards and its failure to inform its foreman that citations had been issued to Hackensack at worksites where he was in charge, we find that the foreman's decision to leave these employees on their own was foreseeable. *See Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1247 (8th Cir. 1978) (employer cannot hide behind lack of knowledge of working practices when it fails to properly train and supervise its employees).

Accordingly, we find that Hackensack had constructive knowledge of the violative conditions.

The Greater Hazard Defense

According to Hackensack, the connectors had to connect the columns and provide wind bracing even though temporary flooring was not available at that time because there was a danger that the steel might collapse due to wind conditions at the site. Although Hackensack characterizes this argument as a greater hazard defense, its claims do not fall within the parameters of that defense. The Commission has held that an employer asserting the greater hazard defense must demonstrate that the hazards of compliance with the standard are greater than noncompliance; that alternative means of protecting employees were either used or not available; and that an application for a variance under section 6(d) of the Act would be inappropriate. *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC at 1204, 1993-95 CCH OSHD at p. 41,304; *State Sheet Metal Co.,* 16 BNA OSHC 1155, 1159, 1993-95 CCH OSHD ¶ 30,042, p. 41,225 (No. 90-1620, 1993).

Usually, this defense is raised when the greater hazard is to the cited employer's employees exposed to the non-complying condition. In this case, the non-complying condition would be Hackensack's failure to use temporary flooring, and the exposed employees would be its connectors. However, Hackensack claims that the danger here was to the employees of other employers and to the adjacent property. While these arguments might have some appeal were they fully developed, we need not address them further because it is clear that Hackensack did not use an alternative means of protecting

its employees from the fall hazard. Although personal fall protection equipment was available to protect the connectors, Hackensack failed to take reasonable steps to ensure that the connectors actually used the equipment. Accordingly, the greater hazard defense has not been established.

The Employee Misconduct Defense

Hackensack raises the employee misconduct defense in rebuttal to the Secretary's case for constructive knowledge as to both fall protection violations and the hardhat violation. To establish the defense, Hackensack has the burden of showing that: (1) it has established work rules designed to prevent the violations; (2) it has adequately communicated the rules to its employee; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations are discovered. *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1502, 2001 CCH OSHD ¶ 32,397, p. 49,866 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003); *GEM Industrial, Inc.,* 17 BNA OSHC 1861, 1863, 1995-97 CCH OSHD ¶ 31,197, p. 43,688 (No. 93-1122, 1996), *aff'd without published opinion,* 149 F.3d 1183 (6th Cir. 1998). *Accord Brock v. L. E. Myers Co*., 818 F.2d 1270, 1276-77 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987).

Hackensack makes virtually no attempt to demonstrate that the conduct of its foreman in determining to proceed with steel erection while knowing he lacked temporary decking was misconduct. It merely argues that management above his level did not specifically authorize him to proceed as he did. None of the elements of the rebuttal case has been proved as to this charge.

We also conclude that Hackensack failed to establish the defense as to the failure of the connectors to use fall protection equipment and hardhats. The third element of the rebuttal case requires an employer to demonstrate it has taken steps to discover the violations. Here, as we have noted, Hackensack's foreman made no attempt to observe the work of the connectors and did not bother to check on them, even once. In the circumstances, we conclude that Hackensack has failed to rebut the Secretary's *prima facie* case.

Characterization

The section 1926.750(b)(2)(i) violation for the failure to use temporary decking was cited as serious and willful; the Secretary amended the citation to add the allegation that the violation was also repeated. Like the judge, we affirm all three characterizations.

A violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), "if there is a substantial probability that death or serious physical harm could result." "That provision does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Miniature Nut & Screw Corp.*, 17 BNA OSHC 1557, 1558, 1995-97 CCH OSHD ¶ 30,986, p. 43,176 (No. 93-2535, 1996). Because the connectors were exposed to a fall of 40 feet, a serious injury was likely if one of them had fallen. The violation was therefore properly classified as serious.

In addition, Hackensack had seven prior fall protection violations, including one for violating section 1926.750.[4] A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.[5] *See, e.g., Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167-68, 1993-95 CCH OSHD ¶ 30,041, p. 41,219 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643

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[4] The Secretary introduced evidence of eight prior fall protection violations – seven for section 1926.105(a) and one for section 1926.750. However, one entity cited under section 1926.105(a) was Hackensack Steel Erectors, and we do not find sufficient record evidence to conclude that it is the same company cited here. Accordingly, we have not considered that violation in determining whether the decking violation was properly characterized as repeated.

[5] We note that even though the prior section 1926.750 violation is of a different subsection than that violated here, the record shows substantial similarity between the two violations as both involve fall hazards during steel erection. *See Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p. 38,819 (No. 88-310, 1990) (primary factor in determining whether violation is repeated is whether the prior and instant violations resulted in substantially similar hazards). Furthermore, the citations for three of the earlier section 1926.105 violations all involve fall hazards during steel erection, including one involving "fall hazards ranging from 25 feet to 44 feet," strikingly similar to the instant case.

(3rd Cir. 1994). Under Commission precedent, the "time between violations does not bear on whether a violation is repeated." *Id.* at 1168, 1993 CCH OSHD at p. 41,220.

Notwithstanding this clear precedent, Hackensack argues that the most recent prior violation was over three years old and that OSHA's Field Inspection Reference Manual ("the FIRM") states that a citation should not be cited as repeated unless the final order date or the final abatement date of the prior citation is within three years of the current violation. *See* FIRM, Chp. III, C, 2, f, (3). However, the FIRM also indicates that there are no statutory limitations upon the length of time that a citation may serve as the basis for a repeated violation. *Id.* The Commission has held that the FIRM and its predecessor, Field Operations Manual, are only a guide for OSHA personnel to promote efficiency and uniformity, are not binding on OSHA or the Commission, and do not create any substantive rights for employers. *Hamilton Fixture*, 16 BNA OSHC 1073, 1079, 1993-95 CCH OSHD ¶ 30,034, pp. 41,174-75 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (unpublished); *Andrew Catapano Ent.*, 17 BNA OSHC 1776, 1780, 1995-97 CCH OSHD ¶ 31,180, p. 43,606 (No. 90-50, 1996) (consolidated); *Orion Constr.*, 18 BNA OSHC 1867, 1868 n.3, 1999 CCH OSHD ¶ 31,896, p. 47,222, n.3 (No. 98-2014, 1999). Accordingly, Hackensack's argument must fail and a repeated violation has been established.

The Secretary also alleged that the decking violation was willful. A willful violation is one committed with intentional, knowing, or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. A showing of evil or malicious intent is not necessary to establish willfulness. A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *Great Lakes Packaging Corp.*, 18 BNA OSHC 2138, 2140-41, 2000 CCH OSHD ¶ 32,094, p. 48,186 (No. 97-2030, 2000). Furthermore, an "employer is responsible for the willful nature of its supervisor's actions to the same extent that the employer is responsible for their knowledge of violative conditions." *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539, 1991-93 CCH

OSHD ¶ 29,617, p. 40,101 (No. 86-360, 1992) (consolidated) (citations omitted). A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. The test of good faith for these purposes is an objective one – whether the employer's belief concerning a factual matter or concerning the interpretation of a rule was reasonable under the circumstances of the case. *Great Lakes Packaging Corp.*, 18 BNA OSHC at 2140-41, 2000 CCH OSHD at p. 48,186.

The Secretary has established that the foreman acted with conscious disregard for the requirements of the standard and that Hackensack is responsible for the foreman's willful action. It is clear from the record that the foreman knew that decking was required and made a conscious decision to proceed without it. Even if Hackensack had a good faith belief that its approach was safer than complying with the standard, an employer who deliberately ignores the requirements of a standard still commits a willful violation. *Valdak Corp. v. OSHRC*, 73 F.3d 1466 (8th Cir. 1996); *Reich v. Trinity Indus.*, 16 F.3d 1149 (11th Cir. 1994).[6] On the evidence in this record, we find that the violation was willful, repeat, and serious as alleged.

The section 1926.105(a) violation for the failure to use personal fall protection was originally cited as serious. The Secretary amended the citation to allege that the item was repeated. The judge found that the violation was serious and repeated. In light of the fact that the connectors were exposed to a fall of forty feet, death or serious injury would be

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[6] Both Hackensack and the cited worksite are located in the Third Circuit, which has worded its test for willfulness as an "obstinate refusal to comply" with safety and health requirements, but considers that test as "differ[ing] little from" the one used by the Commission and most circuits. *Universal Radiator Mfg. Co. v. Marshall*, 631 F.2d 20, 23 (3rd Cir. 1980), *quoted in George Campbell Painting Corp.*, 17 BNA OSHC 1979, 1982, 1995-97 CCH OSHD ¶ 31,293, p. 43,978 (No. 93-984, 1997). We have reviewed the record in light of the Third Circuit test, and we find the violation willful under that test. In particular, we view Hackensack's refusal here to use decking, especially in light of its long history of fall protection violations, as an "obstinate refusal to comply" with the Act and a "knowing, conscious, and deliberate flaunting of the Act." *Frank Irey, Jr. v. OSHRC*, 519 F.2d 1200, 1207 (3rd Cir. 1974).

likely if a fall had occurred. Thus, we agree with the judge that a serious violation is therefore established. Based on Hackensack's six prior final orders for violating section 1926.105(a), the violation is also properly classified as repeated, as the judge found. *See Jersey Steel Erectors*. For the reasons discussed above, we reject the argument that the prior citations are "stale."

The section 1926.100(a) violation for the failure to use hardhats was cited as serious and willful. The Secretary amended the citation to add the allegation that the violation was also repeated. Hackensack's manager agreed that if an employee was not wearing a hardhat and was hit in the head by an incoming beam, he could be seriously injured. The violation is clearly serious.

We also find that the violation is repeated. The judge found that Hackensack had ten prior final orders alleging violations of the same standard. Hackensack has argued that not all the prior hardhat violations claimed by the Secretary involved the company. We agree with Hackensack that, like the prior fall protection violation discussed *supra* at note 4, the record lacks sufficient evidence to establish that two of the prior hardhat violations were issued to the same company cited here. Accordingly, we will not consider two of the ten prior violations of section 1926.100(a) in determining whether the current violation of this standard was properly characterized as repeat. However, on this record, there are eight prior final orders for violations of section 1926.100(a) issued over a period of nine years against Hackensack. Again, we reject Hackensack's argument that these prior violations are "stale."

In addition, we find that the hardhat violation is willful. Hackensack's extensive prior history of hardhat violations and the foreman's own involvement with at least one of these prior violations of which he was made aware establish a heightened awareness of the requirements of section 1926.100(a). *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1685, 2001 CCH OSHD ¶ 32,497, p. 50,377 (No. 00-315, 2001) ("*Revoli*"). As we have already noted, given its long history of hardhat violations, Hackensack was sufficiently alerted to the need for increased monitoring of its employees to prevent future violations. *Id.* at 1686, 2001 CCH OSHD at p. 50,378; *Falcon Steel Co.*, 16 BNA OSHC 1179, 1188,

1993-95 CCH OSHD ¶ 30,059, p. 41,336 (No. 89-2883, 1993) (consolidated). Yet, as its foreman's conduct in this case shows, Hackensack failed to take effective steps to monitor compliance with the cited standard. We find that this demonstrates a plain indifference to employee safety, as well as the requirements of the cited standard. *Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890, 1892-93, 1995-97 CCH OSHD ¶ 31,228, p. 43,788-89 (No. 92-3684, 1997), *aff'd*, 131 F.3d 1254 (8th Cir. 1997). *See also Revoli*, 19 BNA OSHC at 1685-86, 2001 CCH OSHD at pp. 50,377-78. Accordingly, this violation was properly characterized by the judge as willful.[7]

Penalty

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties due consideration be given to four criteria: the size of the employer's business; the gravity of the violation; good faith; and the employer's history of violations. Generally, the gravity of the violation is the primary element in the penalty assessment. *See, e.g., A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2013, 1991-93 CCH OSHD ¶ 29,223, p. 39,134 (No. 85-369, 1991). The gravity of a particular violation depends on: (1) the number of employees exposed; (2) the duration of the exposure; (3) whether any precautions were taken against injury; and (4) the probability that an accident would occur. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178, 1991-93 CCH OSHD ¶ 29,962, p. 41,012 (No. 87-922, 1993).

The Secretary proposed a penalty of $49,500 for the willful, repeat, serious decking item. CO Triscritti indicated that he deemed this violation to be high gravity with high severity and lesser probability. He gave a 10 percent reduction for size, based on 110 employees, but no credit for history or good faith. The judge assessed the Secretary's proposal of $49,500.

The Secretary also proposed a penalty of $2,000 for the repeat, serious safety belt item, similarly based on high gravity with high severity and lesser probability. CO

[7] We also find that the hardhat violation is properly characterized as willful under the Third Circuit test. *See* discussion, *supra*, note 6.

Triscritti again gave no credit for history or good faith but gave a 20 percent reduction for size because the item was not cited as willful. The judge assessed that amount.

With respect to these two items, we note that even though the regulations undergirding both items specify different means of abatement, both standards address fall hazards. Indeed, CO Triscritti testified that the standards address the "same hazard" and agreed that the use of safety belts with lanyards would have been an alternate form of fall protection for the connectors. As part of the Commission's exclusive grant of authority to assess civil penalties, *see* section 17(j) of the Act, 29 U.S.C. § 666(j), we have broad discretion in assessing penalties. *See Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621-23, 1993-95 CCH OSHD ¶ 30,363, pp. 41,881-83 (No. 88-1962, 1994). As part of this discretion, the Commission may assess penalties for distinct but potentially overlapping violations and may find it appropriate to assess a single penalty for such violations. *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981). Under these factual circumstances, we think it appropriate to group these two fall protection items for penalty purposes.

As for penalty amount, we decline to give Hackensack any credit for good faith under the circumstances of this case. As for Hackensack's size, while we note that the Secretary may have overstated the number of employees,[8] that factor is far outweighed by gravity and history. In light of the fact that Hackensack left its employees totally unprotected from possible falls of over 40 feet, Hackensack's prior history of numerous fall protection violations, including six for violations of section 1926.105 alone, and our consideration of the factors set forth in section 17(j), we assess $70,000 for the two grouped items. We recognize that this amount is higher than that proposed by the

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[8] The Secretary based her penalty calculation on the fact that Hackensack had about 110 employees. But Hackensack's manager testified that although the company had sent about 110 tax forms to the IRS in 1995, it never had more than 25 employees at any given time in 1996. While Hackensack's foreman suggested the company had over 100 employees "at certain times," we will credit the more definitive statement of the manager, who was in a better position to know. The Secretary has not taken issue with the manager's claim in her brief upon review.

Secretary for the two items combined. However, in light of Hackensack's history of multiple violations, we conclude that, "a high penalty is necessary to induce future compliance." *See Revoli*, 19 BNA OSHC at 1686-87, 2001 CCH OSHD at p. 50,378.[9]

With respect to the willful, repeat, serious hardhat item, the Secretary proposed a penalty of $49,500, and the judge assessed that amount. CO Triscritti testified that, in determining the penalty, he deemed the violation to be of medium severity and lesser probability for the gravity factor. He based his assessment of probability on the fact that he viewed the connectors without hardhats for eleven minutes during which he saw only two pieces of steel being lowered. CO Triscitti gave a 10 percent reduction based on 110 employees but no reduction for good faith or history.

Hackensack argues that the penalty assessed for the hardhat violation issued immediately before this one was $500 and that the penalty here, $49,500, is "staggering and totally disproportionate to the prior penalty." Citing *Crescent Wharf & Warehouse*, 1 BNA OSHC 1219, 1971-73 CCH OSHD ¶ 15,687, p. 20,978 (No. 1, 1973), the company argues that the penalty should not be substantially higher than the amount necessary to deter the violation. We agree with this proposition. However, in light of the fact that Hackensack has eight prior hardhat violations, it is clear that past penalty assessments have not had the necessary deterrent effect. *See Revoli*, 19 BNA OSHC at 1687, 2001 CCH OSHD at p. 50,378.

As discussed above, Hackensack argues that the Secretary has overstated the number of employees, and we agree. On the other hand, while CO Triscitti based his gravity assessment on the fact that the two connectors were only exposed to two pieces of steel, the record developed at the hearing indicates the two employees were actually

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[9] It is well settled that the Commission has the authority, albeit rarely exercised, to assess a higher penalty than that proposed by the Secretary. *See R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070, 1075, 1993-95 CCH OSHD ¶ 30,682, p. 42,581 (No. 91-1873, 1995) (consolidated). We note that the statutory maximum penalty for a repeat violation, like the maximum penalty for a willful violation, is $70,000. *See* § 17(a) of the Act. Accordingly, the maximum penalty the Commission could have assessed for these two items separately is $140,000.

exposed for a longer period involving the lowering of five to six pieces of steel. Accordingly, considering all the section 17(j) factors, we agree with the judge and assess $49,500 for this willful, repeat, and serious violation.

THE UNGUARDED REBAR VIOLATION

The Secretary alleges a serious violation of 29 C.F.R. § 1926.701(b)[10] based on the exposure of the two connectors to unguarded reinforcing steel rods ("rebars") protruding from the concrete footing below. We agree with the judge that a violation has been established.

The cited standard requires that protruding rebar into which employees could fall be guarded to eliminate the hazard of impalement. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1390-91, 1995-97 CCH OSHD ¶ 30,909, p. 43,034 (No. 92-262, 1995). While Hackensack does not contest the existence of the unprotected rebar on the site, it argues that its employees were not within the zone of danger. Hackensack also argues that it did not create the hazard, was not expected to protect against it, and was unaware of it.

Although one of Hackensack's connectors testified that the rebar was not directly below where they were working but was a foot or two away, the Secretary presented evidence that an employee who fell could reasonably be expected to fall into the area where the protruding rebar was located. We find that this evidence establishes exposure to the impalement hazard. *See Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871, 1995-97 CCH OSHD ¶ 31,207, p. 43,723 (No. 92-2596, 1996).

Moreover, the rebar was out in the open where it was "readily observable" if the foreman had inspected the site. Thus, we find that Hackensack either knew of the rebar hazard or could have known with the exercise of reasonable diligence. *Halmar Corp.*, 18 BNA OSHC 1014, 1016, 1995-97 CCH OSHD ¶ 31,419, p. 44,410 (No. 94-2043, 1997)

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[10] **§ 1926.701 General requirements.**

* * *

(b) *Reinforcing steel.* All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

(reasonable diligence includes inspecting worksite and anticipating hazards), *aff'd*, 152 F.3d 918 (2nd Cir. 1998) (unpublished). Therefore, a violation has been established.

Hackensack's claim that the general contractor on site was responsible for the rebar hazard and that, as a result, Hackensack cannot be held liable for any hazard that existed, raises the multi-employer worksite affirmative defense. In order to establish this defense, an employer must prove that:

> 1) It did not create the violative condition to which its employees were exposed;
>
> 2) It did not control the violative condition, so that it could not itself have performed the action necessary to abate the condition as required by the standard; and
>
> 3) It took all reasonable alternative measures to protect its employees from the violative condition.

Rockwell Int'l. Corp., 17 BNA OSHC 1801, 1808, 1995-97 CCH OSHD ¶ 31,150, pp. 43,536-37 (No. 93-54, 1996)(consolidated). *Accord D. Harris Masonry Contr. v. Secretary of Labor*, 876 F.2d 343 (3rd Cir. 1989).

Even if we accept that Hackensack did not create or control the cited condition, the company has failed to prove that it took reasonable precautions to protect its employees from falling onto the rebar. The evidence establishes that Hackensack could have required its employees to utilize safety belts and lanyards to protect themselves from the hazard of falling onto the rebar. In the alternative, Hackensack could have erected safety nets. Accordingly, we find that Hackensack has not established it took all reasonable alternative measures to protect its employees from the rebar and has failed to prove the multi-employer worksite affirmative defense.

CO Triscritti testified that the unguarded rebar violation was cited as serious because it presented the hazard of impalement. We agree with the judge that this item is properly characterized as serious. CO Triscritti also testified that the rebar violation was high gravity, lesser probability but high severity, and that he gave the company a 20 percent reduction for size. The judge assessed the $2,000 penalty proposed by the Secretary. On review, neither party has challenged the appropriateness of the amount

assessed by the judge for this item, which we believe is appropriate. We therefore affirm the judge.

ORDER

Citation 1, item 1, alleging a violation of § 1926.105(a), is affirmed as a repeat and serious violation. Citation 2, item 2, alleging a violation of § 1926.750(b)(2)(i) is affirmed as a willful, repeat, and serious violation. The two items are grouped for penalty purposes and a total penalty of $70,000 is assessed for the two violations.

Citation 1, item 2, alleging a violation of § 1926.701(b), is affirmed as a serious violation and a penalty of $2000 is assessed.

Citation 2, item 1, alleging a violation of § 1926.100(a), is affirmed as a willful, repeat, and serious violation and a penalty of $49,500 is assessed.

So ordered.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

/s/
Thomasina V. Rogers
Commissioner

Dated: September 24, 2003

SECRETARY OF LABOR, Complainant, v. HACKENSACK STEEL CORPORATION, Respondent.	DOCKET NO. 97-0755

Appearances: For Complainant: Barnett Silverstein, Esq., Office of the Solicitor, U. S. Department of Labor, New York, N. Y.; For Respondent: Edward Rosen, Esq., Fort Lee, NJ.

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, Hackensack Steel Corporation ("Hackensack") all times relevant to this action maintained at a workplace at the Hackensack Medical Center, Hackensack, NJ., where it was engaged in the business of steel erection construction work. Hackensack admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

From October 24, 1996 through April 18, 1997, Compliance Safety and Health Officer ("CO") Charles Triscritti conducted a general inspection of the aforementioned worksite. As a result of this inspection, on April 23, 1997, Respondent was issued four citation items, alleging serious, repeat and wilful violations with a proposed total penalty in the amount of $ 103,000.00. By timely Notice of Contest Hackensack brought this proceeding before the Review Commission. A hearing was held before the undersigned on May 27 to 29, 1998, and June 25-

26, 1998 in New York, NY. Counsel for the parties have submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

BACKGROUND

The subject job site involved the construction of the Hackensack Medical Center, a nine-story office building and a parking garage (Tr. 39)[11]. Respondent was the subcontractor on the job responsible for the erection of the structural steel for the building. Sometime between 8:00 and 8:30 AM on Thursday, October 24, 1996, CO Triscritti drove by the subject job site which he had been assigned to inspect. At that time he observed that skeletal steel had been erected to the second story. He saw no employees on the upper steel at that time. He observed that there were approximately 64 vertical steel columns which were 27 feet tall. There were horizontal steel eye beams connecting the columns to each other (Tr. 42-43). Nothing else had been erected (Tr. 44). At approximately 11:00 AM he returned to the job site to conduct an inspection. Upon his arrival, he observed that the site had changed. The columns had risen two stories above the second story. There were beams connecting a portion of the columns at the third story level and columns jutted up to the fourth story level (Tr. 45-46, 169).

He parked his car a couple of blocks away and walked to the site. As he walked along the sidewalk, he saw two iron workers on the third story steel, about 43 feet from the ground, without any hardhats (Tr. 48-50, Ex. C-2 to C-7, C-27).[12] He observed the crane bringing in steel columns overhead for the two workers to install them. He noted that the crane would bring the steel columns in very close - within a couple of feet of the employees' heads. He saw the employees putting bolts in to join the steel. They were standing on steel eye beams on both the second and third levels of steel. He watched this activity for some 10-12 minutes (Tr. 50-51, 67, 275, 280; Ex. C-27). He also observed that the employees were not tied-off to prevent falling either to the exterior or to the interior (Tr. 48-50; Exs. C-2 to C-7, C-20 to C-25, C-27). During his investigation, he learned that one employee, Donald Ayres, had a safety belt on, however, neither employee had a lanyard with which to tie-off a safety belt. He learned that there were no lanyards on site which could have been used to tie-off (Tr. 137, Ex. C-27). He also observed that there was no decking on the interior of the skeletal steel within 30 feet or two stories of where the employees worked (Tr. 49, 133). He testified that as they approached the outside of the steel, which he believed was at heights from 27 feet to 43 feet, they had no fall protection outside of the steel. He testified that he observed the two employees sliding down the column

[11] The term "Tr." refers to the official transcript of the hearing in this matter.

[12] The terms "Ex." and "Exs." refers to Exhibit and Exhibits introduced into evidence..

from the 43 foot level to the 27 foot level without any means of fall protection (Tr. 149). At the ground level directly under the area the employees worked he observed more than 100 pieces of vertical protruding reinforcing rods which were not protected or bent (Tr. 49-50, 71-72). CO Triscritti testified that on the interior there was no decking as required by OSHA, and on the exterior, there were no ladders, no safety belts or lanyards, no catch platforms, no safety nets, no scaffolding or temporary floors (Tr. 49-50).

He took photos and some video between 11:15 and 11:30 a.m. He took some notes and then proceeded to the general's office - William Blanchard. As he walked to the general's office he observed another column being brought in to continue the steel erection process. They installed it as they did the others (Tr. 51).

CO Triscritti testified that he met quickly in with the general in his office . He learned the heights of the steel from conversations with the general contractor and a review of the plans which the general contractor produced (Tr. 217, 221-22). He was informed that the distance from the ground level to the first level of steel was 11 feet, and from the first level of steel to the second level of steel was 16 feet - a total of 27 feet (Tr. 40, 42, 220-21). He learned that twelve columns had been installed on the third level which was 43 feet off of the ground - an additional 16 feet from the second story (Tr. 46, 173). By the time they got on site, it had drastically changed. There were no employees on the third story steel and every employee that he saw had on a hardhat. This was about 11:45 A.M. At this time there was no activity on the third level of steel, and it looked as if they had gone to lunch at the time (Tr. 54). In total, he was on site 8 days (Tr. 59).

After lunch held a opening conference with contractors. David Campbell, the rig foreman, was there from Hackensack (Tr. 63). Mr. Campbell told him Hackensack had 10 employees on site (Tr. 63). He learned from Mr. Campbell that at the time he arrived between 11:00 and 11:30, Mr. Campbell on the ground directing the crane operator to hoist the steel up to the employees working on the skeletal steel (Tr. 66).

RESPONDENT'S CASE

The plan for work on October 24, 1996, was to erect the deck and erect steel for the next sequence - third level. Respondent began its workday at by unloading, sorting and shaking out steel in preparation for the decking that was to be delivered at approximately 7:00 a.m. At around 9:00 a.m., they began erecting columns for the third floor (Tr. 347, 357, 370). At approximately 10:30 -11:00 a. m., the Dave Campbell learned that the decking was not going to arrive (Tr. 376). At that time, twelve columns had been erected without any decking (Tr. 373).

Dave Campbell testified that upon learning that the decking would not arrive, he became concerned about the columns in the back next to an apartment building. He testified that it was a windy day and going to get windier (Tr. 377). He testified that it would not have been good construction practice to have just left the columns next to the apartment building (Tr. 377). He made the decision to tie in the columns with beams at the back of the building adjacent to the apartment building and to put in the wind bracing columns which started at the 2nd level because of the location of the building. He also testified that he was concerned about the safety of employees from other trades who were working on the wall - laborers and masons (Tr. 383-84, 392,397). It was his opinion that there were no alternative methods to safely secure the columns and was no faster method to stabilize the columns (Tr. 377-78, 387, 406). The record indicates that this task involved the installation of eight beams and the wind bracing columns (Tr. 401-02). This entailed making a square box, putting up column ties and headers, and then moving to the wind bracing (Tr. 398). He decided to install the windbracing columns because they were the strongest columns in the area and would make the area abutting the apartment building a stronger unit (Tr. 404).

Secretary's Burden of Proof

The Secretary has the burden of proving his case by a preponderance of the evidence. 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 (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). To satisfy the element of knowledge, the Complainant must prove that a cited employer either knew, or with the exercise of reasonable diligence could have known of the presence of the violative condition. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1320-1321 (No. 86-351, 1991). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corporation*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). *See also Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer's foreman can be imputed to the

employer). In *Pride Oil Well Service,* 15 BNA OSHC 1809 (No. 87-692, 1992), the Review Commission set forth criteria to be considered when evaluating reasonable diligence.

> Reasonable diligence involves several factors, including an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co*., 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981) . . . Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe. (citations omitted).

Id. at 1814.

Citation 1, Item 1

29 CFR §1926.105(a): Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

> a) Office Building, third story: connectors were exposed to exterior fall hazards of approximately 43 feet while on the third story of steel. No safety net was used, on or about 10/24/96.

The record indicates that it is not disputed that at the time of the inspection two connectors, Bernard Lalley and Donald Ayres did not have on their safety belts (Exs. C- 3 and 27). The record discloses that from the ground floor to the first floor it was approximately 9 feet, from the first floor to the second floor was 15 feet 9 inches, and from the second floor to the third floor was 15 feet 9 inches (Tr. 440-45, 454-55; Ex. R-2; See Secretary's Reply Brief, p. 1 and Respondent's Post-Trial Brief, p.37).[13] It is undisputed that the connectors were on the third level of steel for the purpose of connecting eight beams (Tr. 256, 401-02, 519, 535-36, 569). Accordingly, the undersigned finds that the standard is applicable and that the connectors had no exterior fall protection while working off the top of the steel at the third level which was at an elevation in excess of 25 feet from the first floor. Thus, the cited standard was violated and employees had access to the cited hazard.

The record also demonstrates that safety belts with lanyards attached could have been used to protect exposed employees - this was done on all subsequent days when OSHA was

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[13] The undersigned finds that Respondent's height calculations with regard to the third level, as set forth in its post-trial brief misleading. When properly calculated, via the diagrams at Ex. R-1, the error is revealed.

present (Tr. 60). The Respondent has asserted that the time frame in which the work was performed was very limited (Respondent's Post-Trail Brief. Pp. 43-48). However, the undersigned finds the time limitation no defense to the cited hazards. The short duration of exposure to a violative condition is no defense against evidence of a violation. *Walker Towing,* 14 BNA OSHC 2072 (No. 87-1359, 1991).

At issue here, is whether the Secretary has established that Respondent knew or with the exercise of reasonable diligence should have known about the connectors working on the steel without fall protection. Respondent alleges that it did not know that they were not wearing the safety belts while on the steel. It is the Respondent's position that the connectors had been instructed to wear safety belts, and that the connectors went up on the steel wearing their safety belts. Mr. Campbell testified that company policy required that safety harnesses be worn on the outside of the building after the completion of 2 floors. He stated that he enforced that rule when they were working at that height (Tr. 348). On the morning of October 24, he believed that the connectors had taken their safety belts up on the steel. He testified that when they went up on the steel they had safety belts with them. He stated that once up on the steel, he never saw them without the belts nor was it ever brought to his attention that they were working without the belts (Tr. 375, 405-06). He explained that he had not seen them erect the beams because most of the time he was behind a wall determining what beams would be sent up since the sequence had now changed (Tr. 417).

The undersigned finds that Mr. Campbell's explanation does not excuse him of his obligation to exercise reasonable diligence on the worksite. The Respondent presented no evidence of what steps Mr. Campbell actually took to ensure that the connectors had their safety belts and harnesses on when they first went up on the steel. Mr. Campbell's generalized statements of what the company policy requires and what his job duties require when working at heights above two stories, do not definitively describe the steps he took on October 24 to ensure that company policy was being followed. Mr. Campbell changed the building sequence and started sending steel for the third level without first installing the decking. He acknowledged that he gave no specific instructions about safety belts and did not do anything to ensure that the employees had utilized fall protection when he started sending them beams for the third level (Tr. 736-38). The undersigned finds that Mr. Campbell did nothing to ensure that this policy was being complied with on October 24. His involvement with the selection of beams to be installed at a location in which allegedly made it impossible for him to observe the connectors, did not release him from his duty to exercise reasonable diligence in ensuring that company

safety policy was being followed. The undersigned that in light of the fact that he was so preoccupied with selection of the beams, in his supervisory capacity, he should have taken steps to ensure adequate supervision of employees, and taken measures which would have prevented the occurrence of the cited condition. The undersigned further finds that the violation was a condition which was readily apparent to anyone who looked, and thus, should have been known to management.(*See Simplex Time Recorder Co. v. Brock*, 766 F.2d 575, 589 [12 BNA OSHC 1401](D.C. Cir. 1985). *National Industrial Constructors, Inc*., 10 BNA OSHC 1081, 1097,(No. 76-4507, 1981); *J. H. MacKay Electric Co*., 6 BNA OSHC 1947, 1950 (No. 16110, 1978); *Public Improvements, Inc*., 4 BNA OSHC 1864, 1866 (No. 1955, 1976). The undersigned finds that the preponderance of evidence establishes that the Respondent had constructive knowledge of the cited condition.

Respondent also attempted to prove no knowledge of the violation by the two connectors as witnesses. Both of the connectors testified that they had their safety belts (harnesses and lanyards) when they initially went up on the steel that day. Bernard Lalley testified that prior to the commencement of work on this project, there had been a tool box safety meeting wherein he learned that the company's safety policy included the wearing of certain equipment such as hard hats and harnesses, and failure to follow these procedures could result in disciplinary action (Tr. 512, 553-54). He testified that on October 24th he had his harness with him at the time he went up on the steel. However, both he and Donald Ayres put their harnesses down when they got up on the ladder on the second floor (Tr. 514,561). He explained that he had placed it on top of a column on the second floor. At the time he installed the beams to box the columns he did not wear his safety belt (Tr. 519). He stated that he did not think it was important at the time because they had been "thr[own] off track" with the change of plans caused by the lack of decking. He testified that it took about 5 minutes to install each beam and about 5- 10 minutes to install the wind bracing columns. He stated that in order to set the beams for the exterior and interior climbs, he climbed/shimmied the columns to the third level where the beam would be connected. He stated that he normally would tie off to the column to perform this task (Tr. 545-46, 566). Donald Ayres confirmed that at the safety meeting conducted at the commencement of the job, hard hats and safety belts were discussed. He testified that he took his safety belt up with him on the morning of October 24. He stated that at the time they were tying in columns his belt was on the deck below - second level of steel. He acknowledged that he should have

been wearing it (Tr. 580, 582-83, 592). Both employees testified that the inspector showed them photographs of the cited condition on October 25 (Tr. 520, 585-86).[14]

The record reveals that the connector's testimony contradicts the information which the compliance officer obtained from them during his inspection. CO Triscritti interviewed the connectors on October 31, 1996, about his observations of October 24, 1996. He complied notes from those interviews which indicate that Bernard Lalley told him that they had to wear safety belts, however, he was not wearing a belt when he was working on the third because the belts were not on the job yet - they were coming out (Ex. C-20 & 21). His notes indicate that Donald Ayres told him that he did have on a safety belt but had no lanyard because he started working on the third level before the ropes had come out.(Ex. C-22-23). Furthermore, in its rebuttal case, the Secretary presented the testimony of CO Eric Marrinan who accompanied CO Triscritti for the October 31, 1996 interviews of the connectors. He testified that Bernard and Donald were interviewed separately, and CO Triscritti' notes of both interviews accurately reflected their responses to questions regarding the lack of safety belts. CO Marrinan testified that Bernard Lalley did not say anything about having a belt draped on the steel or anything about having a belt that day (Tr. 833-40, 847-849). He also testified that the day after these interview he reviewed CO Triscritti's interviews which had been typed. At that time he agreed that these notes were accurate (Tr. 846-47, 859-60). The record also contains the handwritten notes of another compliance officer who also accompanied CO Triscritti on this interview. The compliance officer, CO Scott Terefenko recorded notes of the interviews which corroborate CO Marrinan's testimony and CO Triscritti's notes of the interviews of Ayres and Lalley (Tr. 844, 849; Ex. C-22).[15]

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[14] Mr. Campbell also testified that he was shown the photos of the connectors on October 25, and that was the first time he actually saw the connectors without safety belts (Tr. 422) CO Triscritti testified that he could not have shown the pictures on October 24 because he did not get back into his office until late that day and he put the film in for developing on October 25. He stated that the developed film did not come back until the next week. The record indicates that he interviewed the connectors and Mr. Campbell on October 31. Furthermore, he testified that he did not show Mr. Campbell the photos because he did not need to show them to find out the identity of the connectors, and he would not have shown them to someone in management because he considered the connectors to be informants (Tr. 895-96).

[15]These statements were admitted pursuant to FRE Rule 801(d)(2)(D). Admissibility, however, does not establish the trust worthiness or reliability of those statements. *See Regina Construction Co*., 15 BNA OSHC 1044 (1991), where the Review Commission held that, although admissions under Rule 801(d)(2)(D) are not inherently reliable, there are several factors that make them likely to be trustworthy, including: (1) the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant

Respondent argues that the undersigned should disregard the inspectors' notes of these interviews and give credence to the sworn testimony which the connectors (Respondent's Post-Trial Brief, p. 53). The undersigned having listened to the testimony of the connectors and observed their demeanor while testifying finds that their sworn testimony was not credible. The undersigned finds that the compliance officer's written reports of these interviews are more reliable. As previously stated, CO Triscritti's notes were corroborated by two other inspectors who accompanied him on his inspection. The record contains no evidence of any prejudice on the part of OSHA towards the Respondent during the course of this inspection. The undersigned, having observed the demeanor of CO Marrinan, finds his corroborating testimony completely candid. These interviews occurred within a week of the cited condition, at time when the connectors had no time to realize their own own self-interest or feel pressure from the Respondent. The statements were given independent of one another about a critical fact which involved the manner in which the connectors went about their work. By the time the connectors appeared at trial, two years had gone by and one of the connectors had been promoted to foreman - Mr. Lalley. This promotion certainly created a more biased interest in favor of the Respondent with respect to the in the outcome of the case. The undersigned believes that this passage of time and the continued employment and promotion resulted in some pressure and/or bias to testify in favor of their employer. These factors were evident in their demeanor as they testified. [16]

The undersigned also notes that although the connectors had been available to testify during Respondent's case and Respondent was given the opportunity bring them back to refute the Secretary's rebuttal. However, Respondent did not produce the connectors to explain the alleged discrepancy in their statements (Tr. 865-67).

Repeat and Serious Classification

A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation , there was a Commission final order against the same employer

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is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made expected to have access to evidence which explains or rebuts the matter asserted. 4 D. Louisell & C. Mueller, Federal Evidence §426 (1980 & Supp. 1990).
Id. at 1048.

[16] The undersigned also finds that it was interesting that the connectors and Mr. Campbell testified that the photos were shown to them on October 25. The undisputed evidence in the record indicates that the interviews of the connectors took place and October 31, and the film was not sent out for development until October 25.

for a substantially similar violation. Unless the violation involves a general duty standard, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard. *Edward Joy,* 15 BNA OSHA 2091, 2092 (No. 91-1710, 1993). *See also Potlatch Corp.,* 7 BNA OSHA 1061, 1063 (No. 16183, 1979). The record establishes that Respondent had received seven prior violations for §1926.105(a) which had become final orders at the time the subject violation was issued(Tr. 31, 37; Exs. C-1, C-9, C-11, C-12). These final orders were dated from November 7, 1986 to April 25, 1993. There had also been a fall protection violation issued under §1926.750(b)(1)(ii) which had become a final order on August 14, 1984 (Tr. 31; Ex. C-1). Respondent, relying upon OSHA's repeat policy, argues that the subject violation had not been issued within three years of the date of the final order of any of the previously cited violations. See OSHA Field Inspection Reference Manual (FIRM) *Chapter III, C, 2, f. (3).* However, the undersigned finds that Review Commission precedent had established that a single prior violation can invoke the repeated violation sanction authorized by the Act. The Review Commission made no mention of a time limitation when it held that a violation can be cited as a repeat violation, "if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation". *Potlatch Corp*., at 1063. The length of time between two similar violations is relevant only to the "good faith" criterion for assessing a penalty, as it reflects upon the degree of an employer's continuing efforts to protect employees against hazards. *Id.* at 1064. The Review Commission has held that, "the guidelines provided by the FOM are plainly for internal application . . . [and] they do not have the force and effect of law, nor do they accord important procedural or substantive rights to individuals." *FMC Corp*., 5 BNA OSHC 1707, 1710. *See also H.B. Zachry Co.*, 7 BNA OSHC 2202 (No. 76-1393, 1980), aff'd, 638 F.2d 812 (5th Cir. 1981). Moreover, the FOM itself recognizes that "there are no statutory limitations upon the length of time that a citation may serve as a basis for a repeated violation". FIRM at *Chapter III, C, 2 f., (3).*

In light of the fact that the FOM is not legally binding, and the record establishes that Secretary has satisfied the *Potlatch* requirements, I find that the Secretary has properly classified the violation as

The undersigned finds that this violation was appropriately classified as serious. Section 17(k) of the Act, 29 U.S.C. §666(k), provides that a violation is serious if there is a "substantial probability that death or serious physical harm could result" from the violation. The undersigned finds that a fall from the cited condition would result in a substantial likelihood of serious injury.

Penalty

Once a contested case is before the Review Commission, the amount of the penalty proposed by the Complainant in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties "due consideration" must be give to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993).

The record reflects that gravity of the violation established a high severity because of the serious nature of expected injuries. The probability was assessed as lesser because only two employees were observed for approximately 11 minutes. The gravity based penalty was adjusted to reflect the respondent's size - 20 % for size (110) employees (Tr. 491-994). No adjustment was allowed for history or good faith because of the prior final orders, and Respondent the record is void of any evidence that Respondent enforced any kind of safety program. Accordingly, a penalty in the amount of $2,000.00 is appropriate.

Citation 1, Item 2

29 CFR §1926.701(b): Reinforcing steel. All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

> a) Office Building, throughout site: Ironworkers were working on the steel above unguarded vertical protruding re-bar. The re-bar was located at the perimeter walls and at grade level. No floor or catch platform was installed between the ironworkers and the unguarded re-bar, and no fall protection was used, on or about 10/24/96.

The record establishes that at the ground level, underneath the columns on the first two floors, there was a wall with more than 100 pieces of unprotected rebars protruding from it. The two connectors were observed working over this area. Bernard Lalley testified that as he set columns, he was about a foot and one-half off the wall (Tr. 49-50; 550-51; Exs. C-4, C-5). The Review Commission has held that, "[a]ccess to unguarded rebars exists if there is a 'reasonable predictability' that employees 'will be, are, or have been in' the 'zone of danger'". *Kokosing Construction Co., Inc.,* 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996), citing *Capform, Inc.* 16 BNA OSHC 2020, 2041 (No. 91-1613, 1994). The undersigned finds that the photographs and the testimony adequately establish that the cited violation was applicable and that employees had access to the danger of the cited rebars.

The undersigned finds that Respondent had constructive knowledge of this violation which was in plain view and readily apparent to Mr. Hamilton. Had Mr. Campbell exercised reasonable diligence, he would have taken steps to have ensured that his employees were not exposed to the cited hazard as they erected steel beams and columns. The record is void of any measures taken such as the notification of the contractor responsible for this condition and/or the implementation of alternative safety measures.

Serious Classification

The undersigned finds that serious injuries or death would result from a fall onto unprotected rebars. Therefore, the cited condition was appropriately classified as serious.

Penalty

The record reflects that gravity of the violation established a high severity because of the serious nature of expected injuries. The probability was assessed as lesser because only two employees were observed for approximately 11 minutes. The gravity based penalty was adjusted to reflect the respondent's size - 20 % for size (110) employees. No adjustment was allowed for history or good faith because of the prior final orders, and Respondent the record is void of any evidence that Respondent enforced any kind of safety program. Accordingly, a penalty in the amount of $2,000.00 is appropriate.

Citation 2 Item 1

29 CFR §1926.100(a): 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.

a) Office Building, third story: Connectors were not wearing head protection while erecting the steel, on or about 10/24/96

The record unequivocally establishes that at the time CO Triscritti observed the two connectors, they both were working without hard hats (Tr. 48, Exs. C-2 to C-5). CO Triscritti testified that he observed the crane bringing in steel columns overhead for the two connectors. He observed the columns coming in as close as a couple of feet, and maybe within a foot, of the heads of the connectors (Tr. 50). It is undisputed that at the time the two employees went up on the steel that morning they had on their hard hats (Tr. 265, 514). It is also undisputed that there are times that hard hats fall off (Tr. 267).

Bernard Lalley testified that his hard hat fell off as he was making a connection on one of the boxing beams. He testified that at that time he had set 6 beams. He stated that when the hat fell he yelled down to the signal man to send the hat up. He stated that they did not stop working

and acknowledged that he received an additional two beams and connected them after his hard hat had fallen (Tr. 537-.42). He then raised an additional two columns which went from the second level of steel to the fourth level. He acknowledged that when the beam was brought in on the crane he was already up on the column waiting for it, and he described how he would stand inside of a clip inside a column waiting for the beam to come in (Tr. 546) . He testified that the beam would be swung over his head, and as it would come down it would be within a foot or two away from him and then it is slide in(Tr. 548). He testified that the signal man returned both he and his partner's hats at the second level when they were on their way down the stairs (Tr. 517). Donald Ayres testified that while setting the "existing iron". He stated that they yelled down to the signal man to send the hats back. He testified that the hats were returned to them right before lunch as they were coming down. He stated that the hats were on the ladder - the safety guy had placed then there (Tr. 582). He recalled that his partner's hat fell off at about the same time his fell off. He testified that the signal man continued to direct the crane operator to send up steel, and they continued setting - maybe 5 to 6 pieces of steel - without their hard hats (Tr. 588-91).

The Review Commission has recognized that the instant standard requires proof of access to a zone of danger rather than proof of proof of actual exposure. See *Adams Steel Erection, Inc.*, 766 F.2d 804, 811 (3d Cir. 1985). The test for determining whether employees are exposed to a hazard is whether it is "reasonably predictable" that employees would be in the zone of danger created by a noncomplying condition. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996); *RGM Constr. Co.*, 17 BNA OSHC 1229 (No. 91-2107, 1995). The undersigned finds that the testimony from CO Triscritti and Bernard Lalley establish that employees were working within the zone of danger of head injury from the impact from beams being slide in or falling from above as they went about their assigned duties. Accordingly, the cited standard is applicable and because the employees were working without protective head protection noncompliance and employee exposure have been established.

Again, Respondent maintains that during the time the violation was observed, Dave Campbell did not see the connectors and was not made aware of the fact that their hard hats had fallen off. Bernard Lalley also testified that from where he was working he was not able to see Dave Campbell because he was on the other side of a five foot wall that was on the outside of the building in the vicinity of the crane (Tr. 518). It is Respondent's position that only the signal man knew that the hardhats were off because the connectors had yelled down to him. Thus, Respondent asserts that management cannot be held knowledgeable of this violation.

The undersigned finds that Respondent's argument is unpersuasive. The record indicates that management was aware that hats do fall off during steel erection. Mr. Campbell acknowledged that it was not uncommon for hard hats to fall off connectors because they have to bend over and turn completely over. He stated that if the hard hat falls off they "pick it up, tie it on, and send it back up with the next available man"(Tr. 416-17). The undersigned finds that the frequency of hard hats falling off this crew was established by the fact that the hats of both connectors fell off. The undersigned finds that these factors establish the lack of reasonable diligence on the part of management to take preventative measures such as ensuring the adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work did not continue when hard hats had fallen off. Again, this violation was in plain view. Accordingly, the undersigned finds that the record establishes actual and constructive knowledge on the part of Mr. Campbell of the cited condition. This knowledge is imputable to Respondent.

Repeat Classification

The record reveals that Respondent had previously received ten hard hat violations under §1916.100(a) which had become final orders at the time of the issuance of the subject violation (Tr. 31; Exs. C-1, C-8 to C-10). The undersigned finds that the record establishes that the instant violation was appropriately classified as repeat. As previously discussed, the fact that the most recent previously cited hard hat violation was outside of a three-year time frame, is of no consequence with regard to a repeat finding.

Citation 2, Item 2

29 CFR §1926.750(b)(2)(I): Where skeleton steel erection is being done, a tightly planked and substantial floor shall be maintained within two stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed, except when gathering and stacking temporary floor planks on a lower floor, in preparation for transferring such planks for use on an upper floor. Where such a floor is not practicable, paragraph (b)(1)(ii) of this section applies.

a) Office Building, third story: Connectors were exposed to interior fall hazards of approximately 4 feet while on the third story of steel No floor was installed between the connectors and the ground, on or about 10/24/96.

The record unequivocally established that on the morning of October 24, Mr. Campbell expected decking to arrive on site. The decking subcontractor was on site and the skeletal steel erection for the second level had just been completed. He had directed his crew to prepare for

the arrival of that decking (Tr. 370). Upon learning that the decking would not arrive that morning, he directed his crew to connect the beams to the existing columns in order to make a strong unit. He believed the windy conditions created a hazard to the existing columns which were adjacent to the apartment building (Tr. 397-98, 401, 404). He testified that there were no alternative methods to secure these columns (Tr. 407). He acknowledged that the connectors had to climb the columns to get to the third level of steel because there were no ladders to that level and that there were no floors (Tr. 741-44). He acknowledged that after beams were installed to form two boxes, two additional columns were raised (Tr. 751, 752). He testified that the columns installed on October 24 went from the second to fourth floor and were 28 to 30 feet tall (Tr. 803, 811-812).

The undersigned finds that the record establishes that no tightly planked floor was present while two employees were engaged in steel erection at the third level which was more than 30 feet from the ground floor. One of the connectors, Donald Ayres, recalled that the distance from the third level of steel to the ground was approximately 40 to 43 feet (Tr. 593). As the result of the lack of the floor beneath them or any kind of fall protection, the two connectors were exposed to a 40 fall hazard. Accordingly, the standard is applicable and noncompliance and employee exposure have been established. The record further establishes that Mr. Campbell was fully aware of the lack of flooring and the fact that the two connectors would have to work at the third level without the presence of flooring. He stated that he made this decision without consulting anyone else. The violation was in plain view and occurred under the direction of the foreman. Actual knowledge on the part of the Respondent has been established by a preponderance of evidence.

Willful and Serious Classification - Citation 2, Items 1 and 2

The Secretary recommends willful classifications for the violations of the hard hat and interior fall protection violations. The Secretary maintains that Respondent had a "heightened awareness" of the cite violations because Respondent had previously received violations for these hazards.. Furthermore, Mr. Campbell was the same foreman on the jobsite when Respondent was cited in 1993 when Respondent was cited for hard hats and fall protection violations (Exs. C-10, C-12, C-25, and C-26). On the day of the inspection CO Triscritti interviewed Mr. Campbell who indicated that as a part of his foreman duties, he directed the crane operator to hoist the steel up to the employees on the skeletal steel with hand signals (Tr. 66). CO Triscritti's testified Mr. Campbell admitted that he knew the OSHA steel erection standards required every decking every second floor. Mr. Campbell informed CO Triscritti that

it was his decision to put up the next floor and not to use nets. It was his desire to keep the job going because of the expense which had already been expended in preparation of the decking. He also informed Mr. Triscritti that it was "crazy" for connectors to wear hard hats because they drop off so often, and that he had "12,000 pieces of steel to connect" and he did not have time to watch the connectors. CO Triscritti testified that he jotted down notes of that interview and typed these notes upon returning to the office the following Tuesday - the inspection took place Thursday and Friday, October 24 and 25(Tr.68, 116, 118 ; Ex. C-13). CO Triscritti again interviewed Mr. Campbell on November 25, 1996 and he again recorded notes of that interview. At that time, Mr. Campbell informed him that Donald and Bernie were installing beams on October 24, on the third story and no protection was used when they were on the outside beams. He stated he knew this because he saw them (Ex. C-14). On January 30, 1977, he interviewed Walter Hamilton, the superintendent and Mr. Campbell. At that time, Mr. Hamilton informed him that it was difficult to enforce the hard hat rule and that he knew of nothing to prevent the hats from falling (Ex. C-15). Mr. Triscritti in the presence of his supervisor, again interviewed Mr. Campbell, who was at home at the time, via the telephone on March 27, 1997. At that time Mr. Campbell stated that he had seen the connectors not wearing hard hats. He stated he allowed the connectors to work without hard hats because they fall off. He stated when they do fall off he sends them back up when he gets a chance. He admitted that on the day of the inspection he knew the connectors were not wearing hard hats (Ex. C-16).

During the course of his testimony, Mr. Campbell explained that his recorded responses to CO Triscritti's questions were taken out of context.. He testified that it was after lunch on October 24, when he met with CO Triscritti in the general's office, that he was informed that the connectors did not have on hard hats (Tr. 409). He told CO that to the best of his knowledge they had on hard hats and took safety belts with them up on the steel. He explained that he did not mean that he did not need decking. He only meant that if they did not set the columns then there would be no other work for them (Tr. 413). He further explained that what he met when he said "it was a crazy", was that if a man is hanging over upside down, the hat is either going to fall off or he had to take it off in order to do the work. He was referring to connectors who are either bent over or in a lot of times, catching their heel in the top frame of the beam and turning completely over. When they reach over the hats fall off. He testified that he does not allow them to go on the steel without them, and if the hat falls off they pick it up, tie it on and send it back with the next available man(Tr. 416-17, 423-24). He explained that Bernie and Donald were the only two connectors in the area that day, so he knew they had installed the beams that

day. What he meant by "I saw them" was he saw them go up on the steel, but he could not see them erect the beams from his position (Tr. 419).

A violation is willful if committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Trinity Industries, Inc.*, 15 BNA OSHA 1597, 1586 (Nos. 88-1545 and 88-1547, 1992), citing Williams Enterp., Inc., 13 BNA OSHA 1249, 1256 (No. 85-355, 1987). "It is differentiated from other types of violations by a heightened awareness - of the illegality of the conduct or conditions - and by a state of mind - conscious disregard or plain indifference." *Calang Corp.*, 14 BNA OSHA 1789, 1791 (No. 85-319, 1990). There must be evidence that an employer knew of an applicable standard prohibiting the conduct or condition and consciously disregarded the standard. *Trinity* at 1586, citing *Williams* at 1257. An employer who substitutes his own judgement for the requirement of a standard of fails to correct a known hazard commits a willful violation even if the employer does so in good faith. *Valdak Corp v. OSHRC,* 73 F.3d 1466, 1469 (8th Cir., 1996). Evidence regarding prior citations may be considered in determining, whether an employer formed the requisite state of mind to warrant classification of subsequent violation as willful. *Atlantic Battery Co.*, 16 BNA OSHA 2131 (No. 90-1747, 1994). The Review Commission has held that "the employer is responsible for the willful nature of its supervisor's actions to the same extent that the employer is responsible for their knowledge of violative conditions." *Tampa Shipyards, Inc.*, 15 BNA OSHA 1533, 1539 (Nos. 86-360 and 86-469, 1992).

The undersigned finds that the responses which Mr. Campbell gave to CO Triscritti, as well as his testimony explaining his responses to CO Triscritti's questions, demonstrate that he was fully aware that hats fall off of connectors as they connect steel. He was also well aware of the OSHA requirements for hard hats and decking. In spite of this knowledge, he directed the installation of beams without ensuring the presence of interior or alternative fall protection. He also went about his work of directing crane operations without any assurances that the connectors were fully protected, via any fall protection and hard hats, which he acknowledged fell off frequently. He directed operations in order to stabilize columns which he believed presented a greater danger with total disregard for the OSHA standards. The undersigned finds that the most obvious and apparent hazards were presented to the connectors. The foreman's admitted knowledge of the frequency of hard hats falling off, and the lack of decking demonstrate a heightened awareness. His failure to observe the manner in which they were working is further evidence of his voluntary disregard and plain indifference to the requirements

of the Act. He substituted his own judgment for the standard's. The Secretary has established by a preponderance of evidence a willful violation.

The undersigned also finds that the Secretary has established a serious violation. The record demonstrates that death or serious physical harm could result from being hit by steel on one's unprotected head, and free falling 30 to 40 feet.

Penalty - Citation 2, Items 1 and 2

The undersigned the record for both violations supports a gravity finding which reflects a high severity. Massive head injury could occur if steel struck employee in the head. Death or injuries resulting in permanent disability could be expected from a free fall from 30 to 40 feet . The probability was lesser because he only two employees were observed in the zone of danger for approximately 11 minutes. The gravity based penalty of $55,000 for each violation was adjusted for size. No good faith or history adjustments are appropriate. The proposed penalty of $49,500 for each violation is proper.

Affirmative Defenses

The undersigned finds that the record is void of evidence sufficient to support any of the affirmative defenses raised by the Respondent. To establish this affirmative defense, an employer must show that "it had established a work rule designed to prevent the violation, adequately communicated those work rules, and effectively enforced those work rules, when they were violated." *Centrex-Rooney Construction Co.,* 16 BNA OSHA 2127 (No. 92-0851, 1994); *Pride Oil Well Serv.,* 15 BNA OSHA 1809 (No. 87-692, 1992). The Respondent produced no evidence that it adequately enforced its work rules or that work rules were effectively enforced, or that any of its employees had ever been disciplined for failure to follow rules. The Respondent also failed to prove the elements for the defense of greater hazard. In order to establish the greater hazard affirmative defense, the employer must prove that: (1) the hazards caused by complying with the standard are greater than those encountered by not complying, (2) alternative means of protecting employees were either used or were not available, and (3) application for a variance under section 6(d) would be inappropriate. *Peterson Bros. Steel Erection Co.,* 16 BNA OSHA 1196,(No. 90-2304, 1993). Before an employer elects to ignore the requirements of a standard because it believes that compliance creates a greater hazard, the employer must explore all possible alternatives and is not limited to those methods of protection listed in the standard. *State Sheet Metal Co.,* 16 BNA OSHA 1155, 1159, (No. 90-2894, 1993). The Respondent produced no evidence to establish that alternative means of

protecting employees were either used or were not available, and why application for a variance under section 6(d) would have been inappropriate.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

Citation 1, Item 1, alleging a serious-repeat violation 29 C.F.R. §1926.105(a), is AFFIRMED with a penalty of $2,000.00.

Citation 1, Item 2, alleging a serious violation 29 C.F.R. §1926.701(b), is AFFIRMED with a penalty of $2,000.00.

Citation 2, Item 1, alleging a willful-serious-repeat violation 29 C.F.R. §1926.100(a), is AFFIRMED with a penalty of $49,500.00.

Citation 2, Item 2, alleging a willful-serious-repeat violation 29 C.F.R. §1926.750(b)(2)(I), is AFFIRMED with a penalty of $49,500.00.

/s/
Covette Rooney
Judge, OSHRC

Dated: November 16, 1998
Washington, D.C.