SECRETARY OF LABOR, Complainant, v. NEW ENGLAND SYNTHETIC SYSTEMS, INC. Respondent.	OSHRC DOCKET NO. 97-1843

APPEARANCES:

For the Complainant:
Carol J. Swetow, and Ralph Minichiello, U.S. Department of Labor, Office of the Solicitor, Boston, Massachusetts

For the Respondent:
Barrett A. Metzler, CSP, Northeast Safety Management, Inc., Columbia, Connecticut

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This is a proceeding under §10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. ("the Act") to review a serious citation containing nine alleged violations, and a repeat citation containing three alleged violations, issued by the Secretary of Labor pursuant to §9(a) of the Act and proposed penalties thereon issued pursuant to §10(a) of the Act. The aforesaid citations and proposed penalties were issued on October 9, 1997 and a timely notice of contest was filed by Respondent contesting the citation and proposed penalties. Thereafter a complaint and answer were filed with this Commission. Respondent, in its answer, admits the jurisdictional allegations contained in the complaint and generally denies the remaining allegations contained therein.

On August 12, 1997, two compliance officers employed by the Occupational Safety and Health Administration conducted an inspection of Respondent's worksite located at the Colonial Village Apartments, Weymouth, Massachusetts. Respondent's employees were engaged in the removal and

replacement of the outer walls of the building. As a result of that inspection, the aforesaid citations were issued to Respondent. The parties submitted a partial settlement agreement at the hearing in this matter resolving certain disputes between the parties as follows:

1. Serious Citation 1 Item No. 2 is withdrawn by the Secretary.
2. Serious Citation 1 Item No. 3 is amended to an other than serious violation with no penalty assessed thereto.
3. Serious Citation 1 Item No. 4 is amended to an other than serious violation with no penalty assessed thereto.
4. Serious Citation 1 Item No. 5 is amended to an other than serious violation with no penalty assessed thereto.
5. Serious Citation 1 Item No. 7 is amended to an other than serious violation with no penalty assessed thereto.

Respondent has withdrawn its notice of contest regarding the aforesaid citation items. (See partial settlement agreement dated June 26, 1998)

The parties also submitted into evident the following stipulations:

1. The Document entitled "Give to Scaffold Erector & User or Post on Job" was provided by Respondent to Complainant as part of its safety program. Respondent has no objection to its admission into evidence.
2. The Documents entitled "Condition of Employment: were provided by Respondent to Complainant as part of its safety program. Respondent has no objection to its admission into evidence.
3. The ANSI standard A10.8, 4.18 was provided by Complainant to Respondent as part of her Pre-hearing Disclosure Statement. Respondent has no objection to the admission of this standard into evidence.

Discussion

Serious Citation 1 Item No.1

The citation issued to Respondent alleges the following violation:

29 CFR 1926.20(b)(1): The employer did not initiate and maintain such programs as were necessary to comply with this part:

Job Site: 109 Broad St., Weymouth, Massachusetts

> The employer did not implement a safety and health program which included but was not limited to frequent and regular inspections of the jobsite by a competent person.
>
> The standard set forth at 29 CFR 1926.20(b)(1) reads as follows:
>
> (b) Accident Prevention Responsibilities
>
> (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

As an initial matter, Respondent, in its post hearing brief, argues that the cited standard fails to provide adequate notice of the conduct prohibited by the standard. Moreover, according to Respondent, although the descriptive language inserted into the citation by Complainant alleges that Respondent's safety program failed to include frequent and regular inspections of the worksite by a competent person, the record is devoid of any evidence supporting that allegation. (Respondent's brief pg 12.) Moreover, there is no notice to Respondent of the standard "in the part" which directs Respondent to perform the activities set forth in the descriptive language of the citation.

Thus, according to Respondent, the citation lacks sufficient specificity in order to defend against the accusation. It is well established that "statutes and regulations which purport to govern conduct must give an adequate warning of what they command or forbid." *Diebold, Inc. v. Marshall,* 585 F.2d 1327 (6th Cir. 1978). The Commission has stated that "[a]n employer can only be required to comply with requirements of which it has either actual notice or notice derived from the language of the regulation and surrounding circumstances." *Secretary of Labor v. J.A. Jones Construction Company,* 15 BNA OSHC 2201, 2205 (1993) (quoting *Diebold, Inc. v. Marshall supra). See also United States v. L. Cohen Grocery,* 225 U.S. 81 (1921). Moreover, "the applicability of penal sanctions in regulations is to be narrowly construed by the judiciary and...OSHA regulations must 'be written in clear and concise language so that employees will be better able to understand and apply them'..." *Kropp Forge v. Secretary of Labor,* 657 F.2d 119, 122 (7th Cir. 1981) (quoting *Dravo Corporation v. OSHRC,* 613 F.2d 1227, 1234 (3rd Cir. 1980). The Commission has held, however, that "[a]bsolute precision of language...is not required, and a standard is not impermissibly vague simply because it is broad in nature." *J.A. Jones supra* at 2205. The Commission further stated that "a broad regulation must be interrupted in the light of the conduct to which it is being applied, and external, objective criteria, including the knowledge and perceptions of a reasonable

person may be used to give meaning to such a regulation in a particular situation." *Id.* In *Secretary of Labor v. R&R Builders Inc.*, 15 BNA OSHC 1383 (1991), the Commission stated that a standard is not vague and unenforceable "if 'a reasonable person,' examining the generalized standard in light of a particular set of circumstances, can determine what is required, or if the particular employer was actually aware of the existence of a hazard and of a means by which to abate it." *Id.* at 1387.

In this case, Complainant relies heavily upon the Review Commission decision in *J.A. Jones Construction Co. supra.* The Commission, while acknowledging that 29 CFR 1926.20(b)(1), the standard cited herein, "uses broad and general language," stated that the test for vagueness in a standard "is whether a reasonable person familiar with the particular industry would recognize a hazard for purposes of determining the scope of an employer's duty under general personal protective standards" *id.* In *Jones* the record supported the conclusion that Respondent was a large construction company with supervisory authority and responsibility for a large construction site with many subcontractors. Under these circumstances the Commission inferred that the Respondent in that case "would understand that an adequate program under section 1926.20(b)(1) would include specific measures for detecting and correcting [hazards]" *id.* Thus, based upon Respondent's experience and size, the Commission concluded, based upon the facts presented in that case, that the standard was not unenforceably vague.

In order to establish that Respondent in this case, failed to comply with the cited standard, the Secretary must prove that (1) the standard applies; (2) the employer failed to comply with the terms of the standard; (3) employees had access to the cited condition; (4) the Respondent knew, or with the exercise of reasonable diligence, could have known of the violative condition. *Astra Pharmaceutical Products, Inc.*, 1981 CCH OSHC ¶ 25,578, aff'd 681 F.2d 69 (1st Cir. 1982); *Secretary of Labor v. Gary Concrete Products*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29, 344 (1991). In those instances where the Secretary has alleged a violation of 1926.20(b)(1) without a more specific description of the alleged violation (such as citing a specific standard), the Secretary has an additional burden, in light of the broad and general language of the standard, to establish that a reasonable person familiar with its particular industry would recognize the alleged hazard and, further, that Respondent possessed the experience, supervisory authority and/or responsibility to understand that the proscribed conduct described in the citation is prohibited under the standard, see *Jones supra.* In this case, the record contains no evidence which meets the additional burden placed upon the Secretary by *Jones* in order to establish a violation under the broad language of the cited standard. (See *Pelron Corp*, 12 BNA at 1935.) The citation, however, does contain language which describes with sufficient specificity under the broad rubric of the standard the

offending conduct allegedly committed by Respondent. Thus, Complainant charges that Respondent failed to "implement" a safety and health program which included frequent and regular inspections of the jobsite by a competent person. In her post hearing brief, the Secretary asserts that she finds no fault with Respondent's safety program; rather, Respondent, in Complainant's view, failed to enforce the provisions of its' safety program at the inspected worksite. (Secretary's brief page 38.) However, as pointed out by Respondent in its post hearing brief, the transcript of the hearing is devoid of any evidence to support a conclusion that Respondent failed to conduct frequent and regular inspections of the jobsite by a competent person as alleged. Moreover, the requirement to "provide for frequent and regular inspections of the worksite" is set forth at 29 CFR 1926.20(b)(2) rather than the standard cited here. In view of the fact that no motion to amend the citation has been filed nor has Respondent explicitly or implicitly defended a charge of violation 1926.20(b)(2) (Respondent's brief pg 12), there is no basis for amending the citation pursuant to Rule 15(b) Federal Rules of Civil Procedure.

The Secretary, in her brief, also alleges that Respondent's safety program should have addressed hazards associated with scaffolding power tools, electrical issues overhead hazards and the need for employees to wear hard hats, (Secretary's Brief pg 35). Notwithstanding the position taken by the Secretary that Respondent's safety program was not deficient (Secretary's Brief pg 38), there is nothing in the pleadings or in the record of this case that would remotely place Respondent on notice that it was being cited for those safety violations under the standard alleged. *See East Penn Mfg.*, 894 F.2 640; *Diebold, Inc.*, 585 F.2d 1327, 1335; *Diamond Roofing* 528 F.2d 645, 649 *Dravo Corporation* 613 F.2d 1227; *Bethlehem Steel* 573 F.2d 157. For these reasons, the citation must be vacated.

Citation 1 Item No.6

The citation issued to Respondent reads as follows:

29 CFR 1926.404(b)(1)(ii): On a construction site, where an assured equipment grounding program was not utilized, all 120 volt, single phase, 15 and 20 ampere receptacle outlets which were not a part of the permanent wiring of the building or structure and which were used by employees did not have approved ground fault circuit interrupters for personnel protection.

Job Site: 109 Broad St., Weymouth, Massachusetts

Neither a ground fault circuit interrupter nor an assured equipment grounding conductor program was being used to protect personnel from electric shock while using portable electric hand tools.

The compliance officer observed during his inspection a two wire light duty extension cord plugged

into a wall electrical socket in one of the apartments. A 100 foot heavy duty orange extension cord was plugged into the two wire cord and a multi-outlet power strip was plugged into the orange extension cord. Additional extension cords were plugged into the power strip and, finally, hand held power tools, such as screw guns, were plugged into the aforesaid extension cords. The outlet from which the power originated was rated at 120 volts and was not equipped with a ground fault circuit interrupter, (TR 133-143). Under these circumstances, the Secretary asserts that the standard requires that the electrical circuit being used by the employees; that is, the extension cords, must be equipped with a ground fault circuit interrupter.

Respondent does not dispute that the electrical circuitry described above was used by Respondent's employees to power hand held electric power tools. Respondent asserts however, that the Secretary failed to establish that the circuit was 120 volts, single phase, rated at 15 or 20 amperes. Secondly, Complainant failed to establish that the extension cords constitute temporary wiring within the meaning of the standard. On this latter point Respondent cites *Secretary of Labor v. Moritz and Oren, Inc.* 16 BNA OSHC 1006 for the proposition that the Review Commission refuses to conclude that extension cords, of the type at issue here, constitute temporary wiring.

With respect to the first point, it is general knowledge within the construction industry that hand held electric power tools operate on 120 volts at either 15 or 20 amperes. Thus, based upon the facts of this case, it is inferred that an extension cord plugged into a household electric outlet used to power a hand held electric power tool was rated at 120 volts and 15 or 20 amperes within the meaning of the standard. With respect to the second point raised by Respondent, the Review Commission has unequivocally stated that extension cords of the type described herein constitute temporary wiring, *see Secretary of Labor v. Otis Elevator Company* 1993-1995 CCH OSHD ¶ 30, 730 (1995). Moreover, Respondent's foreman Kevin Levesque, acknowledged that the extension cord should have been equipped with a ground fault interrupter (TR 143). Thus, the Secretary has established the essential elements of the allegation and the citation is affirmed.

The Secretary proposed a penalty in the amount of $2,000.00 for the violation. The compliance officer testified that this penalty is based upon a high gravity factor (potential electrocution) which was mitigated by Respondent's small size. Based upon the record as a whole and the severity of a resulting injury to an exposed employee, a penalty in the amount of $2,000.00 is assessed.

Serious Citation 1 Item No.9

29 CFR 1926.451(g)(3)(i) Vertical lifelines were not fastened to a fixed safe point of anchorage.

Job Site: 109 Broad St., Weymouth, Massachusetts

> Life lines were tied to a vent curbing (citation item as amended by Complainant's complaint). The cited standard reads in its entirety, as follows:
>
> (i) When vertical lifelines are used, they shall be fastened to a fixed safe point of anchorage, shall be independent of the scaffold, and shall be protected from sharp edges and abrasion. Safe points of anchorage include structural member of buildings, but do not include standpipes, vents, other piping systems, electrical conduit, outrigger beams, or counterweights.

The compliance officer testified that three lifelines leading to a swing scaffold located at one side of the building were secured to the bottom sections of a venting system located on the roof of the building. (*See exhibits* C-14 and C-17.) Moreover, according to the compliance officer, the lifelines were not adequately secured to the vent "curbing" and were strung over the sharp edges of a metal beam to which the scaffold was attached (*Exhibit* C-17). Respondent does not dispute that the life lines were secured to the "curbing" of the vent system. Respondent argues, however, that the Secretary failed to establish that the vent curbing could not support the weight of the scaffold, the workers, and materials placed thereon.

It is clear that the drafters of the standard intended that lifelines be secured to anchorages which would not fail to hold the weight of the employees on the scaffold. Thus, the drafters specifically excluded vents as a safe anchorage for lifelines. There is no distinction between vents and vent curbing in the exclusionary language of the standard. Thus, it is concluded that the term "vent" includes the curbing to which the vent is attached unless, through creditable evidence, Respondent is able to establish that the curbing was a "structural member of the building" which, pursuant to the standard, is an acceptable anchorage. In this case, Respondent has failed to establish that the vent curbing is a structural member of the building. Moreover, the Secretary has offered sufficient evidence to support the conclusion that the lifelines were not protected from sharp edges and abrasion. (*See exhibit* C-17.) Thus, the violation is affirmed.

With respect to the proposed penalty, the compliance officer testified that $2,500.00 was calculated as a gross penalty based upon a high severity factor; that is, that death or serious injury could occur in the event that the lifelines failed, (TR 132). That penalty was reduced to $1,000.00 based upon the small size of Respondent's business, (TR 132). Based upon the record as a whole, the propsed penalty is appropriate and is assess for the violation.

Serious Citation 1 Item No.8

29 CFR 1926.451(b)(1): Each platform on all working levels were not fully planked or decked between the front uprights and the guardrail supports.

Job Site: 109 Broad St., Weymouth, Massachusetts

> The platforms on the working levels of the 60 inch wide tubular welded frame scaffold were approximately 20 inches [two (2) planks] wide.

Repeat Citation 2 Item No.2

29 CFR 1926.451(e)(1): A proper means of access onto a scaffold platform more than 2 feet above or below a point of access was not used.

Job Site: 109 Broad St., Weymouth, Massachusetts

> Employees were climbing the tubular welded frame scaffold frames from the second tier to ground level due to there not being a proper means of access.

Repeat Citation 2 Item No.3

29 CFR 1926.451(g)(1): Each employee on a scaffold more than 10 feet above a lower level was not protected from falling to that lower level.

Job Site: 109 Broad St., Weymouth, Massachusetts

> Employees were working up to 18 feet from the ground on a tubular welded frame scaffold built three (3) frames high and were not protected from falling by guardrails.

Compliance officer Jones testified that he observed a tubular welded scaffold at Respondent's worksite positioned at the front of the building, (*Exhibit* C-4). The scaffold was six sections long and three sections high, (TR 39). The three work levels of the scaffold were 7 feet 8 inches, 14 feet 2 inches, and 20 feet 8 inches, respectively, from the ground, (TR 54-55). The compliance officer observed three of Respondent's employees on the scaffold. One employee, foreman Keven Levesque, was on the top level and two employees, Hosford and Powers, were working at the second level, (TR 45, 109, 261). These employees were observed securing 4X8 sheets of durock on the outer skin of the building, (TR 109, 261). Compliance officer Jones further observed that each working surface contained only two one foot wide planks. Thus, three feet of the working surface of the scaffold were not fully planked as required by the standard cited (Serious Citation 1 Item No.8). Moreover, the scaffold was not equipped with any guardrails

nor were the employees working on the scaffold wearing personal fall protection as required. (Repeat Citation 2 Item No.3). Finally, the scaffold was not equipped with a safe means of access, such as a ladder or ramp (Repeat Citation 2 Item No.2).

Respondent does not dispute that the condition observed by the compliance officer existed. Thus, Respondent agrees that the scaffold was being used as a work platform and was not fully planked, did not have any guardrails nor were employees wearing personal fall protection, and the scaffold did not have a safe means of access. Nevertheless, according to Respondent, a citation for the aforesaid condition should not have been issued. Respondent asserts that its employees were in the process of erecting the scaffold at the time that the compliance officer arrived at the scene. Thus, dispensation from the requirements of the cited standards is applicable under the circumstances. Respondent points to (a) 29 CFR 1926.451(b)(ii) which provides that full planking is not required when employees are erecting or dismantling a scaffold (Serious Citation 1 Item No.8), (b) 29 CFR 1926.451(e)(9) which provides that a safe means of access is determined by the employer when employees are erecting or dismantling the scaffold (Repeat Citation 2 Item No.2) and (c) 29 CFR 1926.451(g)(2) which provides that its employer, through a competent person, shall determine the feasibility and safety of providing fall protection for employees erecting or dismantling scaffolds (Repeat Citation 2 Item No.3).

In order for the defense raised by the Respondent to be successful, Respondent must establish that the scaffold in question was in the process of being erected. This issue was vigorously disputed at the hearing. In support of its position that the scaffold was being erected at the time of the inspection, Respondent relies upon the testimony of one of its principal officers, Mr. Arthur, and Mr. Levensque, the job foreman at the site. Both individuals testified that the scaffold in question was first erected at the location observed by the compliance officer on the morning of the inspection. Respondent acknowledges that its employees were on the scaffold securing "durock" to the building at the time of the inspection. Durock is the outer skin of the building and was secured to the building after the original outer skin was removed and insulation was put in place. Respondent asserts that the durock was being secured to the building before guardrails, full planking and access ladders were placed on the scaffold because it was necessary to first secure the scaffold to the building. Respondent further asserts that the only anchorage available to secure the scaffold were the exposed steel studs. Since the studs were light weight and, in Respondent's view, incapable of holding the scaffold to the building, it was necessary to place the durock on the building in order to provide the rigidity and strenth to hold the scaffold in place. Respondent points

to 29 CFR 1926.451(c)(1)(ii)[1] to support its argument that it was necessary to secure the scaffold to the building during the erection process before placing guardrails, full planking and access ladders on the scaffold. Moreover, any work that had been performed at that location prior to the day of the inspection was completed while working on a swing scaffold suspended from the roof.

The Secretary called Francine Bolter, a resident of the Colonial Village Apartments, as a witness. Ms. Bolter is elderly and retired and spends most of the day "in the house or around the building", (TR 221-222). During the warm weather she spends most of her time sitting on a bench located at the front of the building, (TR 231, *Exhibit* C-19). She remembers the day that the safety inspection was conducted and the scaffold that Respondent's employees were working from at that time. The scaffold was located at the front of the building where the beauty shop was located (*Exhibit* C-4) and had been at that location for about a week, (TR 230). This was the same scaffold which was the subject of the safety inspection. Ms. Bolter testified that the scaffold was never fully planked, did not have guardrails nor was a ladder provided to employees to get on and off the scaffold, (TR 228-229). Ms. Bolter also testified that a scaffold suspended from the roof of the building was never at the beauty parlor location until after the safety inspection, (TR 231). Moreover, Ms. Bolter observed scaffolds at various locations around the building for a four or five week period and none of the scaffolds had guardrails, ladders or were fully planked, (TR 224, 225).

Mr. Albert Valcourt, employed as a maintenance man by the Colonial Apartments, testified that he observed the work activities of Respondent's employees on a daily basis. He confirmed the testimony of Ms. Bolter that the scaffold which is the subject of this litigation, was located at the front of the apartment building at the beauty shop location for at least five days prior to the OSHA inspection, (TR 314). He observed Respondent's employees during that time as they removed the outer part of the building, (TR 310). In response to a question as to whether the employees were continuing to construct the scaffold at the time of the inspection, Mr. Valcourt responded "the scaffold was already up", (TR 314). He stated that

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[1]29 CFR 1926.451(c)(ii) reads as follows:

> (c) *Criteria for supported scaffolds.* (1) Supported scaffolds with a height to base width (including outrigger supports, if used) ratio of more than four to one (4:1) shall be restrained from tipping by guying, tying, bracing, or equivalent means, as follows:
>
> (i) Guys, ties, and braces shall be installed at locations where horizontal member support both inner and outer legs.
>
> (ii) Guys, ties, and braces shall be installed according to the scaffold manufacturer's recommendations or at the closest horizontal member to the 4:1 height and be repeated vertically at locations of horizontal members every 20 feet (6.1 m) or less thereafter for scaffolds 3 feet (0.91 m) wide or less, and every 26 feet (7.9 m) or less thereafter for scaffolds greater than 3 feet (0.91 m) wide. The top guy, tie or brace of completed scaffolds shall be placed no further than the 4:1 height from the top. Such guys, ties and braces shall be installed at each end of the scaffold and at horizontal intervals not to exceed 30 feet (9.1 m) (measured from one end [not both] towards the other).

the scaffold was not fully planked, and did not have guardrails. Moreover, the swing scaffold was not used at the beauty parlor location until after the tubular welded scaffold had been dismantled after the OSHA inspection, (TR 311).

The testimony of Respondent's witnesses, Arthur and Levesque, that the tubular welded scaffold observed by the compliance officer was in the process of being erected at the time of the inspection directly contradicts the testimony of the Secretary's witnesses, Bolter and Valcourt, that the scaffold was at the location and in the condition observed by the compliance officer for at least five days prior to the inspection. As the trier of fact, the undersigned carefully observed the demeanor of the aforesaid witnesses to resolve these credibility issues. It is clear that Mr. Arthur, as one of the two principal owners of the firm has an interest in the outcome of this litigation. The monetary penalties are potentially substantial and the repeated findings of the same violation could adversely affect future business opportunities and insurance rates. Mr. Levesque, as the sole management representative at the site, has a stake in maintaining his reputation as a competent supervisor and, indeed, his employment status with the firm. On the other hand, Ms. Bolter and Mr. Valcourt are disinterested parties with no personal stake in the outcome of this litigation. Each was present at the work site on a regular and routine basis and had the opportunity to observe the work activity of Respondent's employees. Based upon personal observation of the demeanor of the witnesses at the hearing it is concluded that the testimony of Ms. Bolter and Mr. Valcourt regarding the erection and condition of the cited scaffold is more creditable and entitled to greater weight. Thus, based upon the evidence presented by Ms. Bolter and Mr. Valcourt, it is concluded that the scaffold had been in place for approximately five days prior to the OSHA inspection and was without full planking, guardrails or an adequate means of access. Moreover, Respondent's employees were not in the process of completing the erection of the scaffold. This conclusion is bolstered by the fact that the scaffold was not anchored to the building at any point even though the outer skin had been attached to most of the building, (TR 28, 56). For these reasons the citations are affirmed.

With respect to Serious Citation 1 Item No.8 (failure to fully plank), the compliance officer testified that Respondent's employees were as high as 20 feet 8 inches above the ground while standing on two scaffold planks (24 inches wide) without any fall protection, (TR 41, 50). He stated that a fall from that height could result in serious injury or death. Accordingly, this item is affirmed as a serious violation. The proposed penalty in the amount of $2,000.00 was based upon a high gravity factor (severity of injury) and a greater probability of occurrence. Consideration was given for Respondent's small size, (TR 80, 81). Based upon the record as a whole, the penalty appears appropriate and is assessed for the violation.

With respect to the Repeat Citation 2 Item No.2 (failure to provide adequate means of access to the scaffold) the compliance officer testified that Respondent's employees were exposed to a fall of approximately 20 feet while climbing up and down the frame of the scaffold, (TR 97) with a likely result of serious injury or death, (TR 67). Moreover, Respondent had been cited on three previous occasions for similar violations and those citations were final orders of the Commission (*Exhibit* C-23, No. 2, *Exhibit* C-26, No 11, 12). For these reasons, the citation item is affirmed as a repeat citation. Moreover, the proposed penalty in the amount of $10,000.00. is based upon a high gravity factor and a greater probability of occurrence factor, (TR 99). Since the violation is a repeat violation, the proposed penalty was increased by a factor of five. That figure was reduced by 60% because of Respondent's small size, (TR 99). Based upon the foregoing the proposed penalty in the amount of $10,000.00 appears reasonable and is assessed for the violation.

Repeat Citation 2 Item No.3 was issued as a repeat violation based upon three previous citations issued to Respondent for violations of the same or similar standards. Those citations are final orders of the Commission (*Exhibit* C-23, No. 5; *Exhibit* C-26, No 14, 15). Therefore, this item is affirmed as a repeat citation. A penalty in the amount of $10,000.00 was proposed for this item based upon the factors considered for repeat Item No. 2 above. For the reasons stated above the proposed penalty in the amount of $10,000.00 is assessed for this violation.

Repeat Citation 2 Item No. 1

29 CFR 1926.100(a): Employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns:

Job Site: 109 Broad St., Weymouth, Massachusetts

> Employess were exposed to possible serious head injuries. Employees were working on and under working scaffolding and were not wearing head protection.

There is overwhelming evidence in the record of this case supporting the conclusion that Respondent's employees were not wearing hard hats at the time of the safety inspection, (TR 103, 109, 110, 154; *Exhibits* C-5, C-7, C-9, C-11, C-12). Respondent defends this item on the ground that employees were not exposed to being struck by falling or flying objects. However, the record is replete with evidence

that employees were working with hand tools, screws, sheets of durock and other materials while standing at various levels on the scaffold with other workers standing or working below, (TR 62, 103, 107, 109, 110, 111, 262, 429; *Exhibits* C-22, C-12, C-7, C-10, C-6). It is clearly established and should be obvious to a competent person familiar with the construction industry that Respondent's employees were potentially exposed to falling objects at this worksite. To argue that hard hats are not required under the circumstances of this case indicates a total lack of understanding for safety in the workplace. The Secretary has proposed a penalty in the amount of $1,600.00 for this violation. The penalty is based upon the fact that Respondent was cited previously for the same violation and that citation has become a final order of the Commission (*Exhibit* C-23, No. 1). The compliance officer considered the severity of an injury resulting from this violation to be medium and a low probability of occurrence. However, good faith or the lack thereof, as demonstrated by Respondent's representatives at the worksite and at the hearing in this matter must be given great weight to ensure that this Respondent will comply with safety standards in the future. Accordingly a penalty in the amount of $5,000.00 is assessed for this violation. See *J.A. Jones Construction Co.* 15 BNA OSHC 2201 (1993).

Findings of Fact

Findings of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

Conclusions of Law

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.
2. Respondent, at all times material to this proceeding was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of Respondent and the subject matter of this proceeding.

3. At the time and place alleged, Respondent was not in violation of 29 CFR 1926.20(b)(1) (Serious Citation 1 Item No.1).
4. Serious Citation 1 Item No.2 is withdrawn by the Secretary.
5. Serious Citation 1 Item No.3 is amended and affirmed as an other than serious violation with no penalty assessed.

6. Serious Citation 1 Item No.4 is amended and affirmed as an other than serious violation with no penalty assessed.

7. Serious Citation 1 Item No.5 is amended and affirmed as an other than serious violation with no penalty assess thereto.

8. At the time and place alleged Respondent was in serious violations of 29 CFR 1926.404(b)(1)(ii) and a penalty in the amount of $2,000.00 is assessed thereto. (Serious Citation 1 Item No.6)

9. Serious Citation 1 Item No.7 is amended and affirmed as an other than serious violation with no penalty assessed thereto.

10. At the time and place alleged, Respondent was in serious violation of 29 CFR 1926.451(b)(1) and a penalty in the amount of $2,000.00 is assessed thereto. (Serious Citation 1 Item No.8)

11. At the time and place alleged, Respondent was in serious violation of 29 CFR 1926.451(g)(3)(i) and a penalty in the amount of $1,000.00 is assessed thereto. (Serious Citation 1 Item No.9)

12. At the time and place alleged, Respondent was in violation of 29 CFR 1926.100(a) and said violation was repeat within the meaning of the Act. A penalty in the amount of $5,000.00 is assessed thereto. (Repeat Citation 2 Item No.1)

13. At the time and place alleged, Respondent was in violation of 29 CFR 451(e)(1) and said violation was repeat within the meaning of the Act. A penalty in the amount of $10,000.00 is assessed thereto. (Repeat Citation 2 Item No.2)

14. At the time and place alleged, Respondent was in violation of 29 CFR 1926.451(g)(1) and said violation was repeat within the meaning of the Act. A penalty in the amount of $10,000.00 is assessed thereto. (Repeat Citation 2 Item No.3)

SO ORDERED

Robert A. Yetman
Judge, OSHRC

Dated: