United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

BIG APPLE WRECKING &
CONSTRUCTION CORP.,

Respondent.

OSHRC DOCKET NO. 99-0313

Appearances:

Steven D. Riskin, Esquire; New York, New York
For the Complainant.

Joseph P. Paranac, Jr., Esquire; Newark, New Jersey
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a building demolition work site, located in New York City, of Respondent Big Apple Wrecking & Construction Corporation during July and August of 1998. As a result of the inspection, OSHA issued Respondent a serious citation, a repeat citation and a willful citation alleging violations of the Act. Respondent contested the citations, and a hearing was held in New York City on November 22-23, 1999, and March 14-16, 2000. Both parties have submitted post-hearing briefs.

Willful Citation 2 - Item 1

This item alleges a violation of 29 C.F.R. 1926.451(g)(1), which provides as follows:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level [by the use of personal fall arrest systems or guardrail systems].

The only two witnesses who testified in this matter were Peter Steinke, the OSHA compliance officer ("CO") who conducted the inspection, and Timothy Cassese, Respondent's project superintendent at the site. Their testimony regarding this item is set out below.

CO Steinke testified that he went to the site on July 29, 1998, pursuant to an anonymous complaint that the demolition work was exposing employees to a 60-foot fall hazard. Upon arriving, he saw a six-story theater building that was about 200 feet long and 150 feet wide; he noted the roof of the theater was gone, that there were no floors in the theater except for two under the mezzanine area, and that there was scaffolding around the outside of the entire building.[1] He met with Timothy Cassese and told him why he was there, and the two went to the mezzanine area to watch the work in progress. The CO saw approximately 15 employees working on the top level of the scaffolding. Specifically, there were two jackhammer teams, two torch burner teams, two employees using water hoses to keep the dust down, and five other workers; the jackhammer teams were on the east wall and the southeast corner, as were the hose men, the burner teams were on the north and west walls, and the other employees were walking and moving equipment on the west wall. Steinke observed that the jackhammer teams were standing on the scaffolding outrigger platform, which was 2 feet wide and right next to the 18-inch-wide wall they were demolishing, and that they were taking the wall down to the level of the platform they were on.[2] He also observed that the burners stood on the outrigger platform to cut off the vertical steel columns that were left after the walls were removed, and that the hose men stood on the outrigger platform to spray water. Steinke saw there were no guardrails or cables on the outrigger platform, that no fall arrest systems were in use, and that

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[1]The CO saw the theater from the roof of a building across the street, and C-1 is his photo of this view; he also took C-2-5 that day, and R-17 is a blowup of C-2. (Tr. 10-13; 44-60; 550).

[2]The main platform within the framework of the scaffolding was 6 feet wide, and while the exterior (street side) of the scaffolding had cross bracing on it, the interior (building side) cross bracing had been removed to facilitate working on the outrigger platform. (Tr. 23-24; 31-34).

employees working on the platform were exposed to falls of up to 60 feet to the inside of the building. He discussed the hazard with Cassese, who said that part of the wall was supposed to be left up for protection and that the "old-timers" did not like to wear fall protection; Cassese also radioed his foremen to have the employees move back from the edge of the platform. The CO and Cassese went up on the scaffolding on the east wall so the CO could speak to the employees. The CO saw that they were not wearing safety harnesses or belts, and when he asked about fall arrest systems, Cassese radioed an employee who brought a bucket containing four or five such units. CO Steinke pointed out that the employee had walked close to the edge to approach them, and he asked Cassese to close off the scaffold along the wall, after which a rope was put up. CO Steinke told Cassese the company might be cited for what he had observed. (Tr. 9-34; 40; 72-75).

The CO went back to the site on August 5, 1998, and again saw employees working on the scaffolding outrigger platform without fall protection.[3] He saw the jackhammer team on the east wall continuing to take the wall down to the platform level, and he saw employees on the west wall platform, including torch burners and workers who were walking around and carrying and moving equipment, without fall protection.[4] Steinke asked why the employees were still working without fall protection, and Cassese, after having the employees move away from the edge again, said he had about 15 safety harnesses on order. Steinke then asked why the jackhammer team was still cutting the wall flush with the platform, and Cassese told him that that was the way they did it and that it would take too long to leave part of the wall up for protection. The CO returned to the site the next day. The jackhammer team on the east wall was still removing the wall down to the platform level, and although both employees had on harnesses and were tied off to the scaffolding posts behind them their lanyards were too short to allow for any movement. The CO also saw torch burners working on the west wall platform who were not tied off. CO Steinke spoke to Cassese, who once again had the employees move back from the edge of the platform. CO Steinke's final visit to the site was on

[3]On August 5 and 6, CO Steinke was accompanied by Leon Levine, another CO, who was conducting a health inspection; CO Steinke was also on the site on August 7. (Tr. 183; 556; 590-91).

[4]C-6-7 are photos the CO took on August 5. (Tr. 61-71).

August 26, 1998, for the purpose of holding a closing conference, and the citations were issued on January 21, 1999. (Tr. 18; 38-43; 78-80).

Timothy Cassese testified that the procedure was to demolish the theater's brick walls in sections 6 feet high, the height of a scaffolding frame, and 20 feet long, the distance between the vertical columns, beginning with the top 3 feet. Standing on the scaffold platform, and starting at the wall's midpoint, the jackhammer man would make penetrations to form a 3-foot-square section, and the bar man would insert a wrecking bar into the penetrations and lever the bar so the section would fall into the building. After removing the top half of about three 20-foot sections, the team would remove the lower half; the jackhammer man would make penetrations on the bottom of the wall, and the bar man would stand behind an intact section of wall to lever off the loosened section. Cassese said the team was protected by the bottom 3 feet of the wall as it removed the upper 3 feet and that it was also protected as it removed the lower 3 feet. He noted there was a 6-inch gap between the 2-foot-wide platform and the 2-foot-wide wall and that the penetrations were about a foot into the wall; further, the jackhammer was 4 feet long, such that the operator was 4 to 5 feet from the wall, and the wall was always in front of him in any case. He also noted the wrecking bar was 5 feet long, that the bar man stood behind an intact section of wall to lever off the loosened section, and that when there was no longer any intact wall to stand behind the bar man tied off to the scaffolding. (Tr. 321-28).

Cassese next described the procedures for the torch burners and the hose men. He said the torch burners, who usually worked alone but sometimes had helpers, followed the jackhammer teams. After a wall was down to 3 feet, the burner would stand on the scaffold platform and use a 3-foot-long cutting torch to cut off the exposed 3 feet of each steel column; after a wall was down to the platform level, the burner would tie off to the scaffold to cut off the remaining 3 feet of each column.[5] As for the hose men, Cassese said they stood on the scaffold platform and sprayed water to control dust and to prevent fires on the ground; they tied off to the scaffold while spraying, and to move to a different area, they would untie, take their hoses to the new location by walking down the center of the scaffold platform, and then set up in the new location. (Tr. 331-36).

[5]Cassese noted that at times the burners would cut off the entire 6-foot columns at once but would tie off to do so. (Tr. 333).

Cassese disputed the CO's testimony. For example, he testified that he did not see anyone exposed to fall hazards while he and the CO were on the mezzanine level on July 29 and that he had stopped the work because he wanted to clarify the issues; he further testified that he had explained the demolition process to the CO, that the CO was mostly concerned about the jackhammer teams working where the wall was completely gone, and that he told the CO there was no need for anyone else to be in those areas.[6] Cassese said that the foreman who brought them the fall arrest systems had five or six in his hand and "several" in a "barrel," and that there was a total of 15 to 20 such systems at the site; he also said he felt that the only thing he had to do to be in compliance, when the CO left on July 29, was to replace the safety belts he had with harnesses. Cassese stated he and the CO had no more discussions about fall protection, although the CO was at the site August 5 and 6, and that the inspection on August 6 focussed on a health issue. (Tr. 346-53; 359-62; 368; 475-76; 510-12).

Cassese also disputed the CO's testimony about C-2-5. The CO testified the employee on the left in C-2 was standing at the edge of the platform on the building's southwest corner and using a jackhammer to remove the wall, which was down around his ankles, without fall protection; Cassese testified the employee was tied off, but the CO said they had discussed the employee at the time and he was not tied off. (Tr. 43-46; 224-27; 270-72; 354-56; 457-59; 550-52). The CO also testified that C-3 showed Cassese on the mezzanine radioing an employee on the north wall platform; Cassese said the employee, a foreman, was wearing a harness and was not near the edge, while the CO said he was not wearing a harness and was exposed to a fall hazard. (Tr. 46-50; 227-28; 272-73; 357-58; 460-61). As to C-4, the CO said it showed employees on the platform on the west wall, which had been removed, with neither fall protection nor harnesses or belts; Cassese said the scaffold was being dismantled, and while the CO agreed, he said the employee on the left was carrying a jackhammer and was not engaged in dismantling. (Tr. 50-53; 228-31; 273-74; 358-59). As to C-5, the CO testified it showed Cassese and a jackhammer worker on the building's east side and that neither wore fall protection. Cassese said he and the worker were protected by the 3-foot wall in front of them; however, he agreed neither jackhammer worker had worn fall protection to remove the wall on the left side of C-5, and he said he had admonished them. (Tr. 54-60; 216-18; 353-54; 466-70).

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[6]Cassese indicated that he and the CO did not discuss the burners at all that day. (Tr. 351).

Finally, Cassese disputed the CO's testimony about C-6-7. CO Steinke testified that the three employees in C-6 were on the east wall platform, that the wall was flush with the platform, and that the employee on the left was spraying water into the building's interior; Cassese said that employee was tied off, but the CO disagreed and noted the lanyard hanging from his safety belt. (Tr. 61-66; 231-33; 365). As to C-7, Steinke testified it showed three employees on the west wall platform and Cassese on the mezzanine in the foreground. The CO also testified the wall was essentially flush with the platform and that the scaffold frames on that level were gone; he noted the torch burner on the right was bending over to cut the column in front of him, that the employee on the left was using a jackhammer on the wall, and that the three employees had no fall protection and were not wearing harnesses or belts. Cassese testified the employees were not standing on the scaffold, but, rather, a section of the staircase bulkhead on the building's west side. He agreed that the one on the right was burning a steel column and that the one on the left was using a jackhammer on the wall; however, he said that the wall in front of both workers was about 3 feet high.[7] (Tr. 67-71; 366-68).

It is clear from the foregoing that the accounts the two witnesses gave of the inspection were markedly different. For the reasons that follow, the CO's testimony is credited over that of Cassese. First, significant parts of Cassese's testimony were equivocal and inconsistent. For example, he initially testified that he did not remember discussing the employee in C-2 or the CO taking that photo, despite R-17, Respondent's enlargement of C-2; he then said that he did recall these matters and recounted how he determined the employee was tied off, which, as noted above, was at odds with the CO's testimony. (Tr. 456-59). Cassese also indicated that the usual procedure was for the torch burners to cut off the top 3 feet of the columns and then, after the rest of the wall was removed, the bottom 3 feet; however, he agreed that the exposed beams in C-5-7 were 6 feet and higher and had not been cut as he had described. (Tr. 332-33; 477-88). As a final example, Cassese indicated that the CO told him during the inspection that guardrails could be inserted into the "sockets" or "cups" on the outriggers. He next indicated that the first time he had heard the CO mention this matter was

[7]Cassese also testified as to his belief that the jackhammer man was tied off, but then said it was "very unclear" to him. (Tr. 367).

at the hearing; he then reverted to his original statement, and finally said he could not recall when the issue was first raised.[8] (Tr. 362; 488; 542-43).

A second reason for crediting the CO's testimony is due to the photographic evidence. For example, the CO and Cassese agreed that the wall in front of the two employees in C-5 was about 3 feet high, or around waist level. (Tr. 216; 466-67). Cassese nonetheless testified that the walls in front of the jackhammer man and the torch burner, on the left and right sides in C-7, respectively, were also about 3 feet high, even though it is apparent from C-7 that the walls in front of the workers are much lower than that height, as the CO indicated. (Tr. 67-70; 366-68). Also telling is the testimony about the employees who, according to Cassese, were tied off, with C-6 being the most obvious example. Cassese testified that the hose man on the left side of C-6 was tied off. However, as the CO testified, C-6 shows the looped lanyard hanging from the employee's waist, and that the hose man is not tied off is even more evident upon viewing the employee in the middle of C-6, which, as Cassese and the CO agreed, depicts that employee's lanyard going from his waist to the scaffolding frame behind him. Another example was Cassese's testimony that the jackhammer men worked 4 to 5 feet from the wall, while C-6 and R-17, the blowup of C-2, both show jackhammer workers standing much closer to the wall, as the CO testified. (Tr. 61-63; 231-32; 324-27; 365).

The third reason for crediting the CO's testimony is based on the respective demeanors of the two witnesses. I observed CO Steinke as he testified and found his statements in general to be very candid and credible. I also observed Cassese as he testified, and it was apparent from his deportment and statements that he was being less than forthright about the circumstances at the site. In concluding the CO was the more reliable witness, I have considered Respondent's assertions that CO Steinke's inspection was inadequate, that his recall was vague, and that his photos were taken from such distances and vantage points as to render them inconclusive. I have also considered the CO's testimony about how he documented his observations and his conversations with Cassese and his concession that he documented some of the pertinent information in his office rather than at the site. (Tr. 555-61; 569-97). Regardless, the demeanors of the witnesses, and my review of the record as

[8]Although Cassese said there was nowhere to install guardrails on the outriggers, the CO testified he had seen this type of guardrail many times and that he had also talked to the scaffold rental company that had erected the scaffolding at the site. (Tr. 35; 275-77; 362; 488; 540-47; 554).

a whole, persuade me that it is appropriate to credit the CO's testimony over that of Cassese to the extent their statements are conflicting. This citation item, which alleges violations of 29 C.F.R. 1926.451(g)(1) on July 29 and August 5 and 6, 1998, is accordingly affirmed.[9]

Whether the Violation was Willful

The Secretary has classified the violation set out in Citation 2 as willful/serious. It is clear that the cited conditions could have resulted in serious injuries or death. Further, Commission precedent is well settled that a violation is willful if it was committed "with intentional, knowing, or voluntary disregard for the Act's requirements, or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). As *Williams* also states:

> A willful violation is differentiated by a heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge 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 are not entirely effective or complete.

13 BNA at 1256-57 (citations omitted).

The CO considered the violation willful because on all the dates relevant to this item, and despite his speaking to Timothy Cassese about fall protection, employees continued to be exposed to falls. In particular, the CO testified that on July 29, after he and Cassese observed employees from the mezzanine area, he asked why they were working without any fall protection. Cassese said the employees were taking the wall down all the way to the platform and that they were supposed to leave some of it up for protection; he also said the "old-timers" did not like to wear fall protection. None of the workers the CO saw that day were wearing safety harnesses or belts, and, after he asked

[9]In affirming the violation, I have considered Cassese's testimony about R-5-7, photos he said he took about two months before the inspection showing various aspects of the job. (Tr. 337-46). Although these photos would appear to depict employees working as Cassese described, they do not rebut the CO's testimony about what he observed when he was at the site.

about what was available at the site, Cassese radioed an employee who came up to them a few minutes later with a bucket containing four or five such units. On August 5, the CO again saw employees exposed to fall hazards, working without fall protection, and cutting the wall down flush with the platform. When the CO asked why, Cassese admitted that was how they did the work and that it would take too long to leave part of the wall up; he also said he had 15 harnesses on order and that employees would thereafter use fall protection. The CO indicated that while some employees wore fall protection that day, the only one he saw tied off was the jackhammer man in C-6. On August 6, the CO observed that employees were still exposed to fall hazards; they were wearing safety harnesses, but their lanyards were too short to allow for movement and they were unhooking them in order to work. When the CO pointed this out, Cassese said that he had longer lanyards on order but they were not in yet.[10] (Tr. 17-23; 29-32; 38-43; 49-52; 60-84; 231-32; 270-73).

In addition to the above, the CO testified that when he first met with Cassese on July 29 and told him about the complaint and asked if it was valid, Cassese indicated it could be if employees were cutting the wall all the way down to the platform. The CO also testified that Cassese told him on August 5 he knew about OSHA's fall protection requirements; that is, he knew that fall protection was required for work above 6 feet and that safety harnesses had been required since February 1998. Finally, the CO testified that on August 5 and 6, Cassese told him that he considered the situation "borderline." When the CO returned to the site to hold a closing conference on August 26, he asked Cassese what he meant by that statement. According to the CO, Cassese agreed that while it was possible someone could trip and fall he did not think it was likely because employees were standing on the platform and not on the wall itself. The CO learned on July 29 that the employees had been at the site for about two weeks, and it was his opinion they would have continued working in the same manner if he had not conducted his inspection. (Tr. 16-17; 39; 71-81).

Based on the foregoing, I find that the violation was willful. In so finding, I have noted Respondent's claims that the CO's inspection was deficient and that Cassese's testimony, which was

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[10]The CO initially testified that the lanyards he saw on August 5 and 6 were 4 feet long; he later said they could have been 6 feet long but were in any case too short to be used for the work at the site. He also indicated that utilizing either 8-foot lanyards or safety lines would have been acceptable alternatives. (Tr. 35-37; 41-42; 65-66; 73-74; 79; 83-84; 591-94).

in large part contrary to that of the CO, was the reliable evidence of record. However, these claims were addressed and rejected *supra* after careful consideration of the testimony of both witnesses. I have also carefully considered all of the circumstances in this case, giving particular attention to the number of times the CO visited the site, what the CO observed and what he and Cassese discussed during these visits, and the company's continued failure to protect its employees at the site. In view of the record as a whole, it is my conclusion that the Secretary has met her burden of demonstrating that Respondent acted "with intentional, knowing, or voluntary disregard for the Act's requirements."[11] This citation item is therefore affirmed as a willful violation.

The Secretary has proposed a penalty of $70,000.00 for this citation item. Commission precedent is well settled that in determining penalties, due consideration must be given to the employer's size, history and good faith and to the gravity of the violation. *See, e.g., J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). The record shows that no credit was given for any of these factors due to the company's previous history of violations, the number of employees it had, the high gravity of the violation and the willful characterization of the violation. (Tr. 85-87). However, I disagree with the CO's determination of Respondent's size. CO Steinke testified that companies with over 250 employees are considered "large" and are consequently not entitled to an adjustment for size. Because Cassese was unsure how many employees the company had, the CO called Respondent's office. One individual, whose position the CO evidently did not determine, said there were 115 employees, while the person in charge of records said there were 250. CO Steinke then spoke to Leon Levine, the CO who had conducted the health inspection at the site, who advised him that the president of the company had told him that there were 300 employees. (Tr. 85-87, 207-10). Notwithstanding this testimony, I conclude that a reduction in penalty for size is appropriate. CO Steinke spoke directly to the person in charge of records and asked her specifically for the maximum number of employees the company had had in the past 12 months. Her response was 250, and when he said that that sounded like a round number and asked for the exact number, she repeated that it was 250. (Tr. 209). Because CO Steinke did not speak to the president himself, who may well have provided the 300 figure as merely an estimate, I find his testimony about what Respondent's

[11]This conclusion is supported by Cassese's admission that the CO told him before leaving on July 29 that he would be returning the site. (Tr. 352; 473-74).

employee in charge of records told him to be the more reliable indicator of the total number of employees. On the basis of this finding, a 20 percent reduction for size is appropriate and a penalty of $56,000.00 is assessed.[12]

Serious Citation 1 - Item 1

This item alleges that compressed gas cylinders at the site were not secured in an upright position as required, in violation of 29 C.F.R. 1926.350(a)(9). That standard provides as follows:

> Compressed gas cylinders shall be secured in an upright position at all times except, if necessary, for short periods of time while cylinders are actually being hoisted or carried.

CO Steinke testified that on July 19, 1998, he observed two acetylene cylinders in an upright position in a storage area just outside of the job site office that were not secured as required. He said the cylinders were hooked up to hoses going up the side of the building, for use by the torch burners above, and that the cylinders were not in a storage cart or tied off to the building. He identified C-9 as his photo of the cylinders, which he said were a hazard; he noted employees smoked and took breaks in the area and that something from above dropping on a cylinder or catching on a hose could have resulted in a cylinder falling over, a gas release and a fire or explosion. The CO pointed out the condition and Cassese had it corrected; however, when the CO was on the site on August 6, 1998, there were two unsecured acetylene cylinders in the same location.[13] (Tr. 102-14; 242; 279-80).

Timothy Cassese testified the cited cylinders were tied off with manila rope to the window grills on the building behind them. He said that R-8, an enlargement of C-9, showed a rope around the centers and bases of the cylinders, and he marked where the ropes were on R-8; he also marked the rope around another cylinder in R-8, noting it was also in use, that there was a door in front of it, and that there were more cylinders there that were similarly secured. (Tr. 381-87; 519-25; 547-48).

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[12]I conclude that a 20 percent reduction is also appropriate for the other affirmed items in this case. *See, e.g.*, OSHA Field Inspection Reference Manual, Section 8, Chapter IV.C.2.i.(5)(a).

[13]In her complaint, the Secretary amended this item to include the August 6 date in addition to the July 29 date.

As in the preceding item, the testimony of the witnesses is markedly different, and, for reasons similar to those above, the CO's testimony is credited over that of Cassese. First, I note my credibility findings, *supra*, and the CO's testimony that he went right up to the cylinders and saw that they were not secured. (Tr. 113; 239). Second, while he agreed that the cylinder behind the door in the photos appeared to be secured as there was a rope around the top part of it, he disagreed that the cited cylinders were secured; he pointed out that there was nothing wrapped around the top parts of the cylinders and that the hose or rope draped around the bottom, as shown in R-8 and C-9, would not keep them from falling over. (Tr. 110-13; 240-42). Finally, my own review of the photos persuades me that the subject cylinders were not tied off; although the cylinder behind the door seems to be secured with rope, as both witnesses indicated, there does not appear to be anything around the cited cylinders other than the rope or hose draped at the bottom. This item is affirmed as a serious violation, and a penalty of $2,000.00 is assessed. (Tr. 105-06; 115-16).

Serious Citation 1 - Item 2

Item 2 alleges that two extension cords at the site passed through the pinch points of metal doors, in violation of 29 C.F.R. 1926.405(a)(2)(ii)(I), which states that:

> Flexible cords and cables shall be protected from damage. Sharp corners and projections shall be avoided. Flexible cords and cables may pass through doorways or other pinch points, if protection is provided to avoid damage.

The CO testified that on August 5, 1998, he saw a yellow extension cord under the metal gate to the east side entrance to the site and an orange extension cord under the metal door to the job site office.[14] He identified C-10 and C-11 as photos of the cords, which were used to provide electricity for tools and for lighting in the office, and he said the cords were in the pinch points of the gate and door, that they were subject to damage when the gate and door were closed, and that he observed the cord in C-10 to be crimped and thus already damaged.[15] The CO saw the entry gate in both an open and closed position, and while the office door was always open on his visits he believed it was closed and locked at night as equipment was stored in the office. The CO stated the cords were a

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[14]The complaint amended this item to allege a violation on August 5 rather than July 29.

[15]The electricity to the building had been shut off due to the demolition work, and C-12 shows the fixtures plugged into a circuit outside of the building. (Tr. 118).

hazard, as contacting the gate or door or using the cords could have caused an electrical shock and a heart attack; he also stated the conditions were corrected while he was there. (Tr. 116-30; 243-47; 277-79).

Based on the foregoing, I find that the Secretary has established the alleged violation. In so finding, I have noted the testimony of Timothy Cassese that the cord in C-10 was not damaged, that the cord in C-11 was removed on weekends, which was the only time the door to the office was ever closed, and that the cords were protected by ground fault circuit interrupters. (Tr. 387-93; R-9). Regardless, for the reasons set out *supra*, the CO's testimony is credited over that of Cassese. This item is affirmed as a serious violation, and a penalty of $2,000.00 is assessed.

Serious Citation 1 - Item 3

Item 3a alleges that there were unprotected openings in the scaffolding platform at the site, in violation of 29 C.F.R. 1926.451(b)(1).[16] The cited standard provides as follows:

> Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports....

CO Steinke testified that on August 6, 1998, he saw a scaffold platform on the east side of the building with two unprotected openings; one was about 8 feet long and 3 feet wide, the other was about 8 feet long and 2 feet wide, and both were on the building side of the platform. C-13, the CO's photo, shows the two openings on either side of a stairway; the larger one is in the foreground in front of the stairway, the smaller one is in the background past the stairway, and the CO said both openings were about 25 feet from the stairway. He also said the cited platform was one or two levels below the top platform, where the demolition work was taking place, and that while no one was on the platform when he took C-13 he saw employees walking on it; he noted the platform was used to store and move scaffolding materials and that workers unaware of the openings could have fallen through them and been seriously injured.[17] (Tr. 130-42; 247-50; 280-82; 285-88).

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[16]The Secretary's complaint withdrew Item 3b, which alleged another violative instance of the standard, and amended Item 3a to include the date of August 6, 1998, in addition to July 29, 1998; at the hearing, her motion to reduce the penalty to $2,500.00 was granted. (Tr. 4-5).

[17]The CO said there were two planked platform levels below the top level when he was at the site; he also said that an employee falling through one of the subject openings could have fallen 50

(continued...)

Respondent does not dispute the existence of the floor openings, which are clearly depicted in C-13. However, Respondent contends that it did not violate section 1926.451(b)(1) because of the following exception to the standard:

> The requirement in paragraph (b)(1) to provide full planking or decking does not apply to platforms used solely as walkways or solely by employees performing scaffold erection or dismantling. In these situations, only the planking that the employer establishes is necessary to provide safe working conditions is required.

Respondent asserts that the subject platform met the foregoing exception because it was still in the process of being built. In this regard, the CO and Cassese both testified that demolition was taking place on the top platform, that the subject platform was a "staging area"for dismantling and rebuilding the scaffold, and that the plywood piled near the larger opening in C-13 was there as part of that process. (Tr. 247-49; 282; 393-95; 496-97). The CO went on to describe the dismantling and rebuilding process as follows:

> You had to walk on those platforms if you were from the scaffold crew, because you used those lower platforms to transport a scaffold, because you take the upper platform down and then you have to stage through the lower platforms to reconstruct another platform at the bottom. You have to use all of the platforms. (Tr. 134).

Cassese indicated that the subject platform was still being established and that the openings were there because employees were passing scaffold materials down to the next level. (Tr. 393-95; 496-97). However, the CO specifically testified that the subject platform was completed and not "under construction" at that time, and his testimony also shows that no materials were being passed down to the next level when he saw the openings. (Tr. 132-34; 281-82; 286-87). It is Respondent's burden to prove that it met the exception set out above. Based upon the CO's testimony, which is credited over that of Cassese, I conclude that Respondent has not met its burden of demonstrating that the exception to the standard applied in the circumstances of this case. I also conclude that, as the CO testified, the openings represented a hazard for employees. Item 3a is accordingly affirmed as a serious violation, and a penalty of $2,000.00 is assessed.

Serious Citation 1 - Item 4

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[17](...continued)
feet if there was no platform below, or 6 to 7 feet if there was a platform below. (Tr. 134-36).

This item alleges that scaffolding stairway landings at the site had incomplete guardrail systems, in violation of 29 C.F.R. 1926.451(e)(4)(xii), which states that:

> Guardrails meeting the requirements of paragraph (g)(4) of this section shall be provided on the open sides and ends of each landing.

The CO testified that on every day of his inspection, he observed stairway landings that did not have guardrails as required.[18] He explained that there was a stairway on each level of the east side of the building and that employees used the stairways to get to their work areas; he further explained that while the stairways themselves had handrails on both sides, the stairway landings did not have guardrails to prevent someone from walking off the landing, falling into the stairway opening, and sustaining a serious injury. The CO identified C-14 and C-15 as photos of the stairways on two different levels with unguarded landings, and he marked on both photos where guardrails should have been in place. (Tr. 148-71; 174).

As a preliminary matter, Respondent contends that the cited standard does not apply because it refers to "stairtowers," which were not used at the site. Timothy Cassese testified that a stair tower is an individual unit that is installed adjacent to a scaffold, while the scaffolding at the site had stair inserts that were placed within the parameters of the scaffold frame; he further testified that a stair tower has landings that tie the staircases together, while the scaffolding at the site had no landings and the stairways went directly from one level to another. (Tr. 395-97; 499-502).

As Respondent contends, section 1926.451(e) does refer to "stairtowers." However, this section reads in its entirety as follows:

> Stairtowers (scaffold stairway/towers) shall be positioned such that their bottom step is not more than 24 inches (61 cm.) above the scaffold supporting level.

The foregoing leads me to conclude that the term "stairtowers" includes scaffold stairways and scaffold towers; in this regard, I note that several subsections under 1926.451(e) refer to scaffold stairways, while none refers to "stairtowers." Respondent's reference to a drawing in Appendix E to the standard likewise does not persuade me of its position; although the drawing shows a scaffold

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[18]The complaint amended this item to include August 5-7, 1998, in addition to July 29, 1998.

with a stair tower like the one Cassese described, the drawing is entitled "System Scaffold" and is clearly different from the scaffolding at the subject site. Respondent's contention is rejected.[19]

Respondent next contends that the landing area the CO had marked on C-15 as requiring guardrails was not a hazard. In support of this position, Respondent presented R-1, which the CO agreed was one of his photos and a "mirror image" of C-15, and the testimony of Cassese that the landing area was not accessible because of the other stairway right over it and that a person would have had to crouch down to a height of 3 or 4 feet to get into that area. (Tr. 397-98). However, the CO testified he had used the stairway, that it was not as close to the landing area as it looked in R-1, and that if he had gotten dizzy climbing the stairs in C-15 he could have fallen off the landing area he marked in that photo. (Tr. 250-55). The CO's testimony is credited, and Respondent's contention is rejected. This item is affirmed as a serious violation, and a penalty of $2,000.00 is assessed.

Serious Citation 1 - Item 5 [20]

Item 5 alleges that Respondent did not ensure that both top-rail and mid-rail protection was provided on the scaffolding, in violation of 29 C.F.R. 1926.451(g)(4)(xv), which states that:

> Crossbracing is acceptable in place of a midrail when the crossing point of two braces is between 20 inches (0.5 m) and 30 inches (0.8 m) above the work platform or as a toprail when the crossing point of two braces is between 38 inches (0.97 m) and 48 inches (1.3 m) above the work platform. The end points at each upright shall be no more than 48 inches (1.3 m) apart.

CO Steinke testified that during his inspection he observed that the scaffolding on the street side of the building had cross bracing with a cross point of 42 inches, which was sufficient for a top rail; however, the scaffolding did not have mid-rails, and the wire mesh he saw along the sides of the scaffolding did not meet the standard.[21] He said the standard requires wire mesh to go from the top of the guardrail system to the scaffold platform and that the mesh at the site, which was only about 2 feet high, was several inches below the cross bracing; he also said the standard requires wire mesh to be able to prevent someone from falling through it and that while the mesh at the site was attached

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[19]Also rejected is Cassese's testimony that the stairways at the site did not have landings.

[20]The complaint amended this item to include August 5-7, 1998, in addition to July 29, 1998.

[21]The CO said that the netting hanging from the building, as shown in C-16 and other photos, was debris netting and did not provide any fall protection. (Tr. 182-90).

to the scaffold end frames it was not attached to the cross bracing. The CO noted that C-14, his July 29 photo of the level below the top level, showed the wire mesh along the right side of the scaffold platform. He further noted the mesh was only in some areas; C-16, his August 7 photo, showed no mesh on the outside of the building, and C-13 and C-4 showed no mesh on the levels in those photos. The CO said the condition could have caused falls to the outside of the building and serious injuries or death; he also said Cassese acknowledged the condition but that it was not corrected during the inspection because of the amount of scaffolding on the job. (Tr. 180-94).

Timothy Cassese testified the mesh at the site was 3 feet high, that it was attached every 2 feet to the toe boards along the scaffold platform, and that it was tied with heavy gauge wire to the cross bracing as well as to the scaffold end frames. (Tr. 316-20; 345-46; 410-11; 491-95). The CO conceded he could have been mistaken about the height of the mesh and that he had not checked to see if it was attached to the toe boards. However, he said the requirement was that it be attached to the top rail, and he was adamant that he had looked at the mesh, that he had seen it was not tied to the cross bracing, and that if it had been he would not have cited the condition. (Tr. 256-62; 282-84; 595-97). Cassese further testified the mesh was as "tight as we could get it," while the CO said it was "just sort of tied up and standing up on edge," that it did not have much rigidity, and that "if you fell into it, you could have fallen through it." (Tr. 186; 317-18). Finally, although Cassese testified about R-6 and R-7, photos he took showing the wire mesh as he had described it, he did not rebut the CO's testimony about the photos noted above that show no mesh in place.[22] (Tr. 340-46). The CO's testimony is credited over Cassese's, and I find that the Secretary has proved the alleged violation. This item is affirmed as a serious violation, and a penalty of $2,000.00 is assessed.

Serious Citation 1 - Item 6

Item 6 alleges that employees were not effectively trained to recognize the hazards associated with working on the type of scaffolding used at the site, in violation of 29 C.F.R. 1926.454(a)(1).[23] That standard states that:

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[22]As to photos R-6-7, *see* footnote 9, *supra*.

[23]This item initially alleged a violation of 29 C.F.R. 1926.454(a) on July 29; the complaint amended this item to allege a violation of 1926.454(a)(1) and to include the dates of August 5-7.

> The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. The training shall include the following areas, as applicable: (1) The nature of any ... fall hazards ... in the work area.

The CO testified that after observing the fall hazards at the site on July 29, 1998, and after Cassese had told him the old-timers did not like to wear fall protection, he asked Cassese what type of training was provided in this regard; when Cassese asked what he meant, the CO explained he was talking about any on-site training or tool box meetings, and Cassese replied that no such training was done. (Tr. 194-99). Timothy Cassese, on the other hand, denied that the CO asked about any on-site training, and he testified about the company's fall protection program and the daily briefings and weekly safety talks he had at the site; he also testified that he instructed employees to tie off and disciplined those who did not. (Tr. 328-30; 399-419; 526; 529-34; R-10-11). For the reasons set out *supra*, the CO's testimony is credited over that of Cassese. On the basis of the CO's testimony and my disposition of the willful citation in this case, I find that the Secretary has established the alleged violation. Item 6 is affirmed as a serious violation, and a penalty of $2,000.00 is assessed.

Serious Citation 1 - Item 8[24]

This item alleges that an engineering survey was not performed prior to the start of the demolition work at the site, in violation of 29 C.F.R. 1926.850(a). That standard provides as follows:

> Prior to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the condition of the framing, floors, and walls, and possibility of unplanned collapse of any portion of the structure. Any adjacent structure where employees may be exposed shall also be similarly checked. The employer shall have in writing evidence that such a survey has been performed.

CO Steinke testified that during the inspection he asked Cassese if an engineer had surveyed the building before the job began; his concern was the archway over the stage that was about 100 feet long and 80 feet high, which, if cut improperly, could have collapsed and fallen on anyone working

[24]In her complaint, the Secretary withdrew Item 7 of Citation 1; she also amended Item 8 to add that Respondent had no written evidence of having performed an engineering survey.

below.[25] Cassese said an engineer had been involved with the project but that to his knowledge there was no written survey. Cassese referred him to Ben Versaci, the project manager, who told the CO that there was nothing in writing but that Bernard DiNunzio, an engineer, had been involved with the project and that he would have expected DiNunzio to tell him if there were any problems. The CO noted that the standard requires written evidence of a survey and that he never saw anything in writing. He also noted that he had checked the company's history and had learned that it had been cited previously for a violation of the same standard. (Tr. 200-08; 262-67; 284).

Timothy Cassese testified that DiNunzio, an employee of the company, surveyed the site before the project began. He said he was with DiNunzio during his survey, which was about a month and included the archway over the stage; he also said DiNunzio kept a notebook, that he had seen him writing in the notebook during the survey, and that DiNunzio used the notebook to document the survey and the dates and hours he was at the site. Cassese identified R-3 as a copy of the notes of the survey that DiNunzio had faxed to him on November 18, 1999. (Tr. 302-10; 373).

I find that the foregoing establishes that an engineering survey was performed as required; however, I nonetheless find that Respondent violated the cited standard. Timothy Cassese and Ben Versaci, the project superintendent and the project manager, respectively, both told the CO there was nothing in writing regarding the survey, and the CO never received any written evidence of the survey. During discovery, the Secretary requested documentation of the survey, and, when no such documentation was produced, filed a motion to compel. The Secretary's motion was granted on August 9, 1999, and when Respondent did not comply as required by August 15, 1999, the Secretary filed a motion for sanctions. On September 13, 1999, Respondent was again ordered to comply and was advised that failure to do so by September 27, 1999, would result in dismissal of its answer and notice of contest. On September 24, 1999, Respondent stated, in a letter to my office, that "[t]he originals of all documents have been sent to the Secretary." At the hearing, Respondent's counsel moved to admit R-3 into the record. The Secretary's counsel objected, stating he had never received R-3, that the document produced during discovery was simply a statement signed by DiNunzio, and that Respondent's pre-hearing exchange had not included R-3. R-3 was received in evidence upon

[25]The CO said that C-1 showed the archway and a track hoe on the ground below, where the operator and ground employees worked. (Tr.202-06).

the representation of Respondent's counsel that to the best of his belief he had sent R-3 to the Secretary's counsel on November 19, 1999, the day after it was faxed to Cassese. (Tr. 311-13). Regardless, R-3 is accorded no probative value, for the following reasons.

First, two management officials of the company told the CO that there was nothing in writing regarding the survey, and, despite the Secretary's discovery requests, R-3 was not provided until just before the hearing. Second, R-3 consists of a single legal-sized photocopy of three pages of notes that are largely illegible, and Respondent presented neither the testimony of DiNunzio nor his signed statement indicated above in support of R-3. Third, although Cassese testified about R-3, my credibility rulings set out *supra* preclude giving much weight to his testimony. Based on the record, Respondent did not "have in writing evidence that [an engineering] survey ha[d] been performed." This item is affirmed as an "other" violation, in that the condition had a direct relationship to safety and health but would not have caused serious injury or death, and a penalty of $400.00 is assessed.

Repeat Citation 3 - Item 1

This item alleges that the track hoe being used at the site had an inoperable backup alarm, in violation of 29 C.F.R. 1926.602(a)(9)(ii). That standard states as follows:

> No employer shall permit earthmoving or compacting equipment which has an obstructed view to the rear to be used in reverse gear unless the equipment has in operation a reverse signal alarm distinguishable from the surrounding noise level or an employee signals that it is safe to do so.

CO Steinke testified that on July 29, he saw a track hoe operating inside the building; it was going backward as well as forward, and he noted that it had an obstructed view to the rear due to the large engine box behind the driver's cab, that it did not have a backup alarm, and that there was no one directing the operator. Steinke also testified that the track hoe was picking up masonry debris and pieces of steel and loading these materials into trucks, that it moved "pretty quickly," and that employees could have been at risk when it was in reverse; Cassese was on the ground at times, there were two ground employees who directed trucks coming onto the site, and burners were also on the ground at times in order to cut pieces of steel so they would fit into the trucks. The CO said everyone "kept their distance" from the track hoe when he saw it but that his main concern was the burners, who, if they were cutting steel, might not be paying attention to the track hoe. The CO discussed the alarm with Cassese, who said it was broken and that he would get it fixed; however, the CO saw the

track hoe in use on August 5 and 6, and although Cassese repeated he would have the alarm fixed it was still not working on August 26, the day of the closing conference. (Tr. 88-98; 234-39).

Based on the foregoing, I conclude the Secretary has met her burden of showing the standard applied, that its terms were violated, and that Respondent was aware of the condition.[26] Regardless, in my opinion, the Secretary has not shown employee exposure to the condition. C-8, the CO's photo of the track hoe, depicts no one in the vicinity. Moreover, the CO himself testified that he saw the track hoe operating on the three days noted above and that the employees he saw in that area "kept their distance" and got no closer than 30 feet to the track hoe; he also testified that employees who were on the ground level when the track hoe was operating stood within the confines of the building or out in the street and that he saw no one "getting into a dangerous location behind the machine." (Tr. 89-92; 97; 234-38). Finally, while Cassese's statements have not been accorded much weight in this case due to my credibility findings set out *supra*, his testimony that employees were not allowed in the area when the track hoe was being used is supported by the fact that the CO never saw anyone near it when it was operating. (Tr. 297-98; 374-79). Because the Secretary has failed to establish employee exposure to the cited condition, this citation item is vacated.

Conclusions of Law

1. Respondent, Big Apple Wrecking & Construction Corporation, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

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[26]In so concluding, I have considered Respondent's contention that the standard does not apply based on Cassese's testimony that the track hoe was only used to load pieces of steel into trucks and that it had a clear view to the rear due to the mirrors on either side of the cab; I have also considered Cassese's testimony that he was unaware the alarm was not working until the CO noticed it. (Tr. 376-80; 515-18). However, the CO testified that he saw the track hoe digging and scraping masonry debris in the center of the building and then loading this material as well as steel into trucks; he further testified that the standard applies to earthmoving machines and that track hoes are usually used for excavation and loading. (Tr. 88-89; 96; 235). The CO also testified the operator could not have seen if someone was right behind him because of the engine housing, that the mirrors on the cab would have given only a partial view to the rear, and that he had made this determination from the track hoes he had seen before. (Tr. 96; 238-39). Finally, I note the CO's testimony about what Cassese said when he mentioned the alarm. (Tr. 92-93). The CO's testimony is credited over that of Cassese, and, consequently, the Secretary has shown the elements noted above.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.350(a)(9), 1926.405(a)(2)(ii)(I), 1926.451(b)(1), 1926.451(e)(4)(xii), 1926.451(g)(4)(xv) and 1926.454(a)(1).

3. Respondent was not in violation of 29 C.F.R. §§ 1926.502(d) and 1926.602(a)(9)(ii).

4. Respondent was in "other" violation of 29 C.F.R. § 1926.850(a).

5. Respondent was in willful violation of 29 C.F.R. § 1926.451(g)(1).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1 through 3a and 4 through 6 of Serious Citation 1 are AFFIRMED, and a penalty of $2,000.00 is assessed for each item.

2. Item 3b of Serious Citation 1 is VACATED.

2. Item 7 of Serious Citation 1 is VACATED.

3. Item 8 of Serious Citation 1 is AFFIRMED as an "other" violation, and a penalty of $400.00 is assessed.

4. Item 1 of Willful Citation 2 is AFFIRMED, and a penalty of $56,000.00 is assessed.

5. Item 1 of Repeat Citation 3 is VACATED.

/s/

Irving Sommer
Chief Judge

Date: 12 SEP 2000