

99-2022

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Review Commission
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SECRETARY OF LABOR,

Complainant,

v.

ERNEST BOCK & SONS, INC.,

Respondent.

OSHRC DOCKET NO. 99-2022

DECISION AND ORDER

APPEARANCES:

Troy E. Leitzel, Esquire
Office of the Solicitor
U. S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant

Thomas Bock, Vice-President
Ernest Bock & Sons, Inc.
Philadelphia, Pennsylvania
For the Respondent, *pro se.*

BEFORE: G. MARVIN BOBER
Administrative Law Judge

This case is before the Occupational Safety and Health Review Commission (“the Commission”), pursuant to the Occupational Safety and Health Act of 1970, §§ 651-678 (1970) (“the Act”), to review a two-item serious citation and a one-item repeat citation issued by the Secretary of Labor to Ernest Bock & Sons, Inc., hereinafter “Respondent” or “EBS.”

On August 25 and 31, 1999, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a construction site located in Springfield, Pennsylvania, where EBS was the prime general contractor. As a result of the inspection, OSHA on October 1, 1999, cited EBS for serious violations of 29 C.F.R. §§ 1926.453(b)(2)(iv) and 1926.20(b)(1) and a repeat violation of 29 C.F.R. 1926.453(b)(2)(v). EBS filed a timely notice of contest on October 18, 1999. An administrative trial was held in Philadelphia, Pennsylvania on May 16, 2000, and post-trial briefs were filed by both

parties. The Secretary made a motion to strike certain exhibits EBS submitted with its post-trial brief, and EBS filed a response to the motion.

Stipulations

1. Ernest Bock & Sons, Inc., is engaged in business as a general contractor.
2. Ernest Bock & Sons, Inc., is a corporation with its principal office and place of business located at 2800 Southampton Road, Philadelphia, Pennsylvania 19154.
3. On January 19, 1999, Ernest Bock & Sons, Inc., entered into a contract with Springfield Township, Delaware County for the New Clubhouse at the Springfield Country Club located at 400 West Sproul Road, Springfield, Pennsylvania 19064.
4. On April 9, 1999, Ernest Bock & Sons, Inc., entered into a contract with subcontractor B&K Construction for the New Clubhouse at the Springfield Country Club located at 400 West Sproul Road, Springfield, Pennsylvania 19064.
5. On April 9, 1999, Ernest Bock & Sons, Inc., entered into a contract with subcontractor RRR Contractors for the New Clubhouse at the Springfield Country Club located at 400 West Sproul Road, Springfield, Pennsylvania 19064.
6. The parties stipulate to the authenticity of each others' exhibits, but not necessarily to their relevance or to the matters asserted therein.¹

Motion to Strike

On July 14, 2000, the Secretary filed a motion to strike the documents EBS had attached to its brief and “any portion of the brief which argues from or refers to the documents.” The basis for the motion is that the documents were not admitted into evidence at the hearing and the fact that EBS did not request the record to be left open to admit the documents. In response, EBS notes that the record was left open for the Secretary to provide the articles of incorporation for EBS and Bock Construction, Inc. (“BCI”), a subcontractor of EBS at the site. (Tr. 206). EBS further notes that it is providing the documents attached

¹The Secretary's and Respondent's exhibits are identified as “GX” and “RX, respectively.

to its brief in support of its assertion that EBS and BCI are in fact two separate corporations and that EBS was improperly cited in this matter.

As the above suggests, at issue in this case is whether BCI is a separate legal entity from EBS and whether EBS was properly cited in this matter. Upon considering the documents EBS seeks to introduce, I conclude that they are relevant to understanding the relationship between these two entities and to the resolution of this case. I further conclude that it would be fundamentally unfair to consider the Secretary's documents without also considering those of EBS. The Secretary's motion is accordingly DENIED, and the documents of both parties are received in evidence.²

Corporate History of EBS and BCI

The record shows that Ernest Bock, Inc., was incorporated in the Commonwealth of Pennsylvania on October 15, 1970, and that on December 21, 1981, the company changed its name to EBS. The corporate officers on record are Ernest Bock, CEO, Thomas Bock, vice-president, and Jean Bock, secretary. The record further shows that BCI was incorporated in the Commonwealth of Pennsylvania on March 10, 1994, and that the corporate officers on record then were Christine Marlin, CEO, and Louis Harris, vice-president. 10,000 shares of stock were authorized to be issued, the sole shareholder was Thomas Bock, and the initial members of the board of directors were Thomas Bock, Ernest Bock and Jean Bock. At a special meeting held on March 1, 1997, BCI's shareholders and board of directors approved the sale of BCI to Marianne Owens, appointed her to the board of directors, and appointed Christine Marlin as president, secretary and treasurer and Louis Harris as vice-president. At a special meeting held on February 11, 1998, BCI's board of directors appointed Marianne Owens as president, secretary and treasurer; at the same time, Christine Marlin resigned as an officer and director of BCI. (GX-11-12, RX-8-9, RX-13).

²The Secretary's documents are the articles of incorporation of BCI and EBS and are admitted as GX-11 and 12, respectively. The documents of EBS are the articles of incorporation of BCI, minutes from BCI's board of directors meetings, and other records of BCI. These are admitted as RX-8 through 15. All of these exhibits are specifically set out in Attachment 1 to this decision.

Pursuant to their agreement of March 1, 1997, Thomas Bock agreed to sell Marianne Owens all of the “presently issued and outstanding” BCI stock he owned, consisting of 10,000 shares of stock having a value of \$1.00 per share; in return, Ms. Owens agreed to pay \$50,000 for the stock, with a down payment of \$10, a payment of \$990 by November 1, 1997, and the balance of \$49,000 to be paid over a ten-year period. Annual payments of principal and interest were due by March 1 of each year, beginning in 1998, and Thomas Bock retained a security interest in the stock in the event of a default; in addition, the agreement was “expressly conditioned to and contingent upon Buyer securing a lease from the owner upon the premises situate and known as 2800 Southampton Road, Philadelphia, Pennsylvania, for a period of ten (10) years.” The lease agreement of March 1, 1997, between Thomas Bock, t/a EBS Business Court, and BCI required BCI to pay a minimal annual rental of \$13,750, with the first installment due by March 1, 1998.³ (RX-11-12, RX-14).

Factual Background

On January 19, 1999, EBS contracted with Springfield Township to construct a clubhouse at the Springfield Country Club. As the prime general contractor, EBS was responsible for excavation, steel erection, masonry and concrete, carpentry, roofing and interior finishing at the site.⁴ EBS then subcontracted with various entities to do the actual work on the project, including RRR Contractors (“RRR”) for roofing and siding work, B&K Construction (“B&K”) for carpentry, metal framing, drywall and insulation work, and BCI for door installation and millwork; BCI was also responsible for supervising the work of the EBS subcontractors and for safety coordination, and Anthony Cellucci was BCI’s job site

³Despite the agreement for sale and the lease agreement, I note that BCI’s 1998 Form 1120S shows only a \$24 deduction for interest and no deduction for rent; in addition, the 1999 Form 1120S attached to BCI’s request for an extension of time to file shows no deduction for interest and a deduction of only \$9,800 for rent. *See* RX-15.

⁴Other prime contractors that had separate contracts with Springfield included an HVAC contractor, a plumbing contractor, a sprinkler contractor and an electrical contractor. (Tr. 8-12).

superintendent.⁵ Springfield Township had also contracted with R.M. Shoemaker Company (“Shoemaker”) to act as its construction manager, and Jeffrey Smith, Shoemaker’s project superintendent at the site, was responsible for overseeing all the work and ensuring it was done safely. (Tr. 8-15, 18-20, 27-28, 35-36, 172, 180-82, 188; GX-4-6, RX-2-4).

On August 25, 1999, James Touey, an OSHA compliance officer (“CO”), went to the site to inspect the project. Upon arriving, he saw an employee in an aerial lift; the lift was about 50 feet in the air and the employee was working without fall protection. After videoing the scene, the CO met first with Jeffrey Smith and then with Anthony Cellucci. As they were discussing the condition, the CO saw that the employee had climbed onto the midrail of the lift and was leaning out of it to work; he videoed the scene and then had the employee come down, after which he interviewed him and learned that he worked for RRR. CO Touey also spoke briefly to RRR’s foreman, but he was unable to complete his inspection because he had learned that Ernest Bock, Jr., a family friend, was involved with the project; the CO therefore recused himself from the inspection. (Tr. 42-54).

On August 31, 1999, OSHA CO Nicholas DeJesse went to the site to continue the inspection. When he arrived, he saw an employee in an aerial lift, 30 to 35 feet in the air, without fall protection. The CO videoed the scene and then met with Mr. Smith and Mr. Cellucci; he next had the employee brought down for an interview, and he also spoke to the employee’s foreman, who worked for B&K. The CO then held an opening conference in Shoemaker’s trailer to identify the various contractors at the site. Upon resuming his inspection, the CO saw two employees working in an aerial lift in a different area of the project; the employees were about 20 feet in the air and had on harnesses but no lanyards. The CO videoed them and the basket, which by this time was on the ground, and he learned the employees worked for RRR. CO DeJesse recommended the citations in this case, and he

⁵Specifically, BCI was to “[p]rovide the necessary labor to properly supervise, manage and oversee all aspects of the project including but not limited to safety coordination and installation of doors and millwork per all plans and specifications.” *See* RX-4.

concluded from his inspection EBS was the responsible employer. (Tr. 75-92, 109-12, 146-48).

The Relevant Testimony

Jeffrey Smith, Shoemaker's project superintendent, testified he had been unaware there were two companies at the site, that is, EBS and BCI; as best he could recall, the prime general contractor was just "Bock" and Mr. Cellucci was the superintendent of "Bock."⁶ Mr. Smith also testified that his job included walk-around safety inspections and weekly safety inspection reports. He noted that GX-1, his report of June 19, 1999, said to "instruct Bock's sub B&K to use harnesses in high reach," and that GX-2, his report of August 25, 1999, which had a fax cover sheet to "Bock Construction/Tony Cellucci," stated that "men in high reach need harnesses." He also noted he had given GX-1-2 to Mr. Cellucci, who was responsible for correcting hazards relating to the EBS subcontractors. Mr. Smith stated that RX-5-6, Mr. Cellucci's daily reports to him, had some sheets showing the company as EBS and others showing it as Bock Construction. (Tr. 18-26, 29-35, 40).

CO Touey testified that on August 25, 1999, Mr. Smith told him that the prime contractor involved in the activity he had seen was "Bock." CO Touey further testified that Mr. Cellucci told him he worked for "Bock" and that he did not know at that time that two different companies were involved. The CO noted that besides his acquaintance with Ernest Bock, Jr., he had worked briefly for EBS or BCI in 1989; he thought then there might have been two companies, one union and one non-union, but he did not know if this was actually the case. (Tr. 46-47, 51, 54-55, 62-63, 68-69, 72).

CO DeJesse testified that at the opening conference on August 31, Mr. Cellucci told him he was the superintendent for "Bock." CO DeJesse also testified that although he requested one, Mr. Cellucci never gave him a business card. However, at the closing conference the next day, Mr. Cellucci gave him the safety manual of EBS, and the CO identified GX-7, a discussion of when fall protection is required, as a page from that manual;

⁶Mr. Smith said that "Bock" had a trailer at the site but that he did not remember what company name was on it. (Tr. 22)

Mr. Cellucci also told him that Louis Harris was the person to contact in his office.⁷ At some point, the CO received a fax from Louis Harris on CBI's letterhead, and Springfield Township gave the CO a copy of its contract showing EBS as the prime general contractor at the site. As he was unsure about which company was the employer at the site, the CO on October 1, 1999, phoned Louis Harris, BCI's vice-president, who informed him that it was EBS. Based on his inspection, the CO believed that Mr. Harris and Mr. Cellucci were in effect employees of EBS. (Tr. 80-83, 89-91, 100-01, 109-14, 130-36, 140, 143-48).

J. Lee Fulton was the director of code enforcement for Springfield Township at the time of the inspection, and his duties included involvement in the daily functions of the project. He testified that the township had contracted with EBS for general contracting services relating to the project and that he had regular discussions with Mr. Cellucci about the job. He further testified that he had been unaware there were two separate companies, that "Bock" was the prime general contractor as far as he was concerned, and that he considered EBS and BCI "one and the same." Mr. Fulton noted that Mr. Cellucci told him at one point that his boss was Thomas Bock. (Tr. 150-60).

Gary Perlstein, president of RRR, testified that he had contracted with EBS to do the roofing work at the site and that Thomas Bock of EBS was the person who approved his invoices and issued his checks. He also testified that he had received GX-10, a July 16, 1999 letter from Thomas Bock regarding safety on the job, and that he had received similar letters on other jobs he had done for EBS. Mr. Perlstein said he gave safety information weekly to Mr. Cellucci, the job superintendent, who he assumed worked for EBS; however, he did not know this for a fact. (Tr. 168-177).

⁷The CO recalled no signs for either EBS or BCI at the site, but he agreed that on the closing conference sign-in sheet, Mr. Cellucci noted his company as "Bock Construction." (Tr. 103, 143-45).

Anthony Cellucci testified that he had worked for EBS from approximately 1990 until 1994 and that since then he had worked for BCI.⁸ He said that pursuant to BCI's contract with EBS, he supervised the BCI employees at the site in addition to the employees of the subcontractors of EBS; he also said that Jeff Smith had given him GX-1 and GX-2 and that he had had the authority to correct those conditions.⁹ Mr. Cellucci noted that although Thomas Bock had hired him to work for EBS, Louis Harris was his boss at BCI; he further noted that he had seen Thomas Bock on the job "maybe twice, in the very beginning," and that he had never taken any directions from him at the site. Mr. Cellucci did not know why he had gone from EBS to BCI, and he was not aware of any BCI jobs that were not with EBS. (Tr. 178-193).

Louis "Buzz" Harris testified that he had been BCI's vice-president since 1994 and that before then he had worked for EBS; he further testified that EBS had sold BCI in 1997 and that one of the reasons for the sale had been the fact that BCI was a union company while EBS was not.¹⁰ Mr. Harris said that about 70 percent of BCI's business was with EBS, and he indicated that the companies were in the same suite of the same office building. He also said that he had contacted Thomas Bock during the project about issues with subcontractors and that Thomas Bock had written GX-10; however, he stated that the matters he discussed with Mr. Bock were not safety issues, and he assumed that Mr. Bock had written GX-10 because EBS's contract was with RRR. (Tr. 195-205).

Piercing the Corporate Veil

⁸Mr. Cellucci testified that after 1994, his paychecks came from BCI. (Tr. 181-82, 191-92).

⁹Mr. Cellucci said the subcontractors had their own supervisors but that he oversaw the job and coordinated the work on the project. (Tr. 188-89).

¹⁰Mr. Harris said he had no ownership interest in either EBS or BCI and that his paychecks came from BCI. (Tr. 195-97, 202).

As indicated *supra*, the primary issue in this case is whether EBS and BCI are separate and distinct legal entities and whether EBS was properly cited for the alleged violations. The Secretary contends that because of the interrelationship between the two companies, and in the circumstances of this case, it is appropriate to “pierce the corporate veil,” treat the companies as a single entity, and hold EBS liable for the cited conditions. EBS contends to the contrary.

In support of her position, the Secretary cites to two Commission cases standing for the proposition that when two companies share a common work site (such that employees of both have access to the same hazardous conditions), have interrelated and integrated operations, and share a common president, management, supervision or ownership, the purposes of the Act are best effectuated by treating the two entities as one. *Advance Specialty Co.*, 3 BNA OSHC 2072, 2076 (No. 2279, 1976); *Trinity Indus.*, 9 BNA OSHC 1515, 1518 (No. 77-3909, 1981).

The Secretary asserts the interrelation of the companies is shown by the fact that Christine Marlin, BCI’s CEO on record, is also the office manager of EBS and the person who signed RX-4, the contract between EBS and BCI for the subject project. (Tr. 198, 201). However, the exhibits discussed above, in the corporate history part of this decision, show that Christine Marlin was no longer an officer of BCI when she signed RX-4. The Secretary’s assertion is thus unpersuasive.

The Secretary further asserts that other evidence shows the interrelation of EBS and BCI, such that they should be treated as one entity. She notes that Springfield Township’s contract was with EBS, that none of the witnesses who worked at the site knew there were two separate companies, and that BCI used the safety manual of EBS and at times filled out its weekly reports on EBS letterhead. She also notes that Louis Harris told CO DeJesse that EBS was the employer at the site, that Anthony Cellucci told J. Lee Fulton that Thomas Bock was his boss, and that Thomas Bock signed GX-10, the letters to B&K and RRR advising them they were required to follow “all OSHA regulations and safe working procedures,” in particular those requiring fall protection on the project. Finally, the Secretary notes that EBS

and BCI have the same address and fax number.¹¹ Although the evidence in this case does establish all of these facts, I nonetheless conclude that it not appropriate to “pierce the corporate veil” because the circumstances here are very different from those in *Advance Specialty Co.*, 3 BNA OSHC 2072 (No. 2279, 1976).¹²

First, the two entities in *Advance Specialty* had the same president and owner who actively supervised the activities of both. Second, both entities were located in the same physical plant, and one fabricated wire products that were plated by the other. Third, the interchange of employees between the two companies was not unusual, the workers of both traveled freely into any area of the common work site, and the employees of both companies were equally exposed or had access to the hazards presented by the cited conditions. 3 BNA OSHC at 2074. Based upon the facts in *Advance Specialty*, and the Commission’s reasons for treating the two entities as one, it is my opinion that that decision simply does not apply to this case and that piercing the corporate veil is not the appropriate means of resolving this matter. The Secretary’s assertion is accordingly rejected.

Multi-Employer Work Site Doctrine

The Secretary next contends that under the multi-employer work site doctrine, EBS should be held responsible for the alleged violations because of its overall authority with respect to the general construction on the project. EBS contends that it was not responsible for the cited conditions because it hired BCI to oversee the project and implement its safety program at the job site.¹³

¹¹Mr. Cellucci’s BCI business card has the same fax number appearing on the letterhead of EBS. *See* RX-7, GX-10. In addition, the address of EBS is 2800 Southampton, while that of BCI is evidently 2800-A Southampton. *See* RX-4, RX-14.

¹²*Trinity Indus.*, 9 BNA OSHC 1515, the other case cited by the Secretary, was remanded so that the parties could present additional evidence as to the relationship between the two companies involved and is thus not particularly helpful to this discussion.

¹³The cases EBS cites in its brief have been considered; however, these cases are not relevant to the disposition of this matter.

Commission precedent is well settled that on a multi-employer work site an employer that is in control of an area, and responsible for its maintenance, is responsible under the Act when it is established that a violation has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1196-97 (Nos. 3694 & 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188-89 (No. 12775, 1976). See also *Brennan v. OSHRC*, 513 F.2d 1032, (2d Cir. 1975); *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081 (7th Cir. 1975). Thus, the issue to resolve in this case is whether EBS had sufficient control and responsibility over the site such that it should be held liable for the alleged violations. This determination will necessarily involve whether the Secretary has met her burden of showing that EBS knew or should have known, in the exercise of reasonable diligence, of the violations. *David Weekly Homes*, 19 BNA OSHC 1116, 1119 (No. 96-0898, 2000); *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1939 (No. 97-1676, 1999); *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1386 (No. 92-262, 1995).

As noted above, Springfield Township's contract was with EBS, none of the witnesses knew there were two separate companies, and BCI used the safety manual of EBS and at times filled out its weekly reports on EBS letterhead. Moreover, Louis Harris told CO DeJesse that EBS was the employer at the site, Anthony Cellucci told J. Lee Fulton that Thomas Bock was his boss, and Thomas Bock signed GX-10, the letters to B&K and RRR informing them that they were required to follow "all OSHA regulations and safe working procedures," in particular those requiring fall protection, on the project. Finally, EBS and BCI share the same address and fax number. In these circumstances, I conclude that BCI in general, and Anthony Cellucci in particular, was in essence an agent of EBS at the site. I further conclude that because of this relationship, EBS had control and responsibility over the site sufficient to find it liable for the alleged violations; stated another way, Anthony Cellucci's knowledge of the cited conditions, which is clearly established by the evidence,

is imputable to EBS such that EBS had constructive knowledge of the violations. Accordingly, I find that the Secretary's citation of EBS in this matter was proper.¹⁴

Serious Citation 1, Items 1a and 1b--Proposed penalty: \$3,000

Item 1a of Citation 1 alleges a violation of 29 C.F.R. 1926.453(b)(2)(iv), which pertains to aerial lifts and provides as follows:

Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.

The citation alleges that on August 25, 1999, on the north end of the site, an employee in a Genie S-80 aerial lift was working from the rails of the platform and exposed to an approximately 50-foot fall. CO Touey testified that on August 25, 1999, he saw an employee in an aerial lift, about 50 feet from the ground, who was not tied off. The CO videoed the scene and then met with Mr. Smith, who referred him to Mr. Cellucci. As they discussed the condition, the CO saw that the employee had climbed onto the midrail of the lift and was leaning out of it to work. The CO videoed the scene and then had the employee come down, after which he interviewed him and learned his name was David McFarlin and that he worked for RRR; he also learned he had been on the job for two days, had not been provided fall protection, and had not been told he needed it.¹⁵ (Tr. 44-51).

The foregoing clearly establishes the alleged violation, and EBS presented nothing to rebut the Secretary's evidence. In addition, GX-1-2, GX-7, GX-10 and RX-5-6, described *supra*, clearly establish EBS's knowledge of the requirements of the cited standard as well as prior violations of the standard at the site. This citation item is therefore affirmed.

¹⁴While the foregoing is sufficient to dispose of this matter, I note that RX-4, the agreement EBS had with BCI, required BCI to submit weekly safety meeting minutes to EBS. RX-5-6 are copies of Mr. Cellucci's daily reports to Mr. Smith. The reports for 6/25/99, 7/7/99, 7/24/99 and 8/3/99 all state that B&K and/or RRR were told that their employees needed to use safety harnesses when working in lifts. These reports are deemed to be safety meeting reports provided to EBS, thus establishing that EBS had actual knowledge of the cited conditions.

¹⁵The CO noted that as they viewed the scene, Mr. Cellucci conceded that the employee was not wearing fall protection; Mr. Cellucci then indicated that employees normally had fall protection and that this individual had probably simply failed to put it on. (Tr. 49).

Item 1b of Citation 1 alleges a violation of 29 C.F.R. 1926.20(b)(1), which pertains to the employer's accident prevention responsibilities and provides as follows:

It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

The citation alleges that EBS did not initiate and maintain a safety and health program to assist employees with the hazards associated with their operations. CO DeJesse testified that he recommended this citation item because of EBS's failure to have a safety and health program at the site. He explained that although EBS had a written safety and health program at the site, which included GX-7, a requirement that employees in man lifts or bucket trucks use fall protection, it was apparent that the employer did not enforce the program in light of the fall protection violations he and CO Touey saw at the site. (Tr. 89-91, 96-97, 130-31). Based on the evidence, the Secretary has demonstrated the alleged violation. This citation item is accordingly affirmed.

Items 1a and 1b of Citation 1 have been characterized as serious. A violation is serious if death or serious physical harm is the likely result should an accident occur. *Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557, 1558 (No. 92-2535, 1996); *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1315 (No. 89-2253, 1991). CO DeJesse testified he classified the items as serious because falls from heights of over 20 feet usually cause serious injury or death. (Tr. 93-94). The Secretary has met her burden as to the classification of these items, and they are affirmed as serious violations.

The Secretary has grouped these items and proposed a single penalty of \$3,000. In assessing penalties, the Commission must give "due consideration" to the employer's size, history and good faith, and to the gravity of the violation. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). The gravity of the violation is usually the most significant element in penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-691, 1992). CO DeJesse testified that the severity of Item 1a was high and the probability of an accident greater due to the fact that the employee was working 50 feet above the ground in a lift without fall protection and at one point was standing on the midrail of the lift and

leaning out of it to work. The CO further testified that while a reduction for size was given, no reductions for good faith or history were given because of the employer's failure to enforce fall protection use at the site and because EBS had received a previous serious citation within three years of this inspection. (Tr. 94-97). On the basis of the CO's testimony, the proposed penalty of \$3,000 is appropriate and is accordingly assessed.

Repeat Citation 2, Item 1--Proposed penalty: \$3,000

This item alleges a violation of 29 C.F.R. 1926.453(b)(2)(v) which provides as follows:

A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

NOTE TO PARAGRAPH (b)(2)(v): As of January 1, 1998, subpart M of this part (§1926.502(d)) provides that body belts are not acceptable as part of a personal fall arrest system. The use of a body belt in a tethering system or in a restraint system is acceptable and is regulated under §1926.502(e).

The citation alleges violations of the standard as follows:

- a) North Side - An employee working in a Genie S-80 aerial lift was not wearing a full body harness in conjunction with a lanyard thus being exposed to a fall of approximately fifty (50) feet. Observed 08-25-99.
- b) North Side - An employee working in a Genie S-60 aerial lift was not wearing a full body harness in conjunction with a lanyard thus being exposed to a fall of approximately thirty (30) feet. Observed 08-31-99.
- c) South Side - An employee working in an aerial lift #45 was not wearing a full body harness in conjunction with a lanyard thus being exposed to a fall of approximately twenty (20) feet. Observed 08-31-99.

The citation also alleges that:

Ernest Bock and Sons, Inc. was previously cited for a violation of this occupational safety and health standard, or its equivalent standard 1926.453(b)(2)(v), which was contained in OSHA inspection #116193640, citation #01, item #002, issued on 02/27/98 by the Harrisburg Area Office.

The preceding discussion establishes instance 1a of this citation item. As to 1b and 1c, CO DeJesse testified that on August 31, 1999, he saw an employee in an aerial lift, 30 to 35 feet in the air, without fall protection. The CO videoed the scene and met with Mr. Smith

and Mr. Cellucci; he then had the employee brought down for an interview, and he also spoke to the employee's foreman, who worked for B&K. After holding an opening conference, the CO resumed his inspection. He saw two employees in an aerial lift in a different area of the project; the employees were about 20 feet in the air and had on harnesses but no lanyards. The CO videoed them and the basket, which by then was on the ground, and he learned the employees worked for RRR. (Tr. 76-88).

The foregoing establishes the violative instances set out in the citation, and EBS presented nothing to rebut the Secretary's evidence. This citation item is therefore affirmed.

The Secretary has classified this citation as a repeat violation. A violation is properly characterized as repeated if, at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation. *Armstrong Steel Erectors, Inc.* 18 BNA OSHA 1630 (No. 97-0250, 1999); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1999). The Secretary has the burden of proving substantial similarity between the prior violation and the present alleged violation. *Chesapeake Operating Co.*, 10 BNA OSHC 1790, 1796 (No. 78-1353, 1982). The fact that the violations occurred at different work locations is not important to determining a repeated violation. *Potlatch Corp.* 7 BNA OSHC at 1064. The record shows that EBS was cited on February 27, 1998, for a violation of 29 C.F.R. 1926.453(b)(2)(v), the same standard cited here. On March 17, 1998, the parties reached an informal settlement, which became a final order of the Commission. *See* GX-9. In view of the evidence, the violation was properly characterized as repeated. This citation item is affirmed as repeated.

The Secretary has proposed a penalty of \$3,000 for this item. CO DeJesse testified about the factors he considered in recommending this penalty. Specifically, he assessed the severity of the violations as high and the probability as lesser, since the employees in the cited instances were standing on the platforms of the lifts. He gave a reduction for size but not for good faith or history, for the same reasons set out *supra*. (Tr. 99). Based on the CO's testimony, I conclude the proposed penalty is appropriate. A penalty of \$3,000 is accordingly assessed for this citation item.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation 1, Items 1a and 1b, are affirmed as serious violations, and a total penalty of \$3,000.00 is assessed for these items.
2. Citation 2, Item 1, is affirmed as a repeated violation, and a total penalty of \$3,000.00 is assessed for this item.

/s/

G. MARVIN BOBER

ADMINISTRATIVE LAW JUDGE

Dated: 9 Feb 2001

Washington, D.C.

ATTACHMENT 1 - POST-TRIAL EXHIBITS

- GX-11 Articles of Incorporation of Bock Construction, Inc.
- GX-12 Articles of Incorporation of Ernest Bock & Sons, Inc.
- RX-8 Articles of Incorporation of Bock Construction, Inc.
- RX-9 Board of Directors meeting minutes for Bock Construction, Inc.
- RX-10 Share Certificates of Bock Construction issued to Thomas Bock and Marianne Owens
- RX-11 Agreement for Sale of Stock between Thomas Bock and Marianne Owens
- RX-12 Promissory Note signed by Marianne Owens
- RX-13 Resignation of Christine Marlin as officer and director of Bock Construction, Inc.
- RX-14 Lease Agreement signed by Thomas Bock and Bock Construction, Inc.
- RX-15 IRS Forms 1120S for Bock Construction, Inc., for 1998 and 1999