
SECRETARY OF LABOR,

Complainant,

v.

MJP CONSTRUCTION CO., INC.,

Respondent.

OSHRC Docket No. 98-0502

DECISION

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

This case arises out of an Occupational Safety and Health Administration (“OSHA”) inspection conducted by Compliance Officer Richard Torre from late August 1997 through the first week in November 1997 at the “Tower America - Phase II” project, a high-rise housing project in Jersey City, New Jersey. The Secretary issued citations alleging that Respondent MJP Construction Company (“MJP”) committed serious and willful violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”), by failing to comply with 29 C.F.R. § 1926.501, the general fall protection standard for

construction work.¹ At issue is whether Administrative Law Judge Covette Rooney erred in her affirmances on the merits and classifications of the items on review.

I. BACKGROUND

The building was constructed using the reinforced concrete method, in which wood timbers and plywood and reinforcing bar (“rebar”) are used to create formwork into which concrete is poured for the floors and the columns which support the floors. This method of construction follows a prescribed sequence of work activities as follows. After the concrete

¹The relevant provisions of that standard are as follows:

§ 1926.501 Duty to have fall protection.

(a) *General.* . . .

(b)(1) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

(2) *Leading edges.* (i) each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

NOTE: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with § 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

(ii) Each employee on a walking/working surface 6 feet (1.8 m) or more above a lower level where leading edges are under construction, but who is not engaged in leading edge work, shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system. . . .

(3) *Hoist areas.* Each employee in a hoist area shall be protected from falling 6 feet (1.8 m) or more to lower levels by guardrail systems or personal fall arrest systems. . . .

for the first floor level of the building is poured and allowed to harden, the formwork for each vertical column that will support the floor above is set in place. This formwork consists of vertical rebar surrounded by four wooden frames set on a wooden base known as a “shoe.” Plywood sheets are placed along the top of the columns to provide a decking to support the concrete that will be poured into formwork to create the floor above. This decking is further supported by a system of horizontal timbers called “stringers” and “ribs” placed at right angles to each other and held in position by a series of vertical wooden supports referred to as “legs” or “uprights.” The term “shoring” is loosely used to refer to this supporting structure. Before the concrete is poured, horizontal rebar is placed on this decking and the formwork for the columns is “braced,” that is, straightened and vertically aligned, by workers who tighten clamps to secure horizontal boards against the column formwork. The concrete for the floor above and the supporting columns is poured in a single operation. Once the concrete has hardened, all the wooden formwork is removed, taken to a hoisting area at the edge of the building, and lifted by crane to the floor above to be reused.

MJP was established at the beginning of 1997 by Michael J. Polites after Politis Construction Company, a company which Polites formed in 1979, went bankrupt. On May 27, 1997, approximately three months before the inspection at issue here, another compliance officer, Charles Triscritti, inspected a worksite where Politis Construction was constructing a 7-story reinforced concrete building in Hackensack, New Jersey. During the inspection, Triscritti discussed the requirements of the fall protection standard with the superintendent at the site, Dong (“Don”) Lee, and assisted Lee in writing a document entitled “Fall Protection Program.” As discussed more fully *infra*, this document requires safety belts and guardrails under certain specified work operations. Politis Construction did not contest the citations it received as a result of Triscritti’s inspection and agreed to abate the violations in an informal settlement agreement with the Secretary. Politis Construction had been inspected

a total of 27 times, 22 of those inspections had resulted in citations, and 26 citation items alleged violations of fall protection requirements.²

MJP's first project was the "Tower America" project, which began in June 1997 and for which MJP was the formwork subcontractor. It was the tallest building project Michael Polites had ever constructed. He personally coordinated and supervised the work until later in the year when he became ill. He then gradually reduced both the frequency of his visits and the extent to which he would inspect the site during each visit. By August or September 1997, around the date that Torre began his inspection, Polites was unable to come to the site at all, and he did not resume visits to the site until October or November 1997, about the time Torre finished his inspection. During the time he was incapacitated, Polites delegated responsibility for the performance of the work to Lee, whom he had retained as his superintendent. He depended on Lee to coordinate the job with the foremen, and he testified that he "was too sick to worry" about whether his foremen were performing their tasks properly. He regarded Lee as safety coordinator with responsibility to ensure that employees complied with safety rules.

The Secretary alleged that MJP failed to ensure that the required fall protection was used during the following work activities at the specified locations and on the specified dates:

Citation No. 1 Serious

Item 2(a)	1926.501(b)(1) bracing columns	10th Floor	8/22/97
	2(b) 1926.501(b)(1) erecting hoist	8th Floor	8/22/97
	2(c) 1926.501(b)(1) bracing columns and installing shoring	15th Floor	9/12/97
	2(d) 1926.501(b)(1) erecting columns	30th Floor	10/24/97
Item 3	1926.501(b)(2)(ii) ironworkers installing rebar	11th Floor	8/22/97
Item 4(a)	1926.501(b)(3) working in hoist area	9th Floor	8/22/97

Citation No. 2 Willful

²With the exception of citations resulting from three of these inspections, Politis Construction did not contest the citations issued to it.

Item 1(a)	1926.501(b)(1) stripping shoes at edge	29th Floor	10/23/97
1(b)	1926.501(b)(1) bracing columns	30th Floor	10/24/97
1(c)	1926.501(b)(1) stripping columns and shoring at the perimeter	29th Floor	10/24/97
Item 2	1926.501(b)(1) stripping and bracing columns	32d-33d Floors	11/6/97
Item 3	1926.501(b)(2)(ii) ironworkers installing rebar	34th Floor	11/6/97
Item 4	1926.501(b)(3) working in hoist area	28th Floor	10/24/97

The list above reflects the judge's granting of the Secretary's motions to amend the citations.³

³At the outset of the hearing, the Secretary moved to amend the pleadings to change some of the floor designations on which some of the violations were alleged to have occurred. The Secretary's counsel stated that Torre had advised her that there were "inaccuracies . . . with respect to naming the floors." During the course of the hearing, the Secretary made a similar motion to amend to change the alleged location for another of the citation items.

On review, MJP does not contend that the judge erred in granting the motions to amend but contends that Torre's "failure to identify the floor where an alleged violation occurred" diminishes Torre's credibility as a witness. Judge Rooney expressly found Torre to be a credible witness based both on his demeanor while testifying and on the fact that MJP's foreman, Anthony Buttino, largely corroborated Torre's testimony regarding the work activities of the employees and their proximity to the edge while engaged in those activities. The judge also noted that Torre advised MJP's superintendent, Lee, who was present during the inspection, of his observations and that Lee neither disputed Torre's statements nor testified in rebuttal to Torre. The judge concluded that the small number of misidentifications of floor location in Torre's testimony were insignificant in light of the entire record.

We defer to the judge's assessment of Torre's credibility. We note that MJP erroneously claims on review before us that there is no "independent evidence" to corroborate Torre's testimony and that while MJP asserts that Buttino contradicted Torre's observations, MJP cites no evidence in the record to support this contention. Lastly, contrary to MJP's argument, we do not find Torre's testimony "equivocal" with respect to the proximity to the edge of the floor necessary to show exposure to a fall hazard.

The judge affirmed all the citation items on the merits.⁴ She assessed the proposed penalties of \$4200, \$1500, and \$1500 for items 2, 3, and 4, respectively, of citation no. 1. The judge also concluded that the violations alleged in citation no. 2 were willful, largely on the basis of the knowledge and awareness of the requirements of the standard on the part of MJP's owner, Michael Polites, and on the inspection and citation history of Politis Construction Company. Although the Secretary had proposed penalties of \$42,000 each for items 1 and 2 of citation no. 2, the judge combined both items for penalty purposes and assessed a single penalty of \$42,000. She assessed the proposed penalties of \$33,000 each for items 3 and 4 of citation no. 2.

MJP does not dispute that the Secretary satisfied her burden of proof with respect to the allegations dealing with employees installing rebar, erecting the hoist, and erecting and

⁴The judge affirmed two citation items which are not before the Commission for review. We also note that the allegation that MJP acted willfully is directed to the work operations conducted during the latter portion of the inspection under the Secretary's theory that MJP exhibited an attitude of willful noncompliance by repeatedly ignoring Torre's earlier warnings that fall protection was required. Item 2(d) of serious citation no. 1, however, alleges a violation occurring on October 24, a date included within the willful citations. The judge, therefore, concluded that it should be "incorporated" into citation no. 2 as item 1(d). In her brief before us, the Secretary states that the judge erred by "mistakenly" characterizing this item as a willful violation. While we conclude that a violation was established as to this item, in view of the Secretary's concession, we affirm the item as a serious but not willful violation.

stripping columns and other shoring.⁵ However, MJP argues that the employees working in the hoist area did not come sufficiently close to the edge to be exposed to a fall hazard. MJP does not dispute that employees bracing columns were working at a location where a fall hazard could exist, but it contends that the column braces themselves provided adequate fall protection.⁶ MJP also contends that the judge erred in rejecting its affirmative defense that personal fall arrest equipment (lifelines, lanyards, and safety belts) and/or guardrails were not feasible.

MJP also argues that the items of each citation duplicate each other. MJP contends that the judge erred in finding the violations alleged in citation no. 2 to be willful and that the judge should have combined the items of each citation alleging a violation of the same subsection into single serious violations. Assuming, however, that the Commission finds that the Secretary proved her willful allegation, MJP contends that the Commission should combine citation no. 2, items 1 and 2 into a single violation. MJP argues in favor of the judge's assessment of a single penalty for those two items whereas the Secretary contends that the judge erred in her penalty assessment. For the reasons that follow, we affirm the

⁵The record establishes that the only workers exposed to the hazards at issue in items 2(b) and 3 of citation no. 1 and item 3 of citation no. 2 were not employed by MJP but rather were employees of the hoist contractor and ironworkers employed by the steel erection contractor, respectively. As the judge noted, under well-established Commission precedent, an employer at a multi-employer construction worksite which creates or controls the hazardous conditions is responsible for exposure of the employees of other contractors. *See Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1722-25, 1999 CCH OSHD ¶ 31,821, pp. 46,778-80 (No. 95-1449, 1999) (discussion of the principles for allocating responsibility for working conditions on multi-employer construction worksites). MJP raised no issue before the judge regarding the multi-employer worksite doctrine and on review before us does not argue that the judge erred in holding it responsible for the exposure of employees of other contractors at the worksite.

⁶The other elements of the Secretary's prima facie case were established and are not in issue. *See Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138, 1993-95 CCH OSHD ¶ 30,636, p. 42,452 (No. 90-1747, 1994) (Secretary must show that the cited standard applies, the employer failed to comply with the terms of the standard, employees were exposed to the noncomplying conditions, and the employer had knowledge of those conditions).

judge's decision with one exception. We conclude that the judge erred in not assessing separate penalties for items 1 and 2 of the willful citation.

II. MERITS OF THE VIOLATIONS IN ISSUE

In finding that MJP's employees working in the hoist area were exposed to the hazard of a fall, the judge relied on the testimony of compliance officer Torre, who described his observations of the worksite in extensive detail. Torre testified without rebuttal that employees were stacking shoring material at the edge in preparation for the crane to hoist the material to the next floor as well as pushing loads off the edge as the crane lifted the load. In addition, Torre's testimony is corroborated by a videotape which he filmed as he observed the construction from the public street before he entered the worksite and as he conducted his inspection inside the structure. This videotape clearly shows employees moving between the loads of materials and the open floor, and in at least one instance an employee can clearly be seen leaning over the edge while guiding the load.⁷

The videotape also establishes that the judge properly determined that MJP's employees were not protected from a fall while bracing columns.⁸ The videotape clearly shows employees standing on the column bracing, leaning out over the bracing, and moving around the end of the bracing at the edge of the floor. Contrary to MJP's contention, it is apparent from the videotape that the bracing does not extend all the way from one column to the next and that there is an open area between adjacent columns where employees are not protected from a fall.

III. INFEASIBILITY DEFENSE

There is no dispute that no fall protection was in place at the locations and on the dates alleged in the citations. MJP's primary contention, both before the judge and on review,

⁷MJP contended that Torre's initial observations are unreliable because they were made some distance from the worksite. We reject that argument since the video camera's zoom capability clearly reveals the work operations as viewed looking toward the building from the street, that is, before Torre entered the site.

⁸The judge cited the videotape in her decision but did not make findings of fact specifically from the tape.

is that it could not feasibly have provided fall protection for any of the exposed workers by any of the means set forth in the standard. Under established Commission and judicial precedent, an employer which has failed to comply with the requirements of a standard may affirmatively defend against an alleged violation of the Act by demonstrating both that the means of compliance prescribed by the standard would have been infeasible *and* that alternative means of compliance were either being used or were unavailable. *Brock v. Dun-Par Engd. Form Co.*, 843 F.2d 1135 (8th Cir. 1988); *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991-93 CCH OSHD ¶ 29,442 (No. 88-821, 1991).

In rejecting MJP's argument, the judge determined that MJP had failed to establish that it would have been infeasible to provide fall protection as prescribed by the standard.⁹ Specifically, the judge found that employees of the hoist contractor could have been protected by means of a cable attached to the stripped columns on the 8th floor; that either guardrails or a personal fall arrest system could have been provided for employees installing shoring, stripping shoring, bracing columns, and stacking and moving material in the hoist areas; and that guardrails could have been in place during the time the steel erection contractor's ironworkers were laying rebar. We affirm these findings for the reasons set forth below. We further note that while MJP disputes the judge's findings that the means of protection set forth in the standard were not shown to have been infeasible, MJP does not contend that it established the second element of the infeasibility defense, that is, the use or unavailability of alternative means of protection. It is undisputed that no fall protection was in place at the locations and dates cited, and MJP presented no evidence that alternative

⁹While acknowledging and applying Commission precedent, the judge, however, also stated that the Third Circuit, where this case arises, does not recognize a defense of infeasibility of compliance but rather requires an employer to demonstrate that compliance would have been impossible. As authority for this proposition, the judge cited *E & R Erectors, Inc. v. Secretary of Labor*, 107 F.3d 157 (3d Cir. 1997). On review, the Secretary contends that the Commission is required to follow *E & R*. We need not address this contention. Since we affirm the judge's findings that MJP failed to establish the defense as set forth in Commission precedent, it is unnecessary for us to consider whether the Third Circuit would apply a more stringent test.

means of protection were unavailable. Accordingly, we conclude that MJP also failed to establish the second element of the defense.

A. Erection of the Hoist
(Citation No. 1, Item 2(b))

With respect to the employees of the hoist subcontractor erecting the hoist, the judge relied on Torre's un rebutted testimony describing how cables could be attached to the columns on this floor by means of clamps and stating his opinion that they would not interfere with erection of the hoist because employees could "duck under" the cable to get to the hoist if necessary. The judge also noted that MJP's contract required it to install perimeter cables as soon as a floor was stripped and that MJP's foreman, Anthony Buttino, testified that in compliance with this requirement, MJP did in fact install cables after the floor was stripped and the stripped materials had been hoisted away. Buttino further conceded that once a column is poured and stripped, it would be strong enough to support an employee who ties off a safety belt to a column. MJP's only argument before us is that use of a cable in this fashion would itself be hazardous, yet it provided no evidence to substantiate its argument. Moreover, Torre did not testify that "ducking under" the cable would expose employees to a fall hazard; his testimony concerned only whether the existence of a cable would prevent employees from having access to the hoist in order to work on it. The employer's burden is to establish "genuinely practical circumstances revealing the unreasonableness of an abatement measure." *Seibel*, 15 BNA OSHC at 1227, 1991-93 CCH OSHD at p. 39,683. We find on this record that MJP has not made such a showing.

B. Employees Stacking and Moving Material in the Hoist Area
(Citation No. 1, Item 4(a); Citation No. 2, Item 4))

The judge found as a general matter that MJP's employees working at the building perimeter could be protected by means of either safety belts or guardrails. However, as the Secretary correctly contends, there is more specific evidence which directly addresses the feasibility of compliance with respect to employees working in the hoist area. Torre advised MJP's superintendent, Lee, that the open area from where materials were lifted off the building could have been protected by a chain which could be removed as necessary. There

is no contrary evidence, except that when asked on cross-examination whether a removable chain or gate could have been used, MJP's foreman, Buttino, simply replied "no" without further explanation. On rebuttal MJP did not ask Buttino the basis for his opinion or to further substantiate it. As we have observed, the employer has the burden to set forth the specific circumstances or reasons to justify a conclusion that the specified means of protection¹⁰ is not feasible. MJP has failed to meet that burden here as well.

C. Ironworkers Placing Rebar
(Citation No. 1, Item 3 and Citation No. 2, Item 3)

As the judge noted, Buttino testified that MJP's practice was to install guardrails when 25 percent of the deck is in place, on the premise that until then, the deck is not sufficiently stable for workers to walk on. Torre, however, testified that approximately 75 percent of the deck was in place on the top deck, the 11th floor, when he inspected the building on August 22. When Torre inspected the building on August 22, he asked Lee why no perimeter protection was in place while the ironworkers were installing rebar. Lee replied that MJP customarily installed guardrails after the formwork was completed and before the concrete was poured because the concrete contractor's masons were not comfortable working without fall protection. Lee did not assert that there were any circumstances which would preclude or make impractical the provision of guardrail protection for the ironworkers as well. On the next inspection day, September 12, Torre observed the ironworkers working with guardrails in place on the 16th floor, the top floor at that time. In his testimony, Buttino conceded that MJP had installed guardrails on September 12 "to protect the ironworkers." Based on this testimony, the judge properly found that guardrails could have been provided for the protection of the ironworkers on August 22 as well. In addition, as he had done when working for Politis Construction at the Hackensack worksite, Lee prepared a "Fall Protection Program" which specifically provides that "guardrails must be installed as deck is being placed." Although this provision appears in a portion of the document which addresses fall

¹⁰Section 1926.501(b)(3) expressly allows a chain or a gate in lieu of a guardrail in a hoist area.

protection during “leading edge” work, which is not at issue here,¹¹ the fact that MJP’s safety program provides for guardrail protection when the deck is put in place supports our conclusion that guardrails could feasibly have been installed during the time that ironworkers were setting rebar on the deck. *See V.I.P. Structures Inc.*, 16 BNA OSHC 1873, 1874-75, 1993-95 CCH OSHD ¶ 30,485, p. 42,109 (No. 91-1167, 1994) (finding that a safety precaution is feasible based on employer’s safety rule mandating that precaution).

With respect to the allegation of the willful citation that guardrails were not in place for the protection of ironworkers on November 6, the judge relied on Torre’s testimony regarding statements Lee made to him. According to Torre’s un rebutted testimony, Lee conceded that about half the floor was in place, that guardrails should have been installed, and that he had instructed Buttino to do so. Lee also stated that MJP had gotten behind and was hurrying to complete the formwork because the cement pour was scheduled for the next day, and he surmised that for this reason the ironworkers might have started work before MJP could install the guardrails. The evidence supports the judge’s finding of the feasibility of guardrails. Accordingly, we find that MJP has not met its burden to establish that fall protection was infeasible for citation no. 1, item 3, and for citation no. 2, item 3.

D. Employees Erecting and Bracing Columns
and Installing and Stripping Shoring and Formwork
(Citation No. 1, Items 2(a), 2(c), & 2(d) and Citation No. 2, Items 1(a)-(c) & 2)

1) Tying Off

In brief, the judge found that employees could have been protected by guardrails while removing shoring and formwork and that employees “working at the exterior” in general could have been using safety belts as well. While we affirm these findings as consistent with the record, we do not adopt the entirety of the judge’s reasoning. The judge found that employees could tie off safety belts both to stringers and to interior columns. However,

¹¹The standard defines “leading edge” as “the edge of a floor, roof, or other formwork for a floor or other walking/working surface (such as the deck) which changes location as additional floor, roof, decking, or formwork sections are placed, formed, or constructed.” Section 1926.500(b). The Secretary represented at the hearing that none of the alleged violations deal with leading edges.

Buttino testified that because the uprights which support the stringers are secured by only a few nails and the ribs which form the deck above are not secured to the stringers but are merely placed on top of them, stringers lack sufficient strength to meet the requirement of the standard that anchorages for a personal fall arrest system be capable of withstanding a 5000-pound impact load. *See Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1875, 1995-97 CCH OSHD ¶ 31,207, p. 43,727 (No. 92-2596, 1996) (discussion of inadequacy of anchorages to support 5400 pounds as required under section 1926.104, the predecessor to the fall protection standard at issue here, in relation to feasibility of compliance under section 5(a)(1) of the Act).

While the standard does contain an exception to the 5000-pound load requirement,¹² we find it unnecessary to decide whether MJP established a defense of infeasibility with respect to using stringers as an anchorage for a personal fall arrest system. As previously noted, Buttino conceded that after a column formwork is stripped, the column would have sufficient strength to support an anchorage for a PFAS.

Although Buttino did claim that tying off to interior columns would be infeasible for reasons unrelated to the strength of the anchorage, specifically, that it would create a tripping hazard and safety lines would become entangled in and would dislodge the legs, we reject these claims as unsupported in the record. Buttino stated without explanation that it would be “almost impossible” to tie off to the column “above.” The only alternative, tying off to the lower portion of a column, would present a tripping hazard to an employee moving around on the floor if another employee were to pull the lanyard or lifeline taut. While this scenario itself is not necessarily implausible, Buttino failed to explain why it would not be possible to tie off to the upper portion of a column in view of the fact that there was evidently nothing

¹²Section 1926.502(d)(15) provides that “anchorages used for attachment of personal fall arrest equipment shall be . . . capable of supporting at least 5000 pounds . . . per employee.” However, this requirement does not apply if the anchorages are “part of a complete personal fall arrest system which maintains a safety factor of at least two” and are “designed, installed, and used . . . under the supervision of a qualified person. See generally the discussion of these requirements in *Superior Rigging & Erecting Co.*, 18 BNA OSHC 2089, 2092, 2000 CCH OSHD ¶ 32,060, p. 48,048 (No. 96-0126, 2000).

to preclude tying off to a stringer above. Furthermore, the videotape, which clearly shows the full height of the columns, does not reveal any obstructions or other circumstance which would appear to prevent an employee from tying off at a point sufficient to eliminate a tripping hazard.

Buttino's further claim—that tying off to columns, at whatever height, also would cause the lifelines or lanyards to dislodge the uprights or legs—is unsubstantiated. Buttino admitted, during a somewhat ambiguous exchange with the Secretary's counsel during cross-examination, that the supports for the deck above are removed in the area of interior columns at the same time that exterior columns are being stripped.¹³ Furthermore, MJP has not shown why the accidental removal of some legs, even if that were to occur, would threaten the integrity of the structure. Indeed, Torre testified without rebuttal that when he observed employees stripping columns on the 32d floor on November 6, Buttino called out to the employees and ordered them to get their safety belts and then told Torre that the employees “should have been wearing [belts]” and “they know better.”¹⁴

2) Guardrails

As previously noted, when the top deck is poured, guardrails are in place because the cement masons demand guardrails for perimeter protection. As the judge's decision indicates, Torre told Lee that one way to protect employees erecting columns is to keep guardrails in place on the decking and not strip them from the floor below until the columns are erected, and Torre also noted that Lee's revision of MJP's “fall protection program” explicitly prescribes such a procedure. Torre also specifically explained how, with the decking still in place, guardrails could be attached to the ribs for the protection of employees erecting

¹³We note that the videotape also does not show that any supports were present in the area where the employees were stripping columns during Torre's filming of the perimeter of the building.

¹⁴Buttino testified that the provision of the “Fall Protection Program” providing for the use of belts or harnesses by employees working at the perimeter specifically *exempts* employees handling materials and working on exterior columns. Buttino's testimony, however, is plainly contrary to the explicit wording of MJP's written program.

columns on the top deck. Indeed, Torre testified that leaving guardrails in place while employees are erecting columns is standard practice for reinforced concrete contractors.¹⁵ On the other hand, Buttino testified that guardrails could not be kept in place during the process of erecting columns and other work operations on exterior columns for the following reasons: (1) the guardrails would obstruct the locations where the columns are installed, (2) it would be “dangerous” to maneuver the guardrails around the completed columns when removing them for use on the next floor, and (3) while the columns are being erected, the formwork is being stripped on the floor below, which so weakens the guardrails on the floor where the columns are being installed that the guardrails provide no protection for the employees installing the new columns. The judge discredited Buttino’s testimony, although she did not make an explicit finding regarding the feasibility of guardrails for the protection of employees erecting columns.

We conclude that the record supports the judge’s finding that MJP has not rebutted Torre’s testimony. Buttino did not deny having told Torre that guardrails could be used and did not deny that the corresponding provision of the “fall protection plan” supported the feasibility of using guardrails. The judge also properly found, with respect to Buttino’s concern regarding the availability of guardrail material of sufficient strength, that MJP removed guardrails when it stripped the formwork not because the construction methods required it to do so but because it did not have sufficient guardrail material on site to leave the existing guardrails in place. As the judge correctly concluded, MJP could have addressed this concern simply by obtaining additional wood for use as guardrails.¹⁶

¹⁵Torre described a worksite he inspected in Morristown, New Jersey on October 1, 1998, where the formwork contractor had extended the plywood almost to the end of the ribs, leaving just enough room for the guardrails. He said that there was no reason that MJP could not have used the same design. He also referred to the Morristown worksite as an example of the use of guardrails remaining in place during work on exterior columns. The judge relied on the latter testimony in finding that MJP could feasibly have done the same.

¹⁶At one point in his testimony Buttino stated that the process of stripping removes the supports for the guardrails on the deck above, thus requiring that the guardrails be removed
(continued...)

The judge also found that the guardrails could have been kept in place until the shoring is stripped. That is an extension of the guardrail implementation discussed above because it involves the question of whether guardrails can be left in place for a longer period of time. In finding that MJP could have done so, the judge relied on Buttino's testimony in which Buttino conceded that the length of time guardrails could remain intact was a function of the work schedule and that if the general contractor agreed, the schedule could be extended from a 2-day to a 3-day cycle, which would allow the guardrails to remain "a lot longer." He also conceded that enough additional material for guardrails could have been provided for this purpose.

For these reasons, we conclude that the judge properly determined that MJP failed to prove that the use of a personal fall arrest system or guardrails would have been infeasible for the work operations at issue.

IV. INDIVIDUAL ALLEGATIONS OF VIOLATIONS

MJP argues that the items of the serious citation and the items of the willful citation alleging a violation of the same provision of section 1926.501 are duplicative because they involve the same violative conduct and would be corrected by a common abatement measure. Thus, MJP argues that item 2 of citation no. 1 and items 1 and 2 of citation no. 2, alleging a violation of section 1926.501(b)(1), are all duplicative since they all involve employees bracing and stripping exterior columns and would all be abated by the same abatement measure: the provision of fall protection to employees engaged in such work. Similarly, MJP argues that items 3 of each citation duplicate each other, as do item 4(a) of citation no. 1 and item 4 of citation no. 2. In short, MJP concludes that the Commission should affirm one single violation for each subsection of the standard in issue. The Secretary argues that the judge properly affirmed each alleged citation item as a separate instance of violation but

¹⁶(...continued)

on the deck above. In response to this testimony, the Secretary's counsel asked Buttino whether the exterior columns could be stripped *before* the deck above was "dropped." Buttino did not deny that the operation could be conducted in this manner.

contends that the judge erred in assessing a combined penalty for items 1 and 2 of citation no. 2.

As MJP indicates in its brief, violations may be found duplicative where they require the same abatement measures. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207, 1991-93 CCH OSHD ¶ 29,964, p. 41,027 (No. 87-2059, 1993). Thus, violations have been found duplicative where abatement of one citation item will necessarily result in abatement of the other item as well. *Capform, Inc.*, 13 BNA OSHC 2219, 2224, 1987-90 CCH OSHD ¶ 28,503, p. 37,778 (No. 84-556, 1989). As the Commission held in *Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1118, 1986-87 CCH OSHD ¶ 27,829, p. 36,430 (No. 84-696, 1987), two citation items may be merged into one, where they “involve substantially the same violative conduct.”

Those cases, however, concern situations in which there was a single instance of noncompliance. While *J.A. Jones*, for instance, indicates that citation items are duplicative when compliance with one cited standard would necessarily result in compliance with another, that decision makes clear that individual instances of noncompliance *with the same standard* may nevertheless be cited as separate violations. See *A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1998 n.4, 1993-95 CCH OSHD ¶ 30,554, p. 42,273 n.4 (No. 92-1022, 1994) (separate penalties for separate violations of a single standard); *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172-73, 1991-93 CCH OSHD ¶ 29,962, pp. 41,005-06 (No. 87-922, 1993) (holding that the Secretary could properly allege a separate citation item and the judge could properly assess a separate penalty for each instance in which the employer failed to properly record an occupational injury or illness). Indeed, in *J.A. Jones* the Commission more specifically held that the Secretary may appropriately cite separate violations for each individual instance of improper fall protection where each alleged instance of violation involves either a different floor or a different location on each floor. 15 BNA OSHC at 2212-13, 1991-93 CCH OSHD at pp. 41,032-33. Moreover, in this case, many of the citation items alleged violations occurring on different dates. See *Andrew Catapano Enterp., Inc.*, 17 BNA OSHC 1776, 1786, 1995-97 CCH OSHD ¶ 31,180, pp. 43,604-05 (No. 90-50, 1996) (consolidated) (upholding separate citation items for each

trench excavated by the employer over a period of approximately seven weeks). As the Commission noted in that decision, abatement of one instance of violation would not abate other violations occurring at different locations and other times.

The Secretary therefore acted properly in alleging individual instances of violation, and there is no error in the judge's affirmance of the individual citation items.

V. WILLFULNESS—CITATION NO. 2

A willful violation is one in which the employer's state of mind is that of intentional disregard of the requirements of the Act or plain indifference to employee safety. *Caterpillar, Inc.*, 18 BNA OSHC 1005, 1009, 1995-97 CCH OSHD ¶ 31,386, p. 44,337 (No. 93-3405, 1997), *aff'd*, 154 F.3d 400 (7th Cir. 1998). Such a violation is distinguished from other types of violations by the employer's heightened awareness of the violative nature of its conduct or the conditions at its workplace. *Id.* A willful violation can be found where the employer is aware that violations exist in its workplace and is on notice of the requirements of the standard based on its history of previous citations for noncompliance with the standard in question. *J.A. Jones*, 15 BNA OSHC at 2209, 1991-93 CCH OSHD at p. 41,029.

In applying these principles here, the judge found the items of this citation willful as alleged based on the history of MJP's predecessor company, Politis Construction. The judge also inferred the requisite "heightened awareness" of the requirements of the Act, *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, p. 41,257 (No. 89-433, 1993), from the fact that MJP's superintendent, Lee, used the same "fall protection program" for the MJP site as he did on the preceding Hackensack project for Politis Construction and from Torre's repeated warnings to Lee over a period of many weeks during the course of the inspection that fall protection was required. The judge noted that Lee and Buttino made numerous representations that the fall hazards would be corrected but did not fulfill these promises. More specifically, the judge found that Lee conceded that he had not been diligently enforcing the wearing of safety belts and that guardrails had not been in place for the protection of ironworkers because work had gotten behind schedule. MJP argues, on the other hand, that Lee and Buttino disputed Torre's view that fall protection was feasible,

and it claims a legitimate “difference of opinion” with the Secretary as to whether fall protection was feasible.

As the judge’s decision correctly observes, an employer’s prior history of violations, its awareness of the requirements of the standards, and its knowledge of the existence of violative conditions are all relevant considerations in determining whether a violation is willful in nature. We agree with the judge that the record here establishes the willfulness of the violations alleged in citation no. 2. To the extent, however, that the judge’s decision attributed to MJP the inspection history of its predecessor, Politis Construction, we do not rely on that factor in affirming her finding of willfulness. Whether a continuity of supervision alone may be a sufficient basis on which to charge a successor company with the inspection history of its predecessor is an issue which the Commission has never addressed, and the Commission did not request the parties to brief that issue here.

However, we distinguish this specific issue from the more general question of whether Michael Polites himself, as well as MJP’s supervisors, Lee and Buttino, are chargeable with knowledge of the requirements of the standard based on their prior work experience, wherever that experience originates. MJP’s superintendent, Lee, who apparently controlled the worksite conditions at the time of the inspection, was also Politis Construction’s superintendent at the prior Hackensack worksite. Moreover, the record supports the judge’s finding that Torre repeatedly warned Lee that fall protection was required. Accordingly, we adopt the judge’s conclusion that Lee had actual notice both of the requirements of the standard and of the absence of fall protection at the worksite here.¹⁷ *See Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1613, 1991-93 CCH OSHD ¶ 29,673, p. 40,210 (No. 87-2007, 1992) (employer which has notice of the requirements of the standard and is aware of a condition which violates that standard but fails to correct the violation demonstrates

¹⁷MJP argues that its failure to provide fall protection although such protection is prescribed in its own “Fall Protection Program” is not evidence of willfulness for the reason that the standard requires a “fall protection plan” only when “leading edge” work is being performed. We reject this argument. The fact that the written program itself may have been engendered by a specific exception provision of the standard does not detract from its relevance for showing that MJP viewed the measures set forth in the program as feasible.

knowing disregard for purposes of establishing willfulness). As MJP's supervisor, Lee's knowledge is imputed to MJP. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, pp. 40,583-84 (No. 87-692, 1992), and MJP is responsible for the willful nature of Lee's actions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539, 1991-93 CCH OSHD ¶ 29,617, pp. 40,101-02 (No. 86-360, 1992)

MJP argues that its belief that fall protection would have been infeasible is sufficient to negate willfulness. An employer may rebut a showing of willfulness by demonstrating that it took appropriate measures to comply with the cited standards, or "that it had a good-faith belief that as a factual matter the conditions at its workplace conformed to OSHA requirements." *Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1921, 1999 CCH OSHD ¶ 31,933, pp. 47,377-78 (No. 96-593, 1999). To prevail on this claim, the employer's belief must be *objectively reasonable*. *Id.*; *Morrison-Knudsen Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1124, 1993-95 CCH OSHD ¶ 30,048, p. 41,281 (No. 88-572, 1993); *see Brock v. Morello Bros. Construction*, 809 F.2d 161, 165 (1st Cir. 1987) (employer's attitude toward compliance can be evaluated only by the external objective evidence). For the reasons discussed above, we conclude that MJP could not have reasonably believed that the workers could not have been protected by either safety belts tied off to interior columns or guardrails or both.

VI. PENALTY ASSESSMENT

Section 17(j) of the Act, 29 U.S.C. § 666(j), mandates that penalty assessments be based on the size of the employer, its prior history of violations, its good faith, and the gravity of the violations. *Specialists of the South, Inc.*, 14 BNA OSHC 1910, 1987-90 CCH OSHD ¶ 29,140 (No. 89-2241, 1990). The judge assessed a combined penalty for the two items of the willful citation alleging noncompliance with section 1926.501(b)(1). In making this assessment, the judge determined that an aggregate penalty of \$42,000 for these two violations is sufficient to deter future violations. We disagree, in light of the facts here.

In the circumstances here, gravity and good faith are the predominant factors to be considered in the assessment of an appropriate penalty. *See Orion Constr., Inc.*, 18 BNA OSHC 1867, 1999 CCH OSHD ¶ 31,986 (No. 98-2014, 1999) (holding that penalty factors

need not be given equal weight). As the judge properly found, the violations at issue in items 1 and 2 of the willful citation are of high gravity. Based on the record, we conclude that MJP demonstrated a lack of good faith. MJP refused to provide fall protection even after repeated warnings by Torre and despite the undisputed familiarity of its owner, Michael Polites, and its supervisors with the fall protection standards. This refusal, together with its failure to comply even with its own written fall protection program, demonstrate an utterly cavalier and inexcusable disregard for the safety of its employees and employees of other contractors. This lack of good faith warrants a higher penalty than that assessed by the judge. Considering the penalty factors, we find the Secretary's proposed penalties to be fully supported by the Act and appropriate to ensure future compliance.¹⁸ See *Valdak Corp.*, 17 BNA OSHC 1135, 1139, 1993-95 CCH OSHD ¶ 30,759, p. 42,743 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996).

ORDER

For the reasons set forth above, we affirm the judge's decision except that we affirm item 2(d) of citation no. 1 as a serious rather than willful violation,¹⁹ and we set aside the

¹⁸In view of our disposition, we do not address the Secretary's contention that by assessing a combined penalty for both items of the willful citation, the judge failed to comply with 29 U.S.C. § 666(a), which mandates a minimum penalty of \$5000 for a willful violation of the Act.

¹⁹Our reversal of the judge's reclassification of citation no. 1, item 2(d) as a willful violation does not affect our penalty assessment.

judge's penalty assessment for items 1 and 2 of the willful citation and assess a penalty of \$42,000 for each of those items.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: November 16, 2001

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. :
:
MJP CONSTRUCTION CO., INC., :
:
Respondent. :

DOCKET NO. 98-0502

Appearances:

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Before: Judge Covette Rooney

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”). Respondent, MJP Construction Company, Inc. (“MJP”), at all times relevant to this action maintained a work site located in Jersey City, New Jersey, where it was engaged in steel-reinforced concrete construction work. MJP concedes that it is an employer engaged in a business affecting commerce and that it is subject to the requirements of the Act.

MJP was the subcontractor performing the steel-reinforced concrete construction of the building at the site, a 35-story housing project known as Tower America Phase II (“the Project”). OSHA compliance officer (“CO”) Richard Torre commenced an inspection of MJP’s activities on

August 22, 1997, and, after several more visits to the site, he held a closing conference with MJP on February 19, 1998. As a result of the inspection, MJP was issued a serious citation and a willful citation alleging violations of 29 C.F.R. §§ 1926.100(a), 1926.501(b)(1), 1926.501(b)(2)(ii), 1926.501(b)(3) and 1926.501(b)(4)(ii); the proposed penalties for both citations totaled \$159,900.00. MJP filed a timely notice of contest, and the hearing in this matter was held in New York, New York on December 14-17, 1998, March 15-18, 1999, and May 14, 1999. Both parties have submitted post-hearing briefs and reply briefs.

Background

Steel-reinforced concrete construction consists of pouring concrete into wooden form work that is then removed or “stripped” from that level and lifted to another level, whereupon the process is repeated. More specifically, after the grade-level slab has been done, the forms for the first-level columns are made by nailing together plywood that is backed by stiffeners and held in place by “shoes” and clamps. Wooden joists or braces called “stringers” that are supported by vertical posts or “legs” are laid out horizontally on top of the columns and nailed into place, and further bracing, or “ribs,” is put on top of the stringers. Plywood decking is then placed on top of the stringers and ribs, and reinforcing steel rebar is laid horizontally on top of the decking. Rebar is also set vertically into the column form work, after which concrete is poured onto the decking and into the column form work. Once the concrete has set, the form work is stripped from the columns and the floor. The form work is then stacked at the edges of the grade-level floor and hoisted up by crane for use on another level, and the process is repeated until the structure is completed. (Tr. 74-80, 1102-32).

MJP began operating as a business in 1997. Michael Polites, the president, owned MJP together with his son and daughter; however, Polites was in sole control of MJP’s affairs, as he was the only person authorized to sign checks and contracts on its behalf. Polites was previously the sole officer and owner of Polites Construction, which was started in 1979 and went bankrupt in 1997. OSHA inspected Polites Construction 27 times during those years, and, as a result of 22 of those inspections, the company was cited for numerous violations, 26 of which involved fall protection. Polites Construction did the concrete work to build a seven-story nursing home in Hackensack, New Jersey, using the steel-reinforced concrete method of construction. After OSHA inspected that project, Polites Construction was issued a citation on May 27, 1997, for violations of the fall

protection standards set out at 29 C.F.R. §§ 1926.501(b)(1) and 1926.501(b)(2). The citation was settled, and on July 14, 1997, Michael Polites and OSHA signed a settlement agreement that resulted in the violations being affirmed and becoming a final order of the Commission. (Tr. 55-57, 152, 1398; Ex. C-3, p. 2; Ex. C-7; Ex. C-8; Ex. C-10; Ex. C-14, pp. 7, 12-15, 22, 47-48, 58-67).

On or about May 8, 1997, Michael Polites signed a contract on behalf of MJP in regard to the Project. The general contractor was Tower East Construction (“Tower East”), which was a subsidiary of the Lefrak Organization (“Lefrak”). The specifications for the contract provided, *inter alia*, that MJP was obligated to provide fall protection on the Project. (Tr. 1392, 1399; Ex. C-6, pp. 49-50). Paragraph 14 of the specifications stated as follows:

All labor and materials (except certain material as herein noted) shall be provided by this Subcontractor for temporary safety protection and perimeter protection, in accordance with State, Local and Federal Agencies having jurisdiction, including OSHA. This shall include, but not be limited to floor openings, and perimeter cables. Such temporary safety and perimeter protection shall be installed as soon as each floor is stripped. All cable material will be furnished by the Contractor and installed by this Subcontractor.

Testimony in the record confirms that MJP was responsible for providing fall protection. For example, David Jenkins, the project superintendent for Tower East, so testified. Moreover, the CO testified that Don Lee, an engineer and MJP’s job site superintendent, acknowledged that the company was responsible for installing guardrails on the top deck as it was being put down. Finally, Anthony Buttino, MJP’s carpentry foreman and shop steward at the site, testified that it was MJP’s responsibility to cover floor holes, to cable the stripped floors, and to erect guardrails on the top deck. Buttino also testified that guardrails were installed when about 25 percent of the deck had been put down and that they were put up well before the masons were on the deck to pour concrete. (Tr. 562-64, 738-39, 998-99, 1072, 1088, 1095, 1152, 1275, 1282-84, 1391-92).

The contract specifications contained a paragraph excluding the use of nets on the Project; in this regard, paragraph 16 states that “[o]utriggers and netting, and raising of same are specifically excluded from this Subcontract.” (Ex. C-6, p. 50). Michael Polities testified that he requested the exclusion during negotiations with Anthony Scobo of Lefrak.²⁰ (Tr. 1400-01; 1408-09).

²⁰Polites initially testified that Scobo informed him that nets were infeasible and were not
(continued...)

The OSHA Inspection

CO Torre went to the site on August 22, 1997. Upon arrival, he saw ironworkers on the 11th floor, the top deck at that time, who were laying rebar along the perimeter; another ironworker was bending over the side, and the employees were about 100 feet above the ground.²¹ The CO observed carpenters on the 10th floor, about 90 feet above the ground, clamping columns at the perimeter, and he observed laborers at the edge of the 9th floor in a hoisting area who were about 80 feet above the ground. None of these employees had any fall protection, and, after videoing these scenes, CO Torre went to the general contractor's office and met with David Jenkins, the project manager.²² He told Jenkins what he had seen, and Jenkins explained MJP's responsibility for putting up perimeter protection. Jenkins also explained that there were two other subcontractors on the site, E & J Steel ("EJS"), whose ironworkers were laying rebar, and Regional Scaffolding & Hoisting ("RSH"), whose employees were putting up hoists. As Torre and Jenkins proceeded to the building, the CO again saw employees without fall protection. One was clamping at the edge of the 10th floor and another, in the hoisting area of the 9th floor, was leaning over the edge of the floor measuring; there were also RSH employees erecting a hoist at the edge of the 8th floor.²³ (Tr. 80-85; Ex. C-16).

Torre and Jenkins climbed from levels one to six via ladders that went through unguarded openings that were about 2 feet by 3 feet; there were other floor holes in close proximity to some of these openings. On the 7th, 8th and 9th floors, the ladders were in uncovered stairwells that were 10 feet long and 7 to 8 feet wide. On the 7th floor, the CO saw an MJP employee doing overhead work from a stepladder that was 2 feet from an open pipe chase. In the 8th floor ladder-way, the CO saw

²⁰(...continued)

needed on the job. However, on cross-examination, Polites conceded that he and Scobo had had no discussions as to the feasibility of nets and that he had wanted to make sure that it would not be his obligation to provide them. (Tr. 1398-1401, 1409-10).

²¹The first floor was 10 feet high; the other floors were just over 9 feet high. (Tr. 86).

²²The CO's video, Ex. C-16, depicts the conditions he saw on August 22, as well as those he saw on his later visits to the site, set out *infra*. (Tr. 97-197).

²³Although the CO testified that a carpenter was doing clamping work on the 9th floor, Ex. C-16 shows an employee on the 10th floor working on an exterior column.

a plank leading to an open-sided suspended platform that was supported by 3 by 4's; he also saw MJP employees working on a pipe chase by the open stairwell and RSH employees working at the perimeter of the 8th floor without fall protection. There was another open-sided suspended platform in the 9th floor ladder-way, and the CO saw an MJP employee jump about 2 feet over the opening to reach the platform. He also saw laborers on the 9th floor stacking material in the hoisting area near the perimeter without any fall protection. CO Torre and Jenkins went on to the 10th floor, where carpenters were clamping columns in preparation for the concrete pour and working at the edge of the floor without fall protection. Upon reaching the 11th floor, the CO observed ironworkers putting rebar onto the deck and into the columns without any perimeter protection. Jenkins introduced the CO to Lee, who was watching the work in progress. (Tr. 85-94, 194-97; Ex. C-16).

CO Torre held an opening conference with Lee and informed him of his observations. The CO advised Lee that all the employees working on the building at or near the perimeter needed fall protection, and he asked why none was present on that level. Lee told him they generally provided perimeter protection only when the masons were pouring the concrete as they were not comfortable working on the top deck without it. The CO then discussed the ladder-ways and floor holes, advising Lee they had to be guarded or covered. The CO and Lee went down to the ground level together, and the CO pointed out the ladder-ways and floor holes. The CO reiterated the need for exterior fall protection, and Lee told him that he would take care of it, as well as the ladder-ways and floor holes, immediately. In a phone call later that day, CO Torre reminded Jenkins that he had told Lee to put up perimeter protection on the top deck and that he wanted Jenkins to make sure Lee did so; Jenkins assured the CO that he would. (Tr. 94-96, 197-98, 699; Ex. C-16).

CO Torre returned to the site on September 12, 1997, and advised Jenkins he was continuing his inspection.²⁴ As he approached the building, he saw employees at the edge of the 15th floor, 135 feet above the ground, bracing columns without fall protection. He also saw a worker installing shoring on that floor who was about 1 foot from the edge, and based on his knowledge of the work, he knew these were MJP employees. As he went up to the 15th floor, the CO observed two employees accessing the ladder-way to that floor by jumping over the opening and onto the open-

²⁴The CO discussed what he videoed at the site that day. (Tr. 200; 206-40).

sided suspended platform in the stairwell; both said they worked for MJP. The CO then approached two employees working at the 15th floor perimeter and asked if anyone had given them safety belts to use; they indicated no one had.²⁵ The CO went on to the 16th floor, the top deck that day, where Lee was watching ironworkers put rebar into perimeter columns. The ironworkers were within a foot of the edge but guardrails had been put up along the perimeter, and the CO expressed his satisfaction to Lee.²⁶ The CO then told Lee that the employees on the 15th floor needed fall protection as well, and Lee said he would take care of it. CO Torre went over the hazards he had seen and again told Lee to provide fall protection to any employees working at the perimeter. Lee noted that employees could not tie off when working in and around the interior. The CO responded that he did not expect them to but that when they were working on the perimeter in a stationary position they needed to tie off with safety belts and lanyards. (Tr. 198-206, 230, 234-39; Ex. C-16).

On September 19, 1997, CO Torre went back to the site and held a closing conference with Lee, Buttino, and Jenkins. The CO asked for the fall protection plan for the job, and Lee gave it to him. The plan stated that “[a]ny workers who work on perimeter areas (handling materials/working on exterior columns) must wear body belts or harnesses. No exception.” The plan also stated that “[g]uardrails must be installed as deck is being placed.”²⁷ CO Torre asked Lee why they were not enforcing the plan, and Lee had no answer. The CO then discussed the fact that fall protection had to be used when MJP was bracing, clamping and stripping exterior columns. When Buttino brought up the feasibility of using safety belts during stripping, the CO said that employees could tie off to interior columns. Buttino and the others agreed and assured him that employees would use safety belts when working on exterior columns. Buttino also indicated he was confused about what type of fall protection was required. The CO explained that when it was feasible and not a greater hazard,

²⁵The CO said that Anthony Buttino, MJP’s carpentry foreman, identified the workers as John Matos and Chris DeAnni; he also said Matos was not wearing a hard hat. (Tr. 203-04; 230).

²⁶CO Torre testified that he believed the railings had been put up because the masons were preparing to pour the deck. (Tr. 831, 946-48).

²⁷The plan, which was dated September 8, 1997, was the same one Lee had developed for the Hackensack job earlier that year. (Tr. 242-45; C-9).

conventional fall protection such as guardrails, personal fall arrest systems or nets must be used. He also explained the citations MJP could receive for what he had seen on his prior visits. CO Torre observed no violations at the site that day. (Tr. 241-49; Ex. C-11).

Due to other assignments, CO Torre was unable to issue any citations at the end of his inspection. On his way to another site on October 23, 1997, he drove by the Project and observed that masons were pouring concrete on the 30th floor, the top deck, and that that floor had guardrails. However, an employee on the floor below was stripping a shoe from an exterior column without any fall protection; the employee was walking around the column, bending down and leaning over the edge to remove the shoe, and he was about 6 inches from the edge and approximately 270 feet above the ground. The CO did not enter the site, but he videoed his observations.²⁸ He reported what he had seen to his office and returned to the site the next day. (Tr. 249-67, 847-48, 854; Ex. C-16).

On October 24, 1997, CO Torre saw various employees working without fall protection. Two MJP carpenters were erecting an exterior column on the edge of the 30th floor, and the guardrails that had been up the day before had been taken down and the employees were not tied off or otherwise protected. MJP employees were also bracing exterior columns on the 30th floor, stripping exterior columns on the 29th floor, and stacking materials in a hoist area on the edge of the 28th floor; none of these employees had any fall protection. The CO videoed these scenes and then went to Jenkins' office in search of Lee to find out why employees were still working without fall protection. When Lee arrived, CO Torre conducted a videotaped interview with him. During the interview, the CO asked Lee why, after his previous warnings, employees were continuing to work without fall protection. Lee said he had given four sets of belts to the employees but the belts were clumsy and the men did not want to use them; Lee also acknowledged that he had not really been enforcing the use of fall protection at the site. (Tr. 267-77; 287-303, 957-58; Ex. C- 16).

CO Torre phoned Lee on October 27, 1997, after reviewing his videotape and observing the employees erecting the column on the 30th floor without fall protection. Lee told the CO that he had discussed the matter with Buttino, the carpentry foreman and shop steward, and that there was nothing to tie off to on the deck. The CO suggested nets, but Lee said they were not provided for in

²⁸CO Torre initially identified the floor below the top deck as the 30th floor, but he then corrected himself and said the employee stripping the shoe was on the 29th floor. (Tr. 852).

the contract. The CO then suggested leaving the guardrails up that had been there during the concrete pour, and Lee agreed to do so. (Tr. 312-14, 936-39).

CO Torre returned to the site on November 6, 1997, where he observed ironworkers on the 34th floor, the top deck, laying rebar at the perimeter and inserting rebar into exterior columns; the ironworkers had no fall protection, and they were exposed to falls of 310 feet. The CO also observed carpenters bracing exterior columns on the 33rd floor and laborers stacking stripped materials on the perimeter of the 32nd floor; the employees on neither floor had fall protection. The CO videoed these scenes and then went to Jenkins' office and asked him to call Lee; upon Lee's arrival the three had a meeting, which the CO videoed.²⁹ When the CO inquired about perimeter protection on the top deck, Lee said that half the deck was up and that guardrails should be up. Lee also said he had told the foreman to put the guardrails up before the ironworkers started working and that he did not know why they were not; he then added that they were running behind and would be pouring the next day and that while the ironworkers should have waited to lay the rebar they wanted to get the job done. The CO then asked about the other employees without fall protection, to which Lee responded that he had tried to get them to use it but they did not listen. (Tr. 314-26, 373-87, 416-47, 1639).

After the interview, CO Torre checked to see if employees were using protective equipment. He went to the 32nd floor, where he saw two carpenters, Joe Fazio and Chris DeAnni, stripping a column at the edge of the floor without fall protection. Buttino was watching the operation and he shouted at the two employees to go upstairs and get their safety belts. When the CO asked why they were not already wearing them, Buttino replied that they should have been and that "they know better." The CO also saw John Matos, the same person he had seen without a hard hat on September 12, stripping an interior column on the 32nd floor without a hard hat. The CO then went to the 33rd floor, where he observed two employees bracing columns at the edge of the floor. The CO spoke with Lee again as he was leaving the site. Lee told him they had to pour three floors a week and that he had to balance production and safety. The CO replied that he had just seen employees on the top floors without fall protection and that fall protection at the site seemed "nonexistent." (Tr. 462-66).

²⁹The CO read his notes about the interview into the record pursuant to Federal Rule of Evidence 803(5). The interview itself was not received in evidence. (Tr. 387-89, 415-54).

On December 4, 1997, CO Torre called Lee for the name of the employee who had been fired for not wearing fall protection, who Lee had mentioned during the November 6 interview. However, Lee told him that failing to use fall protection was only a small part of the employee's being fired and that the individual had actually been dismissed for a combination of reasons. CO Torre held a closing conference with Lee and Jenkins on February 19, 1998, at which time he reviewed the hazards he had observed during his inspection. The citations were issued the same day. (Tr. 472-77).

Credibility of CO Torre's Testimony

MJP argues in its post-hearing brief that the Secretary failed to meet her burden of proof because CO Torre's testimony was "patently insufficient and flawed." MJP asserts that the CO's testimony was confusing with respect to where the violations occurred, what employees were doing and how far they were from the edges of the floors. (MJP's Brief, pp. 3-11).

CO Torre did make certain mistakes, such as recording, at times, the wrong floor or affected employees in his notes. However, having examined the record, I find that such errors are harmless. First, I found CO Torre to be a very believable witness. I observed his demeanor as he testified and found his responses to be candid, convincing and credible. The majority of his responses were also supported by his notes, which were made when the events of the inspection were fresh in his mind, and he readily acknowledged the instances in which he made incorrect statements or recorded information in error. The CO's credibility was also bolstered by his experience with OSHA and his construction background. Specifically, the CO testified that he had conducted about 435 inspections since joining OSHA in 1991, that 95 percent of his inspections had been construction sites, and that 25 percent of those sites had involved concrete or steel high-rise projects. The CO further testified that he had been a journeyman carpenter for a number of years and a carpentry foreman for a year, that he had worked on large institutional buildings and high-rise structures, and that these projects had included the same type of construction work taking place at the subject site. (Tr. 69-72).

Second, the record contains ample corroboration of CO Torre's observations. The CO's testimony indicates that his practice at the site was to first use high-powered binoculars to view the hazards, after which he would set up his camera and video the hazards. (Tr. 118-19, 594, 852, 858, 867, 945, 1177, 1639). The CO's testimony also shows that following his observations on October 24 and November 6, he met with Lee and told him what he had seen. Lee did not challenge what the

CO told him during either of these interviews, and MJP did not call Lee as a witness to refute the CO's recollection of the interviews. (Tr. 301-03, 415-55). MJP's carpentry foreman, Anthony Buttino, provided further corroboration of where employees had been working and how far they had been from the perimeter during the course of his testimony as he viewed Exhibit C-16, the CO's videotape. (Tr. 1214-16, 1312-15). I also note that Buttino did not deny the CO's testimony that he had told the employees to go get their safety belts after the CO had observed them working without fall protection at the edge of the floor on November 6. (Tr. 462-63).

Finally, I find that the number of errors that CO Torre made were minute in view of the magnitude of his inspection and the record in this case, and, in this regard, I note the Secretary's motions to amend several of the citation items to conform to the evidence, as set out below. Regardless, MJP's assertions with respect to the credibility of CO Torre are simply not supported by the evidence of record and they are accordingly rejected.

Amendments to the Citations

During the course of the hearing, the Secretary moved to amend Citation 1 to reflect the following changes: Item 1(a) (the alleged violation was on the 15th floor, instead of the 8th floor); Item 2(a) (the alleged violation was on the 10th floor, instead of the 8th floor); Item 2(b) (the alleged violation was on the 8th floor, instead of the 7th floor); Item 2(d) (the alleged violation was on the 30th floor, instead of the 34th floor); and Item 3 (the alleged violation was on the 11th floor, instead of the 10th floor). The motion was granted because the amendments were supported by the record and altered only the floor locations of the cited conditions and not the descriptions of the work being done. The amendments were also granted because there was nothing in the record to establish any prejudice to MJP, particularly in view of the videotaped evidence the company had prior to trial indicating where the work was taking place.

The Secretary also moved, during the course of the hearing, to amend Item 1(a) of Citation 2 to allege that the violation occurred on the 29th floor instead of the 30th floor. A decision on this motion was reserved, pending my review of the record. (Tr. 1365-66). As set out in footnote 9, *supra*, the CO initially identified the floor relating to this item as the 30th floor; however, he then corrected himself and said that the floor pertaining to this item was actually the 29th floor. (Tr. 852). Based upon the evidence of record, the Secretary's motion is granted.

In a motion attached to her post-hearing brief, the Secretary has further moved to amend Citation 1, items 5(a) and (c), to allege violations of 1926.501(b)(4)(i) instead of 1926.501(b)(4)(ii). The record shows that the cited hazard was that of ladder-way floor holes alleged to exist on August 22, 1997, and September 12, 1997, through which employees could have fallen. (Tr. 88-95, 201-02, 550-51). Section 1926.501(b)(4)(i) addresses the specific hazard of falling through holes, and MJP has filed no response to the Secretary's motion. The motion is accordingly granted.

Serious Citation 1, Item 1 - 29 C.F.R. 1926.100(a)

The cited standard states that “[e]mployees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.” The citation alleges as follows:

(a) 15th floor: Employees were not protected by head protection while applying braces to exterior columns where there was a potential danger of head injury from falling metal braces from the top of the column. Violation observed on or about 9/12/97.

(b) 32nd floor: Employees were not protected by protective helmets when stripping columns where there was a possible danger of head injury from falling metal braces from the top of the column. Violation observed on or about 11/6/97.

On September 12, CO Torre saw two carpenters working on perimeter bracing on the 15th floor without fall protection. The CO videoed the employees, who told him they worked for MJP, and Anthony Buttino identified the two workers as John Matos and Chris DeAnni. The CO noted that Matos was not wearing a hard hat. On November 6, the CO again saw Matos without a hard hat; this time, Matos was stripping an interior column on the 32nd floor. The CO testified that Matos was exposed to the hazard of being hit by bracing falling from overhead as he performed the bracing and stripping work; the CO also testified that the violation was serious, in that Matos could have received multiple head fractures. (Tr. 198-204; 230, 457-465, 478-80; Ex. C-16).

Based on the foregoing, the Secretary has established the applicability of the cited standard, that the terms of the standard were violated, that employees were exposed to the cited condition, and that the cited condition could have caused serious injury. The Secretary has also established that MJP knew or should have known of the violative condition. The violation was in plain view, and the record clearly demonstrates that Anthony Buttino, MJP's carpentry foreman, and Don Lee, MJP's job site superintendent, were present on the project on a daily basis and that their duties included

viewing the work operations and ensuring that the employees worked safely and that safety hazards were rectified. (Tr. 85, 94, 205, 301, 381; 462-63, 1088, 1313; Ex. C-12, p. 7, line 13, p. 39, lines 7-18). This item is affirmed as a serious violation.

CO Torre assessed this item as being moderately severe and having a lesser probability because employee exposure was intermittent; in this regard, I note that the CO observed only one employee during his entire inspection who was not wearing a hard hat. In view of these factors, the CO's gravity-based penalty was \$2,000.00, which was reduced by 40 percent due to MJP's size. No reductions were given for history or good faith, in light of MJP's prior OSHA history and the number and nature of the violations at the subject site.³⁰ (Tr. 482-84). Based on the record, the Secretary's proposed penalty of \$1,200.00 is appropriate and is therefore assessed.

Serious Citation 1, Item 2 - 29 C.F.R. 1926.501(b)(1)

The cited standard states that “[e]ach employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.” The citation alleges as follows:³¹

- (a) 10th floor, north side: Employees were bracing outside columns at or near the edge of the building, and were not protected from falling 10 stories to the compacted ground surface below. Violation observed on or about 8/22/97.
- (b) 8th floor: Employees were erecting a hoist at the edge of the building and were not protected from falling, by a guardrail system, 8 stories to the compacted ground surface below. Violation observed on or about 8/22/97.
- (c) 15th floor, southwest side: Employees were bracing outside columns and shoring up the upper deck at the edge of the building, and were not protected from falling 15 stories to the compacted ground surface below. Violation observed 9/12/97.

On August 22, CO Torre saw MJP employees clamping and bracing exterior columns at the edge of the 10th floor; there was no perimeter guarding along the edge, and the employees wore no personal fall protection. He also saw RSH employees erecting a hoist on the 8th floor that day; they

³⁰These same considerations apply to the other penalties assessed in this case.

³¹Due to the date of its alleged occurrence on or about October 24, 1997, Item 1(d) of Citation 1 has been incorporated into Citation 2 as Item 1(d).

were working by the exterior columns near the edge of the floor, and there was no perimeter cabling or other fall protection. On September 12, CO Torre observed MJP employees bracing columns at the perimeter of the 15th floor and another MJP employee putting down shoring about a foot from the edge of the 15th floor; none of these employees had any fall protection. The CO learned that the employees who were bracing columns on the 15th floor were John Matos and Chris DeAnni, and when he asked if anyone had given them safety belts they indicated no one had. CO Torre testified that all of these employees were exposed to falls that could have caused fatal injuries. (Tr. 81-85, 89-92, 115-17, 133-36, 145-49, 169-71, 210-20, 230-34, 486-87, 731-34, 941-43; Ex. C-16).

In view of the foregoing, the Secretary has shown, as to each subitem set out above, that the standard applied, that its terms were violated, and that employees were exposed to the cited hazards; that the cited hazards were serious, in that could have resulted in fatalities, is apparent. The Secretary has also shown that MJP knew or should have known of the cited conditions. The violations were in plain view, and, as noted *supra*, MJP's supervisory personnel were at the site on a daily basis and were responsible for overseeing the work and ensuring it was done safely. The Secretary has accordingly met her burden of proof in regard to Items 2(a) through 2(c).³²

In defense of these items, MJP has asserted the affirmative defense of infeasibility of compliance. This defense requires the employer to show that the means of compliance set out in the standard was technologically or economically infeasible and that there was no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-2267, 1997). The Third Circuit, where this case arose, analyzes this defense in terms of "impossibility" rather than

³²Although only RSH's employees were exposed to the hazard cited in Item 2(b), the Secretary cited MJP pursuant to the multi-employer work site doctrine. Based on long-standing Commission precedent, the doctrine provides that an employer who creates or controls a hazard may be liable for a violative condition even if the only employees exposed are those of another employer. The doctrine applies to construction sites where various employers are working in the same general area and where hazards created by one employer often pose dangers to employees of other employers. See *Anning-Johnson Co.*, 4 BNA OSHC 1193 (No. 3694, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 13775, 1976). Because the 8th floor had been stripped and MJP was responsible for putting up cabling on floors as soon as they were stripped, as discussed below, I find that MJP was properly cited for Item 2(b).

“infeasibility.” That is, the employer must show that it was impossible to comply with the standard, or that compliance would have precluded performing the work, and that no alternative protective means were available. *E & R Erectors, Inc. v. Secretary of Labor*, 107 F.3d 157, 163 (3d Cir. 1997).

With respect to Item 2(b), the record shows that the 8th floor had already been stripped when the CO saw the RSH employees erecting a hoist at the edge of that floor on August 22. (Tr. 84-85, 148, 731-42). As set out *supra*, the contract for the Project obligated MJP to put up perimeter cabling as soon as a floor was stripped, and Anthony Buttino agreed this was the case. (Tr. 1152, 1284; C-6, pp. 49-50). The CO testified that cabling could have been put up on the 8th floor by attaching clamps to the columns and that the cabling would not have interfered with the hoist erection because the RSH employees could have ducked under it if necessary. (Tr. 90). MJP did not rebut this evidence, and Item 2(b) is therefore affirmed as a serious violation.

In regard to Items 2(a) and 2(c), MJP relies on the testimony of Anthony Buttino in support of its contention that conventional fall protection, such as guardrails and personal fall arrest systems, was not feasible for the cited activities.³³ Buttino testified employees could not tie off to overhead stringers or interior columns when working on or around exterior columns because the stringers and columns were not structurally sound enough to serve as anchorage points. He said that stringers and column forms were held in place by nails, and that once they were poured, columns took 28 days to cure; he also said that tying off to interior columns would create a tripping hazard and that the lines would get tangled up in the legs supporting the deck and cause it to collapse. Buttino further testified that leaving the guardrails up after a floor was poured to protect employees working on exterior columns was infeasible. He stated that the guardrails had to come down when a floor was stripped because removing the form work took away the support for the guardrails, that leaving the guardrails up would interfere with column erection, and that removing the guardrails after the exterior columns

³³MJP also presented the testimony of a former OSHA CO who testified that nets, guardrails and fall arrest systems were infeasible at the site. (Tr. 1416-79). However, the Secretary presented un rebutted evidence that this witness had performed a total of only 68 construction inspections and that only two of these had involved concrete construction. (Tr. 1574-75; Ex. C-30). In view of the record, the opinions of this witness are not credited.

were erected would be hazardous because employees would have to lean over the building and maneuver the guardrails between the columns. (Tr. 1141-50, 1226-27, 1336-43).

In considering Buttino's testimony, I note first that C-11, the fall protection plan that MJP's engineer and superintendent Don Lee had developed for the job, stated that "[a]ny workers who work on perimeter areas (handling materials/working on exterior columns) must wear body belts or harnesses. No exception." C-11 also stated that "[g]uardrails must be installed as deck is being placed." (Tr. 245-46). I further note that as of October 11, 1997, Lee had amended C-11 as follows:³⁴

Any workers who work on perimeter area such as exterior columns (1) When stripping column forms must wear body belts or body harness with positive connection to stringers or ribs above. And work 2 men as a team. (2) When erecting column forms, must wear body belts or body harness, if there are any positive connection on new floor such as column dowels. Otherwise, perimeter guardrails on previous poured floor must be remained [sic] until all exterior columns are erected and braced securely. Any floor openings must be covered and any openings at elevator and stairwells must provide guardrails.

In addition to the foregoing, the record shows that during the subject inspection, when the CO discussed protecting employees working at the exterior, Lee and Buttino had agreed that such employees would be protected by tying off or guardrails.³⁵ (Tr. 96, 205-06, 241, 314, 387, 462-63, 937). The record also indicates that MJP was removing the guardrails when it stripped the floors because it needed them for other floors, not because it had to, and that MJP could have resolved this issue by having more material available on the site.³⁶ (Tr. 267-75, 985, 1284-91). Finally, the record

³⁴As set out above, the original plan was dated September 8, 1997, and was the same one Lee had developed for the earlier Hackensack job. CO Torre apparently did not learn of Lee's amendment of the plan until sometime after October 27, 1997. (Tr. 242-45, 937; Ex. C-9).

³⁵Lee's statements have been admitted as admissions by a party-opponent pursuant to Fed. R. Evid. 801(d)(2). *Regina Constr. Co.*, 15 BNA OSHC 1044, 1048-49 (No. 87-1309, 1991). In addition, while Buttino indicated he had not agreed with the CO about having employees tie off, the CO's testimony is credited over that of Buttino. (Tr. 241, 1144-46).

³⁶The CO testified that the guardrails were supported by and attached to the ribs that extended out 2 feet past the perimeter, that the guardrails were adequate protection as long as plywood was placed over the ribs, and that the deck support and ribs remained after a floor was stripped, such that the guardrails did not have to be removed. (Tr. 267, 272-75, 985, 1645-

shows that adjacent to the site, a company named Major Construction (“Major”) performed the same type of construction that was done on the Project; Michael Polites was the owner of Major, and Lee and Buttino, respectively, were the superintendent and foreman on that job following their work on the Project. On November 16, 1998, the CO videoed employees on the Major site working on the top deck, which had guardrails; he also videoed employees working on exterior columns and in hoisting areas wearing safety harnesses tied off to stringers above them.³⁷ (Tr. 990-1000, 1257-58; Ex. R-19).

In view of the record, Buttino’s testimony that fall protection was infeasible at the site is not credited, and I find as fact that the employees reflected in Items 2(a) and 2(c) could have been protected by guardrails or by tying off, as the CO testified.³⁸ (Tr. 241, 314). In so finding, I note that the cited floors in those items would have had guardrails up when the masons were doing the concrete pours on those floors and that MJP could have left the guardrails in place. MJP’s asserted defense is rejected, and Items 2(a) and 2(c) are affirmed as serious violations.

The proposed penalty for Item 2 is \$4,200.00. The CO assessed the gravity of these violations as high; the probability was high due to the continual exposure of the employees to the cited hazards, and the severity was high because employees could have fallen from the building and been killed. (Tr. 487-88). Based on the record, the proposed penalty is appropriate and is therefore assessed.

³⁶(...continued)
46).

³⁷The CO denied ever telling Buttino to have employees tie off to stringers and said he had advised only that they had to find a way to tie off. The CO also denied telling Buttino his office would not approve tying off to stringers; he did, however, tell them that he preferred employees to tie off to interior columns. (Tr. 1257-58, 1333-34, 1268-69, 1643-44). Furthermore, I find that Buttino’s testimony with respect to the alleged strength of the stringer was speculative and not supported by any data.

³⁸Although the CO preferred employees to tie off to interior columns, the record indicates that tying off to stringers was a feasible alternative. Moreover, the Secretary presented evidence of another protective means called a “Safe-T-Strap” that can be looped through rebar or wrapped around joists to provide an attachment point for personal fall arrest systems. MJP did not rebut the Secretary’s evidence about the strap. (Tr. 1488, 1496-1518, 1647-49; Exs. C-26-29).

Serious Citation 1, Item 3 - 29 C.F.R. 1926.501(b)(2)(ii)

29 C.F.R. 1926.501(b)(2)(ii) provides as follows:

Each employee on a walking/working surface 6 feet (1.8 m) or more above a lower level where leading edges are under construction, but who is not engaged in the leading edge work, shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system. If a guardrail system is chosen to provide the fall protection, and a controlled access zone has already been established for leading edge work, the control line may be used in lieu of a guardrail along the edge that parallels the leading edge.

The citation alleges that:

(a) 11th floor, top deck: Employee was working at the edge of the deck, and was not protected from falling 11 stories to the compacted ground surface below. Violation observed on or about 8/22/97.

On August 22, CO Torre observed a number of ironworkers working at the perimeter on the building's 11th floor, the top deck that day; the employees were placing rebar onto the deck and into columns, there was no perimeter protection or personal fall protection in use, and some of the ironworkers were within 6 inches of the edge of the building.³⁹ CO Torre also observed that about 75 percent of the deck was down at that time, and when he questioned Lee, who was on the deck watching the work, Lee responded that they usually provided guardrails only when the masons were pouring concrete as the masons were not comfortable working near the edge without protection. (Tr. 80-81, 94-95, 108, 120-24, 174, 185-89, 571-72, 576-77, 598-601, 797-98; Ex. C-16).

Based on the record, I find that the cited standard was applicable, that its terms were violated, that employees were exposed to the cited hazard, and that MJP was aware of the violative condition. I also find that MJP was properly cited for the condition, pursuant to the multi-employer work site doctrine, although only EJS employees were exposed to the condition. MJP was clearly responsible for putting up guardrails as the deck was being laid, and Buttino testified that they were put up when about 25 percent of the deck was down; moreover, Lee was watching the EJS employees working without guardrails, and, during his September 12 visit to the site, the CO observed that ironworkers

³⁹The CO testified that his OSHA 1B, which showed only one ironworker, was in error, and that there were about 20 ironworkers on the deck. (Tr. 572, 576-77, 797-98). Exhibit C-16 corroborates the CO's testimony, and MJP did not rebut it.

were working on the deck and that guardrails had been put up. (Tr. 94, 562-63, 1088, 1095, 1275, 1282-84, 1391-92; Ex. C-11). This item is affirmed as a serious violation.

The proposed penalty for this item is \$1,500.00. The severity of this item was high because of the fall hazard presented, but the probability was lesser because exposure to the edge was intermittent. (Tr. 491). The proposed penalty is appropriate and is accordingly assessed.

Serious Citation 1, Item 4 - 29 C.F.R. 1926.501(b)(3)

The cited standard provides as follows:

Each employee in a hoist area shall be protected from falling 6 feet (1.8 m) or more to lower levels by guardrail systems or personal fall arrest systems. If guardrail systems, [or chain, gate, or guardrail] or portions thereof, are removed to facilitate the hoisting operation (e.g., during landing of materials), and an employee must lean through the access opening or out over the edge of the access opening (to receive or guide equipment and materials, for example), that employee shall be protected from fall hazards by a personal fall arrest system.

The citation alleges as follows:

(a) 9th floor: Employees working in a hoist area were not protected from falling up to 9 stories to the compacted ground surface below. Violation observed on or about 8/22/97.

On August 22, CO Torre saw MJP employees in a hoisting area on the 9th floor; they were stacking materials near the floor's edge, so the materials could be removed by crane, and there was no perimeter protection or personal fall protection in use. (Tr. 81-82, 91, 113-15, 122-29, 154-56; Ex. C-16). The standard requires employees in hoist areas to be protected from falling by guardrail systems or personal fall arrest systems. The Commission has held that when guardrails cannot be used because a crane is hoisting material from the floor, employees must still be protected by alternative means such as safety belts. *Dic-Underhill*, 5 BNA OSHC 1271, 1274 (No. 9561, 1977). As noted above, Lee's fall protection plan required employees working at the exterior to use personal fall protection, and, as found in Item 2, *supra*, there were various means by which employees working at or near the perimeter could tie off. The record establishes all of the elements required to show a violation of the cited standard, and MJP has failed to demonstrate that tying off in the hoisting area was infeasible. This item is affirmed as a serious violation.

The penalty proposed for this item is \$1,500.00. The severity of this item was high, due to the fall distance to which employees were exposed, but the probability was lesser as work in the hoist area was intermittent. (Tr. 548-49). The proposed penalty is appropriate and is therefore assessed.

Serious Citation 1, Item 5 - 29 C.F.R. 1926.501(b)(4)(I)-(ii)

29 C.F.R. 1926.501(b)(4)(I) states that “[e]ach employee on a walking/working surface shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.” The citation alleges as follows:

- (a) floors 7-9: Employees on walking/working surfaces were not protected from falling through floor holes by covers. Violation observed on or about 8/22/97.
- (c) 15th floor: Employees on walking/working surfaces were not protected from falling through ladderway floor holes by covers. Violation observed on or about 9/12/97.

29 C.F.R. 1926.501(b)(4)(ii) states that “[e]ach employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.” The citation alleges as follows:

- (b) floors 1-8: Employees on walking/working surfaces were not protected from tripping in or stepping into numerous floor holes. Violation observed on or about 8/22/97.

The record shows that the employees at the site accessed the various floors via ladders that went through unguarded floor holes and stairwells. On August 22, CO Torre used these ladder-ways to get to the 11th floor. The ladder-ways up to the 6th floor were about 2 feet by 3 feet, and the CO observed other floor holes in close proximity to some of the ladder-ways. On the 7th, 8th and 9th floors, the ladders were in stairwells 10 feet long and 7 to 8 feet wide. The 8th and 9th floor ladder-ways each had an open-sided suspended platform supported by 3 by 4’s that employees used to access the ladder; there was a plank leading to the platform in the 8th floor ladder-way, but in the 9th floor ladder-way the CO saw an MJP employee jump about 2 feet over the opening to reach the platform. The CO also saw MJP employees working on a pipe chase by the 8th floor ladder-way, and he saw another MJP employee on the 7th floor doing overhead work from a stepladder 2 feet from an open pipe chase. On September 12, as the CO was going up to the 15th floor, he observed two

MJP employees accessing the ladder-way to that floor by jumping across the opening to reach the open-sided platform in the stairwell. (Tr. 86-96, 146-50, 164-67, 190-97; 201-02; Ex. C-16).

The foregoing establishes there were numerous floor holes at the site that violated the cited standards, and the record shows that MJP was contractually responsible for covering floor holes. (Tr. 1088, 1198; Ex. C-4 ¶ 14). The CO testified that all of the floor holes were unsafe and that falling through the larger ones, to a floor or two below, could have resulted in permanent disability or death. He further testified that the smaller ladder-ways should have been guarded on two sides, leaving one side open for access, and that the larger ladder-ways and other holes should have been covered. (Tr. 95, 195, 549-50). Based on the record, Items 5(a) through 5(c) are affirmed as serious violations.

The proposed penalty for this item is \$1,500.00. The CO assessed the severity of this item as high because employees could have been killed or seriously injured, but he assessed the probability as low because employees used the ladder-ways intermittently. (Tr. 549-50). I conclude that the proposed penalty is appropriate, and it is accordingly assessed.

Willful Citation 2, Item 1 - 29 C.F.R. 1926.501(b)(1)

The cited standard is set out *supra*, in the discussion relating to Citation 1, Item 2. The citation alleges a willful violation of 29 C.F.R. 1926.501(b)(1) as follows:

- (a) 30th floor, northwest side: Employees were observed stripping outside columns at the edge of the building, and were not protected from falling 30 stories to the compacted ground surface below. Violation observed on or about 10/23/97.
- (b) 30th floor, northwest and southwest side: Employees were observed bracing outside columns at the edge of the building, and were not protected from falling 30 stories to the compacted ground surface below. Violation observed on or about 10/24/97.
- (c) 29th floor, northwest and southwest sides: Employees were stripping columns and removing shoring from the perimeter of the building without fall protection, and were exposed to falls of up to 29 stories to the compacted ground surface below. Violation observed on or about 10/24/97.
- (d) 30th floor, southwest side, top deck: Employees were erecting outside columns at the edge of the concrete floor surface, without fall protection, and were exposed to falls of up to 30 stories to the compacted ground surface below. Violation observed on or about 10/24/97.

On his way to another site on October 23, CO Torre drove by the Project and observed that masons were pouring concrete on the 30th floor, the top deck, and that that floor had guardrails.

However, an employee on the floor below was stripping a shoe from an exterior column without any fall protection; the employee was walking around the column, bending down and leaning over the edge to remove the shoe, and he was about 6 inches from the perimeter of the building and approximately 270 feet above the ground. The CO returned to the site on October 24, when he saw various MJP employees working without fall protection. Two MJP employees were erecting an exterior column on the edge of the 30th floor, and the guardrails that had been up the day before had been taken down and the employees were not tied off or otherwise protected. MJP employees were also bracing exterior columns on the 30th floor and stripping exterior columns on the 29th floor, and these employees were working at the perimeter of the building without fall any protection. The CO stated that erecting the exterior column was particularly hazardous; he noted that the employees were handling a large, unstable piece of wood at the perimeter, that they could easily trip or lose their balance, and that the wind at that height could blow the column form right off the roof and the employees along with it. (Tr. 249-77; 287-303, 847-48, 854, 949, 957-58; Ex. C-16).

The record clearly establishes the violative instances set out in this citation item. The record also shows that if any of MJP's employees had fallen from the heights at which they were working, they would have been fatally injured. On the basis of the record, the violative instances are affirmed. The characterization of these instances, and the penalties assessed, is discussed *infra*.

Willful Citation 2, Item 2 - 29 C.F.R. 1926.501(b)(1)

This item alleges a violation of the same standard cited in the preceding discussion. The citation states as follows:

- (a) 32nd and 33rd floors, north and northwest sides: Employees were stripping and or bracing/clamping outside columns at the edge of the building without fall protection, and were exposed to falls of up to 33 stories to the compacted ground surface below. Violation observed on or about 11/6/97.

CO Torre returned to the work site on November 6, 1999, at which time he observed MJP employees bracing exterior columns on the 33rd floor and stacking stripped materials at the perimeter of the 32nd floor; none of these employees had any fall protection. After interviewing Lee about what he had seen, the CO went up to the 32nd floor, where he saw two MJP employees, Joe Fazio and Chris DeAnni, stripping a column at the edge of the floor without fall protection. Buttino, who was watching the operation, told the two workers to go get their safety belts, and when the CO

asked why they were not already wearing them, Buttino said they should have been and that “they know better.” The CO then went to the 33rd floor, where he observed two MJP employees bracing exterior columns at the edge of the floor without fall protection; Buttino told him these employees were Rosario Ciambrone and Antonio Ramos. (Tr. 314-25, 373-87; Ex. C-16).

The CO’s testimony and video demonstrate the cited conditions, and it is apparent that falls from the exterior of the 32nd and 33rd floors of the building would have resulted in fatal injuries. This citation item is consequently affirmed. The characterization of this item, and the penalty assessment for this item, is set out below.

Willful Citation 2, Item 3 - 29 C.F.R. 1926.501(b)(2)(ii)

The cited standard is set out *supra*, in the discussion relating to Citation 1, Item 3. The citation alleges a willful violation of 29 C.F.R. 1926.501(b)(2)(ii) as follows:

(a) 34th floor, top deck: Employees were placing steel reinforcing rods at or near the edge of a plywood deck and were not protected from falling 34 stories to the compacted ground surface below. Violation observed on or about 11/6/97.

On November 6, CO Torre observed EJS ironworkers on the 34th floor, the top floor of the building at that time, which was 310 feet from the ground; the ironworkers were laying rebar on the deck and inserting rebar into exterior columns, the work they were doing was at the edge of the floor, and no guardrails had been installed along the perimeter. After viewing this scene, the CO met with Lee, who told him that half of the deck was in place and that guardrails should be up. Lee also said that he had told the foreman to put guardrails up before the ironworkers started working and that he did not know why they were not; he then said that they were running behind and would be pouring the next day and that while the ironworkers should have waited to lay the rebar they wanted to get the work done. (Tr. 315-20, 425-37, 416-47, 1638-40; Ex. C-16).

The CO’s testimony and video establish that EJS’s ironworkers were working at the perimeter of the 34th floor of the building without fall protection, and it is clear that a fall from 310 feet would result in fatal injuries. It is also clear, based on my findings *supra*, that MJP was responsible for putting up guardrails to protect the ironworkers. This citation item is therefore affirmed. The characterization of this item and the penalty assessed for this item are discussed *infra*.

Willful Citation 2, Item 4 - 29 C.F.R. 1926.501(b)(3)

The cited standard is set out above in the discussion relating to Citation 1, Item 4. The citation alleges a willful violation of 29 C.F.R. 1926.501(b)(3) as follows:

(a) 28th floor, northwest side: Employees working in a hoist area were not protected from falling 28 stories to the compacted ground surface below by guardrail systems or personal fall arrest systems. Violation observed on or about 10/24/97.

CO Torre recommended this citation item because on October 24, he saw MJP employees working in a hoist area on the 28th floor without any fall protection; the area had been stripped, employees were stacking materials near the edge of the floor so they could be hoisted to the top deck, and the work they were doing, which included pushing the materials out to the end of the floor as they were being lifted, exposed them to falls of 270 feet. (Tr. 269-70, 289, 296-300; Ex. C-16).

The foregoing establishes the alleged violation, and it is apparent that falling from the 28th floor to the ground below, a distance of 270 feet, would result in fatal injuries. This item is affirmed. The characterization of this item, and the penalty assessed, is set out below.

Whether the Violations in Citation 2 were Willful

Commission precedent has held that a willful violation is one “committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.” *Valdak Corp.*, 17 BNA OSHC 1135, 1136, (No. 93-239, 1995). A willful violation is also “differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference....” *Hern Iron Works*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993) (citations omitted). The Commission has found heightened awareness “where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that violative conditions exist.” *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2209 (No. 87-2059, 1993); *E.L. Davis Contracting*, 16 BNA OSHC 2046, 2051-52 (No. 92-35, 1994); *Calang Corp.*, 14 BNA OSHC 1789, 1791 (No. 85-0319, 1990). The Commission will also find a violation to be willful in cases where the Secretary can demonstrate that the employer was actually aware at the time of the violative act that the act was unlawful or that it possessed a state of mind such that if it had been informed of the standard it would not have cared. *Johnson Controls*, 16 BNA OSHC 1048, 1051 (No. 90-2179, 1993).

As set out *supra*, Polites Construction, a predecessor of MJP, was inspected 27 times and cited for numerous violations, 26 involving fall protection; further, on May 27, 1997, the company

was cited for violations of 29 C.F.R. §§ 1926.501(b)(1) and 1926.501(b)(2), both of which are at issue here.⁴⁰ On July 14, 1997, Michael Polites, the owner of Polites Construction, signed an agreement with OSHA that settled the citation and resulted in the violations becoming a final order of the Commission. (Tr. 55-57, 152, 1398; Ex. C-3, p. 2; Ex. C-7; Ex. C-8; Ex. C-10; Ex. C-14, pp. 7, 12-15, 22, 47-48, 58-67).

Michael Polites, MJP's president, also signed the contract relating to the Project, which required MJP to provide perimeter protection conforming to OSHA regulations. Further, Don Lee, MJP's on-site engineer and superintendent, used the same fall protection plan that he had developed for the Hackensack job. Based on the contract, the fall protection plan, and other undisputed evidence in the record, MJP was to put up perimeter guardrails when 25 percent of a floor's deck had been put down and perimeter cabling as soon as a floor had been stripped, and any employee who was working in an unprotected perimeter area was to wear a personal fall arrest system. (Tr. 562-64, 738-39, 998-99, 1072, 1088, 1095, 1152, 1275, 1282-84, 1391-92, 1399; Ex. C-6, pp. 49-50).

Despite the foregoing, when the CO went to the site on August 22, 1997, he saw ironworkers laying rebar along the perimeter of the 11th floor, carpenters clamping columns at the perimeter of the 10th floor, and laborers in a hoisting area at the edge of the 9th floor, and all of this work was being done without fall protection. Lee had no explanation in this regard, and he agreed to correct the conditions. When the CO returned on September 12, 1997, he saw that the ironworkers on the 16th floor were protected by guardrails; however, he saw other employees bracing columns at the edge of the 15th floor without fall protection, and when he asked two of them if anyone had given them safety belts they indicated no one had. The CO again spoke to Lee about the necessity of providing fall protection, and Lee again agreed to take care of it. On September 19, 1997, the CO held a closing conference with Lee, Buttino, and Jenkins. The CO reviewed MJP's fall protection plan, and when he asked why MJP was not enforcing the plan Lee had no answer. The CO stressed the need to use fall protection for work on exterior columns, and Lee, Jenkins and Buttino all agreed that employees would tie off for that work. (Tr. 80-96, 194-206, 230, 234-39, 241-49, 699).

⁴⁰The May 27, 1997 citation resulted from an inspection of a job site in Hackensack, New Jersey, involving steel-reinforced concrete construction.

On October 23, 1997, as he drove by the site, the CO saw an employee on the 29th floor stripping a shoe from an exterior column without fall protection. The CO went back the next day, when he saw MJP employees erecting and bracing exterior columns on the 30th floor, stripping exterior columns on the 29th floor, and stacking materials in a hoist area on the edge of the 28th floor; none of the employees had fall protection. When the CO asked why employees were still working without fall protection, Lee said he had given them four sets of belts but the belts were clumsy and the men did not want to use them; he also conceded that he had not really been enforcing the use of fall protection. The CO phoned Lee on October 27, 1997, to talk further with him about the employees who had been erecting the column on the 30th floor, and Lee agreed to protect such employees by leaving the guardrails up. (Tr. 267-77; 287-303, 312-14, 936-39, 957-58).

The CO went back to the site on November 6, 1997. He observed ironworkers laying rebar at the perimeter of the 34th floor, carpenters bracing perimeter columns on the 33rd floor, and laborers stacking stripped materials on the perimeter of the 32nd floor, and none of these employees had fall protection. When the CO asked Lee about the ironworkers, Lee said that half the deck was up and that guardrails should be up. Lee also said he had told the foreman to put guardrails up before the ironworkers began working and that he did not know why they were not; he then added that they were running behind and that while the ironworkers should have waited to lay the rebar they wanted to get the job done. The CO next asked about the other employees, and Lee responded that he had tried to get them to use fall protection but they did not listen. The CO then went up to the floors where he had seen employees working. On the 32nd floor, he saw two carpenters stripping an exterior column without fall protection, and Buttino, who was watching them, told the two to go get their safety belts. When the CO asked why they were not already wearing them, Buttino said they should have been and that “they know better.” The CO went on to the 33rd floor, where he saw two employees bracing columns at the edge of the floor without fall protection. As he was leaving the site, the CO came upon Lee, who told him that they had to pour three floors a week and that he had to balance production and safety. (Tr. 314-26, 373-87, 416-47, 462-66, 1639).

In view of the above, I conclude that the violations in Citation 2 were properly characterized as willful. MJP’s predecessor had a history of violating the fall protection standards. Michael Polites, the principal of Polites Construction and MJP, should have been well aware that the cited standards

applied to the work on the Project when he signed the contract; further, I note that Polites signed the settlement agreement relating to the Hackensack job about three months before CO Torre began his inspection of the subject site. However, despite this knowledge, and notwithstanding the contract specifications, MJP's fall protection plan and the CO's warnings, MJP did not comply with the cited standards. CO Torre observed the work at the site on six different days, and September 19 was the only day he did not see employees exposed to fall hazards. Moreover, the CO told Lee at least three times before October 23 and two more times before November 6 to provide perimeter protection or have employees tie off, and while Lee indicated each time he would do so it is clear that MJP continued to violate the contract specifications, its fall protection plan and the cited standards.⁴¹ Finally, Lee's stated reasons for MJP's noncompliance (*i.e.*, the need to meet production schedules and the employees' not wanting to use safety belts) in no way justify the continued violations in this case, especially upon considering the number and nature of the fall hazards to which employees were exposed. The violations in Citation 2 are accordingly affirmed as willful.⁴²

Penalty Assessment for the Willful Items

In Item 1 of Citation 1, as amended, MJP was cited for serious violation of 29 C.F.R. 1926.501(b)(1) based on two instances on August 22 and one instance on September 12; the Secretary grouped these instances and proposed a single penalty of \$4,200.00. In Item 1 of Citation 2, as amended, MJP was cited for willful violation of 29 C.F.R. 1926.501(b)(1) based on one instance on October 23 and three instances on October 24. In Item 2 of Citation 2, MJP was cited for another willful violation of the same standard based on one instance on November 6, 1997; however, the Secretary has proposed a penalty of \$42,000.00 each for Items 1 and 2 of Citation 2.

The Commission has held that the Secretary may, in appropriate cases, issue citations with separate penalties for each instance of improper fall protection. *See J.A. Jones Constr.*, 15 BNA

⁴¹Buttino also failed to have employee tie off after agreeing he would do so.

⁴²In finding the violations were willful, I have noted the testimony of Michael Polites that he was not at the site very often during the fall of 1997 due to illness. (Tr. 1401-02). However, that Polites may not have known of the violations is of no moment, as it is clear from the record that MJP supervisors were at the site on a daily basis and that they were well aware of the fact that employees were being exposed to falls from the perimeter of the building.

OSHC 2201, 2213 (No. 87-2059, 1993). However, the Commission is the final arbiter of penalties, and the Secretary's proposed penalty is just that -- a proposal. *See* sections 10(c) and 17(j) of the Act. Further, the key question in penalty determination is what penalty is appropriate. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2173 (No. 87-922). I find that the Secretary's issuance of a serious citation item for the earlier violations and a willful citation item for the later violations of the same standard was proper under the circumstances of this case. However, I disagree with the Secretary's issuance of a further willful item for the same standard with a separate penalty of \$42,000.00, and I conclude that a single penalty of \$42,000.00 will have a sufficient deterrent effect. Accordingly, the five violative instances in Items 1 and 2 of Citation 2 are grouped for penalty purposes, and a single penalty of \$42,000.00 is assessed for these items.⁴³

In regard to Items 3 and 4 of Citation 2, the Secretary has proposed a penalty of \$33,000.00 for each. The CO assessed the gravity of both of these violations as moderate. The severity of the conditions was high, in that if employees had fallen from their respective work positions they would have sustained fatal injuries, but the probability was lesser because employee exposure to the conditions was intermittent. (Tr. 554-58). I conclude that the proposed penalties are appropriate. A penalty of \$33,000.00 each for Items 3 and 4 of Citation 2 is therefore assessed.

Findings of Fact and Conclusions of Law

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

ORDER

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

1. Citation 1, Item 1, alleging a serious violation 29 C.F.R. 1926.100 (a), is AFFIRMED, and a penalty of \$1,200.00 is assessed.

⁴³In assessing these penalties, I have noted, and I agree with, the CO's assessment of the gravity of these items; specifically, the severity was high, in that falls from the heights at which employees were working would have resulted in fatal injuries, and the probability was greater in that employees were working on exterior columns for extended periods of time. (Tr. 550-54).

2. Citation 1, Item 2, alleging a serious violation 29 C.F.R. 1926.501(b)(1), is AFFIRMED, and a penalty of \$4,200.00 is assessed.

3. Citation 1, Item 3, alleging a serious violation 29 C.F.R. 1926.501(b)(2)(ii), is AFFIRMED, and a penalty of \$1,500.00 is assessed.

4. Citation 1, Item 4, alleging a serious violation 29 C.F.R. 1926.501(b)(3), is AFFIRMED, and a penalty of \$1,500.00 is assessed.

5. Citation 1, Item 5, alleging serious violations of 29 C.F.R. 1926.501(b)(4)(i) and 29 C.F.R. 1926.501(b)(4)(ii), is AFFIRMED, and a total penalty of \$1,500.00 is assessed.

6. Citation 2, Items 1 and 2, alleging willful violations of 29 C.F.R. 1926.501(b)(1), are AFFIRMED, and a total penalty of \$42,000.00 for these two items is assessed.

7. Citation 2, Item 3, alleging a willful violation of 29 C.F.R. 1926.501(b)(2)(ii), is AFFIRMED, and a penalty of \$33,000 is assessed.

8. Citation 2, Item 4, alleging a willful violation of 29 C.F.R. 1926.501(b)(3), is AFFIRMED, and a penalty of \$33,000.00 is assessed.

/s/

Covette Rooney
Judge, OSHRC

Dated: 12/27/99
Washington, D.C.