**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
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Washington, DC 20036-3457

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>KEATING BUILDING CORPORATION.<br>Respondent. | OSHRC Docket No. 04-0774 |

APPEARANCES:

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BEFORE: Covette Rooney
Administrative Law Judge

## DECISION AND ORDER

***Background and Procedural History***[1]

[1]In its Post-Hearing Brief, Keating sought to append several documents that were not introduced at the hearing. The Secretary has moved to strike these exhibits. Two of these documents (Exhibits 4 and 5) are e-mail messages which should have been introduced at the hearing are not part of the record and, under Commission Rule 90(a), 29 C.F.R. §2200.90(a), cannot be considered. Accordingly, these two documents are rejected. The other document is the Joint Pre-Hearing Statement from a companion case to this matter, *Fabi Construction, Inc.*, No. 04-0776. This document is part of the official file in a case currently before the Commission and I take judicial notice of it.

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651-678 ("the Act"), to review (1) a citation issued by the Secretary of Labor ("the Secretary") and (2) a proposed assessment of penalty therefor.

During the Fall of 2001, Respondent Keating Building Corporation ("Keating") was the manager/general contractor on a large construction project involving the expansion of the Tropicana Hotel and Casino in Atlantic City, New Jersey ("the Project"). The Project consisted of a 20-floor hotel tower, ten levels of parking, and several levels of retail and entertainment establishments below the parking garage (Tr. Tr. 33, 52). The parking garage was built in levels designated P1 through P10 (Tr. 33). Keating contracted Fabi Construction, Inc. to provide the labor, materials, and equipment for performing the concrete construction work. Fabi was also responsible for all decisions regarding shoring at the site (Tr. 62-63, 461-462, 618-619).

Keating retained Site Blauvelt Engineers ("Site Blauvelt") as an independent agency to perform on-site testing of the concrete and inspection for the proper placement of the steel reinforcement prior to the pouring of the concrete (Tr. 57, 579, 657). Before concrete could be poured at any level, the reinforcing steel had to also be inspected by Atlantic City Building Inspectors (Tr. 30, 580, 621-623, 643).

On October 30, 2003 the parking garage partially collapsed along Column Line 1 during a concrete pour on the eighth level of the structure (level P8)(Tr. 162-163, 523). As a result of the collapse, four employees were killed and twenty-one were injured (Tr. 11, Ex. K-2).

***Construction Methods***

The project was constructed using a "filigree system" which consists of 2 ¼ inch thick pre-cast concrete slabs that are erected on shoring (Tr. 34). In filigree construction (1) the filigree panels are set in place, (2) reinforcing steel is placed on the filigree panels, and (3) concrete is poured over the reinforcing steel and filigree panels (Tr. 34-36).

Three types of shoring were used. A system manufactured by Peri Company was primarily used underneath the 30-inch deep by 8-foot wide beams.. Another type of shoring, manufactured by the Aluma Company, was used underneath eight 10-inch concrete slabs. A final type of shoring was a scaffold system manufactured by the Waco Company, and was used on Column Line 1, underneath the 16-inch deep by 3-foot, 10½ inches-wide beams (Tr. 34-35).

Fabi used three levels of shoring in the garage. After a slab was poured, Fabi would lay out the slab and start to build the columns the first day after the pour. On the second day, Fabi would finish building the columns. Fabi would install the shoring on the third day, and set the filigree on the fourth day. Rebar would be installed on the fifth and sixth day after the pour and on the seventh day, Fabi would pour concrete on the next level (Tr. 35-36).

On the third day after the pour, Fabi would "crack the shores." This entailed loosening the shoring under the most recently poured slab to allow the slab to deflect and assume its own weight. The shores would then be retightened. These shores would remain in place until there were three levels shoring above that level. At that time, the shoring would be removed and recycled (Tr. 36-37). Adjustable single post shores, made of galvanized steel, were also used to replace the removed shores and to serve as reshores when Fabi wanted to recycle shoring for use on an upper level (Tr. 36-37).

***The Collapse and Subsequent OSHA Investigation***

As noted, the parking garage suffered a partial collapse on October 30, 2003. The collapse occurred while concrete was being poured on the eighth level of the structure. The collapsed area extended from Column Line 1 to Column Line 4, and from Column Line B.9 to Column Line E.7. Upon learning of the incident, OSHA sent a response team to the site which included, *inter alia*, compliance officer Eric Reinhardt and Mohammad Ayub, a licensed engineer, holding a Masters Degree in Civil Engineering with a major in

structural engineering (Tr. 192). The compliance officers questioned employees at the site and Mr. Ayub inspected the debris of the collapse at the so-called "boneyard." The boneyard was an area near the site where the debris from the collapse was shipped and stored (Tr. 166, 227).

As a result of the ensuing OSHA investigation, Keating was issued one citation alleging a serious violation of the Occupational Safety and Health Act ("the Act") for failure to comply with 29 C.F.R. §1926.703(a)(1)[2] on the grounds that "[t]he formwork which was used to support level P-8 was not maintained so that it would be capable of supporting the imposed loads without failure, on or about 10/30/03." A penalty of $7000 was proposed for the alleged violation.

***Discussion***

***A. The Nature of the Alleged Violation***

The first matter to be resolved is a definition of the nature of the violation cited by the Secretary. The Secretary's explanation of the cited hazard can most charitably be described as evolutionary, starting from its ancestral form, as contained in the citation, and reaching its zenith at the hearing, where it appeared in its final form, bearing as much resemblance to its precursor as modern humans to their knuckle-walking ancestors.

The specific problems the Secretary had with the support system that led to the citation was set forth in the Secretary's Inspection Narrative (OSHA-1A) and inspection Worksheet (OSHA-1B), both of which, as here, are routinely provided to cited employer's

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[2] The standard provides:

**§1926.703 Requirements for cast-in-place concrete.**

(a) *General requirements for formwork.*

(1) Formwork shall be designed, fabricated, erected, supported, braced and maintained so that it will be capable of supporting without failure all vertical and lateral loads that may reasonably be anticipated to be applied to the formwork. Formwork which is designed, fabricated, erected, supported, braced and maintained in conformance with the Appendix to this section will be deemed to meet the requirements of this paragraph.

during discovery. According to OSHA-1A:

> Initial information revealed that Fabi Concrete Construction was in the process of pouring P-8 of the garage between column line 4 and column line 1. It was learned from the investigation that while the pour was occurring there was one floor of shoring and one floor of re-shore only, which may not have provided enough support. It was also learned from physical evidence and interviews that the reinforcing steel in the column floor connection and the floor to shear wall connection was not developed per ACI 318-95 requirements.

(Ex. K2, p. 19).

The OSHA-1B similarly focused on the adequacy of the shores and reshores:

> Employees were exposed to the hazards of a garage collapse, due to the lack of properly supporting the formwork with reshoring. The required amount of re-shoring was not in place at the time level P-8 was being poured. The structural engineer of record for this job, DeSimone Consulting Engineers, P.L.L.C., required that when supporting formwork, 1 level of shores and 3 levels of re-shores was to be used. . . . In the garage construction a decision was made to only use 2 levels of reshoring. However, interviews of employees and observations by OSHA compliance officers and OSHA engineers from the National Office have revealed that not only was P4 not re-shored at all, but level P5 had practically no reshores either. . . .
>
> A pour was being conducted on level P-8 on 10/30/03 and level P-7 was shored to support Level P-8. Level P-6 was re-shored to support level P-7 and to help distribute the weight of the pour on P-8. Level P-5 shoring had been taken down which could not help support P-6. Level P-4 was completely stripped of re-shoring. The hazard with only having one floor of re-shoring is that the floor cannot support the construction loads placed on them.

(Exhibit K2, p. 25).

On April 4, 2004, Mohammad Ayub, an engineer in the Office of Engineering Services, issued the official OSHA report of the collapse. Ayub reported serious deficiencies in the placement of the rebars and wire mesh that was to reinforce the concrete slabs. Ayub also found that the presence of cracks in the concrete was indicative

that the slabs were in distress. The report observed that subcontractor Fabi failed to re-shore an adequate number of floors, as required by the project specification, at the time concrete was being cast on level P8. Given that the cracks were noticed around the exterior columns, the report concluded that the fewer levels of reshores were highly detrimental to the integrity of the structure. (Report at p. 2). The report placed responsibility for the collapse on Fabi, Site Blauvelt Engineers and other sub-contractors. Ayub's report did not implicate Keating in the collapse.

As the case moved toward the hearing, however, the Secretary's theory of the case began to produce the rumblings of change. During discovery, the Secretary produced the "Cagely Report." This report, prepared by Cagely & Associates, analyzed the collapse[3] and noted that there were serious deficiencies in the steel reinforcement. The report also opined that cracks that developed in the cement should have "raised a red flag." However, it blamed these problems on Fabi Construction Co. and several of its subcontractors. As with the Ayub report, Cagely never implicated Keating in these failures. Regarding the lack of adequate shoring, however, the report stated that the "physical evidence and the testimony of some workers *seems to indicate* that there was only one level of shores and one level of reshores in the area of the collapse." (Emphasis added).

On the grounds that the "Cagely Report" did not implicate in the failures that might have led to the collapse and, therefore, was prejudicial, Keating, on April 14, 2005 a

[3]At the hearing, the Secretary sought to have James Cagely testify on industry practice in the cast in place concrete construction industry when faced with cracked concrete. However, during *Voire Dire*, it became apparent that for over a decade, Cagely's experience as an expert had been in dealing with specific technical design or deficiency issues and not with industry practice (Tr. 497, 499). In fact, the last time Cagely could remember actually being personally responsible for contract administration on a project in New Jersey was a job in the early to mid 1980s. Based on Cagely's lack of any recent actual hands on involvement in an active concrete project, the undersigned refused to allow James Cagely to testify as to current industry custom and practice (Tr. 519).

Motion *in limine* and a *Daubert* motion to strike the report[4]. At the same time, Keating also filed a Motion for Summary Judgment ("Motion"). In that motion, Keating noted that the Secretary's investigative file was silent about any alleged structural distress (Motion at 6). Keating also observed that, in his report, Mr. Ayub stated that in the absence of any design and construction defects that would lead an employer to suspect that the area of collapse was structurally distressed, two levels of shoring would suffice to support the load and would meet OSHA standards (Motion at 5). Keating pointed out that the Secretary placed fault for causing or failing to detect deficiencies in the steel reinforcement on other subcontractors (Motion at 6), but that neither the Ayub report nor any other evidence suggested that Keating knew or should have known of the structural deficiencies (Motion at 14).

On April 28, just over a month before the hearing, the Secretary, in her response to the Motion *in limine*, clearly stated for the first time, that she intended to present evidence that "the garage was distressed, including evidence that rebar was incorrectly placed or left off altogether, and evidence that numerous people working on the garage saw cracks which had formed in a distinctive pattern around the columns." (Response pp. 2-3) In addition, on April 29, as part of its Opposition to the Motion for Summary Judgment[5], the Secretary submitted an affidavit from James Cagely where Cagely stated, also for the first time, that Keating knew or should have known about the cracks in the concrete and contacted the structural engineer of record to determine its severity.

The Secretary's response to the Motion *in limine* introduced a new universe of factual issues which were barely hinted at in the citation or the OSHA A-1 or B-1. In my

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[4]Moreover, since not relevant to Keating, respondent never sought to depose Cagely or engage in any discovery based on the report.

[5]Allegations that Keating should have known of the "structural distress" were also contained in the Secretary's response to Keating's Motion for Summary Judgment. (Response at p. 4, 6-7)

Notice of Hearing, Scheduling Order and Special Notices, this Judge required the parties to provide "a concise statement of those issues of fact which remain to be litigated." In footnote 1 of that Order, I clearly stated that "a mere restatement of the general elements to be proven will be deemed to be insufficient."

Nonetheless, in the parties' Joint Prehearing Statement, dated ten days before the hearing, in the section entitled "Statement of Issues of Fact Which Remain To Be Litigated," the Secretary listed, in its entirety:

> 1. Keating knew, or with reasonable diligence could have known, the slabs in the parking garage were distressed.
> 2. Keating knew, or with reasonable diligence could have known, that only one level of shoring and two levels of reshoring were in place in the parking garage on October 30, 2003.
> 3. Keating knew, or with reasonable diligence could have known, that the shoring in place in the parking garage on October 30, 2003 was not adequate to support the anticipated load.

In this Judge's view, these responses to my Pre-Hearing Order were seriously deficient. Despite my explicit warning the Secretary did little more than state the factual issues in terms of the general elements to be proved. Moreover, even though she presented new factual allegations not mentioned in the citation or OSHA A-1 or B-1, nowhere did the Secretary mention why the slabs were allegedly in distress or on what basis Keating knew or should have known of that distress. Also, nowhere did the Secretary tie-in the distressed state of the slabs with the alleged deficiency in the shoring which still constituted the gravamen of the violation.

Finally, at the hearing, the Secretary totally abandoned her allegations regarding the deficiencies in the shoring[6] (Tr. 14-17, 177, 233-240) and, though still claiming a violation

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[6]Indeed, in the Joint Pre-Hearing Statement the Secretary stipulated that

> For purposes of this litigation, the Secretary will not dispute that floors P-7, P-6, and P-5 were full shored and/or reshored immediately before and at the time of the collapse.

(Joint Pre-Hearing Statement, p. 11, Section IV, paragraph 4).

of the cited standard, admitted that her theory of the case had been revised (Tr. 608). Instead, she now alleged only that the slabs were distressed and that Keating knew or should have known of that distress because it was aware of serious cracks that allegedly developed in the concrete slabs and that it should have consulted an engineer before allowing construction to continue (Tr. 176-177).[7]

***B. Does the Standard Apply to the Alleged Violation as Finally Defined by the Secretary?***

The Secretary attempts to maintain the integrity of the citation by contending that the

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[7]Keating objected vehemently to this change of theories, arguing that to introduce a new theory for the first time at the hearing denied it due process. (Tr. 174-186) Respondent argued that it was denied lack of notice, and was prevented from full and fair discovery, formulation of a defense, and meaningful cross-examination. (Respondent's Brief at 27). Keating's arguments have substantial merit. The fundamental elements of due procedural due process are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Yellow Freight Syst., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). These notions of due process have been incorporated in the Administrative Procedure Act, which states that "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. §554(b). To satisfy these due process requirements, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Yellow Freight Syst., Inc.* , 954 F.2d at 357. Moreover, "an agency may not change theories in midstream without giving respondents reasonable notice of the change. *Id.* (quoting *Rodale Press, Inc. V. FTC*, 407 F.2d 1252, 1256 (D.C. 1968).

These basic principles of due process have been incorporated in the OSH Act. Thus, the Act requires that a citation "describe *with particularity* the nature of the violation.. . . ." 29 U.S.C. §658(a) (emphasis added)..To meet this requirement, the citation "must be drafted with sufficient particularity to inform the employer of what he did wrong, *i.e.* to apprise reasonably the employer of the issues in controversy." *Alden Leeds Inc. v. OSHRC.*, 298 F.3d 256, 261 (3d Cir. 2000)(quoting *Brock v. Dow Chemical*, 801 F.2d 926, 930 (7th Cir. 1986)) The Commission has recognized that citations are frequently inartfully drawn by nonlegal personnel and, therefore, are not to be as tightly construed as other pleadings, such as a grand jury indictment. *Babcock and Wilcox Co., v. OSHRC*, 622 F.2d 1160, 1164 (3d Cir. 1980). Nonetheless, the citation must be give fair notice to the employer so that it understands the charge being made and has an adequate opportunity to present a defense. *Id.*

However, given the ultimate disposition of the case, I do not find it necessary to determine whether, as a matter of law, the citation should be vacated on due process grounds.

slabs themselves were part of the "formwork"within the meaning of the cited standard, and that the insufficiencies in the steel reinforcement of those slabs, rendered them incapable of supporting the weight of the slabs being poured on the upper levels in violation of the standard**.**

Keating argues that the standard cannot be reasonably interpreted to apply to the slabs. In its view, "formwork" is the temporary support for the pour-in-place concrete until such time as the concrete has gained sufficient strength to support itself (Keating Opening Brief at 54, Keating Reply Brief at 5). It points out that "formwork" is defined at §1926.700(b)(2) as "the total system of support for freshly placed or partially cured concrete, including the mold or sheeting (form) that is in contact with the concrete as well as all supporting members including shores, reshores, hardware, braces and related hardware." Keating notes that each of the items listed in the definition are temporary structures. The slabs, on the other hand, are permanent structures. Moreover, Keating observes that, at §1926.700(b)(5), slabs are included in the definition of precast concrete[8]. Since slabs are one of the items that "formwork" is intended to support, it cannot be reasonably be interpreted to be part of the formwork. (Keating Reply Brief at 5).

The Commission must defer to the Secretary's interpretation of a standard if that interpretation is reasonable. *Martin v. OSHRC (C.F.&I Steel Corp.),* 499 U.S. 144 (1991). An interpretation is reasonable if it sensibly conforms to the purpose and wording of the regulation, taking into account whether the Secretary has consistently applied the interpretation embodied in the citation, the adequacy of notice to the parties[9], and the

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[8]The standard states:

*Precast concrete* means concrete members (such as walls, panels, slabs, columns, and beams) which have been formed, cast, and cured prior to final placement in a structure.

[9]Notice as to the meaning of the standard should not be confused with whether the citation gave Keating notice of the nature of the violation. Thus, whether Keating was provided adequate notice that it was being cited for flaws in the steel reinforcement of the slabs is a consideration independent from whether the standard can be interpreted as including slabs as

quality of the Secretary's elaboration of pertinent policy considerations. *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 n.2 (No. 96-1043, 2003).

While I am sympathetic to Keating's objection to the Secretary's strained interpretation of the standard, I cannot conclude that the Secretary's interpretation is unreasonable. Keating properly argues that "formwork" is usually thought of as temporary structures. However, the definition as set forth by the Secretary broadly defines the term as the "total system of support for freshly placed or partially cured concrete." While the definition goes on to list structures that are generally temporary in nature, there is nothing in the definition to suggest that the list is exclusive or limited to temporary structures. Moreover, it is not disputed that the purpose of the shores and reshores is to distribute the weight of the slab being poured onto the slabs below. Unless these slabs are able to absorb the weight distributed by the shores and reshores, the entire system of support will fail. Here, the slabs at levels P5-P7[10] which were shored or reshored were supporting the freshly poured concrete at level P8. Unless these slabs were capable of supporting the anticipated loads which they were required to bear, the capacity of the shores and reshores and other more traditional "formwork" were not relevant. Thus, the slabs, which ultimately had to bear the weight of the freshly poured concrete on level P8 were part of the overall support system and the Secretary could reasonably consider them "formwork." Accordingly, I conclude that the Secretary's interpretation reasonably conforms to the purpose and wording of the standard and that the Commission must defer to that interpretation.

***C. Whether Keating Knew or Should Have Known of the Deficiencies in the Steel Reinforcement?***

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"formwork."

[10]In the Joint Pre-Hearing Statement, the Secretary withdrew the original allegation that there were only two levels of shoring/reshoring. (Joint Pre-Hearing Statement, p. 11, Section IV, paragraph 4).

At the hearing, through the testimony and report of Mr. Ayub, the Secretary adduced evidence that missing or improperly placed steel rebars and reinforcing mesh put the slabs in distress. This is not seriously disputed by Keating. What Keating vehemently disputes, however, is whether it knew or could have known of these deficiencies and, therefore, whether it could properly be charged with a violation of the Act.

To establish any violation, the Secretary must establish that the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. *American Wrecking Corp. v. Secretary*, 351 F.3d 1254, 1261 (DC Cir. 2003). On a multi-employer worksite, where the general contractor (i.e. Keating) has contractual responsibility for the site, but may lack the technical expertise to identify any particular hazard, the issue is whether it could reasonably be expected to prevent or detect and abate the violation due to its supervisory authority and control over the worksite. *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994).

The Secretary established that cracks developed in the concrete at levels P5-P7 prior to the concrete pour on level P8. What was not established with any certainty, however, was whether the cracks along the One Line were a warning that the slabs were not properly reinforced. Hugh McCarron, who was Fabi Corp's superintendent at the time of the accident (Tr. 69), testified that he observed cracks at level P4 or P5 along the One Line Column which stretched 12 inches in the east-west direction and 48 inches, north to south. (Tr. 38). McCarron also observed similar cracks all along the One Line at levels P6 and P7. (Tr. 40) These cracks were visible to anybody walking through the area (Tr. 42). However, McCarron was not alarmed by these cracks and considered them to be a natural consequence of the inch to inch and a half deflection in the slabs (Tr. 43-44). Moreover, McCarron noted that the cracks weren't changing but rather were constant (Tr. 44). McCarron, who had his son, brother, and brother-in-law working at the site, testified that he

would not have allowed work to continue if he had concerns about the cracks along the One Line.[11]

Mr. Ayub testified, not only that the steel reinforcement was deficient, but also that the cracks were a warning of those deficiencies. Mr. Ayub agreed that cracking is a normal occurrence in concrete due to shrinkage as the material sets (Tr. 196). Here, however, Ayub opined that the nature of the cracking constituted a warning that the slabs were in distress (Tr. 242-243). He stated that, through employee interviews, he learned that the cracks existed at nearly every column at all levels at the beam column joint on the One Line. Some of the cracks were as wide as 1/4 inch, and went across the column and ran diagonally up to the edge of the beam. Moreover, he noted that some employees reported that the cracks went through the entire depth of the slab. Because the cracks were located at the beam column joint and ran through the depth of the slabs, he concluded that the slab may already have begun to rotate. Since the loads must run from the slab to the beam and from the beam to the column, he concluded that these serious cracks definitively demonstrated that the slab was in distress (Tr. 244). Nonetheless, Ayub could not conclude that the distressed slabs were the proximate cause of the collapse (Tr. 205).

I find it unnecessary to decide whether the preponderance of the evidence established that the slabs at levels P5-P7 were distressed to such a degree that they were unable to support the anticipated load from the concrete pour on level P8. Assuming *arguendo,* that the evidence did establish that the slabs were distressed, the Secretary failed to demonstrate that Keating knew, or with the exercise of reasonable diligence could have known of the condition.

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[11]In contrast, McCarron was concerned about cracks that developed near the elevator along the north/south column line, west of the One Line. These cracks were about half an inch wide and in some walls that seemed to be supporting the filigree slab. McCarron reported these cracks to the his superiors. As a result, changes were made to the rebars, and the cracking diminished. (Tr. 61) This area was not involved in the collapse.

To establish that Keating had at least constructive knowledge of the distressed condition of the slabs, the Secretary relied on the testimony of John Campano who was a foreman for Fabi at the Tropicana project. According to Campo, he observed "ominous" cracks along the inside of the column along the One Line on every floor (Tr. 94-95). He also testified that the cracks extended down to the filigree tub at every column he observed (Tr. 95-96). The cracks were in plain view and ranged from 3/16 to 1/4 inch wide (Tr. 98, 137). Campo testified that he told "everybody who would listen...making sure that everybody knew...Everybody who walked by" about the cracks so that they could not later deny that they were told (Tr. 99). Also, of critical importance, Campo testified that he brought the cracks to the attention of Keating Field Superintendent Ken Lang[12], who replied that there were cracks all over the building, chuckled and walked away (Tr. 98, 126).

However, on cross-examination, Keating produced a copy of the transcript of the OSHA interview with Campano, conducted shortly after the collapse. In this interview, Campano stated that:

> I believe that I called Kenny Lyon [sic] one day, but I cannot swear to it. I wish I could remember exactly, but I thought I told Kenny about the cracks . And I got the 'this job has a lot of cracks everywhere around here,' and I think that's the answer I got. But if you ask me to swear on a Bible I couldn't.

(Tr. 136, Ex. K-22, p. 109).

Campano's assertion at the hearing that he told Ken Lang about the cracks was disputed by Lang who denied that Campano ever told him about the cracks (Tr. 666). He testified that he never observed cracks along Column Line 1 and that nobody reported the cracks to him prior to the collapse (Tr. 665-667).

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[12]Among his duties as field superintendent, Lang had to coordinate the efforts of the various building trades and schedule inspections of the decks prior to the pouring of the concrete. (Tr. 655)

Lang's testimony was supported by the testimony of Raymond Apice, the Keating employee who was responsible for overall field planning and coordination of contractors at the project. According to Apice, as part of his job, workers come to him with problems and concerns (Tr. 626). Yet, he specifically denied ever having been told of the cracks by Campano (Tr. 626) or any other employee (Tr. 620). He further testified that he never observed any cracks or other signs of distress that caused him concern and had no reason to know or believe that any of the structural members of the project were under distress at the time of the collapse (Tr. 620, 628). Had someone brought that matter to his attention, Apice testified that he would have notified the structural engineer, as he did when he was notified of the cracks around the elevator (Tr. 621-623, See footnote 11, *supra*).

The Secretary sought to support Campano's assertions through the testimony of Mohammad Ayub. Ayub testified that when he first wrote his report, he believed that Keating did not know of the distressed condition of the slabs (Tr. 271-272). He changed his view, however, after learning that Campano told Keating about the cracks (Tr. 272-273). However, he admitted that he could not remember interviewing Campano after the incident, but learned of his assertions from third parties and from reading Campano's interview[13] (Tr. 283-284, 416). Ayub couldn't identify the source of this information with certainty, but believed he heard about Campano's assertions from the OSHA compliance officer shortly before the citation was issued (Tr. 284). He never spoke to Campano directly to satisfy himself about the veracity of what he was told (Tr. 284), and admitted that there was nothing in his personal notes to indicate that Campano ever told anyone at Keating about the cracks (Tr. 408-409). Ayub also agreed that, at the hearing involving Fabi,[14] he testified that he was unaware that Keating had any knowledge about the cracks (Tr. 415), and that he

[13]Although the transcription of the interview lists Mr. Ayub as having been present, he had no recollection of being part of the proceeding. (Tr. 282, Ex. K-22, p.11)

[14]The Fabi hearing were conducted from May 17-June 3, 2005.

first learned about the allegations involving Keating's knowledge at that hearing (Tr. 416). Furthermore, he admitted that the only basis for concluding that Campano told Keating about the cracks was that he was told by someone at OSHA, and by Campano's interview statements he read the night before this hearing (Tr. 416). As noted, however, in that statement Campano explicitly stated that he couldn't "swear on a Bible" that he told Lang about the cracks.

Having heard the conflicting testimony of Kenny Lang and John Campano and observed their demeanor I credit the testimony of Kenny Lang. The certainty in Campano's assertion that he told Ken Lang about the cracks is at odds with statements made prior to the hearing. When pressed on these discrepencies, Campano became defensive and argumentative and his testimony increasingly equivocal (See e.g. Tr. 117-118, 120, 129-130, 132-135, 140-141). In contrast, Lang's demeanor was calm, certain and consistent. Moreover, I find that neither the testimony of Ayub nor the affidavit of Cagely to support Campano's testimony. The timing of both Ayub's "conversation" and Cagely's late issued affidavit (which concluded that Keating should have known of the cracks and contacted the structural engineer) are highly suspect, especially since both are inconsistent with the contents of their earlier reports which essentially exonerated Keating. Indeed, by his own admission, Ayub's "conversation" came only the night before the hearing, after the Secretary developed a new theory of the case that depended on Lang having been told of the cracks. Moreover, Ayub's inability to recall being present at the interview of Campo after the collapse, even though his name appears on the transcript, places in question the reliability of his later "conversation." (*See* Footnote 13, *supra*.)

That, however, does not end the matter. As the general contractor, Keating may still be liable under the Act if it failed to adequately exercise its supervisory authority and control over the worksite. *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994); *Blount International Ltd.*, 15 BNA OSHC 1897, 1899 (No. 89-1394, 1992). Thus, even if it was not aware of the distressed condition of the slabs, it may still be liable

under the Act if it just sat back and assumed that Fabi and the other subcontractors were operating in a safe manner.

The evidence establishes that Keating met its duty and took all reasonable measures to ensure that Fabi and the other subcontractors were operating in a safe manner. It is undisputed that Keating hired a firm named Site Blauvelt Engineers as an independent inspection agency to perform on-site testing of the concrete and inspection of the steel reinforcement[15] (Joint Pre-Hearing Statement, p. 11, Section IV, paragraph 3). Moreover, Atlantic City inspectors would come to the site and inspect the steel reinforcement on each level before the next level could be poured (Tr. 57, 580, 622-623, 643, 657). When inspecting the reinforcing steel, the Atlantic City inspectors would review the structural and shop drawings and would walk the deck to observe the steel placement (Tr. 643, 670). Lang was always present for the city inspectors and Apice would be present on occassion (Tr. 643-644). The city inspectors never raised any concerns regarding steel placement (Tr. 644).

I find that by hiring an independent inspection company to insure the adequacy of the steel reinforcement and by relying on the Atlantic City inspectors to act as a back-up check on the adequacy of the work of its subcontractors, Keating acted reasonably and properly exercised its supervisory authority and control over the worksite.

Accordingly, I find that the Secretary failed to establish by a preponderance of the evidence that Keating was told about the cracks in the concrete or that, with the exercise of reasonable diligence knew or should have known of the distressed state of the concrete slabs.

***Findings of Fact and Conclusions of Law***

All findings of fact and conclusions of law relevant and necessary to a determination

[15]Site Blauvelt was cited by the Secretary for its failures to properly inspect. (Tr. 580)

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***

For the reasons stated above, the citation issued to Keating Building Corporation alleging a serious violation of 29 C.F.R. §1926.703(a)(1) and the proposed penalty are **VACATED.**

/s/
Covette Rooney
Judge, OSHRC
Washington, D.C.

Dated:January 9, 2006