UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Kone, Inc., Respondent.	OSHRC Docket No. **07-1664**

Appearances:

Amy R. Walker, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Sergio R. Casiano, Jr., Esquire, Miller, Kagan, Rodriguez & Silver, P.L., Coral Gables, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Kone Inc. (Kone) is an international elevator company. On March 22, 2007, an elevator technician who was assigned to paint the top of two elevators at a condominium complex in Naples, Florida, was found dead at the bottom of the elevator shaft. As a result of the fatality, Occupational Safety and Health Administration (OSHA) compliance officer Anthony Compos investigated the accident and recommended a serious citation for alleged violations of 29 C.F.R. § 1910.132(d)(1) and 29 C.F.R. § 1910.147(c)(4)(i) or in the alternative § 5(a)(1) of the Occupational Safety and Health Act (Act). The serious citation was issued to Kone on September 19, 2007. Kone timely contested the citation.

On April 9, 2008, the Secretary amended the citation to allege instead serious violations of 29 C.F.R. § 1910.132(a) (item 1) for failing to utilize fall protection when an employee is painting the top of an elevator car, and 29 C.F.R. § 1910.212(a)(1) (item 2) for failing to protect by a guard

the employee from an adjacent moving elevator car. The citation proposes a penalty of $6,300.00 for each alleged violation.

The hearing on the amended citation was held on May 14-15, 2008 in Naples, Florida. Jurisdiction and coverage were stipulated. The parties have filed post hearing briefs.

Kone denies the alleged violations and asserts the cited standards are not applicable to the elevator industry during maintenance work. As to the fall protection requirement, Kone also asserts greater hazard and infeasibility as affirmative defenses. With regard to the lack of a guard, Kone claims employee misconduct.

For the reasons discussed, the fall protection violation is affirmed and a penalty of $6,300.00 is assessed. The alleged lack of a guard violation is vacated.

The Inspection

Kone is an international elevator company which manufactures, installs, and services elevators. Kone is one of the four largest elevator companies with offices throughout the United States. Kone employs approximately 4,000 employees internationally (Tr. 94, 269, 409).

In its Naples, Florida office, James Houlihan, a certified elevator technician, has been employed by Kone for 25 years. Houlihan is responsible for servicing and repairing approximately 160 elevator accounts including the elevators at the Gulf Breeze Condominiums. The elevators were manufactured and installed at the Gulf Breeze by Montgomery Elevator Company in the early 1990s. Montgomery Elevator was subsequently purchased by Kone who has continued servicing the elevators (Tr. 238, 285, 333, 351, 366).

Building A at the Gulf Breeze is a twelve-story residential building with two elevators sharing a single shaft. The condominium's first floor is referred to as the lobby and succeeding floors are numbered 1 through 11. The two elevators are designated as elevators #1 and #2 (left and right as facing the elevators) (Exhs. C-3, R-2; Tr. 37, 39).

As overhead traction elevators, the cars are suspended by wire cables that attach to the cross-head beams bisecting the top of each elevator car and run into the machine room above the elevator shaft, over traction sheaves, and down to counterweights that move up and down the shaft behind the elevator cars. The cars move on tracks in the elevator shaft which are located on either side of each car (Exh. C-5; Tr. 239, 242-243).

The top of each elevator car is approximately 71 inches, front to back, and 72 inches, side to side. Between the elevator cars, in the center of the shaft, are divider beams that are 5 inches wide and located at each level of the condominium. The distance from the side of one elevator car to the adjacent elevator travelway is less than 14 inches (a gap of 8 inches between the car and the 5-inch divider beam). The distance between the back edge of the elevator car to the back wall of the shaft is at least 40 inches (Exh. C-7; Tr. 85, 266-267).

On March 22, 2007, apprentice technician Dennis McAlexander who had been employed by Kone for less than one year was assigned by Houlihan to clean and paint the tops of the two elevators in Building A. McAlexander met Houlihan at the building at approximately 7:00 a.m. Houlihan had not previously worked with McAlexander and did not know his experience (Tr. 64-66, 88, 336-337, 375).

Houlihan instructed McAlexander how to deactivate each elevator car and how to clean and paint the tops of the cars. Houlihan then deactivated elevator #2 on the second level so that McAlexander could access the roof of the elevator car from the third level. The third level is approximately 30 feet from the bottom of the elevator shaft. The third level elevator doors were left open, secured, and barricaded. Elevator car #1 continued its normal operation for the residents. After giving McAlexander directions and setting up the worksite, Houlihan returned to his office, leaving McAlexander to work alone. Consistent with company policy, McAlexander was not utilizing personal fall protection and there was no guarding between the two elevators (Tr. 90, 337-338).

At 8:40 a.m., Houlihan was notified that both elevators in Building A were out of service. Houlihan returned to the condominium at 9:00 a.m., where he found the body of McAlexander at the bottom of the shaft. The Collier County Medical Examiner concluded that the cause of death was "multiple blunt force injuries" sustained from contact with an elevator and subsequent fall. The top of elevator #2 had been painted and returned to service. Elevator #1 had been deactivated, the doors to the elevator were open on the third level and the painting materials had been placed on top of the elevator (Exh. C-11; Tr. 339-341).

Kone theorizes that McAlexander was struck when he attempted to move from the top of elevator #1, back to the top of elevator #2 through the hoistway, and not from the landing (Kone

Brief, p. 2). Company policy instructs technicians to exit and enter the elevator top through the elevator doors on each landing. According to Kone, McAlexander was struck in the groin area by the retaining cam attached to elevator #2 as it ascended. As a result of the impact, McAlexander fell into the shaft (Tr. 133-137, 352, 354).

On March 23, 2007, OSHA compliance officer Campos arrived at Building A where he observed both elevators and spoke to several Kone employees. Based on Campos' inspection, OSHA issued the serious citation to Kone on September 19, 2007. Although the factual allegations remained unchanged, the Secretary amended the standards cited to allege violations of 29 C.F.R. § 1910.132(a) (item 1) and 29 C.F.R. § 1910.212(a)(1) (item 2).

Discussion

The Secretary has the burden of proving a violation.[1] Kone asserts § 1910.132(a) and § 1910.212(a)(1) are not applicable to Kone's elevator maintenance work including painting the tops of cars. If found applicable, Kone asserts as affirmative defenses, greater hazard and infeasibility as to the alleged violation of § 1910.132(a) and unpreventable employee misconduct as to the alleged violation of § 1910.212(a)(1).

Item 1 - Alleged Violation of § 1910.132(a)

The citation, as amended, alleges Kone failed to require employees to utilize fall protection when exposed to a fall hazard while painting the tops of elevators. Section 1910.132(a) provides:

> Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

[1] In order to establish a violation of an OSHA standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) an employee's access to the violative conditions, and (d) the employer's actual or constructive knowledge of an unsafe condition. *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The top of each elevator car at the Gulf Breeze is 71 inches, front to back, and 72 inches, side to side. The surface is essentially flat. There are no fall hazards on the side of the elevator facing the door or the side next to the wall because of the narrowness of the space. However, from the back edge of the elevator to the back wall, there is an open space of approximately 40 inches. On the side of the elevator in the hoistway, there is less than 14 inches (gap of 8 inches and the 5-inch divider beam at each level) to the adjacent elevator travelway. It is approximately 30 feet from the top of the elevator car when stationed on the third level to the bottom of the shaft. There are no guardrails or other fall protections around the top of the elevator car to prevent falls from the back or side. Kone does not require employees to utilize personal fall protection while painting the tops of elevators.

Section 1910.132(a), a general industry standard, is broadly worded and of general application governing numerous possible hazardous conditions and types of injury. To afford notice to the employer, the Secretary must show "either that the employer had actual notice of a need for protective equipment or that a reasonable person familiar with the circumstances surrounding the hazardous condition would recognize that such a hazard exists." *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1264 (No. 98-0701, 2003).

Application of § 1910.132(a)

Since 1982, the Review Commission has considered §1910.132(a) broad enough to apply to fall hazards and that fall protection such as a safety harness was a form of personal protective equipment. *Bethlehem Steel Corp.*, 10 BNA OSHC 1470, 1472 (No. 79-310, 1982);[2] *Hackney Inc.,* 16 BNA OSHC 1806, 1807-08 (No. 91-2409, 1994); *Cleveland Electric Illuminating Co.*, 16 BNA OSHC 2091, 2093 (No. 91-2198, 1994). Also see, OSHA directive, STD 01-01-013, "*Fall Protection in General Industry*" (Exh. C-12).

Section 1910.132(a) applies to the work performed by McAlexander on March 22, 2007. Kone's argument that the standard is inapplicable to elevators manufactured prior to the year 2000, is misplaced. The guidelines as described by Kone do not require elevators manufactured prior

[2]The citation was vacated based on the lack of fair notice, not because §1910.132(a) did not apply to fall hazards.

to 2000 to have guardrails unless the units are remodeled (Tr. 286-287).[3] Section 1910.132(a) involves the use of personal fall protection such as safety harnesses and lanyards. Guardrails are not considered personal protective equipment.

Terms of § 1910.132(a) were Violated

Section 1910.132(a) requires the use of personal protective equipment if exposed to a hazard. It is undisputed McAlexander was not utilizing personal fall protection while cleaning and painting the tops of the two elevators, 30 feet above the bottom of the shaft. Fall protection was not required by Kone (Tr. 344, 382-383).

Employee Exposure

To establish an employee's exposure to a hazard, the Secretary must show it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that the employee has been, is, or will be in the zone of danger. *Fabricated Metal Products Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). Also, under § 1910.132(a), the Secretary must show there is a significant risk of harm due to a hazard requiring additional protective equipment. See *Anoplate Corp.*, 12 BNA OSHC 1678, 1681-1682 (No. 80-4109, 1986).

In this case, exposure is established based on McAlexander's work on top of an elevator approximately 30 feet above the bottom of the elevator shaft without personal fall protection (Tr. 90). The 40-inch opening at the back of the elevator and the opening in adjacent elevator's travelway were large enough for an employee to fall through if not utilizing personal fall protection (Tr. 85-86, 266). McAlexander's painting required him to work at the elevator's back and side edges. The Elevator Industry Field Employees, Safety Handbook used by Kone requires personal fall protection any time an employee works within 6 feet of an open hoistway or a 12-inch or greater opening into the hoistway (Exh. C-15, Sections 3.6, 4, 18.9). Under the section entitled "Safety precautions when working on car tops," it specifically provides that "when a fall hazard exists, fall protection shall be used (See Section 4)." (Exh. C-15, Section 8.1.2(k)).

McAlexander's working conditions exacerbated the risk of a fall hazard. To move from the back to the front of the elevator, he was required to climb over the cross beam that bisected the top.

[3]Kone's installed guardrails after the accident at the request of the County inspector, not because it was required (Tr. 371, 382).

To paint under the cross beam and around the various protrusions, McAlexander would have to bend, stoop and reach. These conditions would have forced McAlexander into awkward positions, affecting his balance. Also, the top presented tripping hazards from electrical cables and various protrusions (Exhs. C-6, C-7; Tr. 83, 98).

An employee's exposure on top of the elevator is recurring. Houlihan, the technician primarily responsible for maintaining the elevators at the Gulf Breeze, testified he accessed the tops of the elevators once every other month. Kone's service records corroborate that schedule (Exhs. C-9, C-10; Tr. 360).

Kone's argument that the Secretary failed to demonstrate how the use of personal fall protective equipment would have prevented the accident, is irrelevant. The citation, here, alleges the lack of personal fall protection while painting the elevator's top. The allegation does not relate to Kone's theory that McAlexander, for unknown reasons, may have moved through the hoistway from one elevator top to the other elevator top is in violation of company policy. The issue is not whether the accident in this case could have been prevented with the use of personal fall protective equipment but whether the employee while painting the elevator top was exposed to a fall hazard of 30 feet. Such a fall hazard could have been eliminated or reduced by personal fall protection.

Kone's Knowledge

In order to establish employer knowledge, the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engd Form Co.*,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). The focus of § 1910.132(a)(1) is on a recognition of an unsafe condition, not the need for particular personal protective equipment. *Lukens Steel Co.*, 10 BNA OSHC 1115, 1123 (No. 76-1053, 1981). An employer is required to assess its workplace to determine if such hazards are present which necessitate the use of personal protective equipment. Section 1910.132(d)(1)

Kone's knowledge is imputed by Houlihan who acted as McAlexander's supervisor. Under section 1.2 of Kone's Safety Handbook, the supervising technician is responsible for safety on the job (Exh. C-15, Section 1.2). Houlihan was aware of McAlexander's work conditions. He was at the worksite, gave detailed work instructions and helped McAlexander set up the work. Houlihan

knew McAlexander was not wearing fall protection in accordance with company policy (Tr. 337-338, 344, 366).

Kone's argument regarding industry custom and practice is rejected. Kone claims fall protection is not utilized in the elevator industry while performing maintenance due to the danger of moving parts. Although the Commission may look to industry practice in determining whether there is a hazard, industry practice is not dispositive if a reasonable person familiar with the circumstances would perceive that a hazard exists.[4] *Cleveland Electric Illuminating Co*., 16 BNA OSHC supra at 2093.

A reasonable person familiar with the circumstances in this case would have recognized the existence of a fall hazard of 30 feet while painting the elevator tops without personal fall protection. There was no showing of moving parts. The elevator being painted was stationary and not operational.

Kone's reliance on the decision in *Bethlehem Steel Corporation*, 10 BNA OSHC *supra* at 1470, to argue the lack of fair notice that § 1910.132(a) included fall protection hazards was addressed by the Commission in *Hackney Inc.*, 16 BNA OSHC supra at 1807, fn. 1. As the Commission noted, the *Bethlehem* decision provided subsequent employers fair notice of the standard's application to fall hazards.

Similarly, the decisions in *Otis Elevator Company*, 5 BNA OSHC 1429 (No. 13140, 1977) and *Dover Elevator Company*, 12 BNA OSHC 1731 (No. 83-1049, 1986) are not relevant to this case. These decisions involve construction standards (§ 1926.500 and §1926.28) requiring guardrails and safety belts and are limited to the facts in those cases. Also, the decisions lack precedential value because either wrote as separate opinions of the Commissioners or was an unreviewed decision by an administrative law judge.

A violation of § 1910.132(a) is affirmed unless Kone can establish its greater hazard or infeasibility defenses.

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[4]Although there is some evidence the four largest elevator companies do not require fall protection, there is also a showing that Otis Elevator does utilize fall protection during maintenance (Tr. 362, 407). The industry practice evidence is inconclusive. If industry practice was dispositive, it would permit an entire industry to avoid liability by maintaining inadequate safety. *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794 (No. 90-998, 1992).

Greater Hazard Defense

Greater hazard is an affirmative defense. Kone must show (1) the hazard of compliance exceeded the hazard of noncompliance, (2) alternative means of protecting employees were either used or not available; and (3) a variance under § 6(d) of the Act was inappropriate. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1159 (Nos. 90-1620 & 90-2894, 1993).

Kone argues personal fall protection is not used during maintenance work due to the danger of moving parts. The concern is the lanyard getting caught and the employee is pulled off the car top (Tr. 348-349). To lessen the fall hazard, Kone implemented specific procedures regarding how to enter and exit car tops. McAlexander was aware of these procedures (Exhs. R-6, R-7). Safety director Miller has never had to sanction an employee for crossing from car top to car top (Tr. 390-391).

The record shows that a safety harness and lanyard can be used to protect an employee from the fall hazard on top of the elevator car (Tr. 92, 249-251). The employee could tie off the lanyard to the steel traction cables suspending the elevator car in the hoistway. Each cable is capable of holding 22,000 pounds. Kone's Technician's Guide instructs employees working on elevator tops that "when a fall hazard exists, fall protection should be used (Exh. R-3, p. 31).

The risk of the lanyard getting caught in moving parts is not supported by the record. The elevator upon which McAlexander was painting, was stationary and not operational. Safety director Miller conceded there was no increased danger using fall protection on top of a stationary elevator if properly locked and tagged out (Tr. 386). Although McAlexander's elevator was not locked and tagged out, Miller conceded the elevator was stopped and would not move during the painting work (Tr. 385). There was no reason shown why the elevator could not have been locked and tagged out in this case (Tr. 328). Kone's safety handbook requires the use of fall protection when an elevator can be locked and tagged out (Exh. C-15; Tr. 253-254). Regardless, because the elevator was not operational, there were no moving parts on top of the elevator.

Also, the adjacent elevator which remained operational was not shown to pose a hazard of moving parts. The adjacent elevator was approximately 21 inches away (two gaps of 8 inches on either side of the 5-inch divider beam). The danger of entangling the lanyard would be reduced by this distance and would be eliminated if the employee used a retractable lanyard. When questioned

about using a shorter or retractable lanyard to prevent the lanyard from getting caught if the elevator car moves, Miller had not examined the viability of such methods (Tr. 403-404).

Furthermore, Kone failed to show alternative methods of protecting McAlexander from the fall hazard could not have been utilized. Although not required, it was feasible for Kone to install guardrails around the top of the elevator (Tr. 257-259). Houlihan conceded there was sufficient clearance at the top of the shaft to use guardrails (Tr. 361). The current ASME code for the elevator maintenance industry requires guardrails where there is a fall hazard (Tr. 258-259). Guardrails were in fact installed on the elevators in this case. Finally, there is no showing it would have been inappropriate for Kone to seek a variance.

Kone's greater hazard defense is rejected.

Infeasibility Defense

For an infeasibility defense, Kone must show (1) the means of compliance with the standard is infeasible, in that (a) its implementation is technologically or economically infeasible, or (b) necessary work operation is technologically infeasible after implementation, and (2) there are no feasible alternative means of protection. *V.I.P Structures, Inc*., 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994).

Kone argues the Secretary attempted to circumvent the dangers of lanyards by referencing retractable lanyards. Kone claims there is no showing the use of retractable lanyards was in fact feasible for those working on completed elevator tops.

Kone's argument is rejected. As an affirmative defense, Kone has the burden, not the Secretary, of establishing infeasibility. During maintenance work such as painting, the elevator is stationary and inoperable. There are no moving parts on top of the elevator car. While on top of the elevator, the technician was at least 21 inches from the movement of the adjacent elevator car. Houlihan has not used retractable lanyards (Tr. 363). Kone's safety director could not identify any reason why a retractable lanyard was not suitable for maintenance work on top of a stationary elevator car.

Kone's infeasibility defense is rejected.

Item 2 - Alleged Violation of § 1910.212(a)(1)

The citation, as amended, alleges Kone failed to protect an employee by guarding from the adjacent moving elevator. Section 1910.212(a)(1) provides:

> Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are–barrier guards, two-hand tripping devices, electronic safety devices, etc.

According to the Secretary, the moving elevator car created a struck-by hazard to McAlexander whose work required him to be at the very edge of the other elevator top. The distance between the two elevators was 21 inches (Tr. 97). The elevators move at approximately 350 feet per minute (Tr. 244). The Secretary's expert testified guarding in the form of screen mesh down the center of the hoistway was feasible. He had observed such guarding in use and said it could be installed at the Gulf Breeze (Tr. 262-263). The Secretary cites *S&G Packaging Co*., 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001)(finding exposure when an employee was within one to two feet of drive rollers) and *ConAgra Flour Milling Co*., 16 BNA OSHC 1137, 1147 (No. 88-1250, 1993)(finding exposure when an employee was within 1 to 1.5 feet of belts and pulleys).

It is undisputed there was no guarding in the form of a screen mesh separating the two elevators (Tr. 226-227, Kone Br. p. 19). Kone's safety director testified the company uses hoistway screening in construction and modernization work but not during maintenance (Tr. 392-393). Kone concedes McAlexander was not required to erect a barrier between the elevators (Exh. C-2, requests 8 & 9). McAlexander was instructed to leave the adjacent elevator car fully operational while painting the top of the other elevator (Tr. 337-338).

Section 1910.212(a)(1) is entitled "General requirements for all machines" and the Review Commission recognizes this "clearly indicates that the standard is generally applicable according to its terms to the hazard presented by the moving parts of all types of industrial machinery unless a more specific machine guarding standard applies." *Ladish Co*., 10 BNA OSHC 1235, 1237 (No. 78-1384, 1981) (violation affirmed when an employee was struck and pinned against a conveyor belt by the arm of a loader).

The Secretary cites *Superlite Builders Supply, Inc*., 2 BNA OSHC 3020 (No. 5081, 1974) where an administrative law judge found that §1910.212(a)(1) requires the employer to guard the nip point created between a descending elevator and a conveyor frame on four automatic block making machines. In another case, the Commission held the standard "applies to machine hazards that arise during inspection, cleaning and maintenance." *General Electric Company*, 10 BNA OSHC 1687, 1690 (No. 77-4476, 1982) ("in view of the standard's and the Act's remedial, protective purpose, we will not imply an exception to §1910.212(a)(1) that deprives employees of its protection").

Section 1910.212(a) does not apply to the elevator work in this case. An elevator is not a machine as contemplated by the standard. Between the two elevators, there are no point of operation, ingoing nip points, rotating parts, flying chips and sparks as defined in §1910.211. An elevator is a people moving transportation system. It is not a machine which cuts, bends, folds, moves, lifts, manipulates parts or pieces for the manufacture of a product.[5]

No cases have been found where elevators such as at the Gulf Breeze were deemed "machinery" for the purposes of §1910.212(a)(1). In *Beth Energy-Lackawanna/Coke Div. of Bethlehem Steel Corp.*, 14 BNA OSHC 1644, 1646 (NO. 88-2135, 1990), a judge found the "catch point" allegedly created by the space between the moving door machine and stationary coke oven battery is not the type of hazard intended to be guarded by the general machine guarding standard.

Section 1910.212(a)(1) is directed at hazards created by the convergence of either parts of machinery (rotating parts or nip points) or machinery where material is processed (point of operation). The movement of an elevator car and the retaining cam that struck McAlexander are not designed to converge at any point. The elevator industry does not require the use of netting or screens for employees performing routine maintenance to elevator tops of installed and operational cars.

Employee's access to the zone of danger; between the two elevators is not reasonably predictable. The space between the two elevators was approximately 21 inches. Kone has a safety

[5]The lack of application is also shown by the fact that originally, OSHA cited the alleged violation as a lockout/tagout violation under §1910.147.

program that includes specific rules pertaining to employee safety while working atop elevators. Section 8.1.1(e) of the Elevator Industry Field Employees Safety Handbook, states that; "When in a multiple hoistway, never place any part of your body in the runway of an adjacent operational elevator." (Exh. C-15). To violate this policy, an employee would need to make a conscious decision to place himself in the zone of danger. Section 1910.212(a)(1) is inapplicable to elevators and an employer is not held to guard against hazards created by employee's conduct which is not reasonably foreseeable.

A violation of § 1910.212(a)(1) is not established.

Serious Classification

There is a "serious" violation under § 17(k) of the Act when the Secretary establishes there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known of the violative condition.

Kone's violation of § 1910.132(a) is properly classified as serious. A fall hazard of 30 feet to the bottom of the elevator shaft clearly could cause death or serious injury. Kone did not require the use of fall protection when painting the tops of elevators and knew McAlexander was exposed to a fall hazard of 30 feet.

Penalty Consideration

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. § 666(j). The gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.,* 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992).

Kone is a large company with approximately 4,000 employees worldwide. Kone is entitled to credit for history and good faith based on having no history of prior OSHA violations within the last three years and having written safety programs and training (Exhs. C-15, R-6, R-7; Tr. 93-94).

A penalty of $6,300.00 is reasonable for serious violation of § 1910.132(a). One employee was exposed to a fall hazard of 30 feet without fall protection. The duration of the exposure was less than one hour. The company's policy and practice was not to require personal fall protection although its safety handbook seems to provide for such protection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED:

Citation no. 1, item 1, alleged serious violation of § 1910.132(a), is affirmed and a penalty of $6,300.00 is assessed.

Citation no. 1, item 2, alleged violation of § 1910.1910.212(a)(1), is vacated and no penalty is assessed.

/s/
Ken S. Welsch
Administrative Law Judge

Date: November 28, 2008