United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. SUMMER & WINTER CONSTRUCTION, LLC, Respondent.	Docket Nos. 09-1796 & 09-1797

APPEARANCES:

Paul J. Katz, Esquire, U.S. Department of Labor, Boston, Massachusetts
For the Secretary of Labor

Charles A. Russell, Esquire, Concord, New Hampshire
For the Respondent

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a job site of Summer & Winter Construction, LLC ("Respondent" or "Summer & Winter"), in April 2009. The first site was in Hanover, New Hampshire, and the inspection resulted in Respondent being issued serious, willful and repeat citations. OSHA inspected a second work site of Respondent

in August 2009. This site was in Manchester, New Hampshire, and the inspection resulted in Respondent being issued serious and repeat citations. Respondent contested the citations and the proposed penalties from both inspections. The cases were consolidated for discovery and hearing purposes. The hearing in this matter took place in Concord, New Hampshire on October 4, 5 and 6, 2010. Both parties have filed post-hearing briefs.

The OSHA Inspections

Joseph LaRose is a compliance officer ("CO") with OSHA's Concord, New Hampshire office.[1] On April 16, 2009, as he was driving to another site in Hanover, New Hampshire, he saw workers on the roof of a building. The workers appeared to not have proper fall protection. He inspected the other site.[2] He then got approval from his office and went to the roofing site.[3] The building was a retirement community. The roof of the building was 30 feet high on one side and 40 feet high on the other. The roof was also steep, being six-pitch in some places and 12-pitch in others. The CO saw seven workers on the roof. Six were wearing body belts but only three were tied off, and two of those were tied off to the same anchor. The other three were not tied off at all. The seventh worker wore a harness and was walking on the roof without being tied off. Two other workers were on the ground cleaning up the removed shingles. In doing so, they were working under the raised lift of a Lull fork truck. The CO also saw certain ladder violations at the site. The CO asked an employee on the ground who the foreman was.

[1] CO LaRose, a construction specialist, has been with OSHA since 2001. Before then, he worked as a general contractor's assistant superintendent, and he previously worked as a journeyman carpenter and a carpenter foreman. His experience has included installing roofing shingles. He has attended numerous OSHA courses. He currently assists in teaching courses at the OSHA Institute in Chicago. (Tr. 90-93).

[2] The other site had the same address as the subject site but involved a different employer who was adding an addition to a different area of the building. That employer had no connection to Respondent. (Tr. 95-96).

[3] The CO's office has a local emphasis program in regard to fall hazards. If a CO drives by a site and sees fall hazards, he is required to inspect the site after getting approval to do so. (Tr. 92-93, 96).

The employee pointed to an individual on the roof, and the CO held up his credentials and asked him to come down.[4] The CO held an opening conference with Derek Jensen, who said he was the foreman and the son of the owner. Derek Jensen would not allow the CO to speak to the employees. (Tr. 94-111, 124-34, 156-59).

Walter Jensen, the owner, arrived a few minutes later.[5] He told all the employees to leave. He also lowered the Lull's lift and then turned the Lull off. When the CO asked if he could speak to him about his inspection, Mr. Jensen said, "Go ahead, Tubby." When the CO told him what the violations were, Mr. Jensen ran around the Lull, got within inches of the CO's face, and called the CO a "f*****g liar."[6] The CO said he had pictures of the violations, and Mr. Jensen replied he didn't "f*****g care." The CO asked Mr. Jensen to calm down and said he was only doing his job. Mr. Jensen stated he didn't like it when an official told him "what to "f*****g do." The CO held a closing conference with Mr. Jensen and reviewed the violations he had seen and the penalties that could be proposed. Mr. Jensen again got within inches of the CO's face and told him to "f**k off." He also said that he would fight the citations, did it all the time, and had been through many OSHA inspections.[7] (Tr. 112-18).

On August 26, 2009, CO LaRose was returning to his office from an inspection he had just finished. From the road he was on, he saw four workers without fall protection

[4] C-1-25 are the photos the CO took at the site. The CO said that C-1 showed Derek Jensen in a white shirt and another employee. Both wore body belts and were tied off to the same anchor. (Tr. 97-98).
[5] At some point during their encounter, Walter Jensen told the CO his company's name was Summer & Winter Construction. Derek Jensen had told the CO the name was "S&W." (Tr. 100).
[6] Mr. Jensen admitted that he "probably did do that." (Tr. 470-71).
[7] The CO reported Walter Jensen's behavior to the Federal Protective Service ("FPS"). An FPS official spoke to CO LaRose and then went to the work site on April 22, 2009. The official talked to Mr. Jensen and told him that threatening or assaultive behavior like that that had occurred with the CO would not be tolerated and could be prosecuted. Mr. Jensen said he understood. Mr. Jensen also made certain statements to the official about the alleged OSHA violations. The FPS official testified at the hearing, and pages 1 and 4 of C-59, his official report of the incident, were received in evidence. (Tr. 60-72, 76-77, 318).

walking on the roof of the Denron Plumbing Building in Manchester, New Hampshire. He called his office and got approval to inspect the site. On reaching the site, he saw a Summer & Winter box truck like he had seen in Hanover. He also saw that the roof was about 16 feet from the ground, that it was a six-pitch roof, and that the workers were putting down strapping in preparation for installing a metal roof. Of the four workers on the roof, three were wearing harnesses that were not attached to anything. Also, none of the workers with harnesses had the leg straps attached. One employee had on a body belt that was connected to a lifeline.[8] The CO went into the building and met with Mark Bichneu, Denron's safety director. The two then went to observe the roofing work. The CO saw Derek Jensen on the roof and asked him to come down. As before, Derek Jensen said he was the foreman and the company was S&W Construction. The CO described what he had seen, and Derek Jensen said, "What am I going to say, you got me." Derek Jensen also indicated his father would be upset. (Tr. 82, 164-67, 177-97).

The CO observed other hazards at the site. One was employees using nail guns and a circular saw on the roof without utilizing eye protection. Another was the fact that the circular saw was receiving power from an outlet in Denron's garage that did not have GFCI protection. The CO discussed these hazards with Derek Jensen. Just as the CO was preparing to leave, Walter Jensen arrived at the site. The CO approached him and asked if he would like to review the inspection findings. Walter Jensen asked the CO if he had reviewed the inspection findings with his son, Derek Jensen. The CO stated that he had, and Walter Jensen said, "That's good enough." (Tr. 168-76).

[8] C-25-55 are the CO's photos of what he observed during this inspection.

Jurisdiction

As the Secretary notes, Respondent's answer in this matter is in the nature of a general denial. The parties have stipulated the Commission has jurisdiction over this matter. *See* J-1, ¶ 1. But, Respondent has denied it is an employer within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *See* Answer, p. 1. The record shows that Respondent is a general contractor in the construction industry. It also shows that the workers at both work sites were engaged in roofing work. Based on the admissions of Derek and Walter Jensen to CO LaRose, the workers at both sites were Respondent's employees. (Tr. 104, 107-08, 166-67). Walter Jensen confirmed this was so at the hearing. (Tr. 405, 411, 433-35). The employees at the Hanover site were laying GAF Residential Premier shingles, which are made in Texas and Pennsylvania. (Tr. 79-80, 119). Further, Walter Jensen testified at the hearing that he had done jobs in Massachusetts and in New Hampshire. (Tr. 488-89). Finally, as the Secretary notes, the Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). I find that Respondent is an employer with employees within the meaning of section 3(5) of the Act. I also find that the Commission has jurisdiction over this matter.

The Secretary's Burden of Proof

To show a violation of an OSHA standard, the Secretary must prove that: (1) the standard applies, (2) its terms were not met, (3) employees were exposed to the cited condition, and (4) the employer either knew of the condition or could have known of it with the exercise of reasonable diligence. *Astra Pharma. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Serious Citation 1, Item 1 (No. 09-1796, Hanover Inspection)

This item alleges a violation of 29 C.F.R. 1926.502(d)(15), which states that:

> Anchorages used for attachment of personal fall arrest equipment shall be … capable of supporting at least 5,000 pounds (22.2 kN) per employee attached….

CO LaRose testified that two employees on the roof were wearing body belts and were tied off to the same anchor. He said C-1 showed the two employees. The one in the white shirt was Derek Jensen.[9] He also said that while it was not clear from C-1 that the employees were connected to the same anchor, he saw that they were when they moved around on the roof.[10] The CO noted that body belts have been prohibited since 1998. OSHA now requires use of a harness with a shock-absorbing lanyard that is connected to a lifeline, which, in turn, is connected to an anchorage point. The CO further noted that Walter Jensen, after arriving at the site, showed him the type of anchor that was installed on the roof. The CO was familiar with that type of anchor. It had a safety factor of 5,000 pounds, and one employee could tie off to it. The hazard of two employees tying off to one anchor was that if one of them fell off the roof and the anchor failed, the other one would be pulled off the roof. A fall from the subject roof could have caused broken bones, paralysis or death. (Tr. 97-102, 106-11, 119-20, 198, 247-54, 270-73).

Walter Jensen testified that it looked like Derek Jensen was tied off to the roof anchor in C-1.[11] He could not tell from C-1 if the employee on the right was tied off to that anchor. He could not see any other anchors in C-1. He said his rule is for each employee to use one anchor. He also said there were no anchors on the subject roof

[9] The CO asked an employee on the ground who the foreman was. The employee pointed to Derek Jensen. Derek Jensen confirmed that he was the foreman after he came down from the roof. (Tr. 98-100).
[10] The CO identified the anchor as "A" in C-1. He identified the lanyard of the employee on the right with a "C" and his lifeline with a "B." (Tr. 247-54).
[11] Mr. Jensen marked a "D" on C-1 where he said it appeared there was a roof anchor. (Tr. 442).

initially and that he had had two employees install them before the roofing work began. He indicated this is his normal practice and that there are always adequate anchors for his employees. Mr. Jensen noted he had been at the Hanover site on the morning of April 16, 2009.[12] He then had left to run an errand. Mr. Jensen admitted he had previously seen his employees tied off to the same anchor. When that happened, he would make each employee hook off to a separate anchor. If he saw the same employee violate the rule repeatedly, the employee would "get a few days off." (Tr. 440-47, 463-64).

I observed the CO on the witness stand, including his body language and facial expressions, and I found him to be a credible and convincing witness. I thus credit the CO's testimony that he could see when the employees moved that they were both tied off to the same roof anchor. Respondent does not really dispute the violation occurred. It asserts, rather, that the Secretary has not shown knowledge of the violation. It also asserts the violation was due to unpreventable employee misconduct. R. Brief, pp. 5-6, 12-18.

Walter Jensen was not at the site when the CO first arrived, and there is no evidence he had actual knowledge of the violation. Derek Jensen, however, clearly knew of the violation, as he was one of the two employees who had tied off to the anchor. Derek Jensen also told the CO he was the foreman at the site. (Tr. 100). A supervisor's knowledge of a violation is imputable to the employer. The Secretary has therefore shown the four required elements that are needed to establish the alleged violation.

Respondent claims the violation was due to unpreventable employee misconduct. The First Circuit has held that, to establish this affirmative defense, the employer must prove that it: (1) established a work rule to prevent the unsafe condition; (2) adequately communicated the rule to employees; (3) took steps to detect incidents of noncompliance,

[12] Mr. Jensen is almost always at his roofing jobs in the morning to get the work started. (Tr. 406-07, 415).

and (4) effectively enforced the rule when employees transgressed it. *P.Gioioso & Sons v. OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997) ("*P.Gioioso*").[13] *See also Modern Cont'l, Inc. v. OSHRC*, 305 F.3d 43, 51 (1st Cir. 2002). In *P.Gioioso*, the court noted the importance of providing documentary evidence to show all four elements. *P. Gioioso,* 115 F.3d at 110. As the Secretary points out, Respondent has met none of the required elements. S. Brief, pp. 24-26.

Walter Jensen testified that his rule was for each employee to use one anchor. He said he had seen this same type of violation before; when he had, he had told the workers to each use a separate anchor. He also said that if the same worker violated the rule repeatedly, the worker would get "a few days off." (Tr. 440, 444-47). Walter Jensen provided no written evidence of the claimed rule or of his discipline of employees when he saw violations of the rule. In fact, when asked at the hearing if he had brought with him a copy of his safety program or any written records of discipline, he stated he had not. (Tr. 464-65). Further evidence that Respondent had no established work rules is demonstrated by Derek Jensen asking the CO, at the end of the Manchester inspection, "Is there any place that I can find all this information, is it in a book, is it in pamphlets?" (Tr. 183-84). Respondent's asserted defense is rejected, and this item is affirmed.[14]

The Secretary has proposed a penalty of $2,000.00 for this violation. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* section 17(j) of the Act. The CO

[13] The First Circuit's case law is applicable here because this case arose in the First Circuit.
[14] In so doing, I have noted the testimony of Lawrence Jefferson, who has worked for Respondent on and off since 2003 or 2004. He indicated he and other employees had been reprimanded by Walter Jensen for not using protective equipment properly. He also indicated that there could be a "leave of absence" for such behavior. (Tr. 348-49). This testimony, even if true, is insufficient to prove Respondent's asserted defense, especially since Derek Jensen, the foreman, was one of the employees who tied off to the same anchor.

testified that this item had high gravity, as a fall from the 30-foot roof would have caused serious injuries or death. He also testified that the probability of an accident occurring, given that two employees were tied off to the same anchor, was greater. The employer was given a 60 percent reduction due to its small size. No reduction for history was given because the employer had been issued a serious citation within the past three years. And no reduction for good faith was given because, as the CO put it, "I didn't see any."[15] (Tr. 123-24). I agree with the CO's determinations regarding the proposed penalty. I find the proposed penalty appropriate, and it is accordingly assessed.[16]

Serious Citation 1, Item 2 (No. 09-1796, Hanover Inspection)

This item alleges a violation of 29 C.F.R. 1926.600(a)(3)(i), which provides, in relevant part, as follows:

> Heavy machinery, equipment, or parts thereof, which are suspended or held aloft by use of slings, hoists, or jacks shall be substantially blocked or cribbed to prevent falling or shifting before employees are permitted to work under or between them.

The CO testified there were two employees working on the ground cleaning up the removed shingles. In doing so, they were working under the raised lift of a Lull fork truck. There was no operator in the Lull's cab. The Lull's lift had a load of shingles on it, and it was raised up to the roof so that employees on the roof could offload the shingles.[17] The CO said that the lift's hydraulics could fail and the lift could strike someone who was underneath it. Also, the shingles could be dropped during offloading, causing them to hit

[15] Walter Jensen's lack of good faith is amply demonstrated by his behavior on the day of the inspection. The CO's testimony in this regard is supported by the testimony of the FPS official who spoke to Walter Jensen and by pages 1 and 4 of C-59, the official's report of the incident. (Tr. 60-72, 76-77, 112-18, 318).
[16] The 60 percent reduction applies to all of the penalties assessed in this case, unless otherwise indicated.
[17] The CO said that C-2 and C-3 showed the Lull with its lift raised. He also said that the person in C-3 identified with an "A" had walked out from in front of the Lull. (Tr. 131-32).

someone below.[18] The CO said the load was required to be chocked and the operator was required to be within 25 feet of the Lull's cab to be able to get to it in an emergency. He learned from Derek Jensen that Walter Jensen was the only operator of the Lull. When Walter Jensen arrived at the site, he lowered the lift and turned off the Lull. He also told the CO he was the operator of the Lull. (Tr. 112, 116, 124-26, 254-55).

Walter Jensen agreed with the CO that no one should be underneath the lift when the Lull is in use. He also agreed that when the Lull is in use and the lift is extended, the operator has to be in the cab or nearby. According to Mr. Jensen, he had raised a load of shingles up to the roof and then lowered the lift to the ground before he left. He believed the employees had run out of shingles and had reloaded the lift and raised it back up while he was gone. He said his son, Derek Jensen, also operated the lift. (Tr. 448-50).

Based on my credibility determinations above, the testimony of the CO as to what he learned during the inspection is credited over the contrary testimony of Walter Jensen.[19] I find, therefore, that Mr. Jensen raised the lift with the load of shingles up to the roof and then left the lift in that position when he departed the job site. I also find, as the CO testified, that two employees were working underneath the raised lift. In view of the record, the Secretary has shown all of the elements necessary to prove the alleged violation, including knowledge. This item is affirmed as a serious violation, as it is clear that a lift or a bundle of shingles falling on an employee could cause serious injury.

The proposed penalty for this item is $1,400.00. The CO determined the severity of this violation to be high and the probability to be medium. (Tr. 126-27). The Court finds the proposed penalty appropriate. A penalty of $1,400.00 is assessed.

[18] The CO noted that a bundle of roof shingles weighs 80 pounds. (Tr. 125).
[19] I observed Mr. Jensen's demeanor on the stand, including his body language and facial expressions. I found him to be a less than candid witness. Further examples of his lack of candor are set out *infra*.

Serious Citation 1, Item 4 (No. 09-1796, Hanover Inspection)[20]

Item 4a alleges a violation of 29 C.F.R. 1926.1053(b)(15), which requires ladders to be inspected by a competent person for visible defects on a periodic basis and after an occurrence that could affect their safe use.

Item 4b alleges a violation of 29 C.F.R. 1926.1053(b)(16), which states:

> Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

CO LaRose testified that the ladder set up to access the roof had a broken rung on the bottom and two bent rungs on its lower portion. He said C-6 through C-10 showed the ladder and that C-8 and C-9 showed the bent and broken rungs. He asked Walter Jensen if anyone had inspected the ladder before its use. Mr. Jensen said no one had. Mr. Jensen also said he would take the ladder down and replace it. The CO noted that using the ladder as it was could cause an employee to slip and fall, which could result in a sprained ankle or back or broken bones. He also noted that a ladder with such defects does not have its full structural strength. The CO saw all seven employees, including Derek Jensen, use the ladder when they came down from the roof. (Tr. 127-32, 198).

Walter Jensen testified that ladders used at his sites are inspected "[e]very day" at the time they are put up, as "[o]ur lives depend on them." He indicated his son, Derek Jensen, would have been the person who inspected the cited ladder. He also indicated that he always had extra ladders at his sites. Walter Jensen said that no defects or problems

[20] The Secretary withdrew Item 3, alleging a violation of 29 C.F.R. 1926.601(b)(8), at the hearing. (Tr. 17).

with the ladder had been reported to him. He indicated the bent and broken rungs could have been caused that day by planks or shingles falling on them. (Tr. 436-37, 450-52).

Based on my credibility findings *supra*, I credit the CO's testimony that Walter Jensen told him that no one had inspected the ladder at the site. As to Walter Jensen's indicating that the rungs could have been damaged that day, the CO agreed he did not know when the rungs were damaged. He noted, however, that ladders must be inspected on a periodic basis and after an event that could affect their safety. (Tr. 261-63). I find that regardless of when the rungs were damaged, Respondent did not inspect the ladder as required by 29 C.F.R. 1926.1053(b)(15). I also find that the ladder was used with structural defects, in violation of 29 C.F.R. 1926.1053(b)(16).

In view of the evidence of record, the Secretary has shown all of the required elements to prove a violation of the cited standards. With respect to knowledge, it is clear that Walter and Derek Jensen could have discovered the ladder's damage with the exercise of reasonable diligence. Items 4a and 4b are affirmed as serious violations.

The total proposed penalty for Items 4a and 4b is $1,400.00. The CO determined the severity of the violations to be greater and the probability medium. (Tr. 131). The Court finds the proposed penalty to be appropriate. That penalty is therefore assessed.

Willful Citation 2, Item 1 (No. 09-1796, Hanover Inspection)

This item alleges a violation of 29 C.F.R. 1926.501(b)(11), which states that:

> Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

As set out *supra*, CO LaRose observed seven workers on the roof. Six wore body belts but only three were tied off to lifelines, and two of those were tied off to the same

anchor. The other three were not tied off at all. The seventh employee wore a harness but was walking on the roof without being tied off. Also, one employee's lifeline was rigged so as to allow the employee to fall to the ground.[21] There were brackets with planks on them on the roof to provide some level footing for the employees, but, as the CO noted, roof brackets are not fall protection.[22] The CO also noted that although the employees tied off upon seeing him, they all disconnected and walked across the roof without protection to get to the ladder. The CO explained that to have 100 percent fall protection, as required on the roof at the site, employees should have used a double lanyard system when they walked along the roof. (Tr. 96-111, 132-36, 229-31).

The CO's testimony in Item 1, *supra*, establishes that two employees were tied off to the same anchor on the roof. Derek Jensen, the foreman, was one of those employees. The CO's testimony in Item 1 also establishes the hazard of that condition. In Item 1, the CO explained that body belts have been prohibited since 1998. He further explained that OSHA now requires use of a harness with a shock-absorbing lanyard that is connected to a lifeline, which itself is connected to an anchorage point. Based on the CO's testimony in Item 1, and that set out in the preceding paragraph, the record shows that none of the employees at the site were in compliance with OSHA's fall protection standards, which exposed them to falls from the roof and serious or fatal injuries.[23] I find the Secretary has shown all of the elements required to prove the alleged violation. Knowledge is shown by

[21] The CO said the employee in C-16 and C-24 showed this condition. The CO noted the employee was wearing a body belt and his lanyard was on backwards. The lanyard was connected to a rope grab that was at the end of a 50-foot lifeline. There was a non-adjustable buckle where the rope grab was. If the employee fell, he would fall 50 feet even if he was tied off. (Tr. 103, 120-22, 159).

[22] The CO said that while roof brackets are acceptable fall protection for some residential construction, they were not acceptable as such for the subject site, which was a commercial job. (Tr.107, 135-36, 229-31).

[23] Although it cannot be determined from some of the CO's photos what the employees on the roof were wearing and whether they were tied off, the CO has been found to be a credible and convincing witness. I credit his testimony with respect to the alleged violation.

the fact that Derek Jensen was up on the roof with the other workers. He himself was wearing a body belt, and he and another worker were tied off to the same anchor.

Respondent asserts the violation was due to unpreventable employee misconduct. R. Brief, pp. 12-16. This defense was considered and rejected in Item 1, *supra*. It is also rejected for the following reasons. The CO testified that when he asked Walter Jensen why employees were wearing body belts, his response was: "I have full body harnesses, I guess they decided to wear body belts." The CO reiterated his question, and Mr. Jensen replied, "Because I allow them to." (Tr. 116-17). Mr. Jensen told the CO that he owned the body belts and harnesses at the site. (Tr. 118). He also admitted at the hearing that he knew that employees had worn body belts and had not tied off in the past. (Tr. 492).

This item has been classified as a willful violation. A violation is willful if 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. 93-0239, 1995) (citations omitted). Further,

> [I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation….A willful violation is 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, Inc., 16 BNA OSHC 1206, 1214 (No. 89-0433, 1993) (citations omitted).

The citation alleges that three prior violations of the same standard form the basis of the willful classification. The first is contained in C-58, a copy of a citation issued to

Summer & Winter on November 6, 2006.[24] Page 7 of C-58 sets out an alleged serious violation of 29 C.F.R. 1926.501(b)(11). A copy of the demand letter for the penalty relating to that citation appears on pages 14 and 15 of C-58. The demand letter shows a final order date of December 4, 2006. (Tr. 35-46). The Secretary has established the first of the three prior violations of 29 C.F.R. 1926.501(b)(11).

The two other prior violations set out in the citation refer to two willful violations of the cited standard. One was issued on July 13, 1995. The other was issued on July 10, 1995. At the hearing, the Secretary presented C-56, a summary of violations of the cited standard that Walter Jensen's companies had received. The first two entries on C-56 are the willful violations issued on July 10 and July 13, 2005. The Secretary also presented C-57, a printout from OSHA's IntraNet website.[25] C-57 shows the inspection history of companies of Walter Jensen from 1991 to 2009. Pages 8 and 10 of C-57 show the willful violations issued on July 10 and July 13, 1995, respectively. C-56 and C-57, taken together, show the two violations were resolved by an "ALJ Decision" on May 13, 1998. Thus, the final order date for the two 1995 willful violations was May 13, 1998. Respondent objected to the admission of any information in C-56 and C-57 related to companies predating Summer & Winter. Respondent's objection was initially sustained.

[24] The willful citation alleges that the prior citation was issued on November 10, 2006, that the item number was 003, and that the Inspection Number was 309557327. C-58, however, shows that it was issued on November 6, 2006, that the relevant item number was 2b, and that the Inspection Number was 309554327. The willful citation is accordingly modified and amended to conform to C-58, the copy of the prior citation.

[25] The record shows the CO created C-56 from C-57 and printed out C-57 at the request of the Secretary's counsel. (Tr.141-43). C-56 shows the company as "Walter Jensen d/b/a Sharon & Walter Construction" for the July 10, 1995 willful violation. C-56 shows the company as "Sharon & Walter Construction, Inc." for the July 13, 1995 violation. C-57 shows the company as "Walter Jensen, Dba S&W Construction" and "S&W Construction," respectively, for the July 10 and July 13, 1995 violations.

Ultimately, however, based on testimony of the CO and Walter Jensen himself, C-56 and C-57 were admitted in their entirety.[26] (Tr. 22-34, 141-43, 237-42, 281-301, 509-11).

The foregoing clearly shows Walter Jensen's knowledge of the prior violations as set out in the subject citation. Respondent contends that it is inappropriate to use the 1995 violations to support the willful violation in this case, as the company responsible for the prior violations is no longer in business. R. Brief, pp. 20-21, 25. As the Secretary notes, however, on November 18, 2010, the Commission issued its decision in *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286 (No. 00-1402, 2010). S. Brief, pp. 17-23.

In that decision, the Commission utilized the NLRB's "substantial continuity" test to find that it was appropriate to use two prior violations committed by Walter Jensen's sole proprietorship as the basis for affirming as "repeat" a violation committed by Sharon & Walter Construction, Inc. The factors the Commission considered were: (1) whether the business of both employers is essentially the same; (2) whether the work and working conditions of both companies is basically the same; and (3) whether there is a continuity of personnel who control decisions related to safety and health. In affirming the violation as "repeat," the Commission found that all three elements were met. *Id*. at 1294-96. As to (3), it specifically noted that Walter Jensen was in charge of both companies and ran their operations on a daily basis. He was the sole owner and supervisor of both businesses, and

[26] As the Secretary points out, Walter Jensen testified about his previous companies and the fact that each went into bankruptcy, after which a new company was formed. The first was a sole proprietorship, Walter Jensen, d/b/a S&W Construction. The second was S&W Construction, Inc., the third was Sharon and Walter Construction, Inc., and the fourth is his present company. Mr. Jensen indicated that in each new company, he used equipment and employees from the preceding company. (Tr. 476-90). He also testified (in a prior deposition) that S&W Construction was "the same" as Sharon and Walter Construction. (Tr. 484). The interchangeable nature of the companies is shown by employees at the two sites in this matter, including Derek Jensen, stating that they worked for" S&W." Two employees at the Manchester site even wore "S&W Construction" T-shirts. (Tr. 100, 122-23, 166, 372-76; C-36). S. Brief, pp. 16-17.

he had control over decision-making in both companies, including that relating to employee safety and health. *Id*. at 1295-96.

In the same decision, the Commission also affirmed an alleged willful violation of 29 C.F.R. 1926.501(b)(11). Its basis for doing so was that the two companies collectively had received a total of four prior citations for the same or an equivalent standard. Further, the CO who had conducted one of the earlier inspections, in May 1995, testified that he personally had explained the fall protection standard to Walter Jensen. The Commission thus found that Walter Jensen had a "heightened awareness of the violative condition and the requirements of the cited standard."[27] (citations omitted). *Id*. at 1291.

In view of the foregoing, the willful classification of the present alleged violation of 29 C.F.R. 1926.501(b)(11) is plainly appropriate. The only difference between Walter Jensen's current business and those discussed in *Sharon & Walter, supra*, is the fact that Derek Jensen is now the foreman on some of the company's work sites.[28] Walter Jensen is nonetheless the person who controls decisions relating to his business. He described himself as "supervisor/manager/owner" of Summer & Winter. (Tr. 402-03). And Lawrence Jefferson, the individual who has worked for Walter Jensen off and on for six or seven years, testified that although Derek Jensen is the foreman on "some jobs," Walter Jensen is the "man in charge" when he is present on the job site. (Tr. 371-72).

[27] Walter Jensen's heightened awareness is also shown by his telling the FPS official who visited the site that he "understands OSHA's regulations and [has] been in business for a long time." He also said that he "knows the guys have to wear a full harness, but sometimes they wear only the waist belts." (C-59, p. 4).

[28] Walter Jensen's testimony that his prior and present companies are not "just one continuing company" and that they "do different things" is not credited. (Tr. 455). The Commission, in *Sharon & Walter*, found specifically that the two companies discussed therein were essentially the same, performing roofing and other general construction services. *See Sharon & Walter Constr., Inc.*, 23 BNA OSHC at 1295. Mr. Jensen himself stated at the hearing that his present company's work in 2009 was about 60 percent roofing. (Tr. 398-99).

Based on the evidence of record, the alleged violation is properly characterized as willful. This item is therefore affirmed as willful.

The Secretary has proposed a penalty of $70,000.00 for this item. The CO testified that the reduction for size was not applied to this item because the Area Director ("AD") in his office determined the reduction was inappropriate, due to the high gravity of the violation and the intentional disregard of the standard. (Tr. 284-86). The CO noted the multiple inspections Walter Jensen had been involved in and the citations resulting from those inspections. He also noted that the company truck at the site had all the equipment necessary for the employer to be in compliance but it was not being used. (Tr. 137-43). The CO said he was aware of other cases where the reduction for size was not applied to a specific item but was applied to the other citation items. (Tr. 287-88). Stephen Rook, the Assistant Area Director ("AAD") in the CO's office, testified the AD has the discretion to eliminate reductions in a particular case. He has not seen this done routinely but has seen it done six to 12 times in his experience. (Tr. 502, 507).

Respondent asserts that OSHA's failure to apply the reduction for size for this item was improper. R. Brief, pp. 23-25. I do not find that to be the case, in light of the foregoing testimony. Respondent also suggests that the penalty is in retaliation for Walter Jensen's behavior at the Hanover site. R. Brief, p. 24. The CO testified to the contrary, and I credit his testimony. (Tr. 287-88).The CO also testified that OSHA penalties are meant to be a deterrent for employers who expose their employees to hazards. (Tr. 288). I agree with the CO's testimony in this regard. The Court finds the proposed penalty to be appropriate. A penalty of $70,000.00 is assessed.[29]

[29] Walter Jensen testified in defense of this item and the proposed penalty. For example, he testified about training he has provided to employees and the fact that he has had no injuries on his job sites. (Tr. 405-07,

Repeat Citation 3, Item 1 (No. 09-1796, Hanover Inspection)

This item alleges a violation of 29 C.F.R. 1926.1053(b)(1). The cited standard requires that when portable ladders are used to access an upper landing surface, the ladder side rails shall extend at least 3 feet above the upper landing surface to which the ladder is used to gain access. The CO testified that the ladder at the site extended 28 inches above the roof where employees accessed the ladder. He said that C-24 showed an employee bent over and grabbing onto the top of the ladder to climb down from the roof. The employee was already off balance due to the sloped roof, and that, combined with leaning over to grab the ladder, could have caused the employee to fall 30 feet to the ground.[30] The CO also said the ladder was a 40-foot extension ladder with 1-foot-high rungs. The hazard could have been abated by extending the ladder a foot more, so that it would have been 3 feet above the roof. The CO saw all the employees on the roof, including Derek Jensen, climb down the ladder. (Tr. 156-61, 199, 257-61, 277-78).

The foregoing establishes the alleged violation. Walter Jensen testified it looked like the ladder was 3 feet above the roofline in C-24. (Tr. 439-40). The CO's testimony and C-24, however, show it was not. Mr. Jensen admitted that the ladder rungs were "about a foot" apart. (Tr. 463). Based on the record, the Secretary has shown all of the elements required to prove the alleged violation, including knowledge. Walter and Derek Jensen could have learned of the violation with the exercise of reasonable diligence.

424-26, 458). His testimony about training is belied by the evidence set out *infra* in Item 4, Serious Citation 1, relating to the Manchester inspection. His testimony about having no injuries on his jobs is belied by the Commission's S*haron & Walter* decision, discussed above, which involved an employee who fell off a roof and was injured. *See Sharon & Walter Constr., Inc.,* 23 BNA OSHC at 1287. Mr. Jensen also testified that he had never before sworn at an OSHA CO the way he had at the Hanover site. (Tr. 462). AAD Rook, however, testified he had inspected several sites involving Walter Jensen companies in the past. He described one particular inspection where his encounter with Mr. Jensen was very similar to the one CO LaRose had. (Tr. 495-98).

[30] *See* footnote 20, *supra*, for the additional hazard of this situation the CO described.

The Secretary has classified this item as a repeat violation. A violation is repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.[31] *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063-64 (No. 16183, 1979). The CO's testimony shows the repeat classification was based on the same 2006 inspection of Summer & Winter discussed in Willful Item 1, *supra*. That inspection resulted in a citation for a violation of 29 C.F.R. 1926.1053(b)(1), the same standard cited here. (Tr. 159-60). C-58, also discussed *supra*, is a copy of that citation and a demand letter for the penalty due.[32] The demand letter shows a final order date of December 4, 2006. The Secretary has established that the present violation of 29 C.F.R. 1926.1053(b)(1) is repeated. The violation is affirmed as repeated.

The Secretary has proposed a penalty of $4,000.00 for this item. The CO testified that a fall from the roof would have resulted in broken bones or death, indicating the violation had high severity and greater probability. (Tr. 106, 159). I find the proposed penalty appropriate. A penalty of $4,000.00 is accordingly assessed.

Serious Citation 1, Item 1 (No. 09-1797, Manchester Inspection)

Item 1 alleges a violation of 29 C.F.R. 1926.102(a)(1), which requires employees to be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents. CO LaRose saw employees on the roof of the Denron building using pneumatic nail guns without eye protection.[33] C-25 is his photo of Derek Jensen and Lawrence Jefferson using

[31] Respondent urges that a repeat violation cannot be based upon only one previous violation of the same standard. R. Brief, pp. 22-23. The Commission has rejected this view. *See Potlatch*, 7 BNA OSHC at 1064.
[32] Page 7 of C-58 sets out the alleged violation of 29 C.F.R. 1926.1053(b)(1).
[33] The CO's inspection of the Manchester site is summarized on pages 3-4 of this decision.

the nail guns to attach wood strapping to the roof. C-26 is his photo of the nail guns and a DeWalt air compressor. The CO also saw a circular saw up on the roof, as shown in his photo C-27. He did not see anyone using it, but Derek Jensen said he had used it to cut the wood strapping. The CO testified that not using safety glasses for such work could cause eye injuries. Sawdust getting in the eyes can scratch the corneas, and a piece of metal getting in an eye can cause blindness.[34] When the CO spoke to him, Derek Jensen stated that he had no safety glasses in the truck at the site. (Tr. 168-72, 204-06).

Walter Jensen testified that he keeps a full case of safety glasses in each of his trucks, that employees "absolutely" knew to wear the glasses, and that if anyone was not wearing them it was employee misconduct. (Tr. 416-19). In view of the CO's testimony above, and particularly Derek Jensen's admission that there were no safety glasses at the site, Walter Jensen's testimony is not credited. The fact that the foreman, Derek Jensen, was not wearing safety glasses establishes knowledge and negates any contention that the violation was due to employee misconduct. This item is affirmed as serious.

The proposed penalty for this item is $1,400.00. The CO testified that the severity of this item was high, in light of the injury a nail gun could cause, and that the likelihood of an accident occurring was medium. He also testified that a 60 percent reduction for size was applied to the penalty for this item.[35] (Tr. 171-72). The Court finds the proposed penalty appropriate. It is accordingly assessed.

Serious Citation 1, Item 2 (No. 09-1797, Manchester Inspection)

Item 2 alleges a violation of 29 C.F.R. 1926.404(b)(1)(i), which requires the employer to use either ground fault circuit interrupters ("GFCIs") or an assured

[34] The CO said the metal that shoots out of a nail gun is thin and about a quarter-inch long. (Tr. 168-70).
[35] The 60 percent reduction for size has also been applied to the other items in this case.

equipment grounding conductor program to protect employees on construction sites. The CO testified that the circular saw on the roof was being powered by an extension cord that was plugged into an outlet in Denron's garage. The CO looked at the outlet and saw there was no GFCI on it.[36] He also looked at the outlet's circuit breaker, which might have had a GFCI on it, but it was locked. The CO spoke to Mark Bichneu, Denron's safety director, who was with him during the inspection, and to the Denron employee who ran the warehouse. After speaking to them, the CO concluded the outlet had no GFCI protection. The CO discussed the condition with Derek Jensen, who had nothing to say. The warehouse employee provided a "pigtail" to Summer & Winter after the CO found no GFCI. The CO said a "pigtail" is a 2-foot extension cord with a built-in GFCI. He also said that the employees, while using the saw, could have cut through its cord or the extension cord and been shocked, which could cause disorientation or even cardiac arrest. (Tr. 82, 172-76).

Mr. Bichneu testified he was present when CO LaRose checked the subject outlet for GFCI protection. He further testified that that outlet, and a second outlet that was near another overhead door, did not have GFCI protection. Mr. Bichneu said that typically, an outlet with GFCI protection is obvious as it has a reset button on it. He also said that after the inspection, he had a third party perform a safety audit of the warehouse. This resulted in any outlets without GFCI protection being replaced with GFCI outlets. (Tr. 82-88).

Walter Jensen testified he had told employees to always plug into a GFCI plug when using power tools. He agreed he saw no GFCI in C-29, the CO's photo, but he said he had been told the whole building was GFCI-protected. He also said he was not there

[36] C-29 depicts the cited outlet with the circuit breaker box next to it. (Tr. 210-11).

when the extension cord was plugged into the outlet in the warehouse and that he never saw the condition. Mr. Jensen stated that he owned several pigtails. (Tr. 419-20).

Based on the testimony of the CO and Mr. Bichneu, I find that the outlet had no GFCI protection as required. I further find that, even if Mr. Jensen had no knowledge of the condition, Derek Jensen, the foreman at the site, could have discovered it with the exercise of reasonable diligence.[37] This is particularly true since, as even Mr. Jensen indicated, a GFCI on an outlet is obvious. That Derek Jensen had nothing to say when the CO told him about the condition suggests he may well have known there was no GFCI on the outlet. Further, even if Walter Jensen did in fact own "several pigtails," apparently none of those were at the work site. I conclude the Secretary has shown all four elements of her burden of proof. I also conclude the violation was serious. The CO testified that an electrical shock could cause a cardiac arrest; it could also cause disorientation, which in this case could have resulted in a fall from the roof. (Tr. 175).

The proposed penalty for this item is $800.00. The CO testified that the severity of this item was medium and the probability was lesser. (Tr. 175). The Court finds the proposed penalty appropriate. A penalty of $800.00 for this item is assessed.

Serious Citation 1, Item 3 (No. 09-1797, Manchester Inspection)

Item 3 alleges a violation of 29 C.F.R. 1926.502(d), in that personal fall arrest systems and their use did not comply with the provisions set out at 29 C.F.R. 1926.502(d)(1) through (d)(24). The cited standard provides, in pertinent part, as follows:

[37] I have noted Walter Jensen's testimony that he was told the whole building was GFCI-protected. This statement, even if true, did not end Summer & Winter's duty to investigate the situation. If all employees had in fact been told to use only GFCI outlets, Derek Jensen should have learned before the outlet was used that it had no visible GFCI. He then could have checked with someone at Denron, like Mr. Bichneu, who would have told him the outlet had no GFCI; Mr. Bichneu then would have given Derek Jensen a pigtail.

> Personal fall arrest systems and their use shall comply with the provisions set forth below. Effective January 1, 1998, body belts are not acceptable as part of a personal fall arrest system.

The CO's testimony about what he saw upon arriving at the Manchester site is set out on pages 3 and 4 of this decision. In sum, he saw four workers walking on the roof of the Denron building. Three wore harnesses that were not attached to anything, and none of the three had the leg straps of his harness attached. The fourth worker wore a body belt that was connected to a lifeline. Derek Jensen was one of the employees on the roof in a harness. The CO asked him to come down, and he described what he had seen. Derek Jensen replied, "What am I going to say, you got me."[38] (Tr. 164-67, 177-83, 187-97).

CO LaRose testified that the hazard of not fastening the harness leg straps is that if the worker is tied off and falls, the impact from when the lifeline snaps into place can cause the worker to fall out of the harness. He said the leg straps are part of the harness and that to fasten one, "[y]ou just bring it around your leg and strap it into the buckle, like a regular belt." He also said the harnesses served no purpose anyway, as the workers wearing them were not tied off. CO LaRose further testified that the hazard of using a body belt is that the impact from a lifeline snapping into place can cause internal injuries, such as ruptured organs, or a broken back; the impact can also cause an employee to fall out of the body belt. (Tr. 177-83, 187-97).

The CO's testimony and photos, as well as the admission of Derek Jensen, clearly establish all four elements of the Secretary's burden of proof.[39] Respondent offered

[38] The CO identified certain of his photos, *i.e.*, C-31-37, C-39-40, C-42 and C-45-47, as showing the cited conditions. Derek Jensen is the worker bent over in C-46. He is also the worker noted with a "B" in C-47. The workers to his left and right in C-47 are Lawrence Jefferson and "Jeremy," respectively. (Tr. 179-95).

[39] The record shows that the standard applies, that its terms were not met, and that Respondent's employees were exposed to the cited hazards. (Tr. 165-68). Foreman Derek Jensen's participation in the violative conduct and his admission demonstrate knowledge. (Tr. 197).

certain testimony in defense of this item. Mr. Jefferson, for example, testified that all of the workers at the site were given harnesses, were to wear them, and were to be tied off. He admitted, however, that he and the other workers were not tied off. (Tr. 351, 357-60). Walter Jensen testified that he saw "no problems" that morning before leaving the site; the two employees on the roof were "hooked in" and wearing their harnesses properly. He indicated that an employee at the site apparently had found an old body belt among the other equipment and had worn it that day. He also indicated that wearing a body belt would be employee misconduct and that he would discipline a worker he saw using a body belt for fall protection. (Tr. 411, 415-16, 421-24). None of this testimony refutes the Secretary's evidence, and Respondent's claims of employee misconduct have already been considered and rejected *supra*. This item is affirmed as a serious violation, based on the CO's testimony that falls from the roof, which was a six-pitch 16-foot-high roof, could have caused serious injuries or death. (Tr. 167, 177-79, 183).

The Secretary has proposed a penalty of $2,000.00 for Item 3. The CO determined that this item had high severity and greater probability. (Tr. 178-79, 183). I find the proposed penalty appropriate. That penalty is accordingly assessed.

Serious Citation 1, Item 4 (No. 09-1797, Manchester Inspection)

Item 4 alleges a violation of 29 C.F.R. 1926.503(a)(2). The cited standard requires the employer to assure that each employee has been trained by a competent person qualified in the nature of fall hazards in the work area, the correct procedures for erecting the fall protection systems used, and the use and operation of the systems utilized.

CO LaRose testified that after finishing his inspection, and as he was getting into his car, Derek Jensen came up to him and asked: "Is there any place that I can find all this

information, is it in a book, is it in pamphlets?" The CO asked him if he had received any training in fall protection from his father or otherwise. Derek Jensen replied that he had not. The CO said that this conversation, together with the improper use of fall protection at the site, was the basis for this item. The CO also said that training can be obtained through courses offered by schools, by consultants or by equipment manufacturers from whom the employer is buying equipment. (Tr. 183-87).

Walter Jensen testified about the training he has received in fall protection and other safety matters. He also testified about having passed all of this information on to his employees, through "mini get-togethers" held every morning at his job sites and through meetings held at the shop; the meetings include going over what safety equipment is required and how to use it, and he has shown employees how to put on the harnesses and adjust the straps. Mr. Jensen said that he owns "tens of thousands of dollars of safety equipment" and that he bought it to protect employees. (Tr. 399-402, 405-07, 424-26).

Despite Mr. Jensen's testimony, I credit the CO's testimony that Derek Jensen told him that he had received no training in fall protection from his father or otherwise. (Tr. 183-84). I find that the Secretary has shown all four of the necessary elements to meet her burden of proof as to this item. The CO testified that the cited condition could have resulted in employee falls from the roof, which could have caused serious injuries or death. (Tr. 186-87). This item is affirmed as a serious violation.

A penalty of $2,000.00 has been proposed for this item. The CO did not testify as to the severity and probability in regard to this item. It is reasonable to conclude, however, that this item had high severity and greater probability, in light of the situation

at the site and the injuries that could have occurred. *See also* Item 3, *supra*. The Court finds the proposed penalty appropriate, and that penalty is assessed.

Repeat Citation 2, Item 1 (No. 09-1797, Manchester Inspection)

This item alleges a violation of 29 C.F.R. 1926.501(b)(11), which states that:

> Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

The CO's testimony shows that the factual basis for this item was the same as for Item 3 of Serious Citation 1, *supra*. (Tr. 164-67, 177-83, 187-97). In view of my findings and conclusions as to Item 3, the Secretary has also met her burden of proof in regard to this item. The CO stated that the repeat classification of this item was based on a prior citation issued to Summer & Winter; that citation became a final order in early December 2006, after the company failed to file a timely notice of contest.[40] (Tr. 197-98).

A violation is repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Centex-Rooney Constr. Co.*, 16 BNA OSHC at 2130; *Potlatch Corp.*, 7 BNA OSHC at 1063-64. The record in this case shows that C-58 is the prior citation CO LaRose referred to as forming the basis of the repeat classification. C-58 is a copy of a citation issued to Summer & Winter on November 6, 2006. Page 7 of C-58 sets out an alleged serious violation of 29 C.F.R. 1926.501(b)(11), the same standard cited here. A copy of the demand letter for the penalty relating to that citation appears on pages 14 and 15 of C-58.

[40] The CO also stated that this item was not classified as willful, as in the Hanover inspection, because of the use of harnesses, even though the workers wearing the harnesses were not tied off. (Tr. 238).

The demand letter shows a final order date of December 4, 2006.[41] (Tr. 35-46). The Secretary has met her burden of establishing that the present violation of 29 C.F.R. 1926.501(b)(11) is repeated. This item is affirmed.

The proposed penalty for this item is $4,000.00. The CO testified that this item had high severity and greater probability. (Tr. 178-79, 183, 233-34). The Court finds the proposed penalty appropriate. A penalty of $4,000.00 is therefore assessed.

Findings of Fact and Conclusions of Law

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

ORDER

1. Item 1 of Serious Citation 1, Docket No. 09-1796, alleging a violation of 29 C.F.R. 1926.502(d)(15), is AFFIRMED, and a penalty of $2,000.00 is assessed.

2. Item 2 of Serious Citation 1, Docket No. 09-1796, alleging a violation of 29 C.F.R. 1926.600(a)(3)(i), is AFFIRMED, and a penalty of $1,400.00 is assessed.

3. Items 4a and 4b of Serious Citation 1, Docket No. 09-1796, alleging violations of 29 C.F.R. 1926.1053(b)(15) and (b)(16), respectively, are AFFIRMED, and a total penalty of $1,400.00 is assessed.

4. Item 1 of Willful Citation 2, Docket No. 09-1796, alleging a violation of 29 C.F.R. 1926.501(b)(11), is AFFIRMED, as modified herein, and a penalty of $70,000.00 is assessed.

5. Item 1 of Repeat Citation 3, Docket No. 09-1796, alleging a violation of 29 C.F.R. 1926.1053(b)(1), is AFFIRMED, and a penalty of $4,000.00 is assessed.

[41] The repeat citation shows the final order date as November 29, 2006. C-58 shows that the actual final order date was December 4, 2006. The repeat citation is modified and amended to reflect the final order date as in C-58.

6. Item 1 of Serious Citation 1, Docket No. 09-1797, alleging a violation of 29 C.F.R. 1926.102(a)(1), is AFFIRMED, and a penalty of $1,400.00 is assessed.

7. Item 2 of Serious Citation 1, Docket No. 09-1797, alleging a violation of 29 C.F.R. 1926.404(b)(1)(i), is AFFIRMED, and a penalty of $800.00 is assessed.

8. Item 3 of Serious Citation 1, Docket No. 09-1797, alleging a violation of 29 C.F.R. 1926.502(d), is AFFIRMED, and a penalty of $2,000.00 is assessed.

9. Item 4 of Serious Citation 1, Docket No. 09-1797, alleging a violation of 29 C.F.R. 1926.503(a)(2), is AFFIRMED, and a penalty of $2,000.00 is assessed.

10. Item 1 of Repeat Citation 2, Docket No. 09-1797, alleging a violation of 29 C.F.R. 1926.501(b)(11), is AFFIRMED, as modified herein, and a penalty of $4,000.00 is assessed.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC JUDGE

Date: May 13, 2011
Washington, D.C.