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. TODD JOSEPH PROPERTIES, Respondent.	OSHRC DOCKET NO. 11-0822

APPEARANCES:

John A. Nocito, Esquire, U.S. Department of Labor, Office of the Solicitor
Philadelphia, Pennsylvania
For the Complainant.

Todd Joseph
Todd Joseph Properties, Philadelphia, Pennsylvania
For the Respondent, *pro se*.

BEFORE: Covette Rooney
Chief Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under 29 U.S.C. § 659(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On November 1, 2010, the Occupational Safety and Health Administration ("OSHA") inspected a worksite of Respondent, Todd Joseph Properties ("Respondent" or "TJP"). The site was located in Philadelphia, Pennsylvania, and the inspection resulted in Respondent being issued one "serious" citation and one "repeat" citation. Respondent contested the citations and the

proposed penalties. The hearing in this matter took place in Philadelphia, Pennsylvania, on October 28, 2011.[1] Both parties have filed post-hearing submissions.

The OSHA Inspection

Wylie Hinson is the OSHA Compliance Officer ("CO") who inspected the site. On November 1, 2010, he was driving by the site when he saw an old church building being demolished. The CO parked his car, and he observed two employees without fall protection working 2 to 3 feet from an unprotected edge that was 15 to 20 feet above ground level. He then observed one of the employees climb up a scaffold without using a ladder. The employee climbed up to the scaffold's top platform, which was about 20 feet above the floor where the two employees had been working. The CO noted that the scaffold had inadequate fall protection. After photographing his observations, the CO called his office and was told to conduct an inspection. CO Hinson approached the site and asked some employees on the ground level who was in charge. One of them went in the building and returned with Jeff Joseph, who identified himself as the superintendent.[2] The CO held an opening conference with Mr. Joseph and told him what he had seen. Mr. Joseph had no questions, and the CO proceeded to conduct his inspection. The CO interviewed the two employees he had observed, Lewis Freeman and Donald Conover, while he was up on the second floor. He also interviewed Mr. Joseph and held a closing conference with him, after which he took additional photographs of the scaffold on the second floor. The CO then left the worksite. (Tr. 11-23).

CO Hinson's photographs are GX-11, pp. 1-14.[3] Page 1 shows Mr. Conover on the second floor, 2 to 3 feet from the floor's edge, with no fall protection. It also shows employees on the ground. One is operating a jackhammer, one is bending over, and the third, wearing a gray top and blue jeans, is Jeff Joseph. Pages 2-3 also show Mr. Conover up on the second floor. Pages 4-6 depict Mr. Freeman, the other employee who was working on the second floor; he was also 2 to 3 feet from the edge without any fall protection. Pages 7-8 portray Mr. Freeman climbing up the scaffold frame. Pages 9-10

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[1] At the hearing, the Secretary advised the undersigned that she was deleting Items 1, 2, 3a and 3b of Serious Citation 1. She also advised that she was going forward with Item 4 of Serious Citation 1 and with Items 1, 2a and 2b of Repeat Citation 2. (Tr. 5).

[2] The CO said he knew Jeff Joseph from previous inspections and that, to his knowledge, Jeff Joseph was related to Todd Joseph. (Tr. 19).

[3] The Secretary's exhibits are referred to as "GX" in this decision.

show him standing on the top platform of the scaffold, and pages 11-12 show him climbing down the scaffold frame. Pages 13-14 are the photographs the CO took of the scaffold just before he left the job site. (Tr. 22-48).

When the CO interviewed him, Mr. Freeman said "nothing" when asked what he had for fall protection from the edge. Mr. Freeman indicated he had had some training in scaffolds, but his response, when asked at what height fall protection is required, was "10 feet." When the CO interviewed Mr. Conover, that employee also said he had had no fall protection when working near the edge. Mr. Conover's response, when asked at what height fall protection is needed, was "5 feet." During his interview with the superintendent, the CO addressed all of the violations he had seen and Mr. Joseph did not dispute any of them. When asked why there was nothing to protect the employees from falls from the edge of the floor, Mr. Joseph stated that guardrails had previously been in place but had been taken down. He further stated that he believed the employees had been trained in fall protection, but he did not know who had given the training. When the CO brought up the scaffold violations, Mr. Joseph told him there was no ladder on the site. During the closing conference, CO Hinson asked Mr. Joseph to send him copies of the company's fall protection program, its scaffold program, and any documentation of fall protection training the employees had had. The CO never received any of the programs or documents he had requested. (Tr. 48-55, 58-60, 73-75).

Jurisdiction

TJP admits its principal place of business is located in Philadelphia, Pennsylvania, and that it had a place of employment at the subject site on November 1, 2010. It also admits it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that it had employees at the subject site on November 1, 2010. (GX-14, pp. 2-3; GX-15). TJP denies it utilizes tools, equipment, machinery, materials, goods and supplies which have originated in whole or in part from locations outside of Pennsylvania. (GX-14, p. 3; GX-15). The record, however, shows that TJP provided employees at the site with tools and equipment to perform their work. (Tr. 143, 154, 160-61; GX-13). Further, Commission precedent is well settled that construction work *per se* affects interstate commerce because there is an interstate market in construction materials and services. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531

(No. 77-3676, 1983). I find, therefore, that TJP is an employer under the Act and that the Commission has jurisdiction of the parties and subject matter of this proceeding.

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary must demonstrate that: (1) the standard applies; (2) the employer did not comply with the terms of the standard; (3) employees had access to the violative condition; and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Serious Citation 1, Item 4

This item alleges a violation of 29 C.F.R. § 1926.503(a)(1), which states that:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

CO Hinson's testimony is summarized above. His testimony and photographs show that two TJP employees, Mr. Freeman and Mr. Conover, were working near the edge of the second floor, which was 15 feet above the ground, without any fall protection.[4] His testimony also shows that when he questioned the two employees about the height at which fall protection is required, neither gave the correct answer. In particular, Mr. Freeman's answer was "10 feet," while Mr. Conover's answer was "5 feet."[5] The CO said he asked the question so he could determine if the employees had been trained in fall hazards. He concluded, based on their answers, the employees had not been trained as required. (Tr. 16-18, 26-36, 48-50; GX-11, pp. 1-6).

CO Hinson further testified that upon asking the superintendent if the employees had been trained in fall protection, Jeff Joseph told him he believed they had been but he did not know who had provided the training. The CO asked the superintendent to send him documentation of the fall protection training the employees had had. The CO never received any such documentation from TJP. (Tr. 51-52, 55, 58).

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[4] The CO stated that Jeff Joseph told him the second floor was 15 feet above the ground. (Tr. 30-31).

[5] Fall protection is required when employees are on a walking/working surface with an unprotected side or edge that is 6 feet or more above a lower level. *See* 29 C.F.R. § 1926.501(b)(1).

Todd Joseph, TJP's owner, testified that he himself had a certificate showing he had attended an OSHA class in fall protection after his company had received a previous OSHA citation. (Tr. 165-67). He offered no testimony or other evidence, however, that Mr. Freeman and Mr. Conover had received any training in fall protection. Mr. Freeman testified that he told the CO that he had been trained in falls, safety and security at OIC. (Tr. 148-49). This testimony, without more, does not establish that Mr. Freeman was trained as required, particularly in view of the CO's testimony.[6] As set out *infra*, in the discussion relating to Item 1 of Repeat Citation 2, I found the CO to be a credible witness in this matter. The CO's testimony is thus credited over that of Mr. Freeman.

Based on the record, I find that the Secretary has met her burden of proof as to this item. That is, she has shown that the standard applies, that its terms were not met, and that employees were exposed to the cited condition. She has also shown the element of knowledge. Jeff Joseph, TJP's superintendent, was directing the work at the site, and he knew the employees were working near an unprotected edge 15 feet above the ground. (Tr. 29-33, 50, 58, 155-56; GX-11, pp. 1, 3). The superintendent's knowledge is imputable to TJP, and TJP should have ensured that the employees were trained as required before allowing them to perform work that exposed them to fall hazards.[7]

This item has been classified as a serious violation. CO Hinson testified that the hazard of not having fall protection training was that the employees might not have recognized they were in danger of falling from the unprotected edge. If they had had the proper training, they would have known to not approach the edge; they also could have gone to their supervisor to request fall protection. The CO further testified that falls from the edge could have caused fractures, paralysis or even death. (Tr. 58-59). I find that the violation was properly classified. This item is affirmed as serious.

The Secretary has proposed a penalty of $1,000.00 for this item. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *See* section 17(j) of the Act, 29 U.S.C. § 666(j). Albert D'Imperio, the Area Director ("AD") of the OSHA office that issued the

[6] The CO testified that Mr. Freeman indicated he had had some training in scaffolds; but, when asked at what height fall protection was required, Mr. Freeman's response was "10 feet." (Tr. 48-49).

[7] The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993) (citations omitted).

citations, testified he was involved in determining the penalties in this case and that he followed OSHA's Field Operations Manual to do so. According to the AD, Item 4 of Citation 1 had high severity, due to the fall distance involved, and lesser probability, due to the lower likelihood of an injury occurring. A 60 percent reduction was applied to the penalty, due to the company's small size. No reductions were given for history or good faith; the employer had received OSHA citations within the previous three years, and it did not have a safety and health program or system in place. (Tr. 113-23; GX-17, p. 1). I find the proposed penalty of $1,000.00 appropriate. That penalty is therefore assessed.[8]

Repeat Citation 2, Item 1

This item alleges a violation of 29 C.F.R. § 1926.501(b)(1), which provides:

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

As noted in the preceding discussion, the CO's testimony and photographs show that two TJP employees, Mr. Freeman and Mr. Conover, were working near the edge of the second floor without any fall protection. The floor was 15 feet above the ground level, and the CO estimated the employees were working 2 to 3 feet from the edge when he saw them. (Tr. 16-18, 26-36; GX-11, pp. 1-6). When he interviewed them, both Mr. Freeman and Mr. Conover told him they had not had any fall protection when working near the edge. The CO saw no fall protection of any kind when he was up on the second floor. (Tr. 21, 48-50). The CO asked the superintendent why there was no fall protection; Jeff Joseph told him that guardrails previously had been in place but had been taken down two days before. (Tr. 51, 60, 73-75).

Mr. Freeman testified he did not tell the CO he had "nothing" for fall protection; rather, he told the CO they had some protection. He explained that there was a guardrail system on the edge; it was six to seven pieces of fencing, it was sufficient to cover the edge, and it was up almost every day.[9] He further explained that he had a weight belt around his waist that was also fall protection; he wore the belt so that if he went up on the

[8] Todd Joseph urges in his brief, as he did at the hearing, that no penalties are justified in this case as no one was hurt. (R. Brief; Tr. 168-70). This argument is rejected, for the reasons set out in Repeat Citation Item 1.

[9] When prompted by Todd Joseph, Mr. Freeman agreed that the fencing was up "every day." (Tr. 152).

scaffold he could use it to hook up to the side of the scaffold. He agreed, however, that he was not tied off to anything in the CO's photographs that showed him near the edge on the second floor. (Tr. 143-49, 152, 157-59; GX-11, pp. 4, 6).

Despite Mr. Freeman's testimony, I find he did in fact tell the CO he had nothing for fall protection on the day of the inspection. (Tr. 48). I observed the demeanor of Mr. Freeman and CO Hinson on the witness stand, including their body language and facial expressions. I found CO Hinson to be sincere and believable. Mr. Freeman, however, appeared to be less than candid in some of his testimony, and it was clear from certain statements that he was attempting to assist his employer in this matter. (Tr. 148-49, 152, 157-62). Another reason for crediting the CO is that his testimony is supported by other evidence in the record. His photographs clearly show that neither employee had any fall protection when working near the edge, and Mr. Freeman admitted he was not tied off in the photographs depicting him near the edge. (Tr. 157-59; GX-11, pp. 1-6). The CO's testimony is thus credited over that of Mr. Freeman to the extent their testimony conflicts. I find as fact that TJP's employees had no fall protection to prevent them from falling from the edge of the second floor on the day of the inspection. I further find that the superintendent, Jeff Joseph, was aware of the condition. He was directing the work at the site, and the CO's photographs show the superintendent working with two other employees on the ground, where the condition was in plain view. (GX-11, pp. 1, 3).

Todd Joseph testified, and he urges in his brief, that the fencing that served as guardrails on the edge may have been moved for the short time OSHA was at the site; he said there were times it had to be moved so that debris could be removed from that floor.[10] He further testified that the fencing was on site, even though it was not visible in photographs like GX-11, page 1. (Tr. 166, 170-71; R. Brief). Jeff Joseph, however, told the CO that the fencing had been taken down two days before the inspection. (Tr. 51, 60, 73-75). And even if the fencing was in place on the floor's edge at other times during the demolition work, it clearly was not there on the day of the inspection. Based on the CO's testimony, falls from the edge could have caused serious injuries or death. (Tr. 60-61).

This item has been classified as a repeat violation. A violation is repeated if, at the time of the alleged repeated violation, there is a Commission final order against the same

[10] TJP notes in its brief the CO agreed it was possible the fencing had been moved temporarily. (Tr. 75, 79).

employer for a substantially similar violation. *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 860 (3d Cir. 1996) (citing to *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979)). AD D'Imperio testified that this item was classified as repeat as TJP had been cited before for a similar violation. He identified GX-6 as a copy of the prior citation. GX-6 shows that on August 4, 2009,[11] in Inspection Number 312490337, TJP was cited for a violation of 29 C.F.R. 1926.501(b)(13).[12] (Tr. 95-102; GX-6, p. 1). GX-6 also shows, and the AD further testified, that that citation was settled informally and became final when the settlement agreement was signed by Todd Joseph and the AD on August 28, 2009. (Tr. 102-04; GX-6, pp.14-15). Based on the record, Item 1 of Repeat Citation 2 was properly classified. Item 1 is thus affirmed as a repeat violation.

The Secretary has proposed a penalty of $2,000.00 for this item. The AD's testimony about the penalty shows that this item had high severity and lesser probability. A 60 percent reduction for size was given, but no reductions were given for history or good faith, for the reasons noted above as to the serious citation item. (Tr. 123-24).

TJP disputes the proposed penalty, asserting that it is too harsh. It notes that if someone had been hurt on the job, a penalty would be justified; since no one was hurt, no penalty is justified. It also notes that, as no one was hurt, the fence rail "did its job." TJP points out that, in an act of good will, it donated most of the church's contents to other churches and nonprofit organizations in the community. (Tr. 168-70; R. Brief).

I have considered the above arguments of TJP. Those arguments are rejected. That no injuries occurred at TJP's job site is not relevant to whether the standard was violated or whether a penalty should be assessed. As the Act's preamble states, the purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). As early as 1974, the Fifth Circuit Court of Appeals stated:

> It is noteworthy that the Act does not establish as a *sine qua non* any specific number of accidents or any injury rate. Hence, Ryder's reliance on "only 10 injuries in five years" is misplaced. Moreover the Act specifically encompasses non-serious violations, i.e., violations which do

[11] The AD noted that the subject citation showed the prior violation date incorrectly; the correct date of the prior violation was August 4, 2009. (Tr. 97-98).

[12] AD D'Imperio testified that the prior violation and the subject violation were similar, in that both require fall protection at heights of 6 feet or more; the significant difference is that § 1926.501(b)(1) relates to general construction, while § 1926.501(b)(13) relates to residential construction. (Tr. 98-102).

> not create a substantial probability of serious physical harm. 29 U.S.C. Sec. 666(g)(j). Avoidance of minor injuries, as well as of major ones, was intended to be within the purview of this liberal Act.

Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974) ("*Ryder*").

In 1975, the Tenth Circuit Court of Appeals noted that "[o]ne purpose of the Act is to prevent the first accident." *Lee Way Motor Freight, Inc. v. Secretary of Labor*, 511 F.2d 864, 870 (10th Cir. 1975) (citing to *Ryder*, 497 F.2d at 233). And in 1980, the Supreme Court stated as follows:

> The Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring.

Whirlpool Corp. v. Marshall, 445 U.S. 1, 12 (1980).

In regard to TJP's donation of most of the church's contents to other churches and nonprofit groups in the community, that action is certainly commendable. Regardless, based on the fact that TJP violated the cited standard, and in view of the AD's explanation of how the proposed penalty was reached, I find the proposed penalty appropriate. A penalty of $2,000.00 is accordingly assessed.

Repeat Citation 2, Items 2a and 2b

Items 2a and 2b allege violations of 29 C.F.R. § 1926.451(g)(1)(vii) and § 1926.451(e)(1). The cited standards state, respectively, as follows:

> For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

> When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders … shall be used. Crossbraces shall not be used as a means of access.

CO Hinson's testimony and photographs show Mr. Freeman climbing up the side of a scaffold without using a ladder. They also show Mr. Freeman standing on the top platform of the scaffold; the top platform was 20 feet above the second floor level, and the scaffold had inadequate fall protection. The CO explained that the type of scaffold in use at the site was not made for climbing; the rungs on the side are not uniform, like

those of a ladder, and an employee could get his foot stuck in one of the rungs, or simply lose his footing, and fall from the scaffold. He further explained that the cross-bracing on the front and back of the scaffold's top level was not adequate fall protection. He said that either a top rail, 39 to 45 inches high, or a mid-rail, 18 to 24 inches high, was needed. He also said there was a triangle-shaped opening on the side of the scaffold that required a mid-rail. CO Hinson noted that without proper guardrails, Mr. Freeman could have fallen from the scaffold platform and been seriously injured. When the CO spoke to Jeff Joseph about these violations, the superintendent did not dispute them, and he told the CO there was no ladder at the site. (Tr. 17, 20-23, 36-48, 52-54; GX-11, pp. 7-14).

TJP contends that the weight belt Mr. Freeman had on at the site was adequate fall protection and that it worked because no one was hurt. (R. Brief). Mr. Freeman testified that he used the weight belt ("belt") around his waist so that if he went up on the scaffold he could hook up to the side of the scaffold, which would keep him from falling. He noted that the rope shown in some of the CO's pictures was what he used to attach to his belt and that he felt it was sufficient fall protection. Mr. Freeman said he was not hurt on the job. He also said he had worked for TJP for about six years, that safety equipment was always provided, and that he had never been hurt on any TJP job. (Tr. 143-47).

TJP's contention that the belt was adequate fall protection is rejected. First, as set out in the previous discussion, I credited the CO's testimony that Mr. Freeman told him he had nothing for fall protection.[13] (Tr. 48). Second, CO Hinson testified, and his photographs show, that the rope or cord was not attached to Mr. Freeman's waist.[14] (Tr. 85; GX-11, pp. 9-10). Third, Mr. Freeman admitted the belt he was wearing did not go over his shoulders. (Tr. 157-61). The CO testified the belt was not fall protection as it was not a harness, which goes around the shoulders and around the legs, thighs and upper chest; in case of a fall, a harness will keep the person from falling out and hitting the next level. He further testified that the belt he himself had used, when he lifted weights, did

[13] Although the CO asked this question in regard to protection from falls from the second floor edge, I conclude that, had Mr. Freeman actually used the weight belt as fall protection, he would have so informed the CO when asked the question. In any case, that Mr. Freeman had no fall protection while he was up on the scaffold is supported by the CO's testimony that, when he spoke to Jeff Joseph, the superintendent did not dispute any of the violations the CO had seen. (Tr. 54).

[14] The CO said the "blue thing" hanging down in GX-11, p. 7, could have been a rope or cord. (Tr. 81-83).

not have loops or buckles on it to attach things to.[15] The CO was adamant that the weight belt could not be used as fall protection because the belt was not a harness. (Tr. 79-88). AD D'Imperio agreed. He said OSHA does not allow a waist or body belt to be used, as it causes the force of a fall to be all in the body's center and can result in internal or spinal injuries; with a harness, the force is spread out along the whole body.[16] He also said the rope or cord at the site, if it had been tied with a knot to the weight belt, would have had reduced strength. The AD stated that a line with bungee-type material, which is shock absorbing, is the preferred type of line for fall protection. (Tr. 129-31).

In view of the foregoing, the Secretary has shown the necessary elements to prove the alleged violations, including knowledge.[17] The CO testified that Jeff Joseph told him he knew employees were working on the scaffold, and Mr. Freeman testified that the superintendent was directing his work and knew what he (Freeman) was doing that day. (Tr. 52, 155-56). The Secretary has also shown the violations were properly classified as repeat. The AD testified about GX-8 and GX-10, which support the repeat classifications of Items 2a and 2b. GX-8 and GX-10 establish that on August 20, 2010, in Inspection Number 314227620, TJP was cited for violations of the same standards cited in Items 2a and 2b of the repeat citation in this case.[18] The August 20, 2010 citation was settled informally and became final when Todd Joseph and the AD signed the settlement agreement on September 14, 2010. Items 2a and 2b of Repeat Citation 2 are affirmed as repeat violations. (Tr. 104-13; GX-8, pp. 1, 10-11; GX-10, pp. 2, 7-8).

The total proposed penalty for Items 2a and 2b is $4,000.00. The AD's testimony shows that these items were grouped for penalty purposes because the violations were related. Item 2a had high severity and greater probability, while Item 2b had high severity and lesser probability. A 60 percent reduction was given for size, but no reductions for history or good faith were given. (Tr. 125-28; GX-17, pp. 5, 7). I find the proposed penalty appropriate. A total penalty of $4,000.00 is assessed for Items 2a and 2b.

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[15] Mr. Freeman said his belt had hooks on the right side that he used to attach to the rope. (Tr. 147).

[16] The OSHA standard that addresses fall protection systems criteria and practices is in accord with the testimony of the AD and the CO. It states that: "Effective January 1, 1998, body belts are not acceptable as part of a personal fall arrest system." *See* 29 C.F.R. § 1926.502(d)(1).

[17] As to the applicability of the standard, the CO testified the subject scaffold, a fabricated frame scaffold, did not fit any of the scaffold descriptions set out in the first six paragraphs of the standard. (Tr. 61).

[18] The AD noted that the subject citation showed the prior violation date incorrectly; the correct date of the prior violation was August 20, 2010. (Tr. 110-11).

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

In accordance with the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 4 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.503(a)(1), is affirmed, and a penalty of $1,000.00 is assessed.

2. Item 1 of Repeat Citation 2, alleging a violation of 29 C.F.R. § 1926.501(b)(1), is affirmed, and a penalty of $2,000.00 is assessed.

3. Items 2a and 2b of Repeat Citation 2, alleging violations of 29 C.F.R. § 1926.451(g)(1)(vii) and § 1926.451(e)(1), respectively, are affirmed, and a total penalty of $4,000.00 is assessed for these items.

/s/
Covette Rooney
Chief Judge

Date: January 17, 2012
Washington, D.C.