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.	:	OSHRC DOCKET NO. 04-1793
	:	
BLUE RIDGE ERECTORS, INC.,	:	
	:	
Respondent.	:	

Appearances:

Terrence Duncan, Esquire
Office of the Solicitor
U.S. Department of Labor
New York, New York
For the Complainant.

Edward H. Feege, Esquire
John F. Ward, Esquire
Stevens & Lee
King of Prussia, Pennsylvania
For the Respondent.

Before: Judge Covette Rooney

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a work site of Respondent, Blue Ridge Erectors, Inc. ("Respondent" or "Blue Ridge") on March 24, 2004; the site was a gymnasium addition to the West Orange High School in West Orange, New Jersey, and Blue Ridge was erecting steel at the site. As a result of the inspection, on September 3, 2004, OSHA issued to Blue Ridge a Citation and Notification of Penalty alleging serious, willful and repeat violations. Blue Ridge contested all items of the citation, and the hearing in this matter was held from August 16 through 19, 2005, and on September 23, 2005. Both parties have filed post-hearing and reply briefs.

The OSHA Inspection

Patrick Nies, the OSHA Compliance Officer ("CO") who conducted the inspection, testified that he noticed the site on March 23, 2004, when he drove by it on his way back to his office and saw two people laying decking on the building. It was around 3 p.m. and school was letting out, and due to the heavy traffic he decided against entering the site. The CO went back to his office and spoke to his supervisor about the site, and he returned the next morning to inspect the site. (Tr. 32-34).

CO Nies further testified that upon arriving at the site on March 24, 2004, he walked around the perimeter for about an hour and videoed various exposures to hazards that he saw. He then entered the site and met with the general contractor, after which he met with Robert Zawistowski, the foreman for Blue Ridge. The CO conducted an opening conference with Zawistowski, who stated that the two workers the CO had seen laying decking that day and the day before were both employees of Blue Ridge. (Tr. 34-36).

The CO discussed the various violations he had seen at the site. Citation 1, Item 1 involved an aerial lift that had a hook and slings attached to its arm; an individual in a red jacket, who the CO later learned was Zawistowski, was in the bucket of the lift and was operating the lift to unload steel materials from a truck.[1] The CO determined the condition was a serious hazard because aerial lifts are not to be used to lift loads as was being done at the site; the lift could have tipped over, resulting in the serious injury or even death of the operator. (Tr. 37-40, 74, 77-80, 83, 87).

Citation 1, Item 2 involved an employee the CO saw who was walking along the unguarded edge of the "sub-roof" of the building being constructed. The employee, who the CO learned later was Daniel Doolittle, was exposed to a fall of 26 feet from the edge, based on the architectural drawings of the project the CO subsequently saw; the decking on that floor was completed, and no perimeter safety cabling had been put up as required. The CO concluded the condition was serious, as a fall of 26 feet could have resulted in serious injury or death. (Tr. 112-14, 117, 170-71, 312-13).

Citation 1, Item 3 concerned the improper use of a stepladder; the CO observed Doolittle walk along the unguarded edge noted above to access a stepladder in order to go up to the roof level of the gymnasium. The ladder was in a folded, forwarding-leaning position, rather than having its

[1]The CO described what C-25, the videotape he took of the site, showed with respect to this item and the other citation items. (Tr. 85-89, 170-76).

four legs in an open position that would have allowed a reasonable angle of climbing. The CO determined that the condition was a serious violation that could have resulted in serious injuries or death if the employee had fallen while using the ladder. (Tr. 118-21, 171-72).

Citation 2, Item 1 involved three instances of alleged failure to provide fall protection. As to Item 1a, the CO testified that he saw two employees laying steel decking on the roof of the gymnasium; the CO later learned that the employees were Brian Woodall, another foreman, and Thomas McTague.[2] The employees were not using any fall protection, and the area of the deck they were on was 33 feet high. As to Item 1b, the CO testified he observed McTague climb up a column to access the gymnasium roof, where he walked across the open steel to get to the decking area; McTague was not using any fall protection when the CO saw him. As to Item 1c, the CO testified that he saw Doolittle sitting up in the steel structure and welding, about 30 feet from the ground, without the use of fall protection. The CO stated the three instances were classified as serious and willful; they were serious because falls from such heights could have resulted in serious injury or death, and they were willful based on what the CO learned in conversations with employees and on previous similar citations Blue Ridge had received. (Tr. 121-30, 172-74).

Citation 3, Item 1 concerned the failure to use fall protection in the aerial lift bucket. The CO first saw Zawistowski and another employee, Howard Gunn, the union steward on the job, using the lift. The CO next saw Zawistowski using the lift by himself to unload steel. The CO then saw Gunn using the lift by himself to perform welding. Neither employee had on fall protection while utilizing the lift, and the CO concluded the violation was serious; the bucket was going from ground level up to about 30 feet, and an employee falling from the bucket could have died or been seriously injured. The CO also concluded the violation was "repeated" due to a prior citation Blue Ridge had received for violating the same standard. (Tr. 152-55, 175-76, 326-27).

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[2]The record shows Zawistowski was the "detail" foreman, with responsibility for the "detail" or "bolt-up" crew, while Woodall was the decking foreman, with responsibility for the decking crew. Zawistowski was also the lead foreman. He held Blue Ridge's tool box meetings at the site and attended the general contractor's safety meetings as the representative of Blue Ridge; he was also the contact person for OSHA at the site, and Woodall reported to Zawistowski. (Tr. 430-33, 446, 458-61, 504-05, 563-64, 588-89, 702, 710-11, 764).

Jurisdiction

The Secretary and Blue Ridge have stipulated that, at the time the inspection was conducted and the citation was issued, Blue Ridge was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and Blue Ridge was an employer within the meaning of section 3(5) of the Act. *See* Joint Pre-Hearing Statement, dated August 1, 2005. I find, accordingly, that the Commission has jurisdiction over the parties and over the subject matter of this proceeding.

Respondent's Motion for Judgment as a Matter of Law

At the hearing, after the Secretary had presented her case in chief, Blue Ridge moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 52(c). The motion was denied. (Tr. 405-23). Blue Ridge renewed its motion at the conclusion of the hearing, and the parties were directed to address the motion in their post-hearing briefs. (Tr. 890). Based on the record and on my findings of fact and conclusions of law set out herein, Blue Ridge has not shown that it is entitled to judgment as a matter of law pursuant to Rule 52(c). Its motion is therefore denied.

Respondent's Objection to Employee Statements

At the hearing, Blue Ridge objected to statements Zawistowski and Woodall made to the CO during the inspection as hearsay. These included statements Zawisowski made on March 24, 2004, the day of the site inspection, and on statements made on April 21 and May 20, 2004, when Zawistowski and Woodall, respectively, were interviewed by the CO in his office and he recorded their responses on preprinted forms; Zawistowski and Woodall signed C-9 and C-10, their respective forms, and the CO also signed the forms.[3] The March 24 statements were received as admissions, while C-9 and C-10 were received as business records; however, counsel were instructed to brief the issue of whether C-9 and C-10 were admissions. (Tr. 40-42, 51-59, 126-27, 138-141, 158-62, 169, 401-03, 793-97; Exhs. C-9, C-10). Only the Secretary has briefed this matter.

As the Secretary notes, Rule 801(d)(2)(D) of the Federal Rules of Evidence provides that:

> (d) Statements which are not hearsay.[4] A statement is not hearsay if– ... (2) Admission by party-opponent. The statement is offered against a party and is ... (D)

[3]Hereinafter, any dates in this decision will refer to 2004 unless otherwise indicated.

[4]A "statement" is an oral or written assertion. *See* Rule 801(a).

> a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship....

Further, the Commission has long held that a CO's testimony about employee statements made during an inspection are not hearsay but admissions of the employer, pursuant to Rule 801(d)(2)(D). *See Regina Constr. Co.*, 15 BNA OSHC 1044, 1047 (No. 87-1309, 1991), and cases cited therein. There is no requirement the employee be a supervisor or that he appear as a witness; rather, the rule "reflects a common sense view that statements of a principal actor should generally be received rather than excluded from evidentiary consideration. Because of their value, such statements are receivable whether or not the declarant is available or appears as a witness." *Id.* at 1049 (citation omitted). The reliability of such statements depends upon whether the CO correctly appreciated the employee's words and accurately communicated them; their reliability also depends on factors that make the statements likely to be trustworthy, including (1) the declarant did not have time to realize his own self-interest or to feel pressure from the employer, (2) the statement had to do with the declarant's work, about which it can be assumed the declarant is well informed and not likely to speak carelessly, and (3) the employer is expected to have access to evidence which explains or rebuts the matter asserted. *Id.* at 1048 (citation omitted).

Based on the foregoing, the statements employees made in this case to CO Nies, including C-9 and C-10, are all admissible as admissions. The reliability of these admitted statements will be addressed *infra*.

Respondent's Contention that its Foremen were not Supervisors

Blue Ridge contends that its two foremen at the site, Zawistowski and Woodall, were not supervisors and that their knowledge of any violations may not be imputed to it. Blue Ridge notes that at the time of the inspection it was a party to a collective bargaining agreement ("CBA") with the Ironworker District Council of Northern New Jersey and that pursuant to the CBA Blue Ridge was obligated to hire its non-management employees from the local hiring hall. Blue Ridge also notes that the job titles of "foreman," "lead foreman" and "journeyman" are set out in the CBA, that the foremen Blue Ridge hires coordinate activities at the site and work alongside the journeyman ironworkers throughout the day, and that Blue Ridge's foremen do not hire, fire or directly discipline

other employees; rather, these functions are left up to Blue Ridge's president, Frank Impeciati.[5] *See* R. Brief, pp. 2-3.

Blue Ridge asserts that Zawistowski and Woodall cannot be supervisors under federal labor law because the National Labor Relations Act ("NLRA") defines "employee" as expressly excluding supervisors. It states that the term "supervisor" is defined separately under the NLRA, that the NLRA provides that no employer subject to the Act shall be compelled to deem supervisors "employees" for the purpose of any law, either national or local, relating to collective bargaining, and that because both Zawistowski and Woodall belong to the employee bargaining unit they cannot be supervisors under federal labor law. *Id*., pp. 25-26.

I do not agree with Blue Ridge's contention. First, Commission precedent is well settled that employees with job titles such as "crew leaders" and "leadermen" can be found to be supervisors for purposes of imputing knowledge under the Act as long as they have been delegated authority over other employees, even if only temporarily. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000), citing *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-630, 1992). In *Tampa Shipyards*, the Commission specifically held that the "leadermen" in that case were supervisors, even though they had no disciplinary authority, because they were "responsible to higher supervision for the progress and execution of the work" and for advising superintendents of safety problems other employees reported to them. *Id*.

Second, Woodall testified that, as a foreman at the site, he directed and coordinated the work of the employees on his crew.[6] He said that if he saw an employee not wearing a hard hat or harness, he would tell him to put it on; most of the time the employee would comply, but if not, Woodall would go first to the job site steward and then, if the problem persisted, to Impeciati.[7] (Tr. 707-09, 762-63). Impeciati testified his foremen could give employees verbal safety warnings, although they were not supervisors under the CBA; a foreman would first talk to a noncomplying worker, and, if

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[5]Blue Ridge also points out that its foremen are paid on an hourly basis and receive the same benefits as journeymen.

[6]Although Woodall testified at the hearing, Zawistowski did not.

[7]Woodall said he had never suspended or terminated a Blue Ridge employee. (Tr. 709).

that did not solve the problem, the foreman would go to the union steward and then, if necessary, to Impeciati.[8] Impeciati said he might have told CO Nies that his foremen "look out" for the safety of the other employees and make sure they are working safely. (Tr. 436-40, 446, 470-71).

Third, CO Nies testified that Zawistowski told him on March 24 that he was responsible for safety at the site; in fact, according to the CO, Zawistowski stopped the work at the site until the violations the CO had seen could be abated. The CO further testified that when he spoke to Impeciati at the site on March 26, Impeciati told him that his foremen were responsible for safety on the job. Finally, the CO testified that when he conducted interviews in his office with Zawistowski and Woodall on April 21 and May 20, respectively, both said that they were responsible for supervising employees and enforcing safety on the site.[9] (Tr. 60-61, 67-68, 125-27, 138, C-9, C-10).

In considering the foregoing, I note that the testimony of Woodall and Impeciati is sufficient to find that Woodall and Zawistowski were supervisors for purposes of imputing knowledge under the Act, according to the holding in *Tampa Shipyards*.[10] I also note there are discrepancies between what Woodall and Impeciati told the CO during the inspection and what their testimony was at the hearing. I observed the demeanors of all of the witnesses on the stand, and I found CO Nies to be a sincere and credible witness who reliably reported what employees told him; Woodall and Impeciati, on the other hand, were found to be less than candid witnesses, particularly when their hearing testimony differed from their statements to the CO. Taking into account the factors set out *supra* in *Regina Constr. Co.*, 15 BNA OSHC at 1047, especially the factor as to the declarant not having the time to realize his own self-interest or to feel pressure from the employer, I find the statements that Woodall and Impeciati made to the CO to be more believable than their hearing testimony that was

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[8]Impeciati said that he was the supervisor of all of his job sites and the only one with the authority to fire employees; he also said he went to the subject site two to three times a week and that, in his absence, Zawistowski "oversaw" safety. (Tr. 447, 454, 470-71, 561-62, 644-46).

[9]The CO noted that Impeciati was present during Zawistowski's interview and said nothing when Zawistowski stated he was responsible for enforcing safety on the site. (Tr. 68).

[10]In so finding, I have noted the testimony of Impeciati, supported by that of Woodall, that only Impeciati could fire employees. As the Secretary points out, however, "the power to hire and fire is not the *sine qua non* of supervisory status...."*Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003) (citation omitted).

inconsistent with their prior statements. I further find that the statements Zawistowski made to the CO were also believable, for the same reason. The testimony of the CO is thus credited over that of Woodall and Impeciati, to the extent it differs from theirs, and the CO's testimony about what Zawistowski told him is also credited. Based on my findings, Woodall and Zawistowski were supervisors at the site for purposes of imputing knowledge under the Act.

Serious Citation 1 - Item 1

This item alleges a violation of 29 C.F.R. 1926.453(a)(2), which provides as follows:

> Aerial lifts may be "field modified" for uses other than those intended by the manufacturer provided the modification has been certified in writing by the manufacturer or by any other equivalent entity, such as a nationally recognized testing laboratory, to be in conformity with all applicable provisions of ANSI A92.2-1969 and this section and to be at least as safe as the equipment was before modification.

CO Nie's testimony about this item is set out *supra*, and C-25, the CO's video, shows Zawistowski in the bucket of the cited lift and operating the lift to unload steel by means of a hook and slings that had been attached to the arm of the lift. (Tr. 85-88). When the CO spoke to him, Zawistowski admitted he had been operating the lift. (Tr. 39-40). When the CO asked why he had used the lift as he had, Zawistowski said he had to unload the steel and that while there were other machines at the site that could have been used they belonged to other employers.[11] (Tr. 79-81). The CO later called Blue Ridge's office and asked for any information they had about the lift, after which he received some pages from the operator's manual for the lift; the lift was a Genie S-60, and C-7, page 4 of the manual, prohibits attaching overhanging loads to any part of the lift. (Tr. 70-72).

The CO testified that using the Genie S-60 to lift steel at the site was a serious hazard. He said raising the steel and then swinging it around 90 degrees and setting it down could have caused the lift to tip over, which could have seriously injured or killed the operator.[12] He also said he had personally experienced a lift tip-over. The CO explained that he had worked on a project involving using a lift to wash down a roof and clean out rain gutters; the vacuum hose used to clean out the gutters became

[11]Mr. Zawistowski told the CO that Blue Ridge had "issues" with those employers and that he did not want to ask to use their equipment. (Tr. 80-81).

[12]The CO said the lift went from ground level up to 30 feet. (Tr. 38, 88-89, 153, 302).

blocked up and filled with water, causing the lift to be "side loaded" (meaning there was a lateral weight on the lift) and to tip over. The CO further explained that the lateral weight involved in his accident was very similar to the situation at the subject site. (Tr. 38, 74, 77-80, 83, 86-89).

Robert Dice, a customer service representative with Genie Industries, also testified in this matter. After viewing C-25, the CO's video of the use of the lift at the site, he stated the Genie S-60 is designed to lift an operator and his tools but not to have an overhanging load such as C-25 showed; he also stated that any loads must be carried inside the platform and that carrying a load outside was unacceptable.[13] Dice said the only exception to this rule is lifting glass on a construction site; he noted, however, that in that case there is a Genie-made "rest," in which the glass sits, that is attached to the basket and that that particular Genie lift was designed and tested for such use. (Tr. 90-97).

Blue Ridge admits it did not obtain a certificate pursuant to the standard. *See* C-2, p. 2. It contends, however, that a "field modification" under the standard "implies an alteration that is either permanent or of some significant duration." It further contends Zawistowski's use of the hook and slings was not a field modification "because it was temporary and did not involve any fundamental or lasting alteration to the lift." R. Brief, pp. 36-37. However, as the Secretary notes, the standard does not distinguish between temporary or permanent modifications. As she also notes, the manufacturer specifically prohibits attaching an overhanging load to any part of a Genie S-60 lift. *See* C-4, p. 5, and C-7. Moreover, Dice testified that having an overhanging load on a Genie S-60, as shown in C-25, was not acceptable, and Blue Ridge offered nothing to rebut his testimony.[14] Finally, the CO's testimony about his own experience establishes that improper loads on lifts can cause tip-overs, which

[13]Dice testified that page 5 of C-4, a copy of an earlier edition of the manual, showed the activity he saw in C-25. In this regard, both C-4 and C-7 show a lift with a load hanging from its platform, and both state: "Do not place or attach overhanging loads to any part of this machine."

[14]I disagree with Blue Ridge's suggestion that Dice's testimony should be accorded little weight because his interest was to insulate his company from potential liability. I found Dice to be an unbiased witness who offered clear, convincing and credible testimony, and I have noted his many years of experience in the area of aerial lifts. (Tr. 90-94). Moreover, I found Impeciati's testimony to the effect that Zawistowski's use of the lift was safe unconvincing. (Tr. 477-89).

can result in serious injuries or death.[15] Based on the record, I find that attaching a hook and slings to the Genie S-60 lift to unload steel at the site was a "field modification" within the meaning of the standard. I further find that the Secretary has demonstrated three of the four elements required to prove a violation of an OSHA standard; that is, she has shown that the cited standard applies, that its terms were violated, and that employees had access to the cited condition. *See Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

The fourth element the Secretary must prove is that of knowledge, *i.e.*, she must show that the employer either knew or could have known of the violative condition with the exercise of reasonable diligence. *Id*. It is clear Zawistowski had actual knowledge of the violation because he was operating the lift, and his knowledge of the violation is imputable to Blue Ridge because he was a foreman at the site. In addition, Blue Ridge has admitted that the manual for the Genie S-60 was in the bucket of the lift when Zawistowski was using the lift, and the foregoing shows the lift's manual prohibits the cited conduct. *See* C-1, p. 4 (as to Citation 3, Item 1). However, as Blue Ridge notes, the Third Circuit has held that where the Secretary has shown a supervisor had knowledge of or participated in the violative conduct, she must also show the conduct was reasonably foreseeable and therefore preventable.[16] *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 357-58 (3d Cir. 1984) ("*PP&L*"). In *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 268-69 (No. 96-1719, 2000) ("*Kerns*"), the Commission set out three factors to determine whether the Secretary had proved knowledge under *PP&L*: (1) whether supervisors were adequately trained in safety matters, (2) whether reasonable steps were taken to discover safety violations committed by supervisors, and (3) whether the company had a consistently-enforced safety policy.

The record shows that all Blue Ridge foremen and ironworkers have attended a safety course covering Subpart R, OSHA's steel erection standard; two Blue Ridge ironworkers are qualified to teach, and have taught, the course. In addition, Blue Ridge has a written safety manual that includes,

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[15]I have already found the CO credible, and, besides his five years with OSHA, he has also had much experience in construction, steel erection and aerial lift use. (Tr. 28-32, 179-83).

[16]"Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case–even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 268-69 (No. 96-1719, 2000) (citation omitted).

inter alia, the Subpart R requirements. Blue Ridge gives each ironworker a copy of the manual, and each foreman has the manual in his shop truck. The lead foreman at Blue Ridge sites holds weekly toolbox meetings that cover information in the manual, and workers sign a sheet at each meeting to document their attendance. The lead foreman also attends safety meetings held by the general contractor at the site. (Tr. 443-49, 456-61, 676-77, 699-704; 710, 745-77, 798, 839-41, 856; R-6-8).

In addition to the above, Impeciati testified that Blue Ridge provides its ironworkers with personal fall protection in the form of body harnesses and lanyards.[17] He stated that before beginning work on a site he inspects it to identify any special safety risks or concerns; he also holds a meeting with the crew to discuss job safety and to ensure that all the necessary safety equipment, including fall protection, has been provided. Impeciati said he visits each Blue Ridge site two to three times a week to make sure the work is being done safely. Impeciati and Woodall both testified that if a foreman on a site sees a worker violating a safety rule, the foreman will instruct the worker to comply with the rule; generally, the worker does so, but if not, the foreman goes first to the shop steward on site and then, if necessary, to Impeciati, the only Blue Ridge employee who can issue discipline such as discharge. Impeciati said he had discharged one employee, Thomas McTague, for failing to wear fall protection on another job later in 2004. (Tr. 436-40, 447, 450-54, 466-71, 708-10).

Despite the foregoing, I agree with the Secretary that Blue Ridge's enforcement of its safety program was inadequate. First, I note that all of the alleged violations in this case have been affirmed, as set out below. Second, I note that when the CO discussed the violations with him, Zawistowski indicated he had seen the instances relating to Citation 2, Item 1, except for the one as to McTague climbing a column. (Tr. 121-25). Third, the record shows that besides the non-supervisory employees who were not wearing the required fall protection (McTague, Doolittle and Gunn), the two site foremen (Zawistowski and Woodall) were likewise not wearing fall protection. *See* Citation 2 and Citation 3, *infra*. Fourth, the record also shows Blue Ridge had had previous violations affirmed for employee failure to use fall protection and that two had involved Woodall and Zawistowski as foremen. *Id*. Finally, the record shows the employees who had committed the violations at the site

[17]R-5 shows that Doolittle, McTague and Zawistowski were each provided a harness and lanyard in 2002 and that Woodall was provided a harness and lanyard in 2003.

were not disciplined; further, both Woodall and Zawistowski told the CO they had not disciplined employees at the site before the inspection. (Tr. 68, 82-83, 112-14, 131, 155, 162, 289-90).

In defense of its failure to discipline, Blue Ridge contends discipline is generally ineffective because skilled ironworkers are in demand and in short supply, such that a suspended or discharged employee can simply report to the union hall the next day and be immediately referred out to another employer. Blue Ridge also contends it has developed a new policy whereby, pursuant to an agreement with the union, if it suspends an employee but wants to retain the employee following the suspension, the employee is not eligible for referral to another employer during the suspension. *See* R. Brief, p. 6. However, the record shows that Blue Ridge's proposed policy was not sent to the union's counsel until April 15, 2005. *See* R-10. Moreover, even assuming the policy is now in effect, as Impeciati testified, it does not alter the fall protection violations that occurred at the subject site and the fact that Blue Ridge had committed similar violations previously. In any case, as the Secretary points out, the Commission has long ago rejected arguments such as the one Blue Ridge offers here, *i.e.*, that it could not effectively discipline employees. *See Atlantic & Gulf Stevedores*, 3 BNA OSHC 1003, 1010-1011 (Nos. 2818, 2862, 2997 & 2998, 1975). *See also Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1288-89 (No. 02- 0520, 2005). Blue Ridge's contentions are rejected, and the Secretary has proved the element of knowledge. This item is affirmed as a serious violation, based on the CO's testimony, *supra*, that serious injuries or death could have resulted from the lift tipping over.[18]

The Secretary has proposed a penalty of $3,000.00 for this item. As the final arbiter of penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones,*

[18]In affirming this item, I have noted Blue Ridge's assertion that the violation was a result of unpreventable employee misconduct. As Blue Ridge points out, however, the elements that are required to show this defense are substantially similar to the factors set out in *Kerns*. *See Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). Since Blue Ridge has not met the factors in *Kerns*, it likewise cannot meet the defense of unpreventable employee misconduct.

15 BNA OSHC at 2213-14. The CO testified that the gravity of the violation was high, in that the probability of an accident was greater and that death or serious injuries such as broken bones or internal injuries could have resulted. He also testified that while a 40 percent adjustment was made due to the employer's size, no credit for history or good faith was given because of Blue Ridge's previous history of violations and the willful citation that was issued in this case. (Tr. 83-84). I find the proposed penalty appropriate. A penalty of $3,000.00 is accordingly assessed for this item.

Serious Citation 1 - Item 2

This item alleges a violation of 29 C.F.R. 1926.760(a)(2), which states that:

> On multi-story structures, perimeter safety cables shall be installed at the final interior and exterior perimeters of the floors as soon as the metal decking has been installed.

As set out *supra*, CO Nies saw Doolittle walking along the unguarded edge of the sub-roof of the building; the sub-roof was 26 feet from the ground, and although the decking on the sub-roof was completed, no perimeter safety cabling had been put up. C-25, the CO's video, shows Doolittle walking along the unguarded edge. (Tr. 112-13, 170-71, 312-13).

Blue Ridge contends it did not violate the standard because the decking was not completed when the CO saw it. In this regard, Blue Ridge notes the testimony of Doolittle that the roof decking was not completely finished, as Blue Ridge still needed to finish-weld and screw down the decking. (Tr. 847-48). Blue Ridge asserts that Doolittle's testimony should be credited over that of the CO because the CO admitted he never went up to the cited area.[19] (Tr. 186, 312, 889). Doolittle, however, has been found to be an unreliable witness, for the reasons discussed in Citation 2, *infra*. Moreover, the CO testified that he saw the sub-roof from the west side, where the back of the new gymnasium was located; the west side was sloped, such that he was elevated almost to the level of the sub-roof when he observed it, and he also saw the sub-roof decking from underneath by walking into the building and looking up. The CO said that he looked at the sub-roof again on March 26, when he went back to the site to meet with Impeciati. He also said that the sub-roof decking was completed because no decking was taking place, all the sheets were installed, and the initial connections were made. (Tr.

[19]As the Secretary points out, the CO did not go up onto the sub-roof because there was no safety cabling in place and he would have been exposed to a hazard. (Tr. 186).

112-13, 186-88, 871, 887-88). Based on the record, my credibility findings and the CO's experience in steel erection, as noted above, the CO's testimony is credited over that of Doolittle.[20]

The foregoing establishes that the standard applies, that its terms were not met, and that employees were exposed to the condition. As to knowledge, the CO testified that Zawistowski could have known of the violation with the exercise of reasonable diligence. He noted that Zawistowski was in an open area in front of the gymnasium, 100 to 125 feet from where Doolittle was at the time, and that Zawistowski would have had a clear view of Doolittle. He also noted that the two stepladders that Doolittle utilized that day, one of which he used after walking along the unguarded edge, were bright orange and highly visible at the site. (Tr. 114-16, 120). In view of the CO's testimony, I find that the Secretary has shown the knowledge element. She has also shown that the violation was serious, as it is apparent that a fall of 26 feet could have resulted in serious injuries or death. (Tr. 112, 117). This item is affirmed as a serious violation.

The Secretary has proposed a penalty of $1,500.00 for this item. CO Nies testified that the gravity of the violation was high, due to the fact that an accident could have caused serious injuries or death, but that the probability of an accident occurring was lesser, in that Doolittle was not engaged in work but was walking to the ladder and was fully attentive of where he was walking. The CO also testified that a 40 percent adjustment was made to the penalty for size and that no adjustments were made for history or good faith. (Tr. 117-18). I conclude that the proposed penalty is appropriate. A penalty of $1,500.00 is therefore assessed.

Serious Citation 1 - Item 3

This item alleges a violation of 29 C.F.R. 1926.1053(b)(4), which provides that:

Ladders shall be used only for the purpose for which they were designed.

CO Nies testified that the stepladder Doolittle used to go up to the roof level, after walking along the unguarded edge of the sub-roof, was in a folded, forwarding-leaning position, rather than having its four legs in an open position that would have allowed a reasonable angle of climbing. The CO's video, C-25, shows Doolittle climbing up the ladder. The CO concluded that the condition was

[20]Although my findings render moot Blue Ridge's assertions as to the meaning of the cited standard, I do not agree with Respondent's interpretation. *See* R. Reply Brief, pp. 10-11.

a serious violation that could have caused serious injuries or death if the employee had fallen while using the ladder. (Tr. 118-21, 171-72).

Blue Ridge contends it did not violate the standard, based on Doolittle's testimony that the ladder was in a partly open position, that he had secured all four legs in the decking corrugations, and that he had tied the top of the ladder to a beam; Doolittle also testified he believed the stepladder was safer the way he used it than an extension ladder, which has only two legs. (Tr. 851-53). Blue Ridge claims that R-11, a still photo taken from C-25, supports its position as it shows the ladder with its legs about 2 feet apart. I have reviewed R-11 and C-25, and it would appear that the legs of the ladder are about 2 feet apart. However, the CO never testified the ladder was closed; rather, he testified it was in a folded and leaning position. Moreover, as the Secretary points out, Blue Ridge admitted in its responses to interrogatories that "a single employee used a step ladder in the folded position without Respondent's permission or approval after securing the feet and top of the ladder to prevent the ladder from moving." *See* C-2, p. 3. In addition, in the parties' joint pre-hearing statement, in the section entitled "Facts which Are Admitted and Will Require No Proof at Hearing," paragraph 4.17 states that "Doolittle used a step ladder in a folded position to travel between levels." *See* Statement, p. 9. It is clear from the CO's testimony a stepladder is to be used in a fully-open position to prevent slippage of the ladder and also so the load can be supported on all four legs. (Tr. 118, 318-19). I find that the use of the ladder in a folded and leaning position was a violation of the cited standard.[21]

The violation was also serious. As noted above, Doolittle said the ladder's legs were secured in the decking corrugations and that the top of the ladder was tied to a beam; he also said he believed the stepladder was safer the way he used it than an extension ladder, which has only two legs. The CO testified he had no knowledge of the bottom of the ladder being secured and the top being tied off but that even if this was the case the violation was still serious. He stated that while using a stepladder as Doolittle did can cause it to slip, another hazard is the potential for the ladder to be

[21]In so finding, I note that Blue Ridge's own safety manual states that "[s]tep ladders may only be used in the open position. No leaning of closed step ladders." *See* R-8, p. 8. I also note that Doolittle essentially admitted that his use of the ladder was improper. (Tr. 864-65). As to his further testimony, that CO Nies told him he had seen him using the ladder improperly but would not cite it because it was a "lesser offense," that testimony is not credited, in light of my findings as to Doolittle's credibility set out in Citation 2, *infra*.. (Tr. 854, 865-67).

unable to support the load. (Tr. 317-19). He also stated that given the location of the ladder near the edge, if Doolittle had fallen off the ladder he could have fallen 26 feet to the ground and been seriously injured or killed. (Tr. 118-21). The CO's testimony is credited over that of Doolittle, and I find that the Secretary has met her burden of proving the violation was serious.

As to knowledge, the CO testified that Zawistowski could have known of the condition in the exercise of reasonable diligence. As in Item 2, he noted that Zawistowski was in an open area in front of the gymnasium, 100 to 125 feet from where Doolittle was, and that Zawistowski would have had a clear view of Doolittle. He also noted the stepladder was bright orange and highly visible and that Zawistowski would have known Doolittle was in that area. (Tr. 114-16, 120-21). I find that the Secretary has proved the knowledge element. This item is affirmed as a serious violation.

The Secretary has proposed a penalty of $1,500.00 for this item. The CO testified that the gravity of the violation was high, in that an accident could have resulted in serious injuries or death, and that the likelihood of an accident was lesser, because Doolittle was using the ladder to climb from one area to another and was attentive to what he was doing; he also testified a 40 percent reduction was given for size but that no credit was given for history or good faith. (Tr. 121-22). I find the proposed penalty to be appropriate. A penalty of $1,500.00 is consequently assessed.

Willful Citation 2 - Item 1

This item alleges a violation of 29 C.F.R. 1926.760(a)(1), which states as follows:

> Except as provided by paragraph (a)(3)[22] of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

The citation alleges that Blue Ridge "did not provide fall protection for employees" in three different instances. As set out *supra*, in Item 1a, the CO saw two employees, Woodall and McTague, laying steel decking on the roof of the gymnasium; the area where the employees were was 33 feet high. In Item 1b, the CO saw McTague climb a column to access the gymnasium roof, where he walked across the steel to get to the decking area; the column area was 30 feet high, and the decking

[22]Paragraph (a)(3) allows connectors, and deckers working in controlled decking zones ("CDZ's), to work up to 30 feet without using fall protection, but these employees must wear fall protection when working between 15 and 30 feet and must tie off at heights of over 30 feet.

area was 33 feet high. In Item 1c, the CO saw Doolittle sitting up in the steel structure welding; the area where Doolittle was located was about 30 feet high.[23] The CO stated that none of the employees had on fall protection and all three were exposed to falls from the steel. (Tr. 121-24, 172-74).

The CO testified that when he spoke to Zawistowski about the three instances, Zawistowski admitted he was aware of them except he had not seen McTague climb the column and walk across the steel. (Tr. 125). The CO then testified about the statements he took from Zawistowski and Woodall, as set out in C-9 and C-10, respectively. (Tr. 139-40, 143-49, 158-69). According to C-9, Zawistowski was aware of the 15 and 30-foot requirements for using fall protection. Zawistowski further knew that employees were up on the steel on March 24, that they were exposed to falls, and that they were working in violation of the fall protection requirements. According to C-10, Woodall also was aware of the 15 and 30-foot fall protection requirements. Woodall stated that two employees were working up on the steel without the required fall protection; he also stated that he knew that Doolittle was performing welding on the roof without the required fall protection.

At the hearing, Woodall testified he could not tell if Doolittle was wearing fall protection on the roof. (Tr. 757). However, based on my credibility findings on page 7, *supra*, Woodall's statement to the CO on C-10 about Doolittle is credited over Woodall's testimony about Doolittle at the hearing. Woodall also testified C-10 did not "fully and accurately" represent his statements to the CO, stating that some of the notations on the form were not there when he signed it; the CO, on the other hand, testified C-10 "fairly and accurately" represented Woodall's statements and that he did not add any information to C-10 after Woodall signed it. (Tr. 721-29, 818). The Secretary's counsel questioned Woodall at length on C-10, and Woodall in essence conceded the responses on C-10 were truthful.[24] (Tr. 763-93, 805-09). On this basis, and in light of the CO's testimony and my finding that he was a reliable and credible witness, I conclude that both C-9 and C-10 are fair and accurate representations of what Zawistowski and Woodall told the CO during their respective interviews.

Also at the hearing, Doolittle testified he puts on his fall protection first thing in the morning and leaves it on all the day. Doolittle had his harness and lanyard at the hearing, and he put them on

[23]The CO utilized the site architectural drawings to determine the elevations at which employees were working. (Tr. 112, C-5, p. 2).

[24]Counsel did not question Woodall as to his statement on C-10 about Doolittle.

and discussed them. He said he put on his fall protection first thing on March 24 and was tied off to a "C" clamp on a beam when he was welding on the roof; he also said he would not have gone up there without it. He stated that R-11 appeared to show his feet when he was welding and that R-14, while it wasn't clear, appeared to show bumps on his shoulder and above his waist, which could have been his lanyard anchor rings.[25] Doolittle had viewed C-25, and he stated that his fall protection was visible in it as he accessed the ladders and walked along the sub-roof. (Tr. 843-47).

Doolittle's testimony is not credited, for the following reasons. First, Woodall's statement in C-10, that Doolittle was not wearing fall protection on the roof, has been credited. Second, Impeciati admitted that, having viewed the video, it did not appear Doolittle had on any fall protection as he walked along the edge of the sub-roof. (Tr. 628). Third, while Impeciati indicated that Doolittle could have put on his fall protection when he got up on the roof, such would not have been consistent with Doolittle's testimony that he puts his fall protection on "first thing" every day. (Tr. 633). Fourth, while the CO testified that he could not tell if Doolittle had on fall protection when he was welding, he was positive he did not have any on when he walked along the sub-roof edge. (Tr. 250-52, 356). Fifth, Doolittle explained at the hearing that the harness straps go over the shoulders and connect on the chest. (Tr. 843). Upon viewing the video at the point where Doolittle turns and is almost facing the camera, I myself observed nothing showing on his chest other than his blue shirt.[26] In light of the evidence of record, I find that Doolittle was not in fact wearing fall protection on March 24.

Based on the foregoing, Doolittle, McTague and Woodall were all working in violation of the cited standard.[27] Blue Ridge contends, however, that it did not violate the standard because, contrary

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[25]R-14 is another still photo taken from C-25, the CO's video.

[26]This scene appears at 9:16:44 a.m. on C-25 and relates to Citation 1, Item 2.

[27]The standard requires all ironworkers to use fall protection when working at heights of over 15 feet, unless they are connecting or they are laying decking in a CDZ; those employees must (1) wear fall protection when between 15 and 30 feet and (2) tie off when they are above 30 feet. No connecting work was being done on the roof, and the record indicates that no CDZ was in place. (Tr. 167). Moreover, none of the cited employees even had on fall protection, and they were therefore in violation of the standard. Woodall's claim that his not using fall protection was a "miscalculation," because he thought he was going to be working at 29 feet, is incredible, based on his supervisory status at the site and on his experience and training. His further claim, that he was unaware of the fall protection requirements for deckers, is likewise incredible. (Tr. 753-62).

to the Secretary's citation, it did provide fall protection for employees. R. Brief, p. 22-25. The record shows that Doolittle, McTague and Zawistowski were each issued a harness and lanyard in 2002, that Woodall was issued a harness and lanyard in 2003, and that each of these employees signed a memo to that effect. *See* R-5. Moreover, Doolittle and Woodall verified they were issued the fall protection indicated in R-5, and Impeciati testified that employees keep their issued fall protection until they leave the company. (Tr. 450-51, 704-05, 717-18, 841; R-5). Regardless, other evidence in the record persuades me that Doolittle, McTague and Woodall were not provided fall protection at the site.

CO Nies testified that when he interviewed him, Woodall said he normally had the harnesses for his crew in his shop truck but that, since the truck had been taken to another site earlier that day, the harnesses were not available to use; Woodall also said Zawistowski knew the truck had left and that while Zawistowski might have had one or two harnesses they were not for Woodall's crew. Woodall stated that he and McTague had gone up on the roof without fall protection because engineers were coming to check the design and the decking had to be extended. (Tr. 126-27, 166-68, 204-05, 355-56, C-10). CO Nies further testified that when he interviewed Zawistowski and asked if he had harnesses on site, Zawistowski indicated he did; however, when the CO asked why he and Gunn had not used them in the lift, Zawistowski said there was no harness for Gunn due to Gunn's large size and that he himself had not thought about it and had "just lost it."[28] (Tr. 148-49, 158). The CO noted that when he told him of the violations, Zawistowski stopped work at the site until they could be abated.[29] The CO also noted that Zawistowski never showed him any harnesses, that he saw no other means of protection at the site, and that no one ever advised him of any other means being available while he was there. (Tr. 61, 213-14, 350-54). Finally, Impeciati himself admitted that the logical action for Zawistowski, once the CO informed him that employees were not wearing fall protection, would have been to get the fall protection he had and to use it. (Tr. 573, 587).

In view of the evidence set out above, I conclude Blue Ridge did not provide its employees at the site with fall protection. In so concluding, I have considered all of Blue Ridge's arguments and assertions. I have also considered the testimony of Impeciati, Woodall and Doolittle to the effect that

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[28]The employees' failure to use fall protection in the lift is discussed in Citation 3, *infra*.

[29]The CO testified that Mr. Zawistowski told him they were not going to resume work until they were able to provide fall protection. (Tr. 243).

fall protection was provided at the site. However, the CO's testimony about what he observed and what employees told him during the inspection is credited over the hearing testimony of Blue Ridge's witnesses. I find, accordingly, that the Secretary has proved that the standard applies, that its terms were not met, and that employees were exposed to the cited hazard. I further find that the Secretary has established that Blue Ridge had knowledge of the violation, in that the record clearly shows that both Zawistowski and Woodall knew that employees were working without fall protection.[30] The violation was plainly serious, in that falls from heights of 30 feet and more would have resulted in serious injuries or death. (Tr. 129).

The Secretary has classified this violation as willful. To prove that a violation was willful, the Secretary must demonstrate it was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *See Williams Enter., Inc*., 13 BNA OSHC 1249, 1256 (No. 85-355, 1987), and cases cited therein. As *Williams* further explains:

> It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting a violation....A willful violation is differentiated by a heightened awareness–of the illegality of the conduct or conditions–and by a state of mind–conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard.

Id. at 1256-57.

Based on my findings set out above, employees at the site were not wearing the required fall protection, and fall protection was not even available at the site for employees to use. Blue Ridge's two foremen at the job site were aware of these facts and neither did anything to remedy the situation until CO Nies spoke to Zawistowski, at which time Zawistowski stopped the work until fall protection could be provided. Both of Blue Ridge's foremen were performing work that required them to use fall protection, but neither was using fall protection. Blue Ridge's foremen knew of the standard's requirements, as both had had training in Subpart R, the steel erection standard; in addition, Blue Ridge's safety manual contained the Subpart R requirements.[31] *See* C-9, C-10, R-8, p. 17.

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[30]Apparently, no one but the CO observed the instance relating to McTague. Regardless, I find that Blue Ridge could have known of the instance with the exercise of reasonable diligence.

[31]The revised Subpart R went into effect in 2001. *See* 66 Fed. Reg. 5265 (2001).

Besides the foregoing, the record shows OSHA had cited Blue Ridge five times previously for violations of 29 C.F.R. 1926.105(a), the fall protection standard that was used before the revised Subpart R went into effect.[32] Specifically, on September 6, 2001, Blue Ridge was cited as employees, including a supervisor, were bolting and connecting 39 to 49 feet above the ground without fall protection. *See* C-11. On April 25, 2000, Blue Ridge was cited as employees, including Woodall, a foreman at the site, were exposed to exterior falls of about 35 feet without fall protection. *See* C-12. On March 31, 1999, Blue Ridge was cited as employees, including Zawistowski, a foreman at the site, were working 27 feet above the ground without fall protection. *See* C-15. On December 8, 1998, Blue Ridge was cited because connectors were exposed to exterior falls of up to 60 feet without fall protection. *See* C-14. On October 30, 1996, Blue Ridge was cited because an employee was exposed to exterior falls of about 44.5 feet without fall protection. *See* C-13. The citations containing these items settled and are final orders of the Commission.[33]

Blue Ridge contends that the willful classification cannot be based on the prior citations because 29 C.F.R. 1926.105(a) is not the equivalent of the standard cited in this case. I disagree. Section 1926.105(a) provides as follows:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

Both 29 C.F.R. 1926.105(a) and the cited standard require fall protection when employees are working above certain specified heights. The previous citations Blue Ridge received clearly put the company on notice that fall protection was required when employees were working at heights of over 25 feet, and that the fall distance limits in the cited standard are 15 and 30 feet, depending on the type of work involved, is no basis for concluding that the standards are not equivalent. Moreover, as the

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[32]Once the new Subpart R was in effect, 1926.105(a) no longer applied to steel erection.

[33]Blue Ridge stipulated to the authenticity of C-11 through C-17. (Tr. 368-69). C-17, which was also admitted as R-1, is a summary of the history of Blue Ridge's OSHA violations. C-11 through C-15 show, *inter alia*, the relevant citation items issued and the relevant parts of the OSHA inspection forms; they also indicate Impeciati was contacted during the inspections and that he was the individual who signed the settlement agreements. Further, C-15 includes an abatement letter to OSHA dated April 7, 1999, signed by Impeciati, stating that employees had been reminded to wear their fall protection and to tie off or hook off when required.

Secretary notes, the evidence of record in this case is sufficient to find a willful violation without considering the prior citations, in view of the fact that both Woodall and Zawistowski, as set out *supra*, had had the Subpart R training and were well aware of the 15 and 30-foot requirements for using fall protection under the standard. Regardless, I find that the factual circumstances of this case, together with the prior citations Blue Ridge received, plainly demonstrate that the violation of the standard was committed "with intentional, knowing or voluntary disregard for the requirements of the Act." This item is consequently affirmed as a willful violation.

The Secretary has proposed a penalty of $56,000.00. CO Nies testified that all three instances were grouped for penalty purposes and that the unadjusted proposed penalty was $70,000.00, based on guidelines in OSHA's Field Inspection Reference Manual ("FIRM"). He further testified that an adjustment was made for size, but not for history or good faith. He noted, however, that the adjustment for size was only 20 percent, rather than the 40 percent given in the other items, due to the willful classification, and that this consideration is also set out in the FIRM. The CO also noted that the proposed penalty was determined by the circumstances of the case and the FIRM's guidelines. (Tr. 130-31, 256-60, 309-11, 358-59). Upon giving careful consideration to all the circumstances in this matter, and to the CO's testimony about how he arrived at the proposed penalty, I find the proposed penalty appropriate. A penalty of $56,000.00 is therefore assessed.

Repeat Citation 3 - Item 1

This item alleges a violation of 29 C.F.R. 1926.453(b)(2)(v), which states that:

> A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

As noted at the beginning of this decision, this item involves employee failure to use fall protection in the aerial lift bucket. The CO first saw Zawistowski and another employee, Howard Gunn, the union steward on the job, using the lift. The CO next saw Zawistowski using the lift by himself to unload steel, as described in Item 1 of Citation 1. The CO then saw Gunn using the lift by himself, to perform welding on cross bracing, and he was leaning out of the bucket to do so. Neither employee had on fall protection while utilizing the lift, and the CO concluded the violation was serious; the bucket was going from ground level up to about 30 feet, and an employee falling from the bucket could have been seriously injured or killed. (Tr. 152-55, 175).

C-25, the CO's video, shows the above-noted conditions, and Blue Ridge does not dispute that Zawistowski and Gunn were operating the lift without the use of personal fall protection. *See* R. Brief, p. 4. Further, Zawistowski's knowledge of the cited conditions is imputable to Blue Ridge, and the CO's testimony clearly establishes the violation could have caused serious injuries or death. The Secretary has thus demonstrated that Blue Ridge was in serious violation of the cited standard.

The Secretary has classified this violation as repeated. To prove a violation was repeated, the Secretary must show that, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary in this case presented C-16, which shows that in 2001, Blue Ridge was cited for a violation of 29 C.F.R. 1926.453(b)(2)(v), the same standard cited here. The CO in the 2001 case had observed two employees and a supervisor connecting and bolting from aerial lift baskets at heights ranging from 39 to 49 feet without the use of personal fall protection; the violation was classified as serious. C-16 also shows that the case settled and became a final order of the Commission in April of 2002.

Blue Ridge contends the repeat classification is improper, and it sets out a number of factual distinctions between the subject case and the 2001 case. R. Brief, pp. 44-45. However, as the Secretary points out, the factual distinctions between the two cases are meaningless. As she further points out, the issue is whether the two violations resulted in substantially similar hazards, citing to *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005). S. Reply Brief, p. 10. I find that the hazards in the two cases were substantially similar because both involved the same standard and potential falls from significant heights. This item is affirmed as a repeat violation.

A penalty of $8,400.00 has been proposed for this item. CO Nies testified that the unadjusted proposed penalty was $14,000.00, based on a multiplier set out in the FIRM. He said the gravity of the violation was high, due to the fact that serious injuries or death could have resulted in the case of an accident, and that the probability of an accident occurring was greater. He also said a 40 percent reduction for size was given but that no credit for good faith or history was given. (Tr. 156-58). I find the proposed penalty appropriate. A penalty of $8,400.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.453(a)(2), is AFFIRMED, and a penalty of $3,000.00 is assessed.

2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.760(a)(2), is AFFIRMED, and a penalty of $1,500.00 is assessed.

3. Item 3 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.1053(b)(4), is AFFIRMED, and a penalty of $1,500.00 is assessed.

4. Item 1 of Willful Citation 2, alleging a violation of 29 C.F.R. 1926.760(a)(1), is AFFIRMED, and a penalty of $56,000.00 is assessed.

5. Item 1 of Repeat Citation 3, alleging a violation of 29 C.F.R. 1926.453(b)(2)(v), is AFFIRMED, and a penalty of $8,400.00 is assessed.

/s/

Covette Rooney
Judge, OSHRC

Dated: January 27, 2006
Washington, D.C.