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. DIAMOND INSTALLATIONS, INC., Respondent.	OSHRC Docket Nos. 02-2080 & 02-2081

APPEARANCES:

Howard M. Radzely, Solicitor; Joseph M. Woodward, Associate Solicitor; Alexander Fernández, Deputy Associate Solicitor; Daniel J. Mick, Counsel for Regional Trial Litigation; Peter J. Vassalo, Attorney; U.S. Department of Labor, Washington, DC
For the Complainant

Joan M. Gates, Esq.; Douglas E. Grover, Esq.; Thompson Hine, LLP , Cincinnati, OH; New York, NY
For the Respondent

DECISION

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY ROGERS, Commissioner; THOMPSON, Commissioner:

Diamond Installations, Inc. ("Diamond") is a subcontractor that was hired by general contractor Bovis Lend Lease ("Bovis") to install the exterior, or "curtain," wall at the AOL Time Warner Center Project in New York City. After an investigation of an accident in which a Diamond employee at the AOL site was fatally injured, OSHA issued Diamond a willful citation alleging a violation of 29 C.F.R. § 1910.178(l)(1)(ii)[1] for

[1] Section 1910.178(l)(1)(ii) provides: "Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph (l), except as permitted by paragraph (l)(5)."

permitting an untrained employee to operate a forklift, and a violation of 29 C.F.R. § 1926.501(b)(1)[2] for failing to use fall protection. Chief Administrative Law Judge Irving Sommer affirmed both violations as willful and assessed the total proposed penalty of $112,000. For the reasons given below, we affirm both citation items, but characterize the violations as serious and assess a total penalty of $9,800.

I. The Forklift Violation

On May 22, 2002, Dennis Naughton, the gang foreman for Diamond's "bundle distribution gang," gave the key to a forklift to Thomas Gray, Jr., who was working on the distribution gang. At some point, Gray turned the forklift while operating it at a high rate of speed, and it started to tip. When Gray got off the forklift and tried to keep it from turning over, it fell on him.

In affirming the forklift training violation, the judge found that Diamond had actual knowledge of the cited condition through foreman Naughton. Specifically, he concluded that Naughton gave Gray the key to the forklift knowing that he had not been properly trained in its operation. On review, Diamond argues that Naughton was not a management employee and therefore any knowledge he may have had of the cited condition cannot be imputed to the company. Diamond further contends that even if Naughton's knowledge is imputable, he lacked knowledge of the cited condition; and, alternatively, that the violation was the result of unpreventable employee misconduct. We disagree with Diamond and affirm the violation.

A. Naughton's Supervisory Status

Under Commission precedent, "[a]n employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. It is the substance of the delegation of authority that is controlling, not the formal title of the employee having the authority; an employee who is empowered to direct that corrective measures be taken is a supervisory employee." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993). Supervisory status is not dependent on job titles,

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[2] Section 1926.501(b)(1) 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."

but may be established by other indicia of authority that the company has empowered the employee to exercise on its behalf. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080, 2002 CCH OSHD ¶ 32,657, p. 51,326 (No. 99-0018, 2003).

We find here that Naughton was a supervisor for purposes of imputing his knowledge to Diamond. Diamond selected Naughton to serve as gang foreman because the company had trained and authorized Naughton, along with three other employees at the AOL worksite, to operate a forklift.[3] Although in this position Diamond did not consider Naughton a management employee, it is undisputed that Naughton could direct the work of the members of his crew and also direct a recalcitrant employee to pack up his tools and report to the general foreman.[4] *See Propellex Corp.*, 18 BNA OSHC 1677, 1679-80, 1999 CCH OSHD ¶ 31,792, p. 46,587 (No. 96-0265, 1999) (leadperson who was member of bargaining unit and could not discipline employees directly, but could report them to manager, was supervisor). Of greatest weight, Naughton was responsible for the key to the forklift and had been instructed not to give the key to an unauthorized forklift operator. Indeed, Naughton had the authority to operate the forklift himself, or to give the key to and direct the forklift's operation by another authorized operator. Accordingly, we find that, under Commission precedent, Naughton is an imputable supervisor.

B. Knowledge

To establish knowledge, the Secretary must prove that an employer knew or could have known with the exercise of reasonable diligence of the conditions constituting the violation. *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079, 1995 CCH OSHD ¶ 30,699, p. 42,606 (No. 90-2148, 1995), *aff'd*, 78 F.3d 582 (5th Cir. 1996) (unpublished table decision). Here, we find that Naughton had constructive knowledge of the cited condition, but not actual knowledge. Contrary to the judge's finding, the testimony regarding whether Naughton knew Gray was not properly trained on the day of the

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[3] The union through which Diamond hired its workers for the AOL project required that there be a "gang foreman" for every crew. These foremen received one dollar an hour more than the journeymen to supervise from one to four employees.

[4] Diamond considered "general foremen," as opposed to "gang foremen," to be management employees, because they participated in management meetings and could directly discipline recalcitrant employees.

accident is inconsistent, and Naughton himself did not testify at the hearing. Two Bovis employees who were present when two compliance officers interviewed Naughton in connection with the OSHA investigation testified that Naughton initially stated he had trained Gray for five to fifteen minutes before handing him the key to the forklift. According to the Bovis employees, Diamond Safety Manager Frank McCullough then interrupted Naughton to say Gray was not trained.

Both compliance officers testified, however, that Naughton admitted he knew Gray was not trained, but neither was clear as to whether Naughton knew this at the time he handed the forklift key to Gray or was simply stating his knowledge at the time of the interview. Also, Diamond general foreman Daniel O'Brien testified that Naughton may not have known who was a licensed operator in his crew, but one of the compliance officers testified that Naughton said he gave the key to Gray because all the licensed drivers were on another floor. Given these inconsistencies in the record and absent testimony from Naughton himself, we find that the record lacks sufficient evidence to establish that Naughton knew when he handed the key to Gray that he had not been trained to operate a forklift.

We find, however, that the record does support a finding of constructive knowledge. The Secretary can establish constructive knowledge by showing that the employer could have discovered the existence of the violative condition with the exercise of reasonable diligence. *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684, 2001 CCH OSHD ¶ 32,497, p. 50,376 (No. 00-0315, 2001). Here, the cited standard provides that, before allowing an employee to operate a forklift, the employer shall ensure that the employee has completed the training required by the standard. Three months prior to the accident, Naughton was given comprehensive forklift training by Diamond and was specifically instructed that only authorized personnel were permitted to drive forklifts. In fact, that very point appeared as a question on the training test and Naughton answered it correctly. Upon completion of his training, Naughton was given a forklift license and told to carry it with him; it is undisputed that Gray had no such license. There was also a sign on the forklift in question that said only trained employees were permitted to operate it. Finally, Naughton's purported claim to have trained Gray for five to fifteen minutes, as testified to by Bovis employees, cannot constitute reasonable diligence on his part

given that Naughton knew not only that his own forklift training had lasted over an hour, but also that it included both a written test and practical "on the floor" instruction. Under these circumstances, we find that Naughton could have known with the exercise of reasonable diligence that Gray was not trained to operate the forklift and that, in handing the keys to Gray, Naughton was engaged in conduct that was inconsistent with his supervisory responsibilities.[5]

Accordingly, we find that the Secretary met her burden of showing Naughton had constructive knowledge of the violation, and that his knowledge was properly imputed to Diamond.[6]

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[5] Commissioner Thompson notes that this same result would be reached under the foreseeability analysis adopted by several of the Circuit Courts of Appeals in cases involving supervisory misconduct. *See, e.g., W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006); *Penn. Power & Light Co. v. OSHRC*, 737 F.2d 350, 355 (3d Cir. 1984); *Mountain States Telephone & Telegraph Co. v. OSHRC*, 623 F.2d 155 (10th Cir. 1980); *Ocean Elec. Corp. v. OSHRC*, 594 F.2d 396, 401 (4th Cir. 1979). Where, as here, the employer argues that the supervisor was acting outside the scope of his supervisory responsibilities when the violative conduct occurred, the Secretary has the burden of proving that the supervisor's misconduct was foreseeable. *Cf. NY State Elec. & Gas Corp.*, 88 F.3d 98, 108 (2nd Cir. 1996) (suggesting Commission should adopt rule where once Secretary proves her prima facie case, burden of going forward with rebuttal evidence switches to employer and Commission then decides case based on record considered as whole, but with burden of persuasion remaining with Secretary).

Applying this analysis here, Commissioner Thompson would find that the Secretary met her burden of proving that Naughton's misconduct was foreseeable by introducing sufficient evidence to establish that Diamond's program was lacking in terms of communication, enforcement, and efforts to discover violations. Specifically, evidence in the record which satisfied the Secretary's burden to show foreseeability of Naughton's misconduct is that set forth by Chief Judge Sommer in his discussion of the reasons why he rejected Diamond's contention that Naughton's actions constituted unpreventable employee misconduct.

[6] In response to the Chairman's separate opinion, Commissioner Rogers would note that she believes the facts in the record are consistent with the theory that Naughton's crew had been tasked with moving some panels. Thus, she would agree with the judge's assessment of the evidence on possible horseplay in n.9 of his decision. She also notes it is possible that Gray himself was engaging in horseplay, but believes this is speculative based on the record. The Chairman, however, would apparently go further, raising the notion that Naughton turned over the key to the forklift to Gray so that "members or a member of his gang could use the machine for horseplay." In Commissioner Rogers' view, this suggestion of intentional group horseplay is not supported by the record.

Based on the record, Commissioner Rogers believes the question of whether the employer can be charged with knowledge is a close one. In any event, in Commissioner

C. Unpreventable Employee Misconduct

A claim of unpreventable employee misconduct is an affirmative defense for which the employer carries the burden of proof. *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1502, 2001 CCH OSHD ¶ 32,397, p. 49,866 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003). To establish the defense, the employer must prove that "(1) it has established work rules to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover the violations; and (4) it has effectively enforced the rules when violations have been discovered." *Id.* (quoting *Gem Indus., Inc.*, 17 BNA OSHC 1861, 1863, 1995-97 CCH OSHD ¶ 31,197, p. 43,688 (No. 93-1122, 1996), *aff'd*, 149 F.3d 1183 (6th Cir. 1998) (unpublished table decision)).

Here, although Diamond did have a work rule that only authorized personnel were allowed to operate forklifts, the record reflects that this rule was not adequately communicated to Diamond's employees. Naughton apparently believed either that five to fifteen minutes of verbal forklift training was adequate, or that he could give the forklift key to anyone on his crew. Additionally, general foreman O'Brien, who was charged with enforcing Diamond's safety program at the AOL worksite, testified that on the day of the accident he himself did not know whether Gray had been trained to operate a forklift, or whether any other member of Naughton's crew had been given such training. This shows not only that Diamond failed to effectively communicate its work rule, but also that effective steps were not taken to discover violations of the rule.[7]

Rogers' view, whether there was horseplay is beside the point, since the real issue here is Naughton's conduct in handing the forklift key to Gray, an untrained operator. In light of the lack of diligence by supervisor Naughton and the deficiencies in Diamond's safety program, however, Commissioner Rogers believes the Secretary has met her burden of showing knowledge regardless of the allocation of the burden of proof. Because the burden of proof is not dispositive here, as shown by her colleague in n.5 *supra*, and because the parties have not had the opportunity to brief the implications of the recent decision in *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006), Commissioner Rogers sees no reason to depart from our precedent, as the Chairman suggests.

[7] By the terms of the cited standard, the forklift training violation is based on Naughton's conduct in allowing Gray, an untrained employee, to operate the forklift, not on the manner in which Gray subsequently operated the forklift. Therefore, we consider Diamond's claim that Gray was engaged in horseplay on the day of the accident, conduct

Accordingly, we find Diamond failed to establish the affirmative defense of unpreventable employee misconduct.

D. Characterization

A violation is willful if it is "committed 'with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.'" *Spirit Homes, Inc.*, 20 BNA OSHC 1629, 1630, 2002 CCH OSHD ¶ 32,714, p. 51,820 (Nos. 00-1807 & 00-1808, 2004) (quoting *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)). At the heart of the willfulness determination is the employer's state of mind. *See Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶ 30,759, p. 42,741 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). The Secretary must show the employer had a "heightened awareness" of the illegality of the conduct. *Rawson Contractors, Inc.*, 20 BNA OSHC at 1081, 2002 CCH OSHD at p. 51,326 (No. 99-0018, 2003). Heightened awareness is more than simple awareness of the conditions constituting the alleged violation; such evidence is already necessary to establish the violation—or mere familiarity with the applicable standard. *Propellex Corp.,* 18 BNA OSHC 1677, 1684-85, 1999 CCH OSHD ¶ 31,792, pp. 46,591-92 (No. 96-0265, 1999). *See also Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1263 (D.C. Cir. 2003) (mere negligence or lack of diligence is not sufficient to establish employer's intentional disregard for or heightened awareness of violation). Instead, the Secretary must show that the employer was actually aware of the unlawfulness of the action or that it "possessed a state of mind such that if it were informed of the standards, it would not care." *Spirit Homes*, 20 BNA OSHC at 1630, 2002 CCH OSHD at p. 51,820 (quoting *Propellex Corp.*, 18 BNA OSHC at 1684, 1999 CCH OSHD at p. 46,591).

In characterizing the forklift violation as willful, the judge concluded that Naughton was aware of Diamond's work rule prohibiting unauthorized employees from operating forklifts but consciously disregarded the rule when he handed the forklift key to Gray. As discussed above, the record lacks sufficient evidence to establish that Naughton had actual knowledge that Gray was not trained. Under such circumstances, and absent

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that violated a company safety rule, to be irrelevant for the purposes of determining whether a violation was established.

testimony from Naughton himself, we see no basis to support the judge's finding that Naughton acted knowingly and deliberately. Thus, we find that the record establishes only that Naughton was negligent in giving the forklift key to Gray. *See Am. Wrecking*, 351 F.3d at 1263. Accordingly, we find the forklift violation was not willful, and affirm the violation as serious because of the tipping danger inherent in forklift operation. *See* 29 U.S.C. § 666(k) (violation is serious if there is substantial probability that death or serious physical harm could result); *Stanley Roofing Co.*, 21 BNA OSHC 1462, 1466, 2005 CCH OSHD ¶ 32,792, p. 52,435 (No. 03-0997, 2006) (violation found serious rather than willful where seriousness was evident from the record).

II. The Fall Protection Violation

During OSHA's investigation at the AOL worksite, the compliance officer ("CO") observed three Diamond employees working at unprotected edges of the 16th, 25th and 26th floors without fall protection. All three employees were wearing harnesses, and all three tied off after being told to do so. The employees acknowledged to the CO that they were aware of the fall protection requirements, had received training and proper equipment, and understood they could be fired for not using it.

On review, Diamond does not dispute the judge's decision to affirm the fall protection violation for which the company was cited, but argues that the judge erred in characterizing the violation as willful. The judge based his finding of willfulness on the fact that Diamond had received numerous memos from Bovis's site safety managers regarding fall protection violations, and also that Diamond lacked a progressive discipline policy.

We agree with Diamond that the record fails to support a willful characterization of this item. The Commission has previously rejected the willful characterization of a fall protection violation under similar circumstances to those at issue here. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1193-95, 1993-95 CCH OSHD ¶ 30,059, pp. 41,343-44 (Nos. 89-2883 & 89-3444, 1993). In that case, Falcon Steel had a fall protection workrule and provided safety belts and training to its employees, but was aware of a "recurring problem" with noncompliance and had done little more than direct employees verbally to tie off. *Id.* at 1193-94, 1993-95 CCH OSHD at p. 41,344. The Commission found that, while Falcon Steel's compliance problem was "serious and deserving of concentrated

remedial measures," it did not amount to either conscious disregard of the Act or plain indifference to employee safety. *Id.* at 1195, 1993-95 CCH OSHD at p. 41,344.

Similarly, the record here establishes that Diamond had a fall protection program, including a specific workrule, and provided both fall protection equipment and training to its employees. Indeed, even the recalcitrant employees observed by the CO were aware that they should have been tied off and knew how to tie off when told to do so. Like Falcon Steel, Diamond was also aware from the Bovis memos that it had a recurring fall protection compliance problem at the AOL worksite.[8]

As was the case in *Falcon*, we consider Diamond's compliance problem to have been both serious and deserving of "concentrated remedial measures." However, also as in *Falcon*, we cannot say that the fact Diamond was not proactive in preventing further violations of its fall protection workrule, but rather only responded when it was made aware of violations, rises to the level of willfulness. *See Am. Wrecking*, 351 F.3d at 1263 (willfulness is characterized by an intentional or conscious disregard for the applicable safety standard). Indeed, the record reflects that whenever Diamond discovered or was informed of a violation of its fall protection work rule, the company responded by speaking to the employee involved. Because the Bovis memos seldom mention employees by name, there is no way to determine whether the violations documented in those memos were committed by more than one repeat offender.[9] Thus, from the evidence in the record, we cannot conclude that Diamond's verbal reprimands were ineffective in ensuring compliance from previously recalcitrant employees. On the contrary, those employees apparently came into compliance once spoken to by Diamond's management. Under these circumstances, we find that the record fails to support a finding that the company consciously disregarded the Act or was plainly indifferent to employee safety. *See Valdak Corp.*, 17 BNA OSHC at 1136, 1993-95 CCH OSHD at p. 42,741 (willfulness is determined by looking at employer's state of mind).

[8] Fourteen memos issued from Bovis to Diamond's safety managers in the year preceding the subject inspection referred specifically to instances of employees' failure to properly tie off; several of the memos noted repeat violations by one of Diamond's general foremen.

[9] While it is troubling that the one repeat offender identified in the Bovis memos was a supervisory employee, we note that the record lacks evidence as to whether that employee was involved in the current citation.

Because of the potential for death or serious injury resulting from a fall from a high floor, we affirm the violation was serious. *See* 29 U.S.C. § 666(k); *Stanley Roofing Co.*, 21 BNA OSHC at 1466, 2005 CCH OSHD at p. 52,435.

III. Penalties

Section 17(j) of the Occupational Safety and Health Act, 29 U.S.C. 666(j), provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the gravity of the violation, and to an employer's size, previous history, and good faith. Here, the Secretary proposed a penalty of $56,000 for each violation, applying a reduction only for Diamond's small size. The judge assessed the proposed penalties for both items. On review, Diamond argues it should have received reductions for history and good faith.

To reflect the change in each violation's characterization from willful to serious, we reduce each of the proposed penalties from $56,000 to $5,600. For the forklift violation, we find that no further reductions in penalty are appropriate. The fact that the violation resulted in the death of a young man shows the high gravity of the violation, as well as the serious need for Diamond to have better communicated its workrule regarding forklift operation. For the fall protection violation, we find that a penalty of $4,200 is appropriate based on Diamond's good faith and lack of prior history. A gravity-based reduction, however, is not warranted given that a fall from the 16th, 25th or 26th floor would almost surely result in death.

ORDER

We affirm one serious violation of 29 C.F.R. § 1910.178(l)(1)(ii), and assess a penalty of $5,600; and one serious violation of 29 C.F.R. § 1926.501(b)(1), and assess a penalty of $4,200.

SO ORDERED.

/s/____________________________
Thomasina V. Rogers
Commissioner

/s/____________________________
Horace A. Thompson
Commissioner

Dated: September 27, 2006

RAILTON, Chairman, dissenting in part and concurring in part:

I respectfully dissent from my colleagues' opinion insofar as it affirms a violation of the forklift training standard. I would remand to the judge for his determination of whether Diamond could have known that gang foreman Dennis Naughton would turn over the key to the forklift to an untrained person.

The majority opinion omits what I believe are facts of importance to the determination of the issues raised under the forklift training standard. The facts as stated imply that the key was turned over because Mr. Naughton's team had to move some panels.

The record demonstrates beyond question, however, that the work of moving panels for that day had been completed. The Secretary introduced a photograph which was identified by compliance safety and health officer Anthony Campos as showing the panels that supposedly were to be moved. Two or three panels are shown loaded on a wooden frame or pallet, and access for the forklift is blocked by a mechanized cart. The site safety officer for Diamond, Frank McCullough, testified without contradiction that the cart was shut down for the day. He observed that the batteries used to power the cart were being recharged. Therefore, he was of the opinion that the work of distributing the panels on the day of the accident was completed.

Mr. McCullough's testimony that the accident occurred towards the end of the work day was corroborated by Jason Clark, an assistant project manager for the general contractor, Bovis. Mr. Clark was an eye witness to the accident. He observed the forklift and testified that it did not carry a load.

At the time of the accident, Mr. Clark was standing on the ninth floor overlooking the empty eighth floor when, he testified, "I observed a fork lift [on the 8th floor] speeding towards me." According to Mr. Clark's testimony, the driver turned the machine in a manner so that it would spin. It turned through on an angle of about 180 degrees and began to tip over, leaving skid marks on the floor. Mr. Clark also observed a group of men standing at the far end of the floor, and they were not engaged in work activities.

The record also establishes that there were a lot of skid marks on the eighth floor. Michael Tierney, a site safety officer for Bovis, testified the skid marks appeared to be

fresh. Mr. Tierney stated the skid marks did not appear to have been made by normal usage of a forklift. His testimony was corroborated by compliance safety and health officer Campos, who testified that there were "many, many skid marks all over the floor." According to Mr. Campos, some of these marks looked fresh and some looked old. They sent up a red flag in Mr. Campos's mind that the machinery was not being handled in a proper manner.

Mr. Tierney opined the crew was fooling around with the forklift. Mr. McCullough opined that Mr. Naughton's gang was engaged in horseplay with the forklift. Horseplay, as he also testified, was a prohibited practice.

In his decision, the judge addressed some of this evidence in a footnote. He concluded it was not sufficient to prove the employees were engaged in misconduct. In my view, however, the evidence is sufficient to rebut the Secretary's prima facie case of employer knowledge.

I agree with Commissioner Thompson that the recent decision by the U.S. Court of Appeals for the Fifth Circuit in *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006), has application to the Commission's decision in this case. Indeed, that decision and its predecessor, *Horne Plumbing*, as well as decisions of the 3rd, 4th, and 10th Circuits all apply concerning supervisor misconduct. *See Penn. Power & Light Co. v. OSHRC*, 737 F.2d 350 (3d Cir. 1984); *Mountain States Telephone & Telegraph Co. v. OSHRC*, 623 F.2d 155 (10th Cir. 1980); *Ocean Elec. Corp. v. OSHRC*, 594 F.2d 396 (4th Cir. 1979); *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976). *See also NY State Gas & Elec. Co.*, 88 F.3d 98, 106-109 (2d Cir. 1996).

I would not, however, conclude that the Secretary carried her burden of persuasion here on the knowledge issue. I would remand the matter to the judge to resolve the issue. Given that I would change the law on the issue of constructive knowledge, a remand allows the parties an opportunity to brief the matter to the judge, who then could weigh the evidence in the first instance.

Here, we are confronted again with the issue of supervisor misconduct. The issue in this case involves the misconduct of Mr. Naughton in turning the key to the forklift over so that members or a member of his gang could use the machine for horseplay. In that regard I would accept the testimony of the witnesses that the work day was

completed and the forklift was being used for purposes other than the work of distributing panels. I would also accept the testimony of the witnesses that the "J" or skid marks on the floor were evidence of misuse of the forklift, the only question being whether that activity took place on one or more days.

Here too, as the courts have expressed, we are confronted with the overlapping issues of constructive knowledge as they relate to the employer's safety program. On the one hand the Secretary has the burden of persuasion on the issue, but on the other hand the employer under Commission precedent has the burden of persuasion on the employee misconduct defense. The majority of the courts of appeals that have considered the issue have clearly held when supervisory misconduct is at issue, the Secretary must show defects in the employer's safety program that should have provided the employer with notice that its program is defective. *See, e.g., W.G. Yates & Sons Constr. Co.*, 459 F.3d at 607; *Penn. Power & Light*, 737 F.2d at 355; *Ocean Elec.*, 594 F.2d at 401; *Horne Plumbing & Heating*, 528 F.2d at 568.

In this matter, my colleagues point to Mr. Naughton's knowledge that he could have known Thomas Gray was not trained to operate a forklift and to Mr. O'Brien's lack of knowledge that Mr. Gray would operate a forklift; they use their findings to demonstrate that Diamond both had constructive knowledge and failed to prove the employee misconduct defense. Their articulation of these findings demonstrates the overlapping burdens and also the confusion that prevails regarding having two standards of persuasion on the single issue of employer knowledge.

Once again the Commission has failed to clear up what Mr. Justice White characterized as a "confusing patchwork of conflicting approaches to this issue" *See L.E. Myers Co. v. Sec'y of Labor*, 484 U.S. 989 (1987) (White, J., dissenting from denial of certiorari)). *See also Timken Co.*, 20 BNA OSHC 2034, 2042 (No. 97-1457, 2004) (Railton, Chairman, separate opinion) (noting problems with Commission's continued application of conflicting precedent in this area). Here, it seems to me that the issue concerns the adequacy of the employer's forklift safety program and whether Mr. Naughton had any responsibility to oversee or otherwise be responsible as a supervisor for safety regarding that program other than his own safety as a forklift operator. *Cf.*

Rawson Contractors, Inc., 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003) (foreman was designated person for trenching/excavation safety on job).

I also cannot agree that the evidence my colleagues rely upon is sufficient. First, the employer's rule that only authorized, trained employees could operate a forklift was clearly communicated. Mr. Naughton had passed a test which demonstrated his knowledge of the rule. In addition, a sign on the dash of the forklift stated the rule. In this case, Mr. Naughton and every untrained operator had to be aware they were breaking the employer's forklift safety rule.

Second, I also believe my colleagues make too much out of Mr. O'Brien's lack of knowledge regarding operation of the forklift. My colleagues indicate Mr. O'Brien was responsible for safety, but he was only one of three working superintendents on the job. He was not shown to be in charge of forklift safety. Moreover, they refer to Mr. Naughton's belief that a person could be trained to operate the forklift in five to fifteen minutes. Mr. O'Brien, however, took the course after the accident, and he testified that he believed fifteen minutes of driver training was sufficient. In any event, whether fifteen minutes of driver training was or was not sufficient is tangential and perhaps not relevant to the question of turning over the key. I note that the training requirements of the forklift standard include additional matters such as loading the forklift, rules of operation and the like. The entire program Diamond conducted took over an hour.

As indicated, I would remand this matter to the judge to determine from the record whether the Secretary carried her burden of persuasion by a preponderance of the evidence that Diamond's forklift safety program was inadequate.

/s/________________________

W. Scott Railton

Chairman

Dated: September 27, 2006

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 NOS. 02-2080 & 02-2081
DIAMOND INSTALLATIONS, INC.,	:	
Respondent.	:	

APPEARANCES:

William G. Staton, Esquire Evanthia Voreadis, Esquire U.S. Department of Labor New York, New York For the Complainant.	Joan M. Gates, Esquire Douglas E. Grover, Esquire Thompson Hine LLP Cincinnati, Ohio For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding 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"). In May of 2002, the Occupational Safety and Health Administration ("OSHA") went to the AOL Time Warner Center site in New York, New York, to conduct an inspection into the events surrounding a fatal accident involving a forklift and one of Respondent's employees; this inspection began on May 22, 2002, and ended on June 18, 2002. OSHA returned to the AOL Time Warner site in September of 2002, due to a second fatality involving an employee of another contractor at the site, and further inspected Respondent's operations after an employee was observed working without fall protection near the edge of the 26th floor of the building under construction; this inspection began on September 16, 2002, and ended on September 26, 2002. As

a result of these two inspections, OSHA issued two separate citations to Respondent. One alleged a willful violation of 29 C.F.R. § 1910.178(l)(1)(ii), which requires employees to be properly trained prior to operating powered industrial trucks; the other alleged a willful violation of 29 C.F.R. § 1926.501(b)(1), which requires employees on walking/working surfaces with unprotected sides or edges that are 6 feet or more above lower levels to be protected from falling. Respondent timely contested the citations, and the hearing in this matter was held on August 20 and 21, 2003, in New York, New York. Both parties have submitted post-hearing briefs.

Background

The AOL Time Warner Center project, which began in early 2001, involved the construction of two towers, each of which was to be 54 stories high; while both towers were to consist of structural steel and reinforced concrete on the lower levels, the north tower was to be reinforced concrete from the 19th floor up and the south tower was to be reinforced concrete from the 23rd floor up. Bovis Lend Lease ("Bovis"), the general contractor at the site, contracted with Respondent, Diamond Installations, Inc. ("Diamond"), to perform the curtain wall installation, which involved putting the "curtain," or exterior wall panels, on the towers.[1] The curtain wall installation required the welding and bolting of clips onto the outside of the towers and then using a crane to lift the wall panels and set them in place; the work also required Diamond employees to work at or near the outside edges of the floors.[2] (Tr. 23-27; 32-33).

Bovis required every contractor at the site, including Diamond, to submit a site-specific safety plan. Bovis also held orientations at the site that took place daily for any new workers of any of the contractors; the orientations addressed the site safety rules, including those relating to fall protection, as well as the enforcement of the rules.[3] In addition, Bovis required the contractors'

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[1]There were 125 to 150 contractors and approximately 2500 employees at the site at any given time; the number of Diamond employees at the site varied from 60 to 160 and was well over 100 during the fall and winter of 2002. (Tr. 26; 238-39).

[2]The panels, which were made of metal, stone and glass, were moved up to the various floors and then set in place by a crane that would lift each panel and lower it into the clips. (Tr. 32-35).

[3]Bovis enforced its rules by warning the worker for a first infraction, sending the worker to another safety orientation for a second, and dismissing the worker for a third; if the worker was not a Bovis employee, Bovis would fine the worker's employer for the second and third infractions and would also recommend the worker's dismissal after the third infraction. (Tr. 30).

foremen to attend the meetings that were held for the foremen at the site, and Bovis had two site safety mangers who walked the project continuously every day. Upon observing a safety problem, the safety manager would have the employee or the employee's foreman correct the problem; the safety manager would then write up a notice of the problem, either that day or the next, and put it in the mailbox of the specific contractor in the area where such mailboxes were located. The safety managers would also speak personally to the management of contractors about recurring safety problems. (Tr. 24-32; 40- 44; 58-60; 72-75; 86-90; 287-88; R-1).

After a new hire of Diamond attended the Bovis safety orientation, Diamond would issue the new employee his safety equipment and show him how to use it. Diamond also held weekly toolbox meetings for its employees that addressed safety topics such as material handling and storage, scaffold erection, proper work attire and horseplay. Employees of Diamond also received other training at the site, such as vendor-provided training when equipment like scissors lifts was delivered and a union-provided class in rigging scaffold. Diamond had general foremen who walked the job and a safety manager who was at the site once or twice a week and walked the job during his visits; these individuals, upon seeing a safety problem, would address if and have it corrected. (Tr. 237-45; 286; 289-94; R-2-15).

In May of 2002, Diamond had four employees at the site who were authorized to operate forklifts. Diamond's safety manager had trained the four employees in this regard, and the training, which took about an hour and a half, involved instruction from a manual, a written test and hands-on training; each trained employee was also issued a license to show his authority to operate a forklift. On May 22, 2002, Dennis Naughton, a gang foreman of a Diamond distribution crew, gave the forklift keys to Thomas Gray, a 19-year-old employee of Diamond who had been working as a flag man and in distribution.[4] Jason Clark, a Bovis assistant project manager who saw the accident, testified he was on the ninth floor overlooking the eighth floor when he saw a forklift traveling at an excessive rate of speed on the eighth floor. As Clark watched, Gray, the driver, turned the forklift, which went into a 180-degree spin and began to tip over; Gray got out and was trying to keep the forklift from going over when it fell on him. OSHA, Bovis and the New York Police Department investigated the accident, and photos of the scene taken by Bovis and OSHA showed skid marks in

[4]Distribution crews moved the panels and prepared them for installation. (Tr. 246; 310; 318).

a circular pattern made by the forklift. Based on the skid marks, Diamond's safety manager and one of the Bovis safety managers concluded Gray was "fooling around" and engaging in horseplay when the forklift turned over. (Tr. 14-23; 63-66; 83; 95-97; 103; 159-68; 171; 174-75; 182-86; 197-202; 211; 229; 245-46; 257-59; 279; 299-305; 310; 316-18; 337-40; 345; 368-70).

On September 16, 2002, the OSHA compliance officer ("CO") who conducted the second inspection of Diamond saw an employee working at the edge of the 26th floor of the building under construction without fall protection. The CO spoke to the employee, who said he was a foreman but would not give his name, and the CO, after holding an opening conference with the employee, told him he was exposed to falling off the building and that he should tie off; the employee agreed with the CO and tied off.[5] The CO returned to the site on September 23, 2002, when he saw two more Diamond employees working without fall protection; the first was installing a clip at the edge of the 25th floor without fall protection, the second was installing a clip at the edge of the 16th floor without fall protection, and both employees agreed to tie off after the CO spoke to them.[6] (Tr. 108-17).

Willful Citation 1, Item 1, Docket No. 02-2081

This citation item alleges a violation of 29 C.F.R. 1910.178(l)(1)(ii), which states as follows:

> Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph....

To establish a violation of a specific standard, the Secretary has the burden of showing that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharamaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). Respondent Diamond does not really dispute the first and third elements. However, Diamond does dispute that the terms of the standard were violated, in light of the forklift training it provided. Diamond also disputes that it knew or could have known of the violative condition.

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[5]As indicated *supra*, OSHA returned to the site in September 2002 after another fatality at the site involving a different company; OSHA began the second inspection of Diamond after the CO saw the above-noted employee, who, the CO later learned, was Walter Burns. (Tr. 106-10).

[6]The first employee identified himself as Allen Rollen and said he was not a foreman; the second identified himself as Ken Raffloer and said that he was a foreman. (Tr. 114-16).

The record shows that Diamond rented the forklifts it used at the site from Pride Equipment and that Diamond was responsible for maintaining the forklifts. (Tr. 305). The record also shows that Dennis Naughton, the gang foreman who gave the forklift keys to Thomas Gray, had three to five workers in his crew at the time of the accident and that Gray was a member of that crew. (Tr. 174-75; 211; 265; 318). Naughton himself did not testify at the hearing. However, the evidence of record establishes that Naughton was promoted to the position of gang foreman of the subject distribution crew after he had been working at the site for a while, that the distribution crews used forklifts in their work, and that Frank McCullough, Diamond's safety manager, had trained Naughton in forklift operation on February 10, 2002. (Tr. 257-58; 273; 299-300; 304-05; R-20-21). The record further establishes Gray had been working at the site for only a few weeks at the time of the accident, that his flag man and distribution duties did not require him to use a forklift, and that McCullough had not trained Gray in forklift operation. (Tr. 263-64; 310-11; 339-40).

In addition to the above, four witnesses testified at the hearing about a meeting that took place at the site on June 5, 2002. The witnesses who testified in this regard were Anthony Campos and Ubaldo Permes (the OSHA CO's who investigated Gray's accident) and Bovis Safety Managers Michael Tierney and Robert Wright; other persons also at the meeting included Diamond employees Frank McCullough and Dennis Naughton. (Tr. 66-72; 97-101; 172-75; 204-11). These four witnesses testified to the effect that, when asked what training Gray had on the forklift, Naughton first said Gray was not trained.; he then said he had trained Gray for five, ten or fifteen minutes, after which McCullough stated that Gray had not been trained in forklift operation. Naughton was also asked if he had ever seen Gray drive the forklift before the accident, and Naughton replied he had seen him do so for a few minutes just before the accident. Finally, Naughton was asked why he had had Gray operate the forklift; Naughton responded that Gray was the closest available person, that the other licensed operators were working elsewhere, and that it was near the end of the day and they had work they had to finish. (Tr. 66-72; 97-101; 172-75; 204-11).

It is clear from the foregoing that Gray was not properly trained before he operated the forklift. I find, accordingly, that the terms of the standard were violated. It is also clear that Naughton, a Diamond gang foreman, knew that Gray was not properly trained when he had him operate the forklift on the day of the accident. The Secretary contends that because of his position, Naughton's knowledge of the violation may be imputed to Diamond. Diamond, on the other hand,

contends that a gang foreman is not the same as a regular foreman and that Naughton's knowledge may not be imputed to it.

Based on the testimony of Daniel O'Brien, one of Diamond's general foremen, and Frank McCullough, Diamond's safety manager, the union contract specified that a gang foreman was required for all "detail work" at the site.[7] A gang foreman supervised one to four other journeymen and made at least an extra dollar an hour for doing so. However, unlike a regular foreman, who had the authority to discipline employees, a gang foreman's only authority over a crew member who was not following work rules was to have that person pack up his tools and report to a general foremen; gang foremen likewise did not participate in Diamond project meetings, as did the regular foremen. (Tr. 242-45; 318-19).

Diamond points to the foregoing in support of its position that Naughton's knowledge of the cited condition cannot be imputed to it. As the Secretary notes, however, Commission precedent is well settled that a supervisor's knowledge is imputable to the employer and that an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (Nos. 86-360 & 86-469, 1992). It is the substance of an employer's delegation of authority over other employees that is controlling, not the employee's formal job title, *Dover Elevator Co., Inc.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993), and the lack of authority to actually discipline other workers will not prevent the imputation of knowledge to the employer. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2068-69 (No. 96-1719, 2000). The Commission reaffirmed these holdings recently in *Rawson Contractors, Inc.*, 20 BNA OSHC 1078 (No. 99-0018, 2003). There, the Commission found that an hourly-paid union employee who did not have the title of supervisor and who lacked authority to hire or fire was nonetheless a foreman for purposes of imputation of knowledge because he was assigned to supervise work activities, to take all necessary steps to complete job assignments, and to ensure work was done safely. *Id.* at 1080.

The record here establishes that a Diamond gang foreman's job was to supervise a crew, to promote the detail work he was assigned to do, and to perform the tasks the general foreman gave

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[7] O'Brien testified that when the number of Diamond employees was 100 to 160, there would have been 50 to 75 gang foremen at the site; when Diamond had around 60 employees, on the other hand, there would have been 25 to 30 gang foremen at the site. (Tr. 238-39; 242-43).

him. (Tr. 242; 318). The record also establishes that while a Diamond gang foreman could not hire or fire employees, he did have the authority to tell an employee who was not obeying work rules to pack up his tools and report to a general foreman. (Tr. 244-45; 318-19). Based on the evidence, and on the Commission precedent set out above, I find that Naughton's knowledge of the violation in this case is imputable to Diamond because of his gang foreman position. I find, therefore, that the Secretary has demonstrated the knowledge element of her burden of proof and that she has shown a prima facie violation of the cited standard.

Diamond next contends that it rebutted the Secretary's prima facie case by presenting evidence sufficient to establish that the violation was due to unpreventable employee misconduct. To prove this affirmative defense, an employer must show that it (1) has established work rules designed to prevent the violation, (2) has adequately communicated the rules to its employees, (3) has taken steps to discover violations of the rules, and (4) has effectively enforced the rules when violations have been discovered. *Jensen Constr. Co.*, 9 BNA OSHC 1477, 1479 (No. 76-1538, 1979). I agree with the Secretary that Diamond has not met its burden of establishing its asserted defense, for the following reasons.

First, to the extent that Diamond contends that Grays's actions constituted unpreventable employee misconduct, this contention is rejected. The record indicates that Diamond held a tool box meeting at the site addressing horseplay and that Gray attended that meeting.[8] (Tr. 293-94; R-3). The record also indicates that Gray was driving the forklift at an excessive speed, that he was not wearing the seat belt, and that the forks were raised and had no load on them; as set out above, Frank McCullough, Diamond's safety manager, and Michael Tierney, one of the Bovis safety managers, concluded that Gray was "fooling around" and engaging in horseplay when the accident occurred. (Tr. 20; 23; 83; 182; 227-28; 316; 370). However, in my opinion, there is insufficient evidence in the record to establish this was the case.[9] Moreover, as the Secretary notes, R-3 is a general

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[8]I note that R-3, the toolbox meeting addressing horseplay, is dated January 31, 2002, and that Gray did not begin to work at the site until May 2002. The record indicates, however, that Gray had worked at the site before during his breaks from school, and I can only assume that his presence at the site during January 2002 coincided with one of his school breaks. (Tr. 263-64; 337).

[9]McCullough and Tierney reached their conclusions due to the skid marks on the floor in the area where the accident occurred. (Tr. 83; 316; 370). CO's Campos and Permes also noted the skid marks, some of which seemed to be from the accident and some of which seemed older, when they

admonition against horseplay, and McCullough admitted that he did not know if the toolbox meeting about horseplay included any discussion about forklifts. (Tr. 340). Finally, as the Secretary also notes, R-3 is no substitute for specific training in forklift operation, and it is clear from the record Gray did not receive appropriate forklift training. In my view, Diamond cannot seriously assert that the actions of Gray, a young, inexperienced and untrained worker, were the result of unpreventable employee misconduct, particularly in light of the evidence demonstrating that Naughton, Gray's gang foreman, gave Gray the keys and had him operate the forklift.[10] (Tr. 174-75; 211).

Second, I also reject Diamond's contention that Naughton's actions constituted unpreventable employee misconduct. Daniel O'Brien testified that Diamond's policy was that only trained, licensed employees could operate forklifts. (Tr. 245). This policy was set out in a warning sign on the forklift itself and in the tests that were given to the four Diamond employees at the site who had been trained in forklift operation.[11] (Tr. 311-12; R-17-20; R-24). Thus, Diamond had a rule designed to prevent unauthorized forklift operation, and it had communicated the rule to its trained forklift operators.[12]

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were at the site, and Campos described the marks as a "chronic" condition. (Tr. 160; 171; 181-82; 201). However, I make no finding as to what the skid marks meant, because I am not persuaded that the individuals who testified about the marks had sufficient expertise to give a valid opinion; in this regard, I note that Robert Wright, the other Bovis safety manager, testified that he had formed no conclusion from the skid marks. (Tr. 103). In addition, although Jason Clark, the Bovis employee who saw the accident, initially indicated that Gray had turned the forklift so as to make it spin, he then indicated that Gray had simply turned it and lost control. (Tr. 19). Finally, while there were apparently two or three Diamond employees who also saw the accident, none of them gave any information about what Gray was doing. (Tr. 17-18; 21-22; 124-27; 213-14). For these reasons, there is insufficient evidence to support a finding that Gray was "fooling around" with the forklift.

[10]As set out above, the record shows that Gray was not wearing the seatbelt in the forklift, that he was driving with the forks raised, and that he got out of the forklift when it started to tip over. (Tr. 16; 20; 167; 227-28; C-34). As the Secretary notes, all of these actions were prohibited by R-16; the manual that Diamond used to train employees in forklift operation. *See* R-16, pp. 3-5.

[11]The sign on the forklift, depicted in R-24, states: "WARNING Trained Operator Only." Question 20 on R-17 through R-20, which are the tests the four trained employees took, states that "[a]nyone in your company can operate a motorized hand truck." B, the correct answer, states: "No. Only authorized, trained professional operators should operate these or any other type of lift truck." All four of the trained employees, including Naughton, answered Question 20 correctly.

[12]Contrary to Diamond's assertion, there was no evidence in the record that this rule had ever been communicated to other employees.

Despite his training, however, Naughton gave Gray the keys and had him operate the forklift. (Tr. 174-75; 211). Moreover, Naughton testified at his deposition that he felt that he could assign anyone in his crew to drive the forklift. (Tr. 354). Based on his actions and his deposition testimony, it would appear that Naughton believed that he could violate work rules without consequence. Following is the evidence regarding Diamond's efforts to discover violations of work rules and its enforcement of its rules when violations were detected.

Daniel O'Brien, one of Diamond's general foremen at the site, and Frank McCullough, Diamond's safety manager, both testified that they walked the job at least once or twice a week and that if they saw an employee working unsafely the employee would be verbally reprimanded and the condition would be corrected. They further testified that Frank Michaels, the general foreman who was over O'Brien and who was responsible for overall safety at the site, also walked the job, and it was McCullough's belief that Michaels did so daily.[13] O'Brien and McCullough stated that Diamond had no set policy for disciplining employees who repeatedly violated safety rules, and both discussed a foreman, Tom Culling, who Bovis had "written up" for not using fall protection a number of times but had had no action taken against him except verbal reprimands; O'Brien said he had the authority to take action beyond verbal discipline but had never done so and that he had never considered removing Culling from the job because he did not feel it was warranted.[14] McCullough was unaware of Diamond ever firing employees for safety violations, but he said that Michaels had removed workers from the outer edges of the floors for not using fall protection and had sent them to work "downstairs." He also said that Diamond was instituting a "three strikes" policy that would involve removing an employee from the job after three serious safety violations but that the policy was not yet in effect. (Tr. 243-45; 253-57; 267-69; 289-90; 329-31; 348-49; 362-63; 375-76).

The above indicates that Diamond did in fact make efforts to discover safety violations. However, it is clear from the record that Diamond's enforcement of its rules when violations were

[13]There was evidence that another foreman, Frank Colletta, "ran the south tower," and it is reasonable to infer that his job involved walking that tower to detect safety violations. (Tr. 345-47).

[14]Although O'Brien said Culling had been written up two or three times, the record shows he was written up five times for working without fall protection, three before the second inspection and two after; further, while Tierney believed Culling had been removed from the site for one day, O'Brien testified he had not been. (Tr. 52-53; 57; 253-57; 267-68; C-5; C-11; C-14; C-18-19).

detected was inadequate. In essence, the only discipline that Diamond implemented at the site was verbal discipline, even for repeated violations, except for some instances in which workers were apparently removed from the outer edges of the floors and sent downstairs to work for not using fall protection. In addition, while McCullough testified about the "three strikes" policy that Diamond was in the process of instituting, he and O'Brien both admitted, in effect, that Diamond had never had a progressive discipline system. (Tr. 253; 362). Equally significant is the fact that foremen were allowed to violate work rules without being effectively disciplined. The example of Culling, set out above, is telling, and even more telling is Naughton's deposition testimony that he was not disciplined after the accident, a fact that O'Brien verified. (Tr. 271-72; 355). As the Secretary points out, the Commission has held that "[w]here a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1017, 1991) (citations omitted). On the basis of the evidence of record and Commission precedent, Diamond's asserted defense is rejected and the alleged violation of 29 C.F.R. § 1910.178(l)(1)(ii) is affirmed.

This citation item has been classified as willful. To establish a willful violation, the Secretary must show that the violation was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987) (citation omitted). 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. *Id.* at 1256-57. (Citations omitted).

The facts in this case are similar to those in *Rawson Contractors, Inc.*, 20 BNA OSHC 1078 (No. 99-0018, 2003), discussed above. There, a union employee (hereafter, "foreman") had been assigned to supervise the activities of employees who were working in a 20-foot-deep trench. The foreman had been trained in OSHA's trenching requirements, and Rawson had designated him to be the competent person at the site; in spite of his training, he sent two employees into the unprotected trench to work, and he admitted he knew at the time that the condition violated the trenching standards. The Commission found that the foreman had acted with conscious disregard of

the standard's requirements, that he had willfully violated the standard, and that his actions were attributable to the employer. The Commission further found that while Rawson in many respects had a good safety program, *i.e.*, it had work rules relating to the cited condition that had been communicated and monitored, there was no evidence that Rawson had enforced its rules before the cited event; therefore, the violation was affirmed as willful.[15] *Id.* at 1081-82.

The record in this case shows that Naughton, the gang foreman who was supervising Gray, gave the forklift keys to Gray and had him operate the forklift even though he knew that Gray had not been trained in using forklifts. (Tr. 174-75; 208; 211). The record further shows that Naughton was also aware of the rule prohibiting the unauthorized use of forklifts, having been trained in this regard on February 10, 2002, just three months before the accident. (Tr. 304-05; R-17; R-21). Finally, the record shows that while Diamond had a rule designed to prevent the cited condition and had communicated the rule, at least to its forklift operators, and while Diamond had also made efforts to discover violations of its rules generally, the company had not effectively enforced its rules when violations were detected; that this is so is established by the admissions of O'Brien and McCullough that Diamond had never had a progressive discipline system. (Tr. 253; 362). It is also established by the facts relating to Culling, the foreman who was written up five times for violating fall protection rules and who received only verbal reprimands, and by the fact that Naughton was not disciplined after the accident, despite his clear violation of Diamond's work rule. (Tr. 52-53; 57; 253-56; 267-68; 271-72; 355; 363; 375-76; C-5; C-11; C-14; C-18-19). I find that Naughton acted with conscious disregard of Diamond's work rule. I further find that Naughton's knowledge and actions are imputable to Diamond and that the violation was properly classified as willful.[16]

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[15]Rawson did, however, discipline the foreman after the cited event. *Id.* at 1079-80.

[16]In so doing, I have considered the testimony of O'Brien and McCullough that they had no previous knowledge of an untrained employee using a forklift or an employee operating a forklift in an unsafe manner. (Tr. 247; 274; 309-10; 348). This testimony, however, is of no avail to Diamond, as Naughton's knowledge and actions have been imputed to Diamond. I have also considered Diamond's assertion that its good faith efforts to properly train its forklift operators should mitigate against the willful classification, but, as in *Rawson*, I find that such efforts are insufficient in view of Diamond's failure to effectively enforce its work rules. Finally, I have considered McCullough's testimony that, after the accident, he took the forklift operation work away from the ironworkers and gave it to the operating engineers. (Tr. 301). O'Brien did not recall this happening, however, and McCullough's testimony in this regard is thus not credited. (Tr. 281).

The Secretary has proposed a penalty of $56,000.00 for this citation item. CO Permes testified that the penalty was based on Diamond's size, history and good faith, and on the gravity of the violation; the severity of the violation was rated as high and the probability of an accident was rated as great, especially in light of the fatality that resulted from the violation. (Tr. 216-19). I find the proposed penalty appropriate, and a penalty of $56,000.00 is therefore assessed.

Willful Citation 1, Item 1, Docket No. 02-2080

This citation item alleges a violation of 29 C.F.R. 1926.501(b)(1), which states as follows:

> 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.

The record shows that both Bovis and Diamond had a rule that required employees to tie off when they were exposed to falls of 6 feet or more; Bovis communicated the rule during its orientations, which all workers new to the site attended, and Diamond provided each of its new employees with a harness, a lanyard and a strap and demonstrated how to use the equipment. (Tr. 28-29; 247; 290-91; 320; R-1, pp. 23-24). The record also shows that Bovis provided perimeter protection on all floors of the towers that consisted of a top, middle and lower cable located 6 to 12 inches from the floor's edge; these cables also held debris nets that prevented material from falling from the floors, but workers were not to tie off to the cables as they were not approved for that purpose.[17] Bovis also provided 78-inch-high static lines around the perimeters of the upper floors to which workers could tie off, but, on the lower floors, Diamond employees used means such as hooking off to anchor points above them, setting up safety lines between columns and tying off to the lines, and putting slings around columns to tie off to.[18] (Tr. 35-40; 78-79; 320).

Robert Stewart is the OSHA CO who conducted the second inspection of Diamond. As set out in the background portion of this decision, on September 16, 2002, CO Stewart saw Diamond

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[17]A Bovis subcontractor put up and maintained the cables, but other employers who removed the cables to do their work were to replace them at the end of the day. (Tr. 36; C-8; C-10).

[18]Static lines were used from the 19th floor up on the north tower and from the 23rd floor up on the south tower; as to the lower floors, McCullough testified about one system that Diamond used that was a lifeline between two columns that could support two men. (Tr. 40; 322-23; R-25).

employee Walter Burns at the edge of the 26th floor without fall protection.[19] Burns appeared to be directing the work of the other employees with him, and the crew was installing a wall panel; while the other employees were tied off to the static line in the area Burns was not and was standing outside of the line and holding onto it. When the CO asked Burns if his foreman was around, Burns said he was a foreman; the CO then told Burns he needed to be tied off, and Burns agreed and tied off. On September 23, 2002, CO Stewart saw two more Diamond employees working without fall protection. The first, who identified himself as Allen Rollen and said he was not a foreman, was installing a clip at the edge of the 25th floor without fall protection. The second, who identified himself as Ken Raffloer and said he was a foreman, was installing a clip at the edge of the 16th floor without fall protection. Both workers agreed to tie off after CO Stewart spoke to them. (Tr. 104-17).

The foregoing testimony of CO Stewart, which Diamond did not rebut, establishes the first three elements of the Secretary's case, that is, the applicability of the cited standard, the failure to comply with the standard, and employee access to the cited condition. As to knowledge, the Secretary contends that Diamond had actual knowledge of two of the cited instances because Burns and Raffloer were foremen. Diamond, however, contends that the Secretary has not shown that Burns and Raffloer were in fact foremen.

CO Stewart testified that when he spoke to O'Brien about the employees he had seen who had said they were foremen, O'Brien stated that they were probably gang foremen for that particular job.[20] (Tr. 123). The CO also testified, however, that Michaels told him that he did not recognize the name of Walter Burns as being a foreman. (Tr. 133-34). In addition, the CO did not request payroll records to verify that Burns and Raffloer were in fact foremen, and, at the hearing, Diamond presented copies of payroll records that showed that Burns and Raffloer were being paid at the journeyman level during the relevant period in September 2002. (Tr. 134-35; 331-34; R-27).

I observed CO Stewart's demeanor as he testified, I found him credible and convincing, and I have no doubt that his testimony accurately reflects what he saw at the site and what employees told

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[19]Although Burns would not give the CO his name, either O'Brien or Michaels provided the name to CO Stewart later on; Tierney of Bovis was apparently with CO Stewart when the CO made his observations of both Burns and the two other employees. (Tr. 84-86; 109-10; 114-17).

[20]The evidence regarding Diamond's gang foremen at the site, and the fact they were paid at least an extra dollar an hour for working in that capacity, is set out on page 6 of this decision.

him. Further, I can fathom no reason why Burns and Raffloer would have said they were foremen if they were not, unless they were simply mistaken, and what O'Brien told the CO tends to support a conclusion that the two employees were gang foremen. On the other hand, Michaels told the CO that he did not recognize Burns' name as that of a foreman. Finally, the Secretary did not rebut the payroll evidence noted above, and the CO's testimony about what O'Brien said about gang foremen, and in particular their being paid more than the journeymen, was consistent with the testimony of O'Brien and McCullough in that regard. (Tr. 123; 242-45; 318-19). On balance, I find the evidence as to whether Burns and Raffloer were gang foremen to be inconclusive; accordingly, the Secretary's contention that Diamond had actual knowledge of the violations is rejected.

The Secretary next contends Diamond should have known of the cited conditions because of the notices it received from Bovis. The notices Bovis issued to Diamond before the CO's inspection, that is, C-1 through C-16, are dated from September 5, 2001 to July 1, 2002.[21] Except for C-8 and C-10, which refer to replacing perimeter cables at the end of the day, C-1 through C-16 document instances of employees being exposed to falls and not tying off or tying off improperly; further, while C-5 refers to only one employee (Tom Culling, who was seen twice within an hour at the perimeter without fall protection), the other notices refer to two or more employees.[22] O'Brien testified he had received "well over 95 percent" of the notices Bovis had issued, that Michaels had also seen them, and that McCullough had discussed "many" of the notices with him (O'Brien). (Tr. 250-52). Also, Tierney testified he spoke to Diamond's management about its employees not tying off. (Tr. 58-59). Based on the record, I find Diamond had actual knowledge its employees were not following the rule that required them to tie off when exposed to falls of 6 feet or more. I also find Diamond could have known of the cited conditions had it exercised reasonable diligence.

Diamond itself notes that an inquiry into whether an employer was reasonably diligent involves a number of factors, including whether the employer had adequate work rules and training programs, whether it adequately supervised employees, and whether it took adequate measures to

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[21]C-17 through C-22, which date from November 29, 2002 through July 25, 2003, are notices Bovis issued after CO Stewart's inspection.

[22]Tom Culling was a foreman at the site who, as noted in the preceding discussion, was written up five different times for not wearing fall protection; three of the notices were dated before CO Stewart's inspection, and two were dated after the inspection. (C-5; C-11; C-14; C-18-19).

prevent the occurrence of violations. *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2181 (Nos. 11-1268 & 00-1637, 2003) (citation omitted). As set out above, Diamond and Bovis both had a rule requiring employees to tie off when exposed to falls of 6 feet or more. The rule was communicated to all new hires during the Bovis orientations, and Diamond issued to each of its new employees a harness, a lanyard and a strap; Diamond also showed its new employees how to use the equipment. (Tr. 28-29; 247; 290-91; 320; R-1, pp. 23-24). In addition, the record shows that O'Brien and McCullough both walked the job at least once or twice a week and that if they saw an employee who was not tied off the employee would be verbally reprimanded and the condition corrected; the record further shows that Michaels also walked the job site. (Tr. 243-47; 289-90; 329). As to the notices from Bovis, O'Brien testified that when he received one, he would go talk to the employees himself if it was known who they were;[23] otherwise, he would have a meeting with all the employees the next morning before work began and remind them they were to tie off. (Tr. 248; 252-53; 267). McCullough testified that when he received a notice, he would go immediately to the site and talk to O'Brien or Michaels; he would then ask one of them to ensure the condition was corrected or he would do it himself. (Tr. 329-31).

The foregoing establishes that Diamond had a rule designed to prevent the violative condition, that it communicated the rule to its employees, and that it made efforts to discover violations of the rule. However, the discussion relating to Docket No. 02-2081, *supra*, plainly demonstrates that Diamond's enforcement of its rules was inadequate.[24] As set out therein, the only discipline Diamond implemented at the site was verbal discipline, even for repeated violations, although there were evidently some instances in which workers were removed from the edges of the floors for not tying off and sent downstairs to work. Further, while there was evidence about the "three strikes" policy Diamond was in the process of instituting, it was clear Diamond had never had a progressive discipline system and that no one had ever been fired for violating a safety rule. Also significant was the evidence showing foremen were permitted to violate work rules without being effectively disciplined. The record showed that Tom Culling, a foreman who repeatedly failed to tie off, was not disciplined other than verbal reprimands; the record also showed that Dennis Naughton,

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[23]O'Brien testified that Michaels and McCullough would do the same. (Tr. 252-53).

[24]The relevant discussion appears on pages 8 through 10 of this decision.

the foreman in No. 02-2081 who disobeyed Diamond's work rule and gave the forklift keys to an untrained worker, was not disciplined after that worker was fatally injured. As noted therein, a supervisor's misconduct is strong evidence that the employer's safety program was lax. *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1017, 1991). Based on the evidence, I find that the Secretary has proved a violation of the cited standard. The alleged violation of 29 C.F.R. 1926.501(b)(1) is accordingly affirmed.

This item has been classified as willful. As set out *supra*, a willful violation is one that was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enter.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). The Secretary contends the violation was willful because of the numerous notices Diamond had received and its failure to effectively discipline employees. Diamond contends the violation was not willful, due to its good faith efforts to comply with the standard. I agree with the Secretary.

As noted above, Bovis issued 16 notices to Diamond about workers not using fall protection before CO Stewart's inspection; these notices, C-1 through C-16, are dated from September 5, 2001 to July 1, 2002.[25] As also noted above, except for C-8 and C-10, C-1 through C-16 all document instances of workers being exposed to falls and not tying off or tying off improperly; further, while C-5 refers to only one employee, that is, Foreman Tom Culling, the other notices refer to two or more employees working without fall protection. Finally, two more notices, that is, C-11 and C-14, also refer specifically to Culling as well as to other employees working without fall protection.

In addition to the above, C-17 through C-22, dated from November 29, 2002 through July 25, 2003, are notices Bovis issued after the inspection. C-17 through C-19 are addressed to McCullough, all three relate to employees working on the outside edges of the building without fall protection, and C-18 and C-19 both specify Culling as the offending employee.[26] C-20 is addressed to Elliot Kracko, Diamond's owner, and it notes the prior notices issued about Culling and another

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[25]Although Bovis always put the notices in Diamond's mailbox at the site, Bovis also faxed some of the notices to Diamond's address on 43rd Street in New York City; for example, C-1, C-2 and C-16 were faxed to McCullough, and C-14 and C-15 were faxed to Elliot Kracko, Diamond's owner. (Tr. 42-56; 240). Tierney testified that the purpose of faxing the notices to Kracko was "to try and get something done about the fall protection issues." (Tr. 56).

[26]C-18 notes the prior notices issued as to Culling and asks McCullough how many must be received before a worker is removed; C-19 asks McCullough what he intends to do (about Culling).

employee; C-20 then refers to the two employees as "consistent and flagrant repeat offenders" and asks that they be removed from the site.[27] C-21, another notice to McCullough, references two employees working without fall protection and exposed to fall hazards and asks that they be removed from the site "immediately." C-22 is addressed to Matt Baum, Diamond's superintendent at the site, and refers to an employee working without fall protection; C-22 then states that the issue had been brought to Baum's attention before and required "immediate action." (Tr. 240).

At the hearing, O'Brien admitted that he had received "well over 95 percent" of all of the notices Bovis had issued, that Michaels had also seen them, and that McCullough had discussed "many" of the notices with him (O'Brien). (Tr. 250-52). Despite this knowledge on the part of Diamond's management well before CO Stewart's inspection, Diamond's employees continued to violate the fall protection rule with no effective action by Diamond. I therefore agree with the Secretary that Diamond had a heightened awareness of the violative condition before the inspection, particularly in view of the fact that a foreman, Tom Culling, was a repeat offender of the fall protection rule. *See Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1393-94 (No. 97-0755, 2003). Moreover, Diamond took no effective action after either the CO's inspection or the issuance of the citation on November 21, 2002, in light of the continuing notices that Bovis issued. These circumstances, together with the fact that Diamond had never had a progressive discipline system, convince me that the violation in this case was willful; in this regard, I note that at the time of the hearing, which was more than a year after CO Stewart's inspection, Diamond still did not have a progressive discipline system in place, although, according to McCullough, the company was in the process of implementing one. As the Secretary points out, the Commission affirmed the trenching violation as willful in *Rawson Contractors*, 20 BNA OSHC 1078 (No. 99-0018, 2003), discussed *supra*, specifically because of Rawson's failure to show that it had enforced its safety rules prior to the events cited in that case.[28] *Id.* at 1082.

In finding the violation willful, I have considered Diamond's contention that its good faith efforts to comply with the standard at the site should negate the willful classification. However, as the Commission stated in *Rawson*, to negate willfulness, good faith efforts at compliance must be

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[27]C-20 is addressed to Elliot Kracko at Diamond's New Rochelle, New York address.

[28]The relevant facts of *Rawson* are set out on pages 10 and 11 of this decision.

objectively reasonable under the circumstances. *Rawson Contractors*, 20 BNA OSHC at 1082 (citing to *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541 (Nos. 86–360 & 86-469, 1992)). In this case, I conclude Diamond's efforts at compliance were not objectively reasonable under the circumstances. I have also considered Diamond's suggestion that the proliferation of notices from Bovis was due to the interest of Bovis in protecting itself from an OSHA citation. (R. Brief, pp. 9-10). This suggestion is rejected, as Diamond presented no evidence in this regard. Finally, I have considered Diamond's suggestion, based on the testimony of O'Brien, that Tierney may have been selectively enforcing the fall protection rule against Culling because of a prior altercation between the two. (Tr. 248-49; R. Brief, pp. 19-20). This suggestion is also rejected, in view of Tierney's testimony that the only dispute he had had with Culling was his working unsafely. (Tr. 77). Based on the record and Commission precedent, this citation item is affirmed as willful.

The Secretary has proposed a penalty of $56,000.00 for this item. CO Stewart testified the penalty was based on Diamond's size, history and good faith, and on the gravity of the violation; in regard to gravity, he rated the severity as high and the probability of an accident occurring as great. (Tr. 120-22). I find the proposed penalty appropriate; thus, a penalty of $56,000.00 is assessed.

Conclusions of Law

1. Respondent was in willful violation of 29 C.F.R. § 1926.501(b)(1), as alleged in Item 1 of Citation 1, in Docket No. 02-2080.

2. Respondent was in willful violation of 29 C.F.R. § 1910.178(l)(1)(ii), as alleged in Item 1 of Citation 1, in Docket No. 02-2081.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Item 1 of Citation 1, in Docket No. 02-2080, is AFFIRMED as willful. A penalty of $56,000.00 is assessed.

1. Item 1 of Citation 1, in Docket No. 02-2081, is AFFIRMED as willful. A penalty of $56,000.00 is assessed.

/s/
Irving Sommer
Chief Judge

Dated: February 17, 2004
Washington, D.C.