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.

COOPER/T. SMITH CORPORATION
D/B/A BLAKELEY BOATWORKS, INC.,

Respondent.

OSHRC Docket No. 16-1533

ON BRIEFS:

Brian A. Broecker, Attorney; Charles F. James, Counsel for Appellate Litigation; Ann S. Rosenthal, Associate Solicitor; Nicholas C. Geale, Acting Solicitor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Scott D. Stevens, Weathers Bolt; Starnes Davis Florie LLP, Mobile, AL
For the Respondent

DECISION

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

Cooper/T. Smith Corporation d/b/a Blakeley Boatworks, Inc. (Blakeley) repairs ships at its shipyard in Mobile, Alabama. OSHA issued Blakeley a single-item citation following an accident involving one of its employees working on a barge. The citation alleges a serious violation of 29 C.F.R. § 1915.77(c) for Blakeley's failure to ensure employees were using fall protection while exposed to a fall hazard of more than 5 feet.[1] The Secretary proposed a penalty of $4,900.

[1] The cited shipyard provision, as relevant here, states:

> When employees are working aloft, or elsewhere at elevations more than 5 feet above a solid surface, either scaffolds or a sloping ladder . . . shall be used to afford safe footing, or the employees shall be protected by safety belts and lifelines . . . .

Because the parties stipulated that the Secretary established his prima facie case,[2] the only issue before Administrative Law Judge John B. Gatto was Blakeley's affirmative defense of unpreventable employee misconduct (UEM). After a hearing, the judge found that Blakeley had established the defense and vacated the citation. For the reasons discussed below, we reverse the judge's decision and affirm the citation.

BACKGROUND

On June 18, 2016, two Blakeley employees—a shipyard supervisor and an employee described as a "fitter"—were cutting out and replacing the top five feet of an access ladder while standing in a barge holding tank. The fitter had one foot on the access ladder and one foot on the "angle of the barge." The supervisor was standing on a 4x4 inch board running above the bottom of the holding tank. Both the supervisor and the fitter were working more than five feet above the floor of the tank and were not using fall protection. While cutting and replacing the access ladder, the supervisor fell eight to nine feet to the floor of the tank and was hospitalized with multiple serious injuries.

DISCUSSION

The only issue before us is whether Blakeley established the affirmative defense of UEM. To establish the defense, "the employer [must] show that it (1) created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule against employees when violations were discovered."[3] *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1308 (11th Cir.

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[2] To establish a prima facie case, the Secretary must show "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 Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 169 (1st Cir. 1982)

[3] This case arose in Alabama, which is in the Eleventh Circuit. *See* 29 U.S.C. § 660(a) (employers may seek review in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or in the District of Columbia Circuit); 29 U.S.C. § 660(b) (Secretary may seek review in the circuit where the violation occurred, or in the circuit in which the employer's principal office is located). In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . 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, 2067 (No. 96-1719, 2000) (citation omitted).

2013) (citing *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 106 (2d Cir. 1996)). The only element of this defense that the Secretary disputes on review is the fourth element—whether Blakeley established that it effectively enforced its work rules when violations were discovered. *ComTran*, 722 F.3d at 1308; *Precast Servs., Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995) ("Adequate enforcement is a critical element of the [UEM] defense."), *aff'd*, 106 F.3d 401 (6th Cir. 1997) (unpublished).

To satisfy this burden, the employer must "present specific evidence concerning the manner in which it enforces its [work] rules," *Stuttgart Mach. Works, Inc.*, 9 BNA OSHC 1366, 1369 (No. 77-3021, 1981), including "evidence of having a disciplinary program that was effectively administered when work rule violations occurred," *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996), *aff'd per curiam*, 149 F.3d 1183 (6th Cir. 1998) (unpublished). The evidence must also include proof that the employer uniformly and effectively enforced its work rules prior to the misconduct. *See Daniel Int'l Co. v. OSHRC*, 683 F.2d 361, 364 (11th Cir. 1982) (work rule must be "uniformly and effectively communicated and enforced"); *Precast Servs.*, 17 BNA OSHC at 1456 (employer failed to establish effective enforcement of work rule because "company introduced no evidence that prior to [the misconduct] it had subjected an employee to termination, suspension, docked pay, or even a written reprimand or [oral] warning for failure to comply with a work rule").

On review, the Secretary argues that the judge erred in concluding that Blakeley effectively enforced its work rules when violations were discovered. In reaching his conclusion, the judge credited the company with having a progressive disciplinary policy and believed Blakeley's assertion that its lack of disciplinary records for the period prior to the accident was due to a lack of violations. The judge also found persuasive the testimony from Blakeley's safety director that there had been no prior accidents due to the failure to use fall protection, as corroborated by the absence of any fall protection-related injuries on Blakeley's injury/illness logs for 2015 and 2016.

The Eleventh Circuit requires the Secretary to prove that a supervisor's misconduct is foreseeable before the supervisor's knowledge of that misconduct can be imputed to the employer. *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1308 (11th Cir. 2013). Here, Blakeley stipulated to all of the elements of the Secretary's prima facie case, including the imputation of "[the supervisor's] knowledge of the violative conditions." This means the company stipulated to imputation of the supervisor's knowledge of not only the fitter's failure to use fall protection but also of his own failure to use it.

Finally, the judge excused Blakeley's failures to discipline the supervisor involved in the accident and document the fitter's oral discipline because it was undisputed that the fitter received an oral reprimand, and he found that it was reasonable for the company to wait to discipline the supervisor until he recovered from his injuries and was released to full duty.

We find that the record does not support the judge's conclusions. First, there is no evidence in the record that, prior to the inspection, Blakeley had ever used its progressive disciplinary policy to discipline employees for safety violations. As proof of its effective enforcement, Blakeley relies on ten employee disciplinary records from 2016, none of which—as the judge correctly found—are relevant here.[4] All but one of these records were issued after the June 18, 2016 accident,[5] and that record reflects written discipline for a non-safety issue ("carelessly burning on top of a newly laid down geogrid mat thus damaging it[s] sole purpose"). There is no other written evidence of disciplinary action taken before the supervisor's misconduct. *See Daniel Int'l Co.*, 683 F.2d at 364 (employer must prove it uniformly and effectively enforced its work rules); *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 110 (1st Cir. 1997) (employer that "provided no evidence of unscheduled safety audits or mandatory safety checklists, and no documentation that it ever executed its . . . disciplinary policy" failed to establish effective enforcement of its safety program).

[4] Blakeley had only owned the shipyard for approximately a year and a half as of the time of the inspection, but provided no explanation for why it only produced disciplinary notices for the period between January 1, 2016 (approximately six months before the misconduct occurred) and the end of December 2016 (approximately two months after the date of the Complaint).

[5] The Secretary argues that this "clustering of safety-related disciplinary actions" following the June 18, 2016 accident indicates that Blakeley did not enforce its rules before that because it is implausible that employees maintained perfect compliance in the first five and a half months of the year, then suddenly stopped complying with several work rules during a 10-week period that coincided with the OSHA inspection. We decline to draw any negative inferences from Blakeley's pattern of discipline because relying on such inferences could discourage employers in the future from making efforts to improve safety enforcement after an incident or inspection occurs. *Cf. Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2006 (No. 89-265, 1997) (citing *Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2065-66 (No. 78-1443, 1984), *aff'd*, 764 F.2d 32 (1st Cir. 1985); *Cotter & Co. v. OSHRC*, 598 F.2d 911, 914-15 (5th Cir. 1979); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1337-38 (6th Cir. 1978)) ("[T]he Commission and the courts have been reluctant to rely solely on voluntary safety efforts by an employer to find that the employer recognized a hazardous condition.").

Contrary to the judge's finding, this lack of documentary evidence is not overcome by Blakeley's claim that none of its employees failed to use fall protection before the accident.[6] Blakeley relies on testimony from the safety director and the fitter, which the judge found persuasive, that there were no fall protection violations between the time the safety director was hired in January 2016 and the misconduct.[7] But the company provides no explanation for why—even though the company provided all of its disciplinary records for the six months before the misconduct—there is no documentary evidence that Blakeley enforced *any* of it safety-related work rules before that incident. *See Precast Servs.*, 17 BNA OSHC at 1456 (finding ineffective enforcement due to employer's failure to adduce evidence that it disciplined employees for *any* safety rule violations prior to the job at which the misconduct occurred); *see also Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2097 (No. 10-0359, 2012) (considering disciplinary actions taken in response to violations of both citation-related and other work rules); *Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2088-89 (No. 06-1542, 2012) (same); *Rawson Contractors Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003) (finding employer's failure to impose discipline for "minor" violations discovered by an outside consultant defeated UEM claim for supervisor's more serious misconduct); *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 n.5 (No. 76-1538, 1979) (finding employer's claim that it enforced its safety program was undermined by

[6] The judge erred by essentially placing the burden on the *Secretary* to prove the occurrence of prior violations instead of requiring Blakeley, as part of its burden to establish the UEM defense, to prove that there had, in fact, been no prior violations of its work rules. *See, e.g.*, *ComTran*, 722 F.3d at 1308. Blakeley also attempts the same by arguing that it is the Secretary who has failed to prove that there were pre-misconduct fall protection violations that went undisciplined by Blakeley. Although, as noted above, the Eleventh Circuit requires the Secretary to prove that a supervisor's misconduct is foreseeable before the supervisor's knowledge of that misconduct can be imputed to the employer, *see id.* at 1316, Blakeley stipulated here to all elements of the Secretary's prima facie case, including the imputation of the supervisor's "knowledge of the violative conditions." Accordingly, the company relieved the Secretary of his burden in the Eleventh Circuit to prove that the supervisor's conduct was foreseeable. *See id.* at 1308, 1316.

[7] Both the judge and Blakeley rely on the absence of evidence of any prior accidents due to the failure to use fall protection, as corroborated by the company's work-related injury logs for 2015 and 2016, to show there were no fall protection violations during that time. This position lacks merit, however, given that "[a] favorable safety record only indicates that injuries have not occurred, not the absence of violations," and "can be a matter of good fortune rather than an indication of an effectively enforced safety program." *Stuttgart*, 9 BNA OSHC at 1369.

other instances of a failure to protect employees from the relevant hazard even though those other instances were beyond the scope of the citation).

Second, Blakeley cannot claim that there were no safety violations *at all* prior to the misconduct. Indeed, the record shows that unspecified safety infractions occurred at the worksite prior to the accident and that those infractions were met with oral reprimands.[8] It is the "rare case," however, where an employer can establish effective enforcement on the basis of oral reprimands alone absent proof that the employer "has a long, near-unblemished safety and health history, despite frequent opportunity for violations." *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2221 (No. 09-0004, 2014) (consolidated) (quoting *GEM Indus.*, 17 BNA OSHC at 1864)), *aff'd*, 811 F.3d 922 (7th Cir. 2016); *Precast Servs.*, 17 BNA OSHC at 1456 (pre-inspection oral warnings alone insufficient to establish effective enforcement); *cf. Falcon Steel Co.*, 16 BNA OSHC 1179, 1193-94 (No. 89-2883, 1993) (consolidated) (enforcement not established because repeated oral warnings ignored on widespread basis); *Pace Constr. Corp.*, 14 BNA OSHC 2216, 2218 (No. 86-758, 1991) (enforcement ineffective because it consisted primarily of inconsistently-administered oral reprimands). Moreover, the first step of Blakeley's own progressive disciplinary policy is a "verbal" (i.e., oral) warning or "verbal" counseling that is also *documented* in the employee's personnel file. Blakeley's evident failure to document any of these pre-accident oral reprimands greatly "undermine[s] the policy's progressive nature." *Stark*, 24 BNA OSHC at 2221 (where the disciplinary policy "expressly required written warnings with progressive disciplinary consequences," employer that issued undocumented oral warnings "undermined the policy's progressive nature"). We find, therefore, that Blakeley's reliance on undocumented oral reprimands is insufficient to establish that the company effectively enforced its safety program.

Finally, Blakeley's disciplinary response to the undisputed violation here contradicts its claims of effective enforcement. *See Precast Servs.*, 17 BNA OSHC at 1456 (explaining that "Commission precedent does not rule out consideration of *post*-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline"). Blakeley asserts that "both [the

[8] At the hearing, Blakeley's safety director testified that he generally enforced work rules orally. The fitter confirmed that the safety director "correct[ed] people on safety issues when he was walking around the yard before the accident." And the supervisor agreed that the safety director had "corrected" his work without issuing formal discipline.

supervisor and the fitter] were disciplined under Blakeley's progressive disciplinary policy." The evidence, however, does not support the company's claim.

The record shows that the safety director gave the fitter a "verbal discretionary," "wore him out," and "scolded" him, but it also shows that the safety director did not document this oral discipline in the fitter's personnel file as the company's progressive disciplinary policy requires.[9] *See Stark*, 24 BNA OSHC at 2221. This lack of formal discipline is made even more problematic by the fact that Blakeley promoted the fitter to a supervisory position less than three weeks after the fitter violated the company's fall protection rule. As for the supervisor, the record shows Blakeley had yet to discipline him as of the date of the hearing, which was held eight months after his misconduct. Blakeley asserts that it fully intended to discipline the supervisor as soon as he was medically released from light duty to full duty and that the company's "first concern with [the supervisor] was that he recover physically, mentally, and emotionally." The judge accepted these reasons for delaying the supervisor's discipline considering "the particular facts of this case" and that the supervisor's "injuries were severe."

While we agree that Blakeley's concern in this regard is understandable, in cases where the Commission has excused an employer for delaying or forgoing discipline following an accident, the employer had *documented* evidence that it had disciplined employees in the past—evidence not present in this case.[10] *See Am. Eng'g*, 23 BNA OSHC at 2097 (where employer established that it had extensive pre-inspection enforcement efforts, a single instance of delayed discipline did not establish ineffective enforcement); *Thomas Indus.*, 23 BNA OSHC at 2088-89 (where employer had established that it had disciplined employees for safety violations in the past, employer's decision to forgo discipline in one instance did not establish ineffective enforcement).

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[9] Blakeley explained that the fitter did not receive additional discipline because he had expressed that "seeing a man fall was bad enough" and that "he would never forget that."

[10] Blakeley's decision to delay the supervisor's discipline for over eight months also reduces the deterrent effect that a progressive disciplinary policy is supposed to provide. *See P. Gioioso*, 115 F.3d at 109-10 ("[T]he defense of unpreventable misconduct cannot be sustained unless the employer also proves that it insists upon compliance with the rules and regularly enforces them."); *but see Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2183 (No. 00-1268, 2003) (consolidated) (finding that record does not support Secretary's claim of too little documentation of employer's disciplinary program to demonstrate diligent enforcement when noncomplying employees given reprimands and fined *on afternoon after OSHA inspection*) (citing *Kerns Bros.*, 18 BNA OSHC at 2070 ("The evidence indicates that [the employer] disciplined employees on the few occasions when it found them violating safety rules.")).

Accordingly, we find Blakeley's failure to discipline the supervisor and the fitter in accordance with its own progressive disciplinary policy is further evidence of the company's ineffective enforcement.[11]

For all these reasons, we conclude that Blakeley failed to establish its UEM defense and therefore, reverse the judge's decision, affirm the citation as serious, and assess the proposed penalty of $4,900.[12]

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: April 1, 2020

[11] In light of this conclusion, we need not reach two additional arguments raised by the Secretary on review: (1) whether Blakeley was required to meet a heightened burden in establishing its UEM defense because the supervisor's involvement in the misconduct is "strong evidence that the employer's safety program was lax"; and (2) whether, in light of the supervisory misconduct, Blakeley was required to prove that it took "all feasible steps to prevent the accident, including adequate instruction and supervision of [the supervisor]." *See Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991), *aff'd per curiam*, 978 F.2d 744 (D.C. Cir. 1992) (unpublished).

[12] The parties stipulated to the appropriateness of the classification of the violation and the proposed penalty.

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ACTING SECRETARY OF LABOR,[1] Complainant, v. COOPER/T. SMITH CORPORATION D/B/A BLAKELEY BOATWORKS, INC. Respondent.	OSHRC Docket No. 16-1533

DECISION AND ORDER

COUNSEL:

Jaslyn W. Johnson, Karen E. Mock, Attorneys, Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for Complainant.

Scott D. Stevens, Weathers Bolt, Attorneys, Starnes Davis Florie LLP, Mobile, AL, for Respondent.

JUDGE: John B. Gatto.

I. INTRODUCTION

In this enforcement proceeding, Cooper/T. Smith Corporation d/b/a Blakeley Boatworks, Inc. (Blakeley) was issued one citation under the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 651 et seq., by the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging a "serious" violation[2] of 29 C.F.R. § 1915.77(c), relating to working surfaces requirements in ship repairing and shipbuilding operations, with a

[1] Pursuant to Fed.R.Civ.Pro. 25(d), the Acting Secretary of Labor has been substituted for the Secretary of Labor.

[2] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§ 666(a), (b), (c). A "serious" violation is defined in the Act; the other two degrees are not.

proposed penalty of $4,900.00.[3] After Blakeley contested the citation, the Secretary filed a formal complaint[4] with the Commission seeking an order affirming the citation and proposed penalty. There is no dispute that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c), and that Blakeley is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). (Stip. ¶¶ 1, 2).

A bench trial was subsequently held in Mobile, Alabama, under the Commission's Simplified Proceedings.[5] Pursuant to Commission Rules 90(a) and 209(f),[6] after carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 12(j) of the Act. 29 U.S.C. § 661(j). If any finding is in truth a conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so. The Court holds that for the reasons indicated *infra*, the citation is **VACATED** with no penalty assessment.

II. BACKGROUND

Blakeley is an employer engaged in ship repair activities with approximately 35 employees. (Pretrial Order, ¶ 2(c); *see also* Tr. 32). The citation was issued as a result of an accident on the Crimson Clove Barge at Blakeley's shipyard in Mobile, Alabama. Many of the facts in this case are undisputed, including the facts of the accident itself. On June 18, 2016, [redacted], a Blakeley

[3] The Secretary delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads OSHA, and assigned responsibility for enforcement of the Act to OSHA. *See* 77 FR 3912 (2012). The Assistant Secretary promulgated the Occupational Safety and Health Standards, otherwise known as the general industry standards, *see* 29 C.F.R. Part 1910, and adopted several industry-specific "established Federal standards," *see* 29 C.F.R. §§ 1910.12–.16, which were previously established by federal statute or regulation, 29 U.S.C. § 652(10), including the shipyard standards of 29 C.F.R. Part 1915, *see* 29 C.F.R. § 1910.15. OSHA's Area Directors are authorized to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[4] Attached to the complaint and adopted by reference therein was the citation at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[5] The Act provides that unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure. *See* 29 U.S.C. § 661(f). The Commission has adopted Simplified Proceedings, which apply in certain cases, *see* Subpart M of 29 C.F.R. Part 2200 (29 C.F.R. §§ 2200.200 - 2200.211), where the "Judge will receive oral, physical, or documentary evidence that is not irrelevant, unduly repetitious or unreliable." 29 29 C.F.R. § 2200.209(c).

[6] 29 C.F.R. §§ 2200.90(a) and 2000.209(f).

shipyard supervisor, and Blakeley employee Keith Sullivan, were cutting out and replacing the top five feet of an access ladder in a barge holding tank. (Stip. ¶ 3). Sullivan was standing in the barge holding tank with one foot on the access ladder and one foot on the angle of the barge. (Stip. ¶ 4). [redacted] was standing in the barge holding tank on a 4x4 piece of wood that was already in the barge holding tank. (Stip. ¶ 5). Blakeley employee Dana Bearden was positioned above and outside the barge holding tank, passing tools to [redacted] and Sullivan as needed. (Stip. ¶ 6). Blakeley employee Kenny Bennett had cut the materials needed to erect the temporary scaffold and placed them next to the barge holding tank prior to the start of work, but both [redacted] and Sullivan failed to use the materials to erect the temporary scaffold. (Stip. ¶ 9). While cutting and replacing the access ladder, [redacted] fell from an elevation of more than 5 feet. (Stip. ¶ 10). Because of the fall, [redacted] was hospitalized with injuries. (Stip. ¶ 11).

As a shipyard supervisor, [redacted] was responsible for supervising Sullivan, Bearden and Bennett on June 18, 2016. (Stip. ¶ 12). [redacted] had the authority to enforce Blakeley's safety and work rules; had the authority to correct employees' conduct while they were working; and had the authority to issue verbal and written warnings to employees who failed to follow Blakeley's safety and work rules. (Stip. ¶ 13). [redacted] and Sullivan were exposed to a fall hazard when they were working at an elevation of more than 5 feet and were not using fall protection. (Stip. ¶ 7). It was feasible for [redacted] and Sullivan to tie off and/or erect a scaffold as means of fall protection. (Stip. ¶ 8).

The parties also stipulated the Secretary can establish his prima facie case of a violation since:

> a. The cited standard applied to the work Blakeley was performing inside a barge holding tank at its worksite on June 18, 2016.
> b. On June 18, 2016, Blakeley did not comply with the cited standard when [redacted] and Sullivan were working inside a barge holding tank at a height greater than 5 feet without fall protection.
> c. On June 18, 2016, [redacted] knew that he and Sullivan were working inside a barge holding tank at a height greater than 5 feet without fall protection.
> d. [redacted]'s knowledge of the violative conditions is imputed to Blakeley for purposes of establishing the Secretary's prima facie case.[7]

[7] The Court accepts this stipulation, since this case involved the violative conduct of both supervisor [redacted] and subordinate Sullivan, and under *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832 (11th Cir. 2016), there is "little or no difference between the classic situation in which ["imputation is clearly established" when] the supervisor sees the violation by the subordinate and disregards the safety rule … and the instant situation in which the supervisor sees the violation and pitches in and works beside the subordinate[.]" *Id.*, 812 F.3d at 841.

(Stip. ¶ 14). The Court accepts the forgoing stipulations and also concurs with the parties' stipulation that the violation was appropriately classified as "serious" under the Act and that applying the statutory factors under the Act the proposed penalty of $4,900 was appropriate. (Stip. ¶¶ 16-18; *see also* Tr. 16, 18-19).

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). "To implement its statutory purpose, Congress imposed dual obligations on employers. They must first comply with the 'general duty' to free the workplace of all recognized hazards. 29 U.S.C. § 654(a)(1). They also have a 'special duty' to comply with all mandatory health and safety standards. *Id.* at § 654(a)(2)." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013).[8] "The Secretary has rulemaking power and establishes the safety standards; investigates the employers to ensure compliance; and issues citations and assesses monetary penalties for violations." *Id.* (*citing New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 103 (2d Cir.1996)). On the other hand, the Commission "serves as a 'neutral arbiter' between the Secretary and cited employers." *Id.* (*citing Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985). Thus, Congress established an "unusual regulatory structure," which "separated enforcement and rulemaking powers from adjudicative powers" and vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151, 154 (1991).

A. Violation

The cited standard mandates in relevant part that "[w]hen employees are working aloft, or elsewhere at elevations more than 5 feet above a solid surface, either scaffolds or a sloping ladder,

[8] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Mobile, Alabama, which is in the Eleventh Circuit where the company's principal office is also located. In general, where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has 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, 2067 (No. 96-1719, 2000). The Court therefore applies the precedent of the Eleventh Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

meeting the requirements of this subpart, shall be used to afford safe footing, or the employees shall be protected by safety belts and lifelines meeting the requirements of §§1915.159 and 1915.160." 29 C.F.R. § 1915.77(c). "Under the law of [the Eleventh Circuit], the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *ComTran*, 722 F.3d at 1307. *See also*, *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014) (*same*). The parties have stipulated to the Secretary's prima facie case and agreed the only issue remaining for adjudication is whether Blakeley "has established the affirmative defense of unpreventable supervisory misconduct." (Stip. ¶ 18). Therefore, the Court limits its decision to that issue.

B. Unpreventable or Unforeseeable Employee Misconduct Defense

"If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Eller-Ito*, 567 F. App'x at 803 (*citing ComTran*, 722 F.3d at 1308) (same). The employer bears the burden of establishing an affirmative defense by a preponderance of the evidence. *Faragher v Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

In the Eleventh Circuit, the affirmative defense of unpreventable or unforeseeable employee misconduct "requires the employer to show that it: (1) created a work rule[9] to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule against employees when violations were discovered." *ComTran*, 722 F.3d at 1307 (*citing New York State Elec*, 88 F.3d at 106). *See also*, *Eller-Ito*, 567 F. App'x at 803 (where the Eleventh Circuit referred to this affirmative defense as "preventable employee misconduct"). However, as the Eleventh Circuit has held, "noncompliance by a supervisor suggests lax enforcement of a safety rule[.]" *Daniel Int'l Co. v. Occupational Safety and Health Review Comm'n*, 683 F.2d 361, 365 (11th Cir. 1982) (*citing H. B. Zachry Co. v. Occupational Safety and Health Review Comm'n*, 638 F.2d 812, 819 (5th Cir.

[9] The Commission has defined a "work rule" as "an employer directive that requires or proscribes certain conduct, and is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J. K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076 (No. 12345, 1977).

1981); *Floyd S. Pike Electrical Contractor, Inc. v. Occupational Safety and Health Review Comm'n*, 576 F.2d 72, 77 (5th Cir. 1978); *National Realty & Construction Co. v. Occupational Safety and Health Review Comm'n*, 489 F.2d 1257, 1267 n.38 (D.C.Cir.1973)).

1. Created Work Rule

As to the first prong, the parties agree Blakeley had a safety plan in place at the time of the incident on June 18, 2016. (Stip. ¶ 15). However, according to the Secretary, Blakeley's "work rules and maintenance thereof, leaves room for confusion and doubt," and therefore, Blakeley "failed to establish that it has a work rule, which is explicit and whose scope is clearly understood." (Compl't's Br. 5). According to the Secretary, Blakeley "provided testimony and produced document evidence indicating that at various times it had different fall protection requirements." (*Id.*) (*citing* Tr. at 69-70). However, properly framed, this argument is an attack on the adequacy of Blakeley's communication of it work rule and will therefore be addressed in Section III(B)(2), *infra*.

In *Beta Construction Company*, the Commission held that "[i]n order to be considered effective, an employer's work rule must be clear enough to eliminate employee exposure to the hazard covered by the standard" or as it has also said, must be "designed to prevent the cited violation." *Beta Constr. Co.*, 16 BNA OSHC 1435, 1445 (No. 91-102, 1993) (*citations omitted*). "Generally speaking, the work rule must be sufficiently precise to implement the requirements of the standard or be functionally equivalent to it." *Id.* (*citations omitted*).

Here, Blakeley's Fall Protection Program required fall protection "at levels of **4 feet or higher**, when an employee is not enclosed by handrails or other fall restraint apparatus." (Ex. R-1) (emphasis in original). Baugh also testified that at the time of the accident Blakeley had established a rule whereby employees were to use fall protection when working above 5 feet. (Tr. 39). His testimony was supported by materials from 3 training sessions before the accident, including one only 10 days before the accident, that specifically show a 5-foot rule was in effect. (Ex. R- 2, Ex. R-4, Ex. R-11). The Court concludes this work rule met the Commission's standard since it was clear enough to eliminate employee exposure to the hazard covered by the standard. Therefore, the Court concludes Blakeley met the first prong of its preventable employee misconduct defense.

2. Adequately Communicated Rule

As to the second prong, as indicated *supra*, the Secretary asserts Blakeley's "work rules and maintenance thereof, leaves room for confusion and doubt," and therefore, Blakeley "failed to establish that it has a work rule, which is explicit and whose scope is clearly understood." (Compl't's Br. 5). Thus, the Secretary argues Blakeley "provided testimony and produced document evidence indicating that at various times it had different fall protection requirements." (*Id.*) (*citing* Tr. at 69-70). The Secretary also argues Blakeley "kept these inconsistent fall protection requirements in its safety manual, which employees had access to" and "failed to differentiate the expired fall protection requirements from the current fall protection requirements. (*Id.*) The Court finds no merit in these arguments, in particular since at trial, the Secretary stipulated he "does not dispute that [Blakeley] communicated its work order requiring the use of fall protection." (Tr. 27).

Baugh also testified at trial that when he took over the job of safety director he was concerned with the company's fall protection policy that included an 8-foot rule, which Baugh knew was incorrect. (Tr. 69-70). Therefore Baugh "highlighted through it, scratched through it with a pen, and put "five." (Tr. 70). The 5-foot rule was in effect at the time of the accident. (Tr. 39). After the accident, Baugh again changed the policy by scratching through "five" and replacing it with "four," even though OSHA only requires 5 feet. (Tr. 71-72; see also Ex. R-1). As Baugh explained, "I want to go to 4 feet, so that we will just be, you know, doubly safe at what we do. That's why -- and I did that." (Tr. 72).

While it is true Blakeley kept the old version of its fall protection policy in its safety manual, Baugh testified the older version was not kept with the current version, but rather, was kept in the "very back" of the manual. (Tr. 73). As Baugh explained, "I wanted to show a progression. I wanted to be -- a progression of our safety program. I wanted to be transparent as possible, that we were making an effort to educate and enforce our manpower." (*Id.*) Further, each of Blakeley's employees that testified on the issue stated that they had never been taught an 8-foot rule. (Tr. 145, 172). The Court credits this testimony, which it finds persuasive. In contrast, the Secretary failed to elicit any testimony that the work rule was confusing or otherwise unclear to any employee.

The Secretary also argues Blakeley did not adequately communicate its alleged work rules since, according to the Secretary, Blakeley "adduced sign-in sheets from safety meetings" at trial and "the majority of the sign-in sheets fail to reflect specifics regarding the content of the training."

(Compl't's Br. 5) (*citing* Ex. R-2 – Ex. R-17). According to the Secretary, 8 of the 10 sign-in sheets produced "do not have training materials attached" and "simply indicate what topic was discussed." (*Id.* at 5-6) (*citing* Ex. R-3, Ex. R-8 to R-10, Ex. R-13 to R-15, Ex. R-17). The Secretary points to Baugh's testimony regarding Blakeley's Exhibit R-3, which is the sign-in sheet for a "Safety Gang Box Meeting" held on October 6, 2015. When Baugh was asked at trial what the topic of this meeting was, he responded, "fall protection." (Tr. 48). Therefore, according to the Secretary, Blakeley "failed to show that it specifically communicated its alleged work rule requiring fall protection at [5] feet or above." (*Id.*) The Court finds no merit in the Secretary's arguments.

The Secretary relies on the language from two Commission judges, *Dewitt Excavating, Inc.*, 23 BNA OSHC 1834, 1838 (No. 10-1515, 2011) (ALJ), and the judge's decision appended at the end[10] of the Commission's opinion in *Quinlan Enterprises*, 24 BNA OSHC 1154 (No. 12-1698, 2013). Although they may be persuasive, unreviewed administrative law judge decisions do not constitute binding precedent. *KS Energy Serv. Inc.*, 23 BNA OSHC 1483 (No. 09-1272, 2011); *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976). The Court does not find *Dewitt* or *Quinlan* persuasive since both are distinguishable from the present case.

In *Dewitt*, Judge Welsch found the "tool box talks fail to establish an adequate training program. Although its principal business, the sheets identify only seven tool box talks over a four-year period which involved excavation training. The documents do not describe the specific information read to the employees. Also, the sign-in sheets do not show any training for the employees involved in this case …." *Dewitt Excavating*, 23 BNA OSHC at 1838. In *Quinlan*, Judge Calhoun found Quinlan had not adequately communicated its work rules regarding fall protection to its employees for multiple reasons, not simply because they "fail[ed] to reflect specifics regarding the content of the training," as the Secretary asserts, but also because Quinlan provided minimal evidence regarding the communication of its work rules, adduced no specifics as to the training, and "inconsistent with Mr. Quinlan's testimony that sign in sheets reflected safety training, Pacheco testified that they were used to show receipt of pay checks."

Here, as Blakeley argues, and the Court agrees, "each employee, including [redacted], also testified that they knew fall protection was required on the job at issue." (Resp't's Br. 3 (*citing* Tr.

[10] In *Quinlan*, the Commission's two-page opinion ends on 24 BNA OSHC at 1155, and the cited page *11 is an excerpt from Judge Calhoun's decision, included by Westlaw after the end of the Commission's opinion.

134, 154, 166). It is also undisputed that [redacted] had specific instructions from Baugh on this job to build a scaffold with guard rails or wear a harness to serve as fall protection. (Tr. 78). [redacted] also testified had met with Baugh and received instructions on the type of scaffolding needed and the alternative option of wearing harnesses. (Tr. 131-32). Blakeley's employees also took steps to follow the work rule by cutting the parts to build the scaffold. (Tr. 132-33). [redacted] admits that he knew that he was supposed to use fall protection for this job. (Tr. 134).

The record also shows [redacted] was trained on the 5-foot fall protection rule as recently as 10 days before the accident. Blakeley's Exhibit 11 is a company record of a safety meeting held on June 8, 2016, and in subpart D, states "When employees are exposed to unguarded edges of decks, platforms, flats, and similar flat surfaces, more than five feet above the solid surface, the edges shall be guarded by adequate guardrails meeting the requirements of 1915.71(j)." (Ex. R-11). On bates stamp page 142 of that exhibit, it again states "Guardrails (including toe boards and top rails) shall be installed on all open ends and ends of platforms more than five feet above the ground, or floor, or other platform." *(Id.*) [redacted] attended that safety meeting held on June 8, 2016. (Tr. 63). Further, all employees were required to acknowledge that they had received a copy of the handbook that included the disciplinary policy. (Tr.). The record reflects [redacted] signed an acknowledgment that he has read and understood the employee handbook. (Ex. R-19).

Therefore, the Court concludes not only did Blakeley have a work rule in place to protect against this type of accident, it provided specific instructions to use fall protection on this specific job that would have prevented this accident. Thus, the Court concludes Blakeley adequately communicated the work rule to its employees. Therefore, the Court concludes Blakeley has met the second prong of its affirmative defense.

3. Took All Reasonable Steps to Discover Noncompliance

Baugh testified, "We do visual walk-arounds all day. I walk a cycle around the shipyard repeatedly monitoring." (Tr. 79-80). He also testified Tim Sheppard, head of corporate safety for the company, helped monitor, as well as the shipyard superintendents. (Tr. 50, 80). The lead men were taught to monitor. (Tr. 80). Further, the shipyard manager himself monitored. (*Id.*) As Baugh explained, "We try to police each other." (*Id.*) The Court credits this testimony, which was undisputed. The Court concludes Blakeley took all reasonable steps to discover noncompliance and has therefore met the third prong of its affirmative defense.

4. Effective Enforcement of Work Rule

Blakeley had a corrective action plan, which was included in its employee handbook, and presented copies of employee counseling notices issued to employees for safety infraction. (Ex. R-18, Ex. R-21; *see also* Tr. 83). Although admitted into the record, the Court does not find the counseling notices relevant in determining whether Blakeley effectively enforced the work rule *before* the accident, since they were all dated *after* the accident, except one, and that one was a "warning for "burning on top of a newly laid down geogrid mat." (*Id.*) However, it is not dispositive that Blakeley did not have disciplinary records related to fall protection prior to the accident, since it is only required to show it effectively enforced the work rule "when violations were detected." *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096 (No. 10-0359, 2012).

Baugh credibly testified he taught the employees and supervision and lead men that Blakeley had a disciplinary program. "I communicated that disciplinary program to the employees in our meetings, once I communicated that to them, I went over the verbals. I went over the steps of the policy. And then after that, as I would see them on the shipyard, I would remind them of the disciplinary policies that we have and how we would enforce them for noncompliance. And I did that often through meetings, you know." (Tr. 82). Baugh also testified that prior to the accident there had never been any accidents due to failure to use fall protection. (Tr. 81). The Secretary did not rebut that testimony. Blakeley also presented copies of its logs of work-related injuries and illnesses for 2015 and 2016, none of which report injuries implicating fall protection. (Ex. R-22). Since the Court concluded Blakeley took all reasonable steps to discover noncompliance, and there is no evidence any violations of the work rule were detected prior to the accident, the Court would not expect any fall protection related disciplinary record to exist.

Finally, the Secretary argues that Blakeley did not discipline [redacted] or document the discipline of Sullivan. (Sec'y's Br. 9-11). However, as the Commission observed in *Thomas Industrial Coatings, Inc.*, No. 06-1542, 2012 WL 1777086 (OSHRC Feb. 28, 2012), and noted again in *American Engineering*, "post-inspection discipline alone is not necessarily determinative of the adequacy of an employer's enforcement efforts." *Am. Eng'g*, 23 BNA OSHC at 2097. It is undisputed Sullivan was given a verbal reprimand after the incident. (Tr. 114-15, 171). As Blakeley points out, Sullivan also witnessed firsthand the potential ramifications of failing to use fall protection and as a result, said that he would never forget it. (Resp't's Br. 14; *see also* Tr. 171).

At the time of trial, [redacted] had not been released from medical care and the evidence is clear that [redacted] had not been disciplined at the time of trial because Blakeley's first concern

was that [redacted] "recover physically, mentally, and emotionally." (Tr. 89, 145). However, Baugh also testified that after [redacted] recovers and is released to full duty, he would be disciplined. (Tr. 89). Further, as the Secretary acknowledges, [redacted]'s injuries were severe, consisting of "twelve vertebrae injuries, thoracic fractures, a shattered shoulder blade, a fractured hip, a fractured pelvis, a herniated disc, and three compression fractures." (Sec'y's Br., p. 3; *see also* Tr. 139-40). Given the particular facts of this case, the Court does not find the company's decision to delay the discipline of [redacted] and to impose a verbal warning to Sullivan is indicative of a lax safety program. In totality, based upon the evidence presented, the Court concludes Blakeley has met the fourth prong of its affirmative defense. Accordingly,

III. ORDER

IT IS HEREBY ORDERED THAT the citation is **VACATED** with no penalty assessment.

SO ORDERED.

/s/ John B. Gatto
John B. Gatto
Administrative Law Judge

Dated: March 31, 2017
Atlanta, GA