Some personal identifiers have been redacted for privacy purposes.

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

MARTIN J. WALSH, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Complainant, v. EUSTIS CABLE ENTERPRISES, LTD, Respondent.	OSHRC DOCKET NO. 20-1006

APPEARANCES:

Allison L. Bowles, Esquire
Department of Labor, Office of the Solicitor, New York, New York
For the Secretary

Pietro Lynn, Esquire
Lynn, Lynn, Blackman & Manitsky, P.C., Burlington, Vermont
For Respondent

BEFORE:
The Honorable Dennis L. Phillips
U.S. Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

I. FACTS

A. Background

Eustis Cable Enterprises LTD (ECE) is a communications contractor with its corporate office at Brookfield, Vermont that provides manpower and equipment for the construction of communications systems. (Tr. 443; Fact Stipulation (Stip.)[1] No. 6). At issue in this case is ECE's work as a prime contractor to Armstrong Telecommunications, Inc. (Armstrong). (Tr. 488; Stip. Nos. 7-9; Exs. 46 at 3 (Resp. to Interrog. Nos. 1-2), 49-50). Starting in August 2018, Armstrong hired ECE to install fiberoptic (also referred to as fiber) cable pursuant to a series of location-specific contracts within a large project to expand broadband access throughout rural, upstate New York.[2] (Tr. 97, 101, 339-40, 614; Stip. Nos. 7-11; Ex. 46 at 3 (Resp. to Interrog. Nos. 2-3)). During October 2019 to January 2020, ECE was performing work in and around Alfred, New York, generally replacing strand and fiber.[3] Strand is a support that holds the fiber for lashing. The fiberoptic is fiberglass and the strand is needed to support the fiber in order for it to stay up on the pole. (Tr. 98-101, 115, 340; Stip. No. 7; Ex. 49). During this time period, ECE ran its operations out of the Belmont Field Office under the direction of (former) Project Manager (PM) Timothy Becker.[4] PM Becker worked on one project, the Armstrong Telephone, Western New York project, starting in 2017 during the four years he worked at ECE. (Tr. 98-99,

[1] Unless identified as a "Legal Stip." all references to "Stip." alone are to fact stipulations.

[2] The program is referred to as the "New NY Broadband Program." (Ex. 46). The fiber was used to distribute communication, internet, and telephone to homes. (Tr. 102).

[3] Foreman Cole testified that when you place a strand, you place the fiber on top of the strand for the communication. He said lashing includes fiber work. (Tr. 100).

[4] PM Becker worked in the telecommunications installation industry for forty-seven years before retiring during which time he climbed a lot of telephone poles and used a lot of lashers. (Tr. 391-92).

338-39, 342-43, 394; Stip. Nos. 12-13). He supervised at least twenty people out of the Belmont field office. (Tr. 347).

On Monday, January 13, 2020, OSHA learned that a fatality had occurred at 208 Fisher Road, Andover, New York (Incident Worksite), one of ECE's worksites under PM Becker's supervision. PM Becker was supervised by Jamie Dodd.[5] (Tr. 146, 192, 603; Ex. I at 0336). Foreman AJ died by asphyxiation when the tool line belt he was wearing rose up his body and suffocated him as he traversed the strand to fix a midspan equipment malfunction of a lasher. (Tr. 99, 109, 111; Stip. Nos. 24-25; Exs. 44, I at 336-347, HH at 726, 737).

The Occupational Safety and Health Administration (OSHA) assigned Compliance Safety and Health Officer (CSHO or CO) Michael Willibey to investigate the fatality. CO Willibey was employed at OSHA for over 18 years where he conducted about 1,400 inspections that included about 50 to 60 inspections that involved a fatality. Before that, he served in the Navy as a corpsman for nearly three years. Thereafter, he worked in construction as an engineering technician, foreman, construction superintendent, project manager and general manager. He holds professional certifications in construction, occupational safety and health for general industry, and emergency management. (Tr. 600-03; Ex. I at 336). CO Willibey promptly met with ECE's Vice President (VP) of Operations Andrew Bauer at the Incident worksite on January 14, 2020. He also visited the Incident Worksite on January 15 and January 16, 2020, when he watched the lasher's recovery from the strand. (Tr. 604-05, 655).

1. Aerial Line Work

[5] Mr. Dodd is also referred to as Jeremy Dodson in the trial transcript.

Aerial line work involves work on utility poles. It includes both creating a support system, *i.e.*, strand, and placing fiberoptic cable, and then, lashing the two together. (Tr. 92-93, 100, 114-15). Aerial line crews perform work in the telecommunications space, which is typically located about twenty feet off the ground. It includes both a support strand and fiberoptic cable. (Tr. 102-05, 114-15, 382-83; Exs. 3, 35). There are numerous dangers associated with aerial line work, including electrocution, traffic, falls, falling equipment, and equipment malfunctions. (Tr. 482-83). A typical aerial line crew at ECE consists of a foreman/lineman, a lineman and a ground hand. (Tr. 93, 99).

2. Lashing Work

The purpose of lashing work is to connect the fiberoptic cable to the support strand. (Tr. 114-15). During lashing activities, the role of the lineman is to ascend to the telecommunications space, which they do either via the boom of a bucket truck or by climbing utility poles. (Tr. 93-94). Typically, lashing work starts when the lineman attaches a 50-to-70-pound lasher or lasher machine to the support strand, along with a rope and/or mule tape (also referred to as "muletape", "mule string," or "mule line") that hangs from the lasher down to the ground.[6] Lashing work is done when the lasher runs along the strand and wraps the strand and fiberoptic cable together with "lashing wire" (Tr. 112-15, 211; Exs. 35, 46 at 4-5 (Resp. to

[6] A photograph of the white mule tape used to pull the lasher on the day of the incident is at Exhibit 7 to the right of the yellow rope shown in the photograph. VP Bauer testified that mule tape is a lightweight, high tensile strength rope that is flat and somewhat rectangular that is used a lot in the industry. He said lasher ropes are mostly only about 40 to 50 feet long and ECE uses mule tape if it needs to go over a pond, steam, or mobile home park. [redacted] testified that mule tape was made of nylon. He said that it was "really strong" and "unbreakable." The Crew used "mule tape" that had been hung and left in place on the west side of the lake from on a prior visit to the Incident Worksite. VP Bauer believed that the Crew had been at the Incident Worksite before, and specifically that AJ had been at Incident Worksite three times before. [redacted] was not sure whether AJ had pieced the yellow rope to the mule tape, or "just put the muletape straight to the lasher". The plan was for a crewman positioned at the west side of the lake to pull the lasher across the lake from Pole B to Pole C by pulling the mule tape. (Tr. 215, 217, 219-21, 227, 232, 302, 555-57, 583-84; Exs. 7, 58A at "B", "C", "D").

Interrog. No. 11)). The lasher has two rubber wheels that sit on the strand that move when the lasher is pulled. (Tr. 112-16, 212-15, 222, 224; Exs. 7, 35, 62 at 14). During lashing activities, the role of the ground hand is to pull the lasher sending it from pole to pole and handle materials in case the linemen need materials on the pole. (Tr. 93-94, 117). Once the lasher is set up, the ground hand pulls the rope from one pole to the next from below, careful to keep tension on the rope so that the lasher does not flip off the line.[7] (Tr. 92-93, 224-25, 367). As the ground hand pulls the rope, the lashing machine moves along the strand, wrapping the fiberoptic cable and the support strand together with lashing wire. (Tr. 114-15, 385; Ex. 46 at 4-5 (Resp. to Interrog. No. 11)). At each subsequent pole, a lineman manually transfers the lasher from one side of the pole to the other and sets the lasher up again. (Tr. 106).

3. The Armstrong Project & Alfred Job

ECE did not complete a job hazard assessment form[8] for the Armstrong Project, the Alfred job, or the Incident Worksite, despite the requirement that it do so in its Eustis Cable Enterprises, LTD Safety Manual at Exhibit C. (Tr. 432-33, 441-43; Exs. 46 at 7-8, C at 0110 at Part C). ECE did not create a site-specific safety plan for its work on the Armstrong project, including the Alfred job. (Ex. 46 at 7 (Resp. to Interrog. No. 6)). During the Armstrong Project, including the Alfred job, about 50% of the work ECE's aerial line crews performed involved placing the support strand and about 50% of the work ECE's aerial line crews performed involved placing

[7] Foreman Cole stated the "the line" refers to the strand or the complete strand with fiber. (Tr. 101).
[8] PM Becker stated at his deposition that he was not familiar with a job hazard assessment form. (Tr. 359).

the fiberoptic cable on the support strand, including lashing the fiber to the strand.[9] (Tr. 100). On the Armstrong Project, including the Alfred job, about 50% of the work occurred off-road in easements, which could include work in fields or up and down mountainsides. (Tr. 118-19).

There are no discipline records in the record issued by PM Becker on the Armstrong Project other than one he issued to AJ, when, a week after he was hired, he got a police ticket for failing to stop at a DOT inspection site.[10] (Tr. 384; Ex. 56 at 10-12). The only other discipline record in evidence from the Armstrong Project was issued to a member of a splicing crew for not wearing a vest or hard hat on August 19, 2019. This was issued by Brian Carlson, who supervised ECE's splicing crews. (Tr. 573-74; Ex. 54 at 9).

PM Becker reported to VP Bauer. Bauer became VP of Operations in 2017, and in that capacity, he oversees safety. He said "[w]e put a lot of emphasis on having a very robust, good safety program." He has worked at ECE since 2002. (Tr. 395, 430, 481-85). PM Becker was supposed to fill out field inspection reports weekly, but he was "lax" about it. (Tr. 425-26). There is no record of any inspection of the Crew that included Foreman AJ, [redacted] and [redacted] (together "the Crew") during AJ's employment with ECE. (Tr. 425-26, 597; Stip. No. 15). CO Willibey testified that he did not believe ECE's inspection program "raised to the level required for the work that they were doing." (Tr. 630-31).

B. The Crew's Assignment on January 13, 2020

---

[9] Foreman Cole testified that the photograph at Exhibit 3 shows the support strand as the third line down from the top where ECE performed its work on a pole. (Tr. 104-05; Ex. 3). He also said that the bottom line shown at the photograph at Exhibit 5 shows a fiberoptic cable at the bottom wire and a support strand above it. (Tr. 107-08; Ex. 5).

[10] VP Bauer said [redacted] was not disciplined for sliding out on the strand on January 13, 2020 because he was trying to save AJ. He said both Messrs. [redacted] and [redacted] did not want AJ to go out on the line. [redacted] was also not disciplined. (Tr. 561, 574-75, 584-85; Stip. No. 4).

On January 13, 2020, PM Becker assigned the Crew to lash, *i.e.* connect or wrap, fiber-optic cable to an existing support strand[11] between various utility poles.[12] (Stip. Nos. 14-15; Ex. 46 at 4-5 (Resp. to Interrog. No. 11)). Fiberoptic cable is made of glass and needs some "form of support to stay up on the pole" line. (Tr. 115). The strand provides that support. (*Id*.) This work generally occurred here about twenty feet off the ground. (Tr. 102-05, 382-83; Stip. No. 21; Ex. 3).

1. The Crew

By January 13, 2020, each of the three Crew members was still relatively new to ECE. PM Becker hired AJ as a foreman on October 21, 2019.[13] (Tr. 99, 348, 352, 99; Stip. No. 24). He hired [redacted] around the same time. (Tr. 178; Ex. S at 440). [redacted] had joined ECE a few weeks prior. (Tr. 353).

Foreman AJ, [redacted] and Foreman Henry Cole[14] started their telecommunications careers in Jamaica. (Tr. 91-92, 140-41, 294-95; Ex. 56 at 2). [redacted] worked in the telecommunications industry in Jamaica from about 1994 to about 1999,[15] again from 2003 to 2008 where he worked at his brother's company, [redacted]'s Cable, and then not again until 2018, when he migrated to the United States and worked at Crammer and O'Connor (Crammer),

---

[11] The support strand is also known as the "wire," the "line," the "messenger cable" or the "string". (Tr. 100-105, 146; Exs. 3, I at 342). [redacted] testified that part of the lasher wraps "the fiberoptic cable to the strand wire." (Tr. 302). Cole testified that a lasher is the tool used to wrap the fiberoptic cable along the strand. (Tr. 101).

[12] PM Becker was in charge of issuing daily work. (Tr. 342-43).

[13] AJ's Employment Application to ECE is dated October 7, 2019. (Tr. 532; Ex. 56 at 1).

[14] Foreman Cole was an ECE employee at the time of the Worksite Incident and trial. He worked at ECE for about 22 years. (Tr. 88-90). He was not at the Incident Worksite at the time of the Incident. (Tr. 90). Cole identified himself as a foreman/lineman on the Armstrong Project. (Tr. 92-93). Some people refer to Cole as a "senior foreman", which he presumes is due to his length of time with ECE. (Tr. 137).

[15] [redacted] worked at Allen Cable, a company owned by Eustis Cable in partnership with Mr. Cole, in Jamaica from 1994 to about 1999. [redacted] testified that he was trained on the job by Mr. Cole. (Tr. 294, 418).

a U.S. telecommunications company and sub-contractor to ECE, that did the same lineman work as ECE. Cole introduced [redacted] to Crammer. [redacted] worked at Crammer for about six to seven months. AJ worked for Crammer from an unknown date in 2018 to at least August 15, 2019. (Tr. 534, 566-68; Exs. 56 at 1, 3, 57).

On August 15, 2019, AJ was involved in an incident while working for Crammer in an easement. The incident resulted in a loss of power to about 75 customers for 30 minutes and required the power company's assistance. (Tr. 422-23, 545-47; Ex. 57). There was no documentation about the August 15, 2019 incident, or any other discipline records, in ECE's Personnel File for AJ. (Tr. 531, 567-68; Ex. 46 at 10, Req. For Produc. Nos. 24, 56). ECE hired AJ without any proof that AJ had had any OSHA-10 or OSHA-30 training. (Tr. 447, 564-66; Ex. 56). AJ attended ECE's new hire orientation on October 26, 2019. (Ex. S at 0435). AJ scored poorly on the driving test at orientation and had to retake the examination. (Tr. 425). Within a week of his hiring by ECE, AJ received a New York State police ticket for his failure to stop at a DOT inspection site. (Tr. 424-25, 536-39; Stip. 24; Ex. 56 at 10-12).

Foreman Cole told PM Becker that AJ was capable of running his own crew. (Tr. 140). [redacted]

PM Becker assigned AJ, [redacted] and [redacted] to be an "aerial line crew,…." (Tr. 190, 353). He determined that AJ would lead the Crew as Foreman. (Tr. 352). AJ also worked as a lineman in the Crew, as did [redacted]. (Tr. 189-90). [redacted] was the Crew's ground hand.[16] (Tr. 93-94, 115-18, 189-91).

2. Start of the Day: Belmont Field Office

[16] Mr. [redacted] was an ECE foreman when he testified at trial on April 26, 2022. (Tr. 177).

The Crew met at the Belmont Field Office. (Stip. No. 14). The Crew did not have a conversation about the day's assignment. (Tr. 193-94). PM Becker's assignment to the Crew was detailed on a design blueprint (hereinafter "print") of the pole line, with relevant information related thereto. (Tr. 194-95; Ex. 58). The Crew's scope of work involved several worksites on a section of the pole line that ran both along the roadway and offroad, or through, easements. (Tr. 118; Exs. 46 at 4-5 (Resp. to Interrog. Nos. 6, 12), 58). Foreman Cole testified that a Crew's Foreman was responsible for making sure that the Crew had the equipment that it needed for the day's job. (Tr. 95-96). PM Becker testified that the equipment needed to do the work at the Incident Worksite included a lasher, rope, and belt, and some hooks. (Tr. 409).

The work began offroad in a wooded easement on the south side of Fisher Road and then ran roadside along Fisher Road, before ending in another easement on the north side of Fisher Road. The Incident Worksite was about 20 to 25 miles away from the Belmont field office. (Tr. 397-98; Exs. 46 at 5 (Resp. to Interrog. No. 12), 58 at 2-3). About half of the poles on the day's print were not roadside accessible, including the poles at the Incident Worksite. (Ex. 58). The Crew had been to the Incident Worksite before December 25, 2019 and was familiar with the terrain. (Ex. 61 at 10). The Crew knew that the pole line crossed over a lake[17] and understood that the lake would impact how it could run the lashing machine.[18] (Tr. 223-25). Before leaving the Field Office, the Crew "got the truck stocked up" with tools. (Ex. 61 at 7-8). The Crew's

[17] Mr. [redacted] used the word "lake" to describe the body of water at the Incident Worksite, both in his statement to the police on January 13, 2020, and at hearing, until Respondent's counsel questioned the use of the word "lake" instead of "pond" on the annotated Exhibit 58 (Ex. 58A at "D"), at which point, [redacted] changed his testimony of the "lake" and referred to it as a "pond". (Tr. 192-98; Exs. I at 340, 58A at "D"). The Court finds the use of "lake" or "pond" to describe the body of water shown in Exhibit 41 at the Incident Worksite to be immaterial to the outcome of the case. (Tr. 605-06; Ex. 41).

[18] VP Bauer testified that "there was a lot of rivers and ponds and obstacles in western New York" and within the scope of the Armstrong project. (Tr. 581).

truck was brand new; just the day before, AJ drove to ECE headquarters in Vermont and exchanged the Crew's previous truck for a new one. (Tr. 207, 356). Neither truck was equipped with a ladder and the Crew did not bring one with them on January 13, 2020.[19] (Tr. 208-09, 256; Stip. No. 1). The equipment on the new truck included a lashing machine which had neither a top lock or a back gate[20], lashing wire, and three layup sticks.[21] (Tr. 211-12, 222-23, 236; Stip. Nos. 2-3; Ex. 35). The two linemen, [redacted] and Foreman AJ, also had pole climbing equipment. (Tr. 212; Exs. 44, HH at 737).

C. The Incident Worksite

To reach the first worksite on the print, the Incident Worksite, the Crew drove about 30 minutes along back country roads. (Tr. 282-84, 613-14). The Crew parked the truck in a farmer's driveway off of Fisher Road. (Tr. 210-11; Exs. 58A at "E", 61 at 10). The Crew carried the lasher and their tool belts from the truck for "several hundred yards" through a field and into the wooded area, where the majority of the relevant pole line was located. (Tr. 211, 605-08; Exs. 32, 37-41, I at 0335). The Crew's work at the Incident Worksite included three utility poles, including two on the east side of the lake. (Tr. 194-201; Ex. 58A (Poles "A-C")). The span across the lake was one of the longest on the day's print, at 407 feet. (Ex. 58).

1. The East Side of the Lake: Poles A and B

---

[19] Mr. [redacted] testified that there are no ladder racks on the type of new truck, a T40, that the Crew used at the Incident Worksite, or on the Crew's old truck. (Tr. 208-09). VP Bauer testified that T40 trucks typically do not have ladder racks. (Tr. 492).

[20] Some lashing machines have a top gate and a back gate. The former helps to hold the lasher on the strand to guide it down to the rubber rollers. The latter holds the fiberoptic cable in place. (Tr. 384-85). The lasher the Crew used on January 13, 2020 had neither. (Stip. Nos. 2-3).

[21] Layup sticks are a special tool made of fiberglass with a hook on the end. They come in six-foot and three-foot sections, which can be connected and used to reach heights. (Tr. 121, 382-83).

From the road, the Crew proceeded directly to the first pole, Pole A, on the print, without doing a "walk-through" of the Incident Worksite "to identify sources of hazards".[22] (Tr. 211; Exs. 58A at "A", C at 0110). At that point, the crewmembers split up. (Tr. 212-13, 608-09; Exs. 58A, 64 at ¶ 2[23]). While [redacted] climbed Pole A with the lasher, [redacted] stayed on the ground beside Pole A and AJ walked over to and climbed up Pole B. (Tr. 213, 609; Exs. 32, 58A at "A", "B"). Eventually, [redacted] got the lasher up to the strand and prepared it to send to Pole B. (Exs. 58A at "B", 64 at ¶ 2). [redacted] pulled the lasher over to Pole B. (Tr. 212, 215; Ex. 58A at "B").

Once [redacted] reached Pole B, AJ, already atop the pole, manually took the lasher from one side of the pole to the other and prepared the lasher for its journey to Pole C on the other side of the lake. (Tr. 215-17, 609; Exs. 29, 58A at "B", "C"). The Crew did not have a boat for the crossing and the lake was "too far around to pull the lasher" from either side of the lake. (Tr. 220-21, 225; Ex. 58A at "D"). Instead, the Crew planned to regroup on the western side of the lake and pull the lasher across the lake from there. (Tr. 221; Ex. 58A). To that end, AJ took two extra steps to ready the lasher to cross the lake. (Tr. 222-24; Ex. 58A at "D"). First, AJ attached mule tape to the lasher. (Tr. 226-27, 232, 555-56; Ex. 16 [white line hanging below the lasher is mule tape]). On January 13, 2020, the mule tape ran from the lasher on the east side of the lake, into and across the lake, onto the western shore of the lake, and across the land to a place where the Crew had attached it to a tree trunk. (Tr. 227-28; Exs. 16, 18-20, 58A at "D"). The photograph at Exhibit 16 shows cable to the right of the mule tape. (Tr. 226; Ex. 16).

---

[22] The Safety Manual called for the Crew to conduct a walk-through to identify sources of hazard. (Tr. 22; Ex. C at 110 at ⁋ C).

[23] For ease of reference, the Court has adopted the Secretary's assignment of a paragraph number to each of the 35 statements in Exhibit 64 that begin with a "-".

Second, AJ attached two balls of lashing wire to the front of the lasher while he was on Pole B. (Tr. 223; Ex. 35). He did this because the Crew was aware that, due to the distance and the lack of tension under the lasher as it made its way across the lake, the lasher may tip over on its side. (Tr. 113, 223-24, 366-67; Ex. 35). Attaching balls of lashing wire to the machine was an attempt, albeit an inadequate one, to weigh the lasher down and keep it stable for the lake crossing. (Tr. 222-25; Ex. 61 at 18-19). Once AJ completed his work atop Pole B, he descended. (Tr. 229; Ex. 58 at "B"). [redacted] walked the lasher as close to the edge of the east side of the lake as he could. (Tr. 217-19, 229; Ex. 58A at "D").

2. Lasher Malfunction Between Poles B to C

During lashing work, "[l]ashers frequently become disabled, entangled, stuck or otherwise requiring service at a working altitude," including in the space between two poles, or midspan. "This is a daily [sometimes several times in a day] occurrence …" "ECE does not track stuck lashers, it is a frequent item that is part of typical routine construction activities." (Tr. 119-20; Ex. 46 at 5-6 (Resp. to Interrog. Nos. 14, 17) at 11-12 (Resp. to RFP No. 34)). How to handle a lasher malfunction "var[ies] with the circumstances . . . ." (Ex. 46 (Resp. to Interrog. No. 14)). ECE's safety program does not include any instructions on midspan work generally or on lasher malfunction specifically. (Exs. 46 (Resp. to Req. For Produc. Nos. 14, 30, 34), 56, C). When a stuck or flipped lasher occurs midspan where it is accessible from the road, an aerial line crew uses its bucket truck to access the span and address the issue. (Tr. 120). Specifically, "the individual would operate the bucket to the appropriate working height, address the issue and either remove the lasher from the line or continue lashing." (Ex. 46 at 6 (Resp. to Interrog. No. 18)). If the lasher malfunctions off-road, the bucket truck is not a viable option to address the

problem. (Tr. 119-121, 209, 364-65, 413). Instead, Foreman Cole testified that he would "[p]ull it [lasher] back to the pole or use a layup stick to push it over." (Tr. 120).

The Crew eventually met again on the west side of the lake. [redacted] arrived first. From that side of the lake, [redacted] planned to pull the lasher with the mule tape. (Tr. 230; Exs. 58A at "D", 64 at ¶¶ 4-8). But when he got to the shore, he unexpectedly found that about five feet of the mule tape was frozen under ice. (Tr. 231-32; Exs. 61 at 17; 64 at ¶ 5). Once [redacted] had joined [redacted] on the west side of the lake, they worked to free the mule tape from the ice, eventually freeing it. In so doing, however, "it overturned the lasher" and it stopped moving on the mule tape in the direction toward Messrs. [redacted] and [redacted]. (Tr. 231-33, 300-02; Exs. 61 at 17-18, 64 at ¶¶ 5-6, I at 0340).

By the time AJ arrived at the west side of the lake, [redacted] and [redacted] knew there was a problem with the lasher. (Tr. 233-35; Exs. 58A at "D", 64 at ¶¶ 7-8). The Crew attempted to pull the lasher across the lake a second time to no avail. (Ex. 64 at ¶ 8). When it was clear the lasher was stuck, Messrs. [redacted] and AJ went back to the east side of the lake with the truck. (Tr. 233-35; Exs.16, 58A at "D", 64 at ¶¶ 10-11). [redacted] stayed on the west side of the lake. (Tr. 233-34; Ex. 58A at "D"). Before [redacted] and AJ left, [redacted] suggested they go get the layup sticks off the truck and try to see if they could use them to right the lasher "because a lot of the times you can just use the lap stick and put it on, back on the line."[24] (Tr. 235, 304-05; Ex. 58A at "E").

3. Troubleshooting Efforts and Attempts to fix the Stuck Lasher

[24] [redacted] said that [t]here's a part on the lasher machine where you could put the lap stick on and just put it [the lasher] on, back on the line", but it was a bit harder to put the lasher back on if it had flipped over. (Tr. 304-05).

There are several options for reaching and repairing a lasher that has malfunctioned midspan without a bucket truck. According to PM Becker, the "best way" to reach the appropriate working height in an easement, is to use "a ladder." (Tr. 413; Exs. 46 at 5-6 (Resp. to Interrog. Nos. 13, 18); 53). Sometimes layup sticks may be used to address a malfunctioning lasher. (Tr. 119-20, 234-35, 364-65). Sometimes you can just pull the lasher back to the pole and start over. (Tr. 120, 146-47, 272; Ex. 53). Another way to address lasher malfunction midspan is to lower the strand by loosening the clamp. (Tr. 146-47, 312-13, 330, 373-382; Ex. 46 at 5, 12 (Resp. to Interrog. No. 13, Req. For Produc. 34). Lowering the strand is the more time consuming and labor-intensive option. (Tr. 615). During his 25 years with ECE, Foreman Cole has never lowered the strand to address a stuck lasher. (Tr. 123). In his short time with ECE, [redacted] has never lowered the strand to fix a stuck lasher. (Tr. 330). On January 14, 2020, [redacted] told Bauer that he would have taken the strand out of the clamp and let it go. But, Bauer later rejected that suggestion as the appropriate course of action. (Ex. 61 at 29). Another way that linemen can, and do, access difficult-to-reach equipment midspan is by traversing the strand. (Tr. 254, Exs. 55, I at 338-43).

(a) The Crew should and could have used a ladder to work on the lasher if a ladder was available at the Incident Worksite.

Back on the east side of the lake, AJ "discovered that the lashing machine was stuck because it had flipped upside down."[25] (Ex. I at 340). The Crew made some initial efforts to

[25] Foreman Cole and [redacted] testified that the photograph at Exhibit 35 shows a lasher on a strand that looks upside down. (Tr. 112, 278-79; Ex. 35). Foreman Cole identified two balls of lasher wire on the lasher shown in photograph 35 that are used "to wrap the fiberoptic to the strand so it looks like one complete package instead of like where you have those two separate. When you're done, instead of that gap in between, it wraps it and now it sits right on top of each other." (Tr. 114-15).

reach the lasher, both from the ground and from a working altitude. [redacted] testified that the Crew did not think about using a ladder. [redacted] did not "know if it [a ladder] would reach up there either." There was no ladder on the truck. The Crew would have to call PM Becker and request a ladder be brought over to the Incident Worksite.[26] [redacted] said "[i]t's hard to put a ladder there", on a slope and in the bush away from the road.[27] But, CO Willibey testified that two workers could have carried an extension ladder from Fisher Road to Pole B. (Tr. 636; Ex. 58A at "B", "E"). PM Becker testified that "[w]hen a lasher becomes stuck, our employees were supposed to use a ladder to reach the lasher if possible." (Tr. 374).

VP Bauer investigated the Worksite Incident for ECE. He visited the Incident Worksite and interviewed management team members and Crew members who worked at the Incident Worksite.[28] (Tr. 558-60). VP Bauer testified that he thought that use of a ladder at the Incident Worksite "might have been an option" and was "a safe alternative." (Tr. 461-63). He also admitted to saying at his deposition that "I believe it could have been safe to use a [typical

---

[26] PM Becker testified that it would have taken a "Half hour, 45 minutes" to get a ladder to the Incident Worksite. VP Bauer testified that an employee could also call the closest crew to see if they could provide a ladder. (Tr. 493, 555, 684). He said ladders are readily available if needed by making a phone call to supervisors. (Tr. 557-58).

[27] However, at trial [redacted] admitted that he had said in earlier deposition testimony:
"Q Would it have been possible to use a ladder to work on the lasher.
A Yes, we could use the ladder too. …
Q Where would you have set it up?
A We would just set it up right underneath the lasher and it's sort of kind of a hill sort of terrain, so the lasher would, you know – …
Q Would a ladder have been a feasible option on this terrain.
A It's half and half. I was saying it's half and half. We could have used a ladder.
Q What's the other half?
A It's because the hill – because of the terrain, it was almost near the water. …
Q I don't understand. What does the water have to do with the ladder.
A No. I say because of the hill the ladder will probably be a little more difficult to use, but we could use a ladder too. We could use a ladder."
(Tr. 327-29).

[28] VP Bauer concluded that AJ made a "bad decision." He said it's inherently known in the industry not to do what AJ did. (Tr. 560, 563).

fiberglass extension] ladder [with hooks], absolutely." VP Bauer admitted that such a ladder was a common tool in ECE's line of work. (Tr. 463-64, 496-97). He said the Crew would have to first get the ladder's hooks over the top of the line and let the ladder sink back into the line. (Tr. 464-65). The Court finds that the Crew could have used a ladder to work on the lasher if a ladder was available at the Incident Worksite. (Tr. 327-29).

(b) If the use of a ladder is not possible, ECE employees were supposed to cut and lower the cable strand.

PM Becker testified at trial (also referred to as "hearing") that he had signed an affidavit, which he acknowledged as true and accurate, that when a lasher becomes stuck and a ladder will not reach the lasher employees were supposed to cut and lower the steel cable. Becker testified at trial that the employee would "put a "block and tackle" up on the pole and you'd attach the strand to it, and then you would cut the strand and lower it down." PM Becker also said a "chain hoist" would be equally useful. (Tr. 375, 380). PM Becker said ECE's "Crews were instructed to use those proper and safe methods [ladder use and cut and lower cable strand] to reach a lasher." (Tr. 374-75).

(c) Layup Sticks: from the Ground and from a Tree

Foreman Cole testified that the use of layup sticks was the best way to flip over a lasher that has flipped over and gotten stuck. (Tr. 146). [redacted] said the easiest way to fix the lasher "was just to pull back the [lasher] machine if we can use the lap stick and get it [the lasher] up." (Tr. 306, 311-12, 317, 662; Ex. JJ at 1). AJ and [redacted] took [redacted]'s suggestion and went to the road to get layup sticks off the truck.[29] (Tr. 235; Ex. 64 at ¶ 10). The Crew had three

[29] Layup sticks are also sometimes referred to as "lap sticks." (Tr. 236).

layup sticks on the truck. [redacted] testified that each of the three layup sticks was about eight to ten feet long, but he was not sure.[30] (Tr. 236; Ex. 61 at 23). PM Becker testified that ECE's layup sticks are either six-foot sections or three-foot sections in length. He said ECE normally put three six-foot sections and one three-foot section on their trucks.[31] (Tr. 382). Both [redacted] and AJ tried to use the pole made up of layup sticks to "flip the lashing machine over but it [the pole made up of three layup sticks] was too short." (Exs. 61 at 24, I at 0340). [redacted] said in his January 15, 2020 interview that the pole did not have "enough length". (Ex. 64 at ¶ 11). [redacted] testified that AJ probably needed another layup stick for the pole to fix the situation. On January 15, 2020, [redacted] told CO Willibey that the layup stick they had at the worksite "wasn't long enough." (Tr. 236; Ex. JJ at 1). [redacted] told Bauer on January 14, 2020 that AJ probably needed five sticks to get under the lasher. (Ex. 61 at 23). AJ was "barely able to touch the lasher" from the ground using the three layup sticks. (Ex. I at 340). Next, [redacted] climbed almost twenty feet up an adjacent tree with the three layup sticks to try to fix the lasher.[32] (Exs. 61 at 25, 64 at ¶ 12). But even "holding the very end" of the sticks, [redacted] could "barely control it". He could "just get it onto the lasher but" could not fix it from the tree. (Ex. 61 at 25). [redacted] stated in a statement made under oath on March 6, 2020

[30] Both [redacted] and [redacted] agree that the Crew had three layup sticks with them. At the trial, [redacted] could not remember what combination of short and long sticks the Crew had. [redacted] thought each stick was about eight to ten feet long. (Tr. 236, 382; Ex. 61 at 23).

[31] The Court finds that the Crew at the Incident Worksite only had three layup sticks that together measured between 15-18 feet in length. The Court further finds that this smaller amount of layup sticks was less than the normal complement of crews. Typically a crew would have four layup sticks on their trucks that measured twenty-one feet in length when joined. PM Becker said crews normally attach the clamp to the elongated pole at around 18 to 21 feet and the layup sticks "just clip together." (Tr. 236, 382-83; Ex. 61 at 23).

[32] PM Becker testified that it was an unsafe practice for an employee to climb a tree to get more height with the three sticks. (Tr. 384).

that the Crew tried, but failed, to: 1) free the lasher with the poles taken from the truck and 2) pull the lasher back. He said that "It [the lasher] remained stuck in place." (Tr. 326).

(d) The Lasher Would Not Pull Back

After efforts with the three layup sticks failed, AJ stood "underneath the lasher looking up" and determined that "the lasher would not pull backwards,…." to Pole B. [redacted] told VP Bauer on January 15, 2020 that AJ told both him and [redacted] "that the lasher would not pull backwards." (Tr. 237-38, 309; Exs. 58A at "B", 61 at 26-27, 85, 64 at 2). [redacted], back on the east side of the lake, suggested to AJ, who was already up on the strand halfway from Pole B to the lasher, that AJ should "pull the lasher back to the Pole [Pole B]."[33] He said AJ heard his suggestion and AJ responded that "[i]t wouldn't pull back." [redacted] figured that AJ "was seeing something that [he] didn't see when he was underneath it," – for instance, that maybe the strand "was pinched." (Ex. 61 at 27, 85-86). In any event, at that point the mule string attached to the lasher "was way out of reach…."[34] (Exs. 11, 16, 61 at 26). The Court finds that AJ tried to pull back the lasher before going out on the strand but was unable to do so. (Tr. 237-38, 309; Exs. 58A at "B", 11, 16, 61 at 26-27, 85-86, 64 at 2).

(e) Trash Can

Meanwhile, [redacted] found a residential trash can (or bin) by a trailer in the woods at the lake's west side and brought the can over to the east side of the lake. (Tr. 238-39; Exs. 12, 26). His thought was that the Crew could turn the trash bin upside-down underneath the lasher,

---

[33] [redacted] testified "That's how we always – that's the best way to do." (Tr. 237). [redacted] testified that AJ "thought it would take a little more time." (Tr. 237). On January 15, 2020, [redacted] told CO Willibey that AJ told him AJ chose to go out on the strand because AJ was "just trying to go fast, and he knew better." (Tr. 669-71; Ex. JJ at 5).

[34] [redacted] testified that if he couldn't reach the muletape, AJ "could have used a lap stick to hold the muletape and just pull it towards him." (Tr. 313).

stand on top of the trash can and from there, use the three layup sticks to get the extra height to reach the lasher. (Tr. 238-40, 667; Exs. 12, 25-26, 64 at ¶ 16, JJ at 2). The photograph at Exhibit 25 shows the trash bin "pretty much probably underneath it [the lasher]" where [redacted] put it.[35] (Tr. 240-41; Ex. 25). But doing so was no longer necessary because by the time [redacted] arrived at the east side of the lake with the trash bin, AJ was already up on Pole B wearing [redacted]'s belt and out on the strand wire.[36] (Tr. 240-43, 612; Exs. 44, I at 340, HH-726).

(f) Traversing the Strand or so-called "Midspan Excursions"

Prior to the Incident, PM Becker had seen people go out on the strand. (Tr. 413-14). [redacted] too had seen "guys" in Jamaica go out on the strand.[37] (Tr. 255, 299, 658; Ex. JJ at 1, 8). Prior to the Incident, VP Bauer had also heard of people going out on the strand. (Tr. 474, 615-16). [redacted] also had heard of people going out on the strand. (Tr. 615-16, Ex. 61 at 72).

The day after the Incident, [redacted] told VP Bauer that he personally did not want to traverse the strand because he knew his "physical limitations" and the work "is harder than it looks." (Exs. 61 at 30, 34-35, 64 at ¶ 14). He told VP Bauer that AJ, "acted like he had [traversed the strand] a million times…." (Ex. 61 at 71).

On January 14, 2020, [redacted] told VP Bauer that he considers what AJ did to be a "last resort" option. (Tr. 254-56). VP Bauer considers what AJ did "old school cowboy cable stuff."

---

[35] PM Becker testified that if he had observed one of his crews using a trash can to get some extra height with the layup sticks, he would have "Shut them down" because it would be an unsafe practice. (Tr. 383-84).

[36] VP Bauer testified that [redacted] told him that "he emphatically asked AJ not to go out on the line, told him no." (Tr. 593). On January 15, 2020, [redacted] told CO Willibey that he hollered to AJ to wait and not go out on the wire, but AJ was already out on the strand half-way to the lasher. [redacted] told CO Willibey that AJ "flipped the lasher." (Tr. 665-66; Ex. JJ at 2-3).

[37] [redacted] testified that ECE would not have permitted him "to go out on the line with some bosun's chair jerry-rigged out of a climbing belt." (Tr. 299). PM Becker testified it would be "just outrageous" for someone to shimmy across a strand on a jerry-rigged bosun's belt to get to a lasher. (Tr. 413).

(Tr. 474). On Oct. 22, 2018, another ECE field employee went out on the strand in Bethel to reach equipment during work "off road". (Ex. 55). This employee walked on the strand like a tightrope. (Tr. 470-74; Ex. 55). ECE's Employee Warning Notice for the offense of violating company policies stated that the Plan for Improvement was that the employee "will use a ladder when equipment is difficult to reach on off road poles." (Ex. 55).

AJ first "mentioned going out onto the strand to fix the lasher" when [redacted] got down from the tree. (Ex. 64 at ¶ 14). [redacted], the only one of them who had his climbing belt at that moment[38], told AJ, "I cannot do that, I know it's harder than it looks." (Tr. 242, 580-81; Exs. 61 at 30, 64. at ¶¶ 14-15). [redacted] gave AJ his tool belt and rope lanyard. (Tr. 242, 612; Exs. 44, HH-726). He "didn't know to say [to AJ], 'You're not doing this right.'" (Ex. 61 at 31). [redacted] had heard of guys who had done this technique, and AJ "acted like he had done it a million times," so [redacted] "thought [AJ] had done [it] before" too. (Tr. 615; Ex. 61 at 32, 71-72).

Once AJ got to the strand, he put [redacted]'s rope lanyard over the strand a single time and began "to shimmey [sic] out on the line upside down."[39] (Exs. 61 at 35-36, 64 at ¶ 18). He was "wearing the belt . . . like you normally would climb" and "even put it … up under his butt" like "he was going to sit on the strand kind of in a seat." (Ex. 61 at 36). [redacted] testified that AJ pulled himself out to the lasher with his hands. When AJ reached the lasher, some 35 feet from Pole B, he fixed it. (Tr. 243, 309-10; Exs. I at 338, 61 at 39, 64 at ¶ 19). "He [AJ] had one

[38] After descending his initial ascent up Pole B, AJ went back to the truck and left his climbing belt there. (Tr. 232-33, 242). The photograph at exhibit O shows a climbing belt similar to the one worn by AJ when he climbed up Pole B on the day of the incident. This type of belt is not used for fall arrest. (Tr. 577-80; Ex. O at 1). VP Bauer testified that a fall arrest system is a body harness that ECE uses with aerial lifts. (Tr. 596).

[39] AJ was reportedly a "heavyset man", and the strand went down with a diagonal "tilt". (Tr. 243).

hand on the strand, reached to the lasher" and flipped it [the lasher] back into place. (Tr. 243; Ex. 61 at 39).

4. Rescue Efforts Trying to Save AJ

At about 11:20 a.m.[40], January 13, 2020, on his uphill journey back to Pole B, AJ began to struggle. [redacted] testified that AJ was about twenty feet from Pole B and was getting tired. (Tr. 243-44; Exs. 64 at 1, I at 0338, 0340).

(a) Improvisation Attempts to Save AJ

AJ was "roughly halfway [back] to the pole [Pole B] when…the waist belt begin [sic] to slide up his back…" and eventually cinched up to his chest. His body became perpendicular with the ground. From the ground, Messrs. [redacted] and [redacted] spent a couple of minutes "trying to improvise" ways to help AJ, who was about fifteen feet off the ground. [redacted] first used the three layup sticks with a hook at its end to put over the strand to try to balance AJ on the layup sticks and allow him to catch his breath. The layup sticks were about two inches thick. AJ wrapped his legs around the layup sticks, but more needed to be done. (Tr. 244-45, 248; Exs. 61 at 49, 64 at ¶ 21, I at 335, 338).

[redacted] then climbed up a tree near AJ to loosen AJ's belt so AJ "could come down on the [layup] stick." [redacted] testified that he [[redacted]] "put my foot through the stand trying to get him to loose[n] because he said he wasn't breathing. I was telling him to ease up so I could loose[n] his belt. He wasn't making no effort to do it." (Tr. 245).

[40] [redacted] testified that he thought the lasher turned over at about 9:00 a.m. on a real cold day. (Tr. 300). The Court finds that this is a bit too early and that the lasher got stuck on the strand closer to 11:00 a.m. (Ex. I at 0338).

On the ground, [redacted] found a 13 to 15-foot log in the woods[41] to give AJ something wider to balance on. [redacted] and [redacted] put the 13 to 15-foot log next to the layup stick. AJ was able to "stand" on the log with one foot, off and on. [redacted] told Bauer on January 14, 2020 that AJ would "get his balance for a second. And then it [the log] would kick out." While holding the log upright, [redacted] screamed at AJ to "Slide out of the belt. Unclip it. Unclip it." Meanwhile [redacted] ran to the truck parked about 200 to 400 feet away to retrieve AJ's belt while AJ was still conscious and fighting to save himself. While [redacted] is still holding the log upright, AJ, no longer able to stand on the log, suddenly "went limp" and became unconscious. [redacted] grabbed the three layup sticks and "hooked his [AJ's] hook. And I'm pulling him. I'm trying to pull him through this belt", but to no avail. (Tr. 244-54; Exs. 24, 31, 61 at 30, 47-65, 64 at ¶¶ 22-28, 32, I at 338-40, HH at 737).

(b) A Second Midspan Excursion; this time by [redacted]

[redacted] returned from the truck and gave [redacted] AJ's belt and a machete.[42] By the time [redacted] returned to Pole B, AJ's body was "limp" on the line. (Tr. 251, 613; Exs. 61 at 60, HH-737). [redacted] climbed up Pole B. [redacted] repeated the steps AJ had used to get to the lasher: he put AJ's pole strap over the strand, slid AJ's belt under his butt and went out "head first" twenty or so feet towards AJ. With one hand, [redacted] "pulled [his] weight up and [with] the other hand, [he] slid the [pole] strap" along. (Ex. 61 at 59). After reaching AJ, [redacted] first unsuccessfully tried using a "nipper", used to cut wire, to try to cut AJ down. He

[41] The photographs at exhibits 24 and 31 show the piece of wood [redacted] used to help balance AJ. (Tr. 247; Exs. 24, 31). [redacted] testified that the piece of wood was a lot wider than the layup stick. (Tr. 248).

[42] [redacted] also alerted the Code Inspector, Yamile Saltarin Baena, who had been parked next to the Crew's truck by the road all morning, to what was happening in the woods. [redacted] testified that Baena would "always be there with us working." (Tr. 248-50; Ex. I at 336, 341-42).

then took about 6 to 10 swings of the machete to cut the rope lanyard AJ had tied over the strand. AJ then dropped down to the ground. (Tr. 244-54; Exs. 24, 31, 61 at 30, 47-65, 64 at ¶¶ 22-28, 32, I at 339-40, HH at 737).

With great difficulty, [redacted] made it back from where AJ had been to Pole B, while screaming "I can't do it, man. I can't do it", I can't [expletive deleted] breath", and "I'm not going to make it" because he was having to go "straight uphill" on the strand. [redacted] "felt like I [he] was fighting for my life for a minute." He "flipped around," was "upside down," and "almost went … ass over teacup on the strand." Eventually, he "ended up getting [his] leg back on top of the strand." [redacted] said [redacted] was "panicking" while traversing the strand back to Pole B. (Tr. 244-54; Exs. 24, 31, 61 at 30, 47-65, 64 at ¶¶ 22-28, 32, I at 339-42, HH at 737). [redacted] stated going out on the strand to get to AJ was "scarier than anything" he had ever done. (Ex. 61 at 72).

Two days after the Incident, ECE issued a Safety Alert about AJ's death, instructing: "There will be **NO midspan excursions** allowed for any reason. Use a ladder or pull the lasher back and start over." (Emphasis in Original). (Ex. 53).

(c) Code Inspector Baena calls 911 and Administration of Cardiopulmonary Resuscitation (CPR)

Code Inspector Baena was employed by Advantage Point Solutions and was assigned to inspect ECE's work. She reached Pole B as AJ's body fell to the ground. (Tr. 253; Ex. I at 336, 342). By this point, AJ had been hanging by his belt for approximately six to fifteen minutes. (Ex. I at 339-40). AJ did not have a pulse. (Ex. I at 342). Code Inspector Baena knew the Crew's location and called 911. (Ex. I at 342). Code Inspector Baena also performed CPR but was unable to revise AJ. (Ex. I at 342).

D. Citation 1, Item 2 – Training at ECE

ECE did not prepare a "certification record" reflecting that ECE provided AJ, [redacted] or [redacted] with training in the "precautions and safe practices" set forth in 29 C.F.R. § 1910.268. (Tr. 447-49). ECE did not obtain any "certification record" or other such documentation showing that AJ, [redacted], or [redacted] received training in the "precautions and safe practices" set forth in 29 C.F.R. § 1910.268 prior to his employment with ECE. (Tr. 447-51). ECE did not provide AJ, [redacted], or [redacted] training on aerial lifts as required by ECE's safety program. (Tr. 126-27, 359-60, 456; Exs. 46 at Req. For Produc. No. 12, 56 at 25, A at 1, C at 011-15).

ECE did not provide AJ, [redacted], or [redacted] training on the "specific use of ladders for line work," before commencing work, as required by ECE's safety program, or at any time before the Worksite Incident. (Tr. 128, 359-60, 449-52; Ex. 56 at 25). ECE did not have a "qualified person" certify AJ, [redacted] or [redacted] in pole climbing before allowing them to climb poles, as required by ECE's safety program, or at any time prior to the Worksite Incident. (Tr. 128, 456-57; Ex. 56 at 25). ECE did not provide AJ, [redacted], or [redacted] with fall protection training before working at heights, as required by ECE's safety program, or at any time before the Worksite Incident. (Tr. 127, 359-60, 454-55; Exs. C at 0043-46, 56 at 20). ECE did not ensure that Messrs. AJ, [redacted], or [redacted] viewed the instructional video on the Buck Squeeze, which is a body belt system that provides fall protection that ECE required employees to wear "while climbing wood poles". (Tr. 457; Exs. A at 1; C at 0124, 0146). ECE did not provide AJ, [redacted], or [redacted] with training in specific personal protective equipment (PPE), as required by ECE's safety program. (Tr. 127, 359-60, 631-32; Ex. C at 108-

13, Appendixes A, C). There are no training records in AJ's personnel file. (Tr. 577, 631-32; Ex. 56). ECE does not specifically train its subcontractor employees. (Tr. 584).

PM Becker does not have OSHA-30 training. (Tr. 361). PM Becker did not provide any classroom training at ECE. (Tr. at 359-60). In his four years at ECE, PM Becker did not receive or give training on OSHA's telecommunications standard.[43] (Tr. 338, 360-62). He did not give or receive any training on how to address stuck or flipped lashers. (Tr. 362). Lasher troubleshooting is not included in ECE's new employee orientation. (Tr. 362; Ex. 56). PM Becker never told anyone that they should not go out on the strand. (Tr. 363-64). He never provided any training on how to use layup sticks. (Tr. 362). PM Becker is not aware of ever being with the Crew when it encountered a stuck or flipped lasher. (Tr. 426). PM Becker has no knowledge of foremen AJ and Cole confronting a stuck lasher while working together. (Tr. 426).

Neither Cole nor Becker is aware of AJ ever encountering a stuck or flipped lasher.[44] (Tr. 134, 426). Cole does not provide any formal training at ECE.[45] (Tr. 127). For instance, Cole does not provide training on ladder usage. (Tr. 128). Cole has never certified any ECE employee in pole climbing. (Tr. 128). Cole never provided AJ with formal training after he was hired by ECE. Cole believed that he "didn't have to teach [AJ] anything" given his experience.

---

[43] PM Becker retired in October 2020. (Tr. 338).

[44] Foreman Cole testified that in his experience not many lashers get stuck; "probably zero too." (Tr. 144). Becker testified it was "very rare" for lashers to flip over; but added "Well, I mean, it can happen." PM Becker estimated that a crew's lasher flips over "once" a month. (Tr. 410-11). He said that a lasher can get stuck in place and not be pulled back, "but that is rare." (Tr. 411). The Court does not place much weight on any testimony that states lashers "rarely" get stuck. (Tr. 119-20; Ex. 46 at 5-6 (Resp. to Interrog. Nos. 14, 17) at 11-12 (Resp. to RFP No. 34)).

[45] [redacted] testified that Cole showed him how to pull the lasher back to the pole. [redacted] told CO Willibey that he was told in the field that "in rare cases, pole and/or ladders would be used when it [the lasher] couldn't be pulled back." (Tr. 311; Ex. JJ at 8)

(Tr. 126). Cole did not provide AJ with any training on troubleshooting lasher issues. (Tr. 123). Cole has not received any training on troubleshooting stuck lashers from ECE. (Tr. 123). AJ's and Cole's crews "joined together and did a couple of jobs" together. (Tr. 126-27). Cole never told anyone not to go out on the strand. (Tr. 125-26). No one at ECE ever told Cole not to go out on the strand. (Tr. 125). Cole does not have any certification of training under 29 C.F.R. § 1910.268. (Tr. 129).

E. Citation I, Item 3 – Tools and PPE

The Crew did not bring a ladder to the Incident Worksite on January 13, 2020. (Tr. 209, 256; Stip. No. 1). Foreman Cole testified that he would have called PM Becker or his supervisor Mr. Dodd if he needed to get a ladder to use at a worksite. (Tr. 145). On January 14, 2020, [redacted] told VP Bauer that he thought AJ would have used a ladder had one been on the truck. (Tr. 271-72). The Court finds that it would have been possible to use a ladder to reach the lasher at the Incident Worksite on January 13, 2020. (Tr. 327-28, 369-70).

Layup sticks are fiberglass sticks can be attached together and used to reach a stuck or flipped lasher. (Tr. 121, 493). Per PM Becker and Foreman Cole, standing on a trash can with layup sticks is not a safe practice. (Tr. 122-23, 383-84). Per PM Becker and Foreman Cole, using layup sticks while climbing a tree is not a safe practice. (Tr. 122-23, 384). The Court finds that had the Crew had access at the worksite to the normal complement of four layup sticks capable of reaching up to twenty-one feet the Crew would have been able to flip the stuck lasher back upright on the strand which was about eighteen to twenty feet off the ground. (Tr. 236, 243; Exs. 64 at ¶ 11, I at 340, JJ at 1; Stip. No. 21).

Another way to address a lasher malfunction midspan is to pull it back to the pole and start over. (Ex. 53). At the Incident Worksite, AJ stood underneath the lasher and determined that it

would not pull back. (Tr. 237; Ex. 61 at 27). AJ told both Messrs. [redacted] and [redacted] that the lasher would not pull back. (Exs. 61 at 85; 64 at ¶ 13). The Crew did not have any gear with it on January 13, 2020 to safely traverse the strand. (Ex. 61 at 30). ECE does not issue combination climbing/fall protection harnesses to its aerial line crews. (Tr. 388-89, 628). VP Bauer testified that ECE did not issue PPE to AJ for use when sliding out on the strand line because ECE employees "don't do that. It's not allowed." (Tr. 553). But if AJ had been wearing a combination climbing and fall protection harness, he would not have been exposed to caught-in and fall hazards when he went out on the line wearing a climbing belt. (Tr. 634).

II. STIPULATIONS

The following facts and law were stipulated to by both parties in the Joint Pre-Hearing Statement (J. Pre-Hr'g Statement) and the stipulations were accepted by the Court. (Tr. 76).

A. Stipulations of Fact

1. The truck used by AJ's crew on January 13, 2020 was not equipped with a ladder.
2. The lasher used by AJ's crew on January 13, 2020 did not have a top lock.
3. The lasher used by AJ's crew on January 13, 2020 did not have a back gate.
4. No employee on AJ's crew received any discipline for conduct on January 13, 2020.
5. Exhibit 63, the media file Eustis produced on April 26, 2021 with the file name "Follow discussion AB DW GB 011520" is a recording of a conversation that took place between Andrew Bauer and crewmembers [redacted] and [redacted] on January 15, 2020.[46]

[46] Stipulation No. 5 concerns Exhibit 63, which was not offered or admitted, and was withdrawn at the hearing. (Tr. 713).

6. At all times relevant to this matter, Respondent was a communications contractor that provides manpower and equipment for the construction of communications systems.
7. The work at issue in the citation was performed pursuant to a contract between Respondent and Armstrong Communications involving the "Alfred" exchange, which refers to Alfred, New York (the "Alfred" contract).
8. Armstrong Communications received funding from New York State to extend broadband access to Western New York.
9. Respondent was the prime contractor for Armstrong on the Alfred contract.
10. The Alfred Contract included work in Allegany and Steuben counties in upstate New York.
11. The Alfred contract contemplated 184.71 route miles for "new aerial plant", or above-ground telecommunication lines, in and around the town of Alfred, New York.
12. Respondent ran its work on the Alfred contract out of a temporary Field Office, located in Belmont, New York.
13. At all times relevant to this matter, Mr. Timothy Becker was the project manager in charge of ECE's Belmont Field Office.
14. On January 13, 2020, a Monday, Mr. Becker assigned a three-man "aerial line crew" (the "Crew") to lash fiber optic cable to an existing support strand.
15. The Crew included [AJ], [redacted] and [redacted].
16. The Crew was part of Respondent's Construction Department.
17. On January 13, 2020, the Crew's scope of work included lashing fiber optic cable along numerous segments of the pole line, including the segment (the "Worksite" or "work step") where the crew was working at the time of the work at issue in the citation.
18. The Worksite at issue in the citation was located in an easement to the south of Fischer

Road in Andover, New York.

19. Specifically, the crew's task in this "work step" was to lash fiber optic cable to bare support strand from approximately pole E23/Route 3000 to approximately pole 179/Route 3000.
20. The pole line at issue runs roughly parallel to Fisher Road, starting first in an easement to the south of Fisher Road, then roadside along Fisher Road and ending up in an easement on the northside of Fisher Road.
21. The strand was located approximately 18 to 22 feet off the ground.
22. The strand was located a (sic)[47] below the transmission wires.
23. At all times relevant to this matter, AJ was Respondent's employee.
24. Respondent hired AJ on October 21, 2019.
25. On January 13, 2020, Mr. AJ died while performing line work at the Worksite.
26. On January 13, 2020, Mr. AJ was the crew's working foreman.
27. The instant citation was not ECE's first citation.

(Tr. 76; J. Pre-Hr'g Statement at Ex. A at 10-11).

B. Stipulations of Law

1. For Citation 1, Item 2, as amended, the Secretary alleges that:

29 CFR 1910.268(c): The employer failed to provide training in the various precautions and safe practices described in this section and insure that employees do not engage in the activities to which this section applies until such employees have received proper training in the various precautions and safe practices required by this section:

a) On or about 01/13/2020 in a wooded area near 208 Fisher Road, Andover, New York; an employee used a climbing belt to climb out on the support strand to

[47] "(sic)" inserted by Court.

> retrieve a lashing machine that became stuck mid-strand. The employee slipped through the belt to his chest and was suffocated. Employees were not trained in the various methods to retrieve the lasher nor were they trained in the limitations of climbing belts or the hazards of misusing a climbing belt for horizontal access on an aerial wire.

2. For Citation 1, Item 3, as amended, the Secretary alleges that:

29 CFR 1910.268(e): The employer failed to provide personal protective equipment, protective devices and special tools needed for the work of employees, and failed to ensure that such equipment was used by employees:

> a) On or about 01/13/2020 in a wooded area near 208 Fisher Road, Andover, New York; an employee used a climbing belt to climb out on the support strand to retrieve a lashing machine that became stuck mid-strand. The employee slipped through the belt to his chest and was suffocated. A combination climbing/fall protection harness and appropriate rigging was not on site. Neither a ladder nor a sufficient number of layup sticks to reach the support strand were on site.

3. The Secretary withdraws Citation 1, Item 1; and for Citation 1, Items 2 and 3, the Secretary withdraws his alternative allegations under 29 C.F.R. Part 1926.
4. Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with Citation 1, Item 1.
5. Jurisdiction over this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c), 29 U.S.C. § 659(c), of the Act.
6. At all times relevant to this matter, Respondent was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act, and was an employer within the meaning of section 3(5) of the Act.
7. The law of the Commission and the Second Circuit Court of Appeals applies to this matter.[48]

[48] The parties further stipulated that the law of the Supreme Court of the United States also applies. (Tr. 76-77).

8. At all times relevant to this matter, ECE was a corporation doing business in the State of New York.
9. The work at issue in the citation constitutes "telecommunications field installations" as defined by 29 C.F.R. § 1910.268(a).
10. OSHA's telecommunications standard, 29 C.F.R. § 1910.268, is applicable to this matter.

(Tr. 10-13, 76-77; J. Pre-Hr'g Statement at Ex. B at 12-13).

A three-day trial was conducted on April 26 through April 28, 2022.[49] (Tr. 1).

III. DISCUSSION

A. The Secretary Has Proven Each of the Cited Violations.

The Secretary has met his burden in proving both items of the Citation. To demonstrate a *prima facie* serious violation of a safety standard under the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; and (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition. *N. Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *Astra Pharm. Prods., Inc.*, No. 78-6247, 1981 WL 18810, at *4 (OSHRC, July 30, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982). The Commission defines a preponderance of the evidence as enough to convince the trier of fact that the facts asserted are "more probably true than false." *Astra Pharm. Prods. Inc.*, 1981 WL 18810, at *5. Based on the record of this

[49] The trial was conducted remotely at the request of the parties. (Tr. 323).

case, and as set forth below, the Secretary has established that ECE violated the cited standards because it failed to equip the Crew with the tools and PPE required by 29 C.F.R. § 1910.268(e) and did not ensure that the Crew received the proper training required by 29 C.F.R. § 1910.268(c).[50]

B. ECE Did Not Ensure that the Crew Received Proper Training Before Engaging in the Activities Covered by 29 C.F.R. § 1910.268(c).

OSHA issued Citation 1, Item 2 because ECE failed to provide the Crew with training relevant to the aerial line work they performed at the time of, and during the three months leading up to, the fatality. The evidence presented at the trial shows that ECE did not provide instructions to the Crew sufficient to prepare it to perform the work PM Becker assigned to it on January 13, 2020. Prior to sending the Crew out into the field, ECE failed to ensure that the

---

[50] Section 1910.268(c) reads:

> (c) Training. Employers shall provide training in the various precautions and safe practices described in this section and shall insure that employees do not engage in the activities to which this section applies until such employees have received proper training in the various precautions and safe practices required by this section. However, where the employer can demonstrate that an employee is already trained in the precautions and safe practices required by this section prior to his employment, training need not be provided to that employee in accordance with this section. The employer shall certify that employees have been trained by preparing a certification record which includes the identity of the person trained, the signature of the employer or the person who conducted the training, and the date the training was completed. The certification record shall be prepared at the completion of training and shall be maintained on file for the duration of the employee's employment. The certification record shall be made available upon request to the Assistant Secretary for Occupational Safety and Health. Such training shall, where appropriate, include the following subjects:
>
> (1) Recognition and avoidance of dangers relating to encounters with harmful substances, and animal, insect, or plant life.
>
> (2) Procedures to be followed in emergency situations, and
>
> (3) First aid training, including instruction in artificial respiration.

Crew had received proper instructions and training on how to prevent the known hazards associated with performing routine midspan work at offroad worksites, such as the Incident Worksite, where a bucket truck is not an option for reaching working altitude of twenty or more feet.[51] Training instructions should have included the use of personal climbing equipment and ladders, and ECE's failure to provide such training and instructions exposed the Crew to serious hazards, as the death of Foreman AJ demonstrates.

Accordingly, Citation 1, Item 2, is affirmed.

1. The Cited Standard Applies.

The parties stipulated that "the work at issue in the citation", lashing fiberoptic cable to an existing support strand, "constitutes 'telecommunications field installations' as defined by 29 C.F.R. § 1910.268(a)."[52] (Legal Stip. No. 9). 29 C.F.R. § 1910.268(c) applies and ECE was required to comply with the standard's training provision.

2. ECE violated § 1910.268(c) by failing to ensure that the Crew had proper training under 29 C.F.R. § 1910.268(c) before they commenced field work.

The evidence demonstrates that ECE did not comply with the training provision in OSHA's telecommunications standard, 29 C.F.R. § 1910.268(c). The Secretary establishes non-compliance with a training standard by showing that an employer failed to provide potentially exposed employees with "the instructions that a reasonably prudent employer would have given

[51] CO Willibey testified that caught-in and fall hazards can result from a lack of training on how to safely perform midspan work like stuck lasher retrieval. (Tr. 632).

[52] OSHA's telecommunications standard "sets forth safety and health standards that apply to the work conditions, practices, means, methods, operations, operations and processes performed," in relevant part, "at telecommunications field installations…." 29 C.F.R. § 1910.268(a) (1). Per the standard, "[f]ield work includes the installation, operation, maintenance, rearrangement, and removal of conductors and other equipment and used for signal or communication service, and of their supporting or containing structures, overhead or underground, on public or private rights of way…." (*Id.*).

under the same circumstances." *N & N Contractors*, *Inc.*, No. 96-0606, 2000 WL 665599, at *7 (OSHRC, May 18, 2000) *aff'd*, 255 F.3d 122 (4th Cir. 2001). Such circumstances include "the specific conditions [at the worksite], whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard." *Compass Env'tl, Inc.*, 663 F.3d 1164, 1168 (10th Cir. 2011) (quoting *W.G. Fairfield Co.*, No. 99-0344, 2000 WL 1535922, at *3 (OSHRC, October 16, 2000) *aff'd,* 285 F.3d 499 (6th Cir. 2022)). An employer's instructions must be "specific enough to advise employees of the hazards associated with their work and the way to avoid them." *El Paso Crane & Rigging Co.*, No. 90-1106, 1993 WL 393508, at *8 n.7 (OSHRC, Sept. 30, 1993).

OSHA's telecommunications standard aims to protect employees from the hazards associated with what, as ECE concedes, is an "inherently dangerous industry." (Ex. 56 at 18). As set forth in the Preamble to the rule:

> The foremost concern of these standards is to assure that telecommunications workers will take proper precautionary measures and have proper training with respect to them and will use appropriate protective equipment in carrying out their duties. The primary hazards to which these standards are directed relate to the prevention of injuries caused by electricity and falling.
> 38 Fed. Reg. 23038 (Aug. 28, 1973).

Accordingly, the standard includes a training provision that requires covered employers to "insure that employees do not engage in" covered work until they "have received proper training in the various precautions and safe practices required by" the standard. 29 C.F.R. § 1910.268(c). The standard requires that "employees be trained in the safe practices applicable to the telecommunications industry." *Marcus Cable Assocs., LLC.*, No. 02-0966, 2003 WL 1889141, at *5 (OSHRCALJ, April 14, 2003).

Such "precautions and safe practices" include how to prevent injuries from falls, or more specifically, how to safely access and perform work at "Other elevated locations" at working altitude. 38 Fed. Reg. 23038; 29 C.F.R. § 1910.268(n)(8). *See Marcus Cable*, 2003 WL 1889141, at *5 (affirming violation of section 1910.268(c) due to failure to certify training on "precautions necessary to prevent an employee from falling from the elevated bucket of the Ford F-450 bucket truck."). Further, "where appropriate," the standard requires that covered employers "shall include" instruction on certain enumerated topics, relevantly including "[p]rocedures to be followed in emergency situations." 29 C.F.R. § 1910.268(c)(2). *See also* OSHA Interpretation Letter, Mar. 1, 2004 at 1 (Interp. Ltr.) (Recognizing that "the nature of telecommunications work presents a wide variety of work locations, schedules, and work crew configurations" and that such differences influence what training is appropriate).[53] (Interp. Ltr. at 1, https://www.osha.gov/laws-regs/standardinterpretations/2004-03-01-0, last accessed by the Court on October 19, 2022; Sec'y Post Hr'g Br. at 26). The OSHA Interpretation Letter also states: "The requirement to provide training 'where appropriate' allows employers to evaluate their own worksites and job tasks and determine for themselves, using reason and prudence, what training is necessary." (OSHA Interp. Ltr. at 1).

Accordingly, "the reasonably prudent employer concerned about the safety of its employees" needs to evaluate its worksites and job tasks to "detect potential dangers" and ensure that its crews receive "instructions sufficient to inform them about the conditions" that they will "foreseeably encounter[]…." during field work. *Pressure Concrete Constr. Co.*, No. 90-2668,

[53] The Interpretation Letter also states in part "Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed." (OSHA Interp. Ltr, at 1, Re: Standard 29 C.F.R. § 1910.268). The Court is cognizant of this limitation.

1992 WL 381670, at *6-8 (OSHRC, Dec. 7, 1992). *See also* Interp. Ltr. at 1. This includes known geographic and environmental conditions relevant to the work, as well as the related routine problems and hazards. *See also Hayward Baker, Inc.*, No. 12-0859, 2013 WL 2458533, at *5 (OSHRCALJ, Apr. 19, 2013) (training inadequate when it failed to address "how to deal with the routine problem of a stuck or difficult-to-load casing."); *Compass Env't*l, 663 F.3d at 1170 ("Nor does it seem unduly burdensome to require an employer to train its employees on a known severe hazard at a mobile construction worksite where unanticipated contingencies may arise."). The "requisite instructions have to be detailed enough to take into account various contingencies." and emergencies related thereto. *Pressure Concrete*, 1992 WL 381670, at *8; 29 C.F.R. § 1910.268(c)(2)-(3).

a. A reasonably prudent employer needs to provide specific instructions to aerial line crews about how to reach elevated positions from which to perform midspan work without a bucket truck.

At the time of the Worksite Incident, the parties agree that the Crew was lashing cable offroad in an easement, when the lasher malfunctioned midspan at about twenty feet above ground. (Stip. Nos. 14, 17-22; Ex 64 ¶¶ 2-9). Both easement worksites and lasher malfunctions were commonplace throughout ECE's Armstrong Project. [54] (Tr. 119, 461; Ex. 46 at 5 (Resp. to Interrog. Nos. 13-14)). Under these circumstances, a reasonably prudent employer concerned about the safety of its employees, needs to provide its aerial line crews with specific instructions about safe means and methods to reach and repair malfunctioning lashers in easements, without the benefit of a bucket truck. (Tr. 209). Such instructions would include "potential dangers"

[54] VP Bauer testified that a stuck lasher is "a fairly common thing." (Tr. 461). At trial, VP Bauer admitted previously telling DOL counsel that "a stuck lasher is kin to a lineman as a bent nail is to a carpenter." He further testified at trial that "I would still agree with that, yes, ma'am." (Tr. 461; Ex. 46 at 5, ¶13).

related to such work and be "detailed enough to take into account various contingencies," as well as the procedures to follow during emergencies. *Pressure Concrete*, 1992 WL 381670, at *8; 29 C.F.R. § 1910.268(c)(2)(3).

One such known contingency is the possibility of what ECE refers to as "midspan excursions," or employees traversing the line to access difficult-to-reach equipment, as AJ ultimately did on January 13, 2020. (Ex. 53). This practice is, as CSHO Michael Willibey learned during his investigation, something "that happens" throughout the industry, even if "not encouraged or endorsed." (Tr. 617). Four former and current ECE employees, Messrs. Becker, Bauer,[55] [redacted] and [redacted], acknowledged that they had either personally witnessed the practice, or heard of it prior to the Worksite Incident. (Tr. 254, 373, 413-14, 474, 615-16; Ex. 61 at 72). As such, the reasonably prudent employer concerned about employee safety would include instructions about this known danger and related emergencies. One option was to prohibit the practice altogether; another was to teach employees how to do it safely. See *New Eng. Tel. & Tel. Co.*, No. 76-3010, 1980 WL 10607, at *14 (OSHRC, May 30, 1980) (Company had two different avenues to avoid a violation of 29 C.F.R. § 1910.268(j)(4)(i): train employees or make it unnecessary for them to work near the hazard).

ECE concedes that aerial line crews need to learn information about midspan work, including how to address lasher malfunction. (Ex. 46 at 5, Resp. to RFP No. 14). ECE claims linemen typically learn about midspan work (other than midspan excursions) "hands on," throughout their careers. (*Id.*). Per VP Bauer, midspan excursions are, "like riding on the hood of a car," or something "[y]ou just don't do…". But, ECE had "no rules specific to midspan

[55] Bauer admitted to referring to AJ going out on the strand as "old school cowboy cable stuff" as something he would have said." (Tr. 474).

work . . . ." (Exs. 46 at 11 (Resp. to Req. For Produc. Nos. 29-30), 61 at 30-31). CO Willibey testified that although employees told him that they had received field training relating to retrieving stuck lashers, there was no specific training about what to do with lashers. (Tr. 674-76). CO Willibey stated that "[t]here was no confirmation of the training, no certification of the training to ensure that the employees, first of all, understood the rules and second of all, followed the rules." (Tr. 675-76). The Court agrees with the Secretary that without more the Court is not able to conclude that such OJT training about what to do with lashers actually occurred. (Sec'y. Post Hr'g Br. at 9). *See U.S. ex rel. Compton v. Midwest Specialties, Inc.*, No. 96-4374, 1998 WL 30811, at *7, n. 6 (6th Cir. Jan. 22, 1998) (The absence of a record of an event that would ordinarily be documented is probative of the fact that the event did not occur.).

b. ECE did not ensure the Crew received proper training.

The evidence establishes that ECE did not ensure that the Crew had received instructions that the reasonably prudent employer would provide to protect it from hazards it "foreseeably encountered on the day of the fatal accident" at hiring or at any point prior to the Worksite Incident. *Pressure Concrete*, 1992 WL 381670, at *8. Per the cited standard, the employer "shall provide" such training directly to new employees before they commence field work absent proof that an employee "is already trained in the precautions and safe practices" applicable to the telecommunications industry "prior to his [or her] employment…." 29 C.F.R. § 1910.268(c). *See generally Elliot Constr. Corp.*, No. 07-1578, 2012 WL 3875594, at *9 (OSHRC, Aug. 28, 2012) (stating "the 'purpose of the Act is to prevent the first accident.'") (quoting *Lee Way Motor Freight, Inc. v. Sec'y of Labor*, 511 F.2d 864, 870 (10th Cir. 1975)). Here, ECE cannot show compliance under either option. First, there is no evidence that ECE itself provided the Crew with proper training. Second, there is no evidence that ECE ensured each of the

crewmembers was "already trained" in the various precautions and safe practices set forth in OSHA's telecommunications standard prior to joining ECE. 29 C.F.R. § 1910.268(c).

(i) ECE did not provide proper training to the Crew.

ECE did not provide the Crew with proper training about how to address the hazards common to their work on the Armstrong project, such as those that were anticipated and encountered on January 13, 2020. The Crew did not receive such information via "on-the-job training or classroom-type training or a combination of both" as required by 29 C.F.R. § 1910.268(c).

(a) ECE did not provide classroom training.

ECE did not provide any formal/classroom training to the Crew at hiring or at any time prior to the Worksite Incident. At trial, PM Becker testified unequivocally that he did not provide any classroom training while at ECE. (Tr. 361-62). Foreman Cole gave similar testimony. (Tr. 127-28). PM Becker further testified that he neither gave nor received any training on OSHA's telecommunications standard specifically while at ECE. Foreman Cole also acknowledged he had no certificate of training for training required under 29 C.F.R. § 1910.268(c). (Tr. 128-29, 359-60). ECE asserts that its safety program includes initial orientation training, a safety manual provided to all employees and kept in every truck for reference, on the job training, video trainings and formal classroom training in safety every week as part of regular employment duties. (Resp't Post Hr'g Br. at 10). This assertion is broad in scope, but short on specifics. There are no documents in the record reflecting that anyone at ECE provided the Crew with formal training in the three-month period between their hiring and the Worksite Incident.

As to the proper procedures, means and methods for midspan work, including lasher malfunction, ECE's written safety program is silent. For instance, ECE's written safety materials contain no specific discussion of: (1) midspan excursions; (2) work in easements; (3) "the specific use of ladders for line work," or (4) several methods that ECE witnesses described at the trial as options for reaching and repairing lashers without a bucket truck, *e.g.*, layup sticks or lowering the strand. (Tr. 119-20, 234-35, 364-65; Exs. 56, C). PM Becker confirmed at the hearing that he did not provide any training on the proper usage of layup sticks. (Tr. 362). Foreman Cole testified that he was not aware of any rules regarding the number of layup sticks crews should carry on the truck. (Tr. 132-33). Also, ECE witnesses provided inconsistent testimony about the work and equipment entailed in lowering the strand, thereby illustrating the lack of any clear training or rules on this point. (Tr. 313, 375, 380).

ECE provides no formal training on lasher retrieval and has "no rules specific to midspan work", or any "specific rule that addresses a 'stuck lasher." (Tr. 445-46; Ex. 46 at 8 (Resp. to Req. For Produc. 14), at 11 (Resp. to Req. For Produc. 30, 34). PM Becker also testified that lasher troubleshooting is not covered at new employee orientation, and it was not covered at any weekly safety meeting during the relevant time period. The subjects covered at the weekly safety meetings are at exhibit 51. (Tr. 362, 403, 433-34; Exs. 51, 54, 56 at 17). Foreman Cole, a 22-year veteran with ECE, testified that he had never received any formal training on lasher troubleshooting from ECE, and he never received or provided any training on midspan excursions. (Tr. 89, 123, 126-27). Foreman Cole testified that he did not provide AJ with formal training, including on how to retrieve a stuck lasher. (Tr. 126-27). PM Becker too testified that he neither received nor provided any training on lasher malfunction. (Tr. 362-64). Bauer

testified that he never "heard of formal training for retrieving a stuck lasher." He said, "all that training is hands-on training in the field." (Tr. 511-12).

As to the proper use of other equipment used to perform midspan work and the PPE used to prevent hazards related thereto, ECE's written safety materials contemplate some formal training, but ECE did not provide it to the Crew. For instance, ECE's Safety Manual requires formal training, and documentation thereof, on PPE, fall protection, including the use of the "Buck Squeeze", and aerial lifts. (Exs. 56 at 25, C at 0011-0015, 0043-0047, 0108-0113, 0124, 0146). ECE's safety program, like OSHA's telecommunications standard, requires that employees receive the training noted in its Safety Manual "prior to performing any work…." (Exs. 56 at 25, C at 0008). With respect to ladders and fall protection, all key components of midspan work specific to easement worksites, ECE is clear that such training is to take place at the start of employment "regardless of claimed previous experience." (Exs. 56 at 25, C at 0045). Yet, VP Bauer confirmed at hearing that ECE has no record of providing the Crew with any of the training its own Safety Manual requires. (Tr. 451-52; Exs. 46 at 8 (RFP No. 12), 51, 56 at 17, C.).

ECE has provided no explanation for the absence of training mandated by its own safety program. ECE admits that it did not perform a site-specific safety program for its work on the NY Broadband Program, and there is neither a job hazard assessment form, nor worksite "walk-through" documents, in the record. (Tr. 442-43; Ex. 46 at 7-8 (Resp. to RFP Nos. 6, 8-9, 58, C at 0110). To the extent ECE performed any assessment of the types of training that it considered appropriate for its line of work, it is reflected by its written safety program, which it routinely disregarded. (Exs. 56, C).

As with midspan work generally, ECE's written materials also do not contemplate the "procedures to be followed in emergency situations…" related to its work or any work performed in remote, offroad worksites like the Incident Worksite. (Exs. 51, 56, C). (29 C.F.R. § 1910.268(c)(2)), VP Bauer testified that generally ECE trains "people to stay alert, stay calm, and make the best decisions they can in the moment." (Tr. 484). But neither PM Becker nor Foreman Cole gave testimony to that effect, and ECE's written program does not include any guidance to help prepare its linemen to make such decisions in emergency situations. (Exs. 51, C). *See Pub. Utils. Maint., Inc.*, No. 08-1831, 2009 WL 5323071, at *9 (OSHRCALJ, Nov. 17, 2009) (admonition that employees "be careful" rejected as giving employees "too much discretion in identifying unsafe conditions and was therefore too general to be effective in preventing employee exposure") (quoting *Superior Custom Cabinet Co*., No. 94-200, 1997 WL 603024, at *3 (OSHRC, Sept. 26, 1997), *aff'd* 158 F.3d 538 (5th Cir. 1997) (per curium). ECE admits that it had "[n]o safety plans specific to NY Broadband program." (Ex. 46 at 7, Resp. to Req. For Produc. No. 6). There was no evacuation plan specific to the Incident Worksite. *See Pressure Concrete*, 1992 WL 381670, at *7-8 (instructions to "get out" in case of an emergency, to the extent given were "not communicated in such a way as to make them meaningful to" employees). To the extent ECE's Safety Manual contemplates any emergency situations, it is limited to two very specific emergencies: chemical spills and "pole top rescue." (Ex. C at 0028, 0130-32).

ECE employees had access to ECE's Safety Manual. ECE's Safety Orientation states "All trucks have safety manuals as do all office locations." (Tr. 551; Exs. 56 at 18, C). ECE's Employee Orientation Checklist states: "All vehicles and offices are equipped with a copy of the safety manual, and they are available upon request." (Tr. 542; Exs. 56 at 80, C). PM Becker

said, "everybody got one [Safety Manual]" and the Safety Manual is kept "[i]n every truck." (Tr. 402; Ex. C). VP Bauer testified that the Safety Manual "is available in the offices, in the trucks, and also electronically per request." (Tr. 438, 551; Ex. C). VP Bauer's testimony was that ECE "typically do[es] not make [employees] read the whole [Safety] manual," and it neither tests employees on the Safety Manual nor requires them to acknowledge having read it. (Tr. 437-38; Ex. C). Foreman Cole admitted that "we don't really study it [Safety Manual]," noting that it was "huge," and at trial he said he could not recall everything in it. (Tr. 129; Ex. C). [redacted] testified that he had a copy of the Safety Manual which he kept in his house or in the truck. (Tr. 297-98; Ex C). [redacted] said "[e]very Monday morning they always have a safety meeting where we go through different safety procedures." (Tr. 298, 314, 354-55). VP Bauer also testified that employees are given Safety Orientation materials included within the "Eustis Cable Enterprises Orientation SAFETY" document at Exhibit 56. (Tr. 436-37; Ex. 56 at 17-32). He said "[t]he safety orientation is essentially an overview of our safety program." (Tr. 540-41; Ex. 56 at 17-32). VP Bauer testified that ECE includes a safety section in its Employee Handbook to remind employees that ECE provides a safe and helpful work environment. (Tr. 554; Ex. 56 at 67 at ¶5-01 Safety).

Finally, at the trial VP Bauer admitted that ECE does not have a "certification record" for any member of the Crew demonstrating that ECE provided the training required by the cited standard. (Tr. 129, 448-49). The standard at 29 C.F.R. § 1910.268(c) states, in part, that employers:

> shall certify that employees have been trained by preparing a certification record which includes the identity of the person trained, the signature of the employer or the person who conducted the training, and the date the training was completed. The certification record shall be prepared at the completion of training and shall be maintained on file for the duration of the employee's employment….

(29 C.F.R. § 1910.268(c)).

(b) ECE did not provide on-the-job training to the Crew.

ECE did not provide any on-the-job training (OJT) to the Crew at hiring or at any time prior to the Worksite Incident. (Tr. 596). But ECE claims that the Crew received OJT. The weight of credible evidence belies that assertion. Testimony from ECE's own former and current employees makes clear that any purported OJT did not include the instructions a reasonably prudent employer would have provided under the circumstances.

PM Becker and Foreman Cole both testified that they never instructed anyone not to go out on the strand. Per PM Becker, "the subject never came up." (Tr. 125-26, 363-64). The absence of training on the dangers of midspan excursions was underscored by [redacted]'s candid statements to VP Bauer the day after the Worksite Incident. [redacted] told VP Bauer, "I didn't know to say [to AJ], You're not doing this right. . . ." (Ex. 61 at 31). To the contrary, he "thought [AJ] had more experience than" he did and he "thought [AJ] had done [a midspan excursion] before." (Ex. 61 at 32). Per [redacted], AJ "acted like he had done it a million times…."[56] (Ex. 61 at 71). [redacted] admitting that on the day after the Worksite Incident, he told VP Bauer that he thought what AJ did was a "last resort" option. (Tr. 255-56). Messrs. Cole and Becker were not familiar with the term "midspan excursion" before their depositions in this case. (Tr. 124-25, 364).

[56] [redacted]'s statements undercut VP Bauer's testimony that [redacted] "knew better than to do" what AJ did when he went out on the strand. (Tr. 561). While [redacted] initially declined to do it, it was not because ECE had taught him not to; it was because he knew his "physical limitations." (Ex. 61 at 30). On January 15, 2020, [redacted] told VP Bauer that he told AJ "I cannot do that, I know it's harder than it looks." (Ex. 64 at ¶ 14). On January 14, 2020, [redacted] told VP Bauer, "You know, I took his guidance. And I should have been the one to say, 'Don't do it.' But I thought that he was able to – I don't know." (Ex. 61 at 76).

PM Becker and Foreman Cole also testified that they did not provide hands on instructions to AJ's Crew on how to address a stuck or flipped lasher. (Tr. 362, 417). PM Becker testified that "[t]here was never any really instruction" on retrieval of stuck lashers. (Tr. 134, 417, 426). [redacted], however, appeared to have told CO Willibey as one of the employees the CO interviewed,[57] that he was "shown in the field" how to retrieve a stuck lasher and testified at trial that it was Cole who showed him how to do it. (Tr. 311; Ex. JJ at 8). But the Court finds [redacted]'s testimony to not be credible on this point. Foreman Cole's testimony does not support [redacted]'s contention. Cole did not have any specific recollection of encountering a stuck or flipped lasher when working with AJ's crew prior to the Worksite Incident, either in an easement or on the roadway. (Tr. 134, 426). PM Becker had no recollection of AJ and Cole encountering this problem together. (Tr. 596). Foreman Cole testified that, in his experience, stuck or flipped lashers do not occur that often, "probably zero" times in a given month. (Tr. 143-44). The Court doubts that Foreman Cole provided any hands-on instructions to the Crew about how to address this process. Like Cole, PM Becker could not remember any instance when he personally encountered this issue in the field with AJ or his crew. (Tr. 426). Thus, testimony from ECE's own witnesses proves that ECE failed to provide any instruction via OJT on what is a routine problem ECE linemen "frequently" face. (Ex. 46 at 5-6, Resp. to Interrog. Nos. 13-14, 17).

[57] CO Willibey's OSHA Worksheet states "[w]hen interviewing employees about training, specifically retrieving stuck lashers, they explained that they were shown in the field by foremen and senior members on the crew." The CO did not specifically identify who these employees were in the worksheet. (Ex. JJ at 8).

Foreman Cole testified that PM Becker asked him to observe AJ and assess whether he thought AJ could run his own crew, which he did.[58] (Tr. 138-39). Foreman Cole testified that he observed how AJ climbed poles. (Tr. 128). But, he did not certify AJ, or anyone, on pole climbing before letting them climb poles and he did not provide training on the "specific use of ladders for line work." (Tr. 127-28; Ex. 56 at 25). Foreman Cole testified that AJ's and Foreman Cole's crews did "not often" work together. The two crews would "double team" so they could "get the job done." (Tr. 134). During this time, Foreman Cole admitted that he did not "teach" AJ anything. (Tr. 126). He testified that "I didn't have to show him [AJ] anything because he pretty much knew, just like I do, what we were doing, so I didn't have to teach him anything and such, no." (Tr. 126). But, CO Willibey contended at trial that AJ was not appropriately trained to competently and safely perform his work. He said that AJ "didn't recognize [this as] an unsafe condition." (Tr. 686).

The weight of credible evidence in the record proves that ECE did not provide the Crew with the training a "reasonably prudent employer" would provide via formal training or OJT. 29 C.F.R. § 1910.268(c). ECE has no document showing that ECE provided fall protection training to AJ or certified him in pole climbing. (Tr. 454-56). No ECE employee, including Foreman Cole, claimed at trial to have certified AJ in pole climbing. (Tr. 128). There are no documents or certifications in the record reflecting that anyone at ECE provided the Crew with the required OJT in the less than short three-month period between their hiring and the Worksite Incident. (Exs. I at 338, 340, S at 0435). The absence of required documentation is indicia that the event, in this case the

[58] PM Becker had no specific recollection but said typically, such observation lasts one to two weeks. (Tr. 296, 353). Foreman Cole testified that the two crews did "not often" work together. (Tr. 134). ECE's pay records indicate the Crew worked one week and odd days with Foreman Cole. (Ex. S at 434-40, 452).

required training of AJ, [redacted] and [redacted], on the retrieval of stuck lashers did not occur *Midwest Specialties, Inc.*, 1998 WL 30811, at *7, n. 6) (The absence of a record of an event that would ordinarily be documented is probative of the fact that the event did not occur.).

Instead, as described below, ECE sent the Crew into the field, not on proof of proper training prior to joining ECE, but based on being aware that each of the crewmembers had some experience in the industry and ECE's faulty assumptions about what the Crew members actually knew. (Sec'y Post Hr'g Br. at 47).

(ii) ECE did not ensure that the Crew had already received proper training prior to employment with ECE.

To comply with the cited standard, an employer may demonstrate "that an employee is already trained in the various precautions and safe practices required by" OSHA's telecommunications standard "prior to employment." Under such circumstances, an employer may assign employees to "engage in [covered] activities" without first providing the required safety training itself. In other words, the standard permits employers to substitute evidence of prior external safety training for its own initial safety training. However, the standard does not permit employers to assume the required safety training occurred simply because an employee has experience in the industry prior to employment. 29 C.F.R. § 1910.268(c); *New Eng. Tel. & Tel. Co.*, 1980 WL 10607, at *14 ("even highly experienced employees are entitled to the protection the Act seeks to provide."); *Jesco, Inc.*, No. 10-0265, 2010 WL 9448085, at *2 (OSHRC, Mar. 26, 2010) ("If the wording [of a standard's text and structure] is unambiguous, the plain language of the standard will govern . . . ").

Here, ECE "mistakenly relied on the general experience of its linemen and assumed that each one knew what to do" under the circumstances the Crew encountered at the Incident Worksite. *Davis H. Elliot Co., Inc.*, No. 15-0799, 2017 WL 3217818, at *45 (OSHRCALJ, June

19, 2017). ECE did not, and cannot, demonstrate that "prior to employment" with ECE, any member of the Crew received training in the precautions and safe practices set forth in the telecommunications standard, including those that a reasonably prudent employer would have provided under the circumstances and "[p]rocedures to be followed in emergency situations; …." 29 C.F.R. § 1910.268(c),(c)(2)).

(a) ECE did not confirm the Crew had safety training prior to employment with ECE.

The record shows that, prior to sending the Crew into the field, ECE did not confirm that each member of the Crew was "already trained in the precautions and safe practices" set forth in OSHA's telecommunications standard. 29 C.F.R. § 1910.268(c). At trial, no witness provided testimony about the receipt of required safety training prior to joining ECE. Also, ECE did not proffer any "certification record" from a prior employer or any record of any kind showing training the Crew received "prior to employment." (Ex. 56). ECE offered neither testimony nor records showing that any member of the Crew had received training prior to employment at ECE on the safe means and methods for working at heights, including but not limited to performing midspan work and the procedures to be followed in emergency situations. For instance, despite ECE's emphasis on ladders, bucket trucks and layup sticks to perform midspan work, ECE offered no proof of the Crew's prior training on any of these topics. (Tr. 116, 382; Ex. 46 at 5-6, 11 (Resp. to Interrog. Nos. 13, 18), Req. For Produc. No. 29).

The absence of the required prior training records is particularly conspicuous given that the sole employer both AJ and [redacted] listed on their employment applications was Crammer, a subcontractor to ECE on the Armstrong Project. At trial, VP Bauer testified that ECE does not train the employees of its subcontractors. (Tr. 484). Any training AJ or [redacted] may have

received before October 2020 on the project would have come from Crammer. But none was forthcoming into the record.

(b) General industry experience is not a substitute for required safety training.

Without any training records, ECE tries to emphasize that the Crew had prior experience in the industry when they joined ECE, which ECE asserts would have included hands-on learning about how to use and retrieve lashers. Proof of industry experience is not proof of safety training, and the plain language of the standard refers to prior training. 29 C.F.R. § 1910.268(c). *See also Davis H. Elliot Co., Inc.*, 2017 WL 3217818, at *45 (employer "cannot shift its safety responsibilities to its employees" by "rely[ing] on the general experience of its linemen and assum[ing] each lineman knew what to do" under certain situations); *New Eng. Tel. & Tel. Co.*, 1980 WL 10607, at *14 ("an employer may not ignore readily available opportunities to take precautionary measures that will protect an employee from exposure to life threatening hazards simply because the employee is experienced").

ECE's own safety program underscores the point. Regardless of any hands-on learning that ECE claims occurs during work activities, ECE's policy still requires – at least on paper – that its employees receive formal training on topics such as, in relevant part, ladders, aerial lifts, pole climbing and PPE. Indeed, ECE's written Safety Manual emphasizes that such "**Training for this program will be conducted prior to performing any work….,"** and mandates that some training be provided "regardless of claimed prior experience." (emphasis in original) (Ex. C at 0008, 0045) (Sec'y Post Hr'g Br. at 29-31).

The record highlights the inadequate nature of the Crew's prior industry experience.[59] The Crew's unsafe conduct at the Incident Worksite, both before and during the attempted rescue of AJ, reveal the severe shortcomings of ECE's reliance on the Crew's general experience in lieu of ensuring they had specific safety training, including the very training contemplated by ECE's own safety program. On January 13, 2020, the Crew committed several unsafe acts, including two midspan excursions without appropriate PPE. The Crew's conduct is evidence of ECE's failure to comply with the standard. ECE simply did not ensure that the Crew was prepared to deal with either a routine equipment failure or a related emergency situation at the location of the Worksite Incident.

3. Eustis Knew, or with Reasonable Diligence, Could Have Known that it Did Not Ensure the Crew Was Properly Trained.

It is well-established Commission law that an employer will be charged with knowledge of a hazard if it knew, or with the exercise of reasonable diligence could have known, of the presence of the violative condition. *Astra Pharm. Prods.*, 1981 WL 18810, at *4. Reasonable diligence involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations. *Danis Shook Joint Venture XXV*, No. 98-1192, 2001 WL 881247, at *5 (OSHRC, Aug. 2, 2001) (citing *Pride Oil Well Serv.*, No. 87-692, 1992 WL 215112, at *6 (OSHRC, Aug. 17, 1992)). The actual or

[59] VP Bauer had no knowledge of how long AJ worked for Crammer or when and for how long he attended a lineman training school/program in Jamaica. He did not know what lineman school AJ attended and had no idea what was taught in the Jamaican lineman school. AJ's Employment Application indicated that he had no "Current Certifications." (Tr. 533, 564-66; Ex. 56 at 2).

constructive knowledge of the employer's foreman or supervisor can be imputed to the employer. (*Id*.)

Where, as here, the alleged violative condition is inadequate training of employees, employer knowledge of the violative condition "will almost invariably be present." *Compass Env't'l*, 663 F.3d at 1168. ECE admits that it has no rules on midspan work, including on the frequently encountered problem of a malfunctioning lasher which the Crew encountered on January 13, 2020. (Tr. 222-25; Ex. 46 at 5, 11). Further, both witnesses who ECE identified as having oversight over the Crew during the requisite period, PM Becker and Foreman Cole, admitted at trial that they had not received any instruction on how to address malfunctioning lashers from ECE. (Tr. 125-26, 362-64). PM Becker also testified that he did not provide such training at orientation or otherwise. (Tr. 362, 417). Foreman Cole specifically stated that he did not provide such training to AJ. (Tr. 99, 127, 190, 352, 418).

The fact that ECE failed to train PM Becker and Foreman Cole in the "precautions and safe practices" relevant to a known and frequent problem that occurs during aerial line work "establishes that [ECE] had at least constructive knowledge of the inadequacy of its training program." *Pressure Concrete*, 1992 WL 381670, at *8. These supervisors "could not be reasonably expected to instruct" the Crew "on matters or hazards about which [they themselves] had not been taught," nor could AJ. (*Id.).* Each of the supervisor's knowledge of "his own actions or inactions may be imputed to" ECE. *Pride Oil*, 1992 WL 215112, at *6.

Finally, the lack of instructions on the specific hazard the Crew expectedly anticipated and encountered on January 13, 2020 is just an example of the deficiency of ECE's implementation of its safety program. The absence of a job hazard assessment, worksite walk-throughs, and documentation of formal training relevant to the work, all of which are required by

its own written safety program, underscores ECE's constructive knowledge of the inadequacy of its training program. (Sec'y Post Hr'g Br. at 28-29). *N. Y. State Elect. & Gas*, 88 F.3d at 105-06 ("constructive knowledge may be predicated on an employer's failure to establish an adequate program to promote compliance with safety standards.").

4. The Crew Had Access to the Violative Condition.

Employee exposure is established when workers are "actually exposed to the violative condition (through injury or death) or that it is reasonably predictable they have been or will be in the zone of danger posed by the condition." *Armstrong Utils., Inc., D/B/A Armstrong Cable Servs.,* No. 18-0034, 2021 WL 4592200, at *3 (OSHRC, Sept. 24, 2021). In this case, the violative condition is the lack of training or specifically, "proper training" on "precautions and safe practices" when, *inter alia*, accessing and working midspan without a bucket truck. Exposure is established because ECE's employees were engaged in telecommunications field work, accessing and repairing a stuck lasher at about twenty feet, without first receiving required training on how to safely access working heights. *Bardav, Inc., d/b/a Martha's Vineyard Mobile Home Park*, No. 10-1055, 2014 WL 5025977, at *10 (OSHRC, Sept. 30, 2014) (exposure established where employees were performing excavation work without first receiving training).

5. Item 2 Was Properly Classified as a Serious Violation of the Act.

ECE's failure to ensure that the Crew had received proper training under the telecommunications standard before engaging in covered work qualifies as a serious violation of the Act. (Tr. 633). A violation is properly characterized as "serious" if there is a "substantial probability that death or serious physical harm could result" from the cited conditions. 29 U.S.C. § 666(k). This provision "does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the

likely result should an accident occur." *Pressure Concrete*, 1992 WL 381670, at *9. At trial, CSHO Willibey testified that without proper training, including on common midspan work, ECE exposed its employees, including AJ and [redacted], to a risk of falls of twenty or more feet, which was both the approximate height of the strand at the Incident Worksite and throughout the project, as well as caught-in hazards. (Tr. 382-83, 632-33; Stip. 21).

The fact that falls of twenty or more feet can lead to serious injury and death is a well-established and uncontested reality. *Brady Socal, Inc.*, No. 18-1584, 2020 WL 6532732, at *18 (OSHRCALJ, Sept. 25, 2020) (serious physical harm or death could result from falls of twenty-one feet). (Ex. 56 at 18, 19). CO Willibey testified that falling 20 to 25 feet typically resulted in either permanent disability or death. (Tr. 633). Further, training violations, including those involving falls, are routinely upheld as serious. *See, e.g.*, *Pressure Concrete*, 1992 WL 381670, at *9 (upholding violation of training standard as serious); *Pride Oil*, 1992 WL 215112, at *10 (oxygen deficient atmospheres); *Todd Joseph Props.,* No. 11-0822, 2012 WL 891080, at *4 (OSHRCCALJ, Jan. 17, 2012) (fall protection training); *Tower Painting Co., Inc.*, No. 07-0685, 2008 WL 4697060, at *5, 11 (OSHRCALJ, Sept. 2, 2008) (respirator training).

ECE's failure to ensure the Crew had received proper instructions about midspan work, including emergencies related thereto, resulted in serious injury or death. AJ lost his life on January 13, 2020, when he attempted to reach and repair a common equipment malfunction that typically occurs midspan or at a height at about eighteen to twenty feet. (Stip. Nos. 21, 25; Ex. I at 335-36, 347). Though he did not fall to his death, AJ was exposed to severe falls as he traversed the strand without any PPE. [redacted] was likewise subjected to risk of serious injury or death when he repeated AJ's steps, while also holding a machete, in an unsuccessful attempt to save AJ's life. (Ex. 64 at ¶¶ 28-32).

C. ECE Violated 29 C.F.R. § 1910.268(e) by Failing to Provide and Ensure the Use of the Tools and PPE the Crew Needed to Perform Midspan Work Safely at the Incident Worksite.

ECE violated Citation 1, Item 3 because it failed to provide the Crew with and ensure its use of the "[p]ersonal protective equipment, protective devices and special tools needed for the work" it was assigned to perform on January 13, 2020. 29 C.F.R. § 1910.268(e).[60] PM Becker assigned AJ's crew to lash cable at an offroad worksite in the woods, where he knew that: 1) the odds of lasher malfunction were heightened due to certain known environmental conditions and 2) the Crew could not use a bucket truck to address any such issues. (Tr. 209, 364-68; Stips. 14-20; Ex. 58A). Neither he nor AJ provided the Crew with or ensured its use of either the tools or personal protective equipment it needed to safely address a lasher malfunction from the ground (*e.g.*, sufficient layup sticks) or from a working height (*e.g.*, a ladder or a combination climbing/fall protection harness). (Tr. 581, 628). When the lasher malfunctioned midspan about twenty feet above ground, ECE's failure to provide and ensure the use of the tools and PPE necessary to access and repair the machine safely exposed the Crew to serious injuries and death.

1. The Cited Standard Applies.

As set forth above, the parties stipulated that "the work at issue in the citation", lashing fiberoptic cable to an existing support strand, "constitutes 'telecommunications field installations' as defined by 29 C.F.R. § 1910.268(a)." (Legal Stip. No. 9, Stip. No. 14).

---

[60] 29 C.F.R. § 1910.268(e) *Tools and personal protective equipment – Generally* states:

> Personal protective equipment, protective devices and special tools needed for the work of employees shall be provided and the employer shall ensure that they are used by employees. Before each day's use the employer shall ensure that these personal protective devices, tools, and equipment are carefully inspected by a competent person to ascertain that they are in good condition.

(Tr. 12).

Accordingly, the cited standard, 29 C.F.R. § 1910.268(e) (Tools and personal protective equipment), applies and ECE was required to comply with its requirements.

2. Eustis Did Not Provide or Ensure the Use of the Tools and PPE the Crew Needed to Complete its Assigned Work at the Incident Worksite.

On January 13, 2020, the Crew both anticipated and eventually encountered an equipment malfunction midspan at about twenty feet. (Tr. 222-25, 234). Exhibit 16 shows where the lasher stopped working. (Ex. 16). Due to the location of the Incident Worksite, in a wooded easement several hundred yards from the roadway, the Crew needed tools and PPE with which to access and address the malfunction without a bucket truck in order to complete the assigned job. (Ex. I at 335). As VP Bauer conceded the day after the Incident, "I think what was throwing [AJ] a little was the fact that there was a pond there and you just didn't have…. another set of tools." (Tr. 606; Exs. 41, 61 at 34). As set forth below, the Crew needed either a ladder or a combination climbing/fall protection harness with which to access the machine at working height, or alternatively, at least the normal complement of four layup sticks to do so from the ground. The Crew did not possess or use four layup sticks at the Incident Worksite.[61] (Tr. 581, 628). Making required PPE "available 'on request'" does not constitute compliance with a standard that, like the cited standard, requires that PPE be used. *Clarence M. Jones*, *d/b/a C. Jones Co.,* No. 77-3676, 1983 WL 23870, at *3 (OSHRC, Apr. 27, 1983) (affirming violation where hardhats and goggles were available for use on site). The fact that a ladder and additional layup sticks may have been "available from" the Belmont office, located some "25 minutes away from the site", does not satisfy the standard's requirement. (Resp't Post Hr'g Br. at 2, ¶ 5, 3 a ¶ 11). *See United Geophysical Corp.*, No. 72-6265,

[61] The crew did attempt to use the three layup sticks that were available to it. (Exs. 61 at 24, I at 0340).

1981 WL 18807, at *7 n.13 (OSHRC, Jul. 28, 1981) ("[P]rotective equipment kept at a central location as much as 30 miles away from the jobsite, as in this case, cannot be considered available for use by the employees at the site.").

According to PM Becker, the "number one best" way to address a malfunctioning lasher, regardless of whether it has flipped over or gotten stuck, at an offroad worksite such as the Incident Worksite, is a ladder. (Tr. 413; Ex. 55). PM Becker testified that at the Incident Worksite, the Crew would just have to set the ladder up, stand it straight, lay it up against the strand, climb up the ladder, take the safety off the lasher, and "deal with the lasher." (Tr. 368-70). PM Becker and [redacted] agreed that use of a ladder at the Incident Worksite was feasible.[62] (Tr. 271, 327-29, 368-70). [redacted] told Bauer that he thought that AJ would have got a ladder from the truck if the truck had one. (Tr. 271-72, 276-77; Ex. 46 at 5-6 (Resp. to Interrog. Nos. 13, 18, Ex. 53). ECE stipulated that the truck it assigned to the Crew, a new truck which ECE issued to the Crew the day before the Incident, was not equipped with a ladder. (Stip. No. 1). ECE has trucks equipped with ladder racks at the Belmont Field Office, including some, but not all, trucks used by aerial line crews. (Tr. 124, 209, 399). On January 13, 2020, the Crew did not carry a ladder with it. (Tr. 209, 399).

At trial, testimony from each of the ECE witnesses made clear that, in the absence of a ladder, an aerial line crew can use layup sticks to address a midspan-equipment malfunction

---

[62] PM Becker testified:
Q Okay. Would a ladder have been feasible at that worksite [from area underneath the lasher at the Incident worksite]?
A Yes.
(Tr. 369-70).

from the ground. (Tr. 120, 146, 412-13). On January 13, 2020, using layup sticks from the ground was the Crew's first attempted solution. (Tr. 234-35). Using layup sticks may have worked, but the Crew only had only three sticks on the truck that day. (Ex. 61 at 23). The three sticks were fewer than the amount crews typically bring with them to worksites; i.e., four sticks measuring at least twenty-one feet. (Tr. 121-22, 382-83). Three layup sticks were not enough to reach and repair the lasher. (Ex. 61 at 22-23). To reach the lasher and get enough leverage to push it back on the line, the Crew needed at least four layup sticks. (Tr. 121-22, 236; Ex. 61 at 23). Given that ECE knowingly did not provide its aerial line Crew with ladders or sufficient layup sticks for their work on January 13, 2020, ECE did not ensure the use of the tools and PPE necessary to do the assigned work. (Tr. 635-36). *See Jones, d/b/a C. Jones Co.*, 1983 WL 23870, at *3 ("Our cases make clear that merely having protective equipment available at a worksite does not satisfy a standard that requires that this equipment be used"); *Custom Built Marine Constr., Inc.*, No. 11-0977, 2012 WL 6737159, at *3 (OSHRC, Dec. 20, 2012) (standard requiring that eye protection worn in certain circumstances violated where company "had protective eyewear available at its worksite [but] left the decision regarding use of this safety equipment up to its employee, who chose in this instance not to wear eye protection despite the potential for injury."). CO Willibey testified that AJ would not have been exposed to caught-in and fall hazards had he had the tools needed to fix the lasher from the ground. (Tr. 634-35).

Aerial linemen can, and do, access difficult-to-reach equipment midspan by traversing the strand in an unsafe manner. They may do so by sliding down the line, "hand over hand", as AJ and [redacted] did on January 13, 2020. (Exs. 53, 61 at 44). At trial, CSHO Willibey testified that there is an alternate safe way to traverse the strand. (Tr. 617). It requires using certain personal protective equipment that will prevent falls, *e.g.*, either a combination

climbing/fall protection harness, or a cable sled (also known as a splicing platform). (Tr. 617, 623-24, 627-28, 682). ECE did not equip the Crew with any of the above equipment needed to traverse the strand in a safe manner. As VP Bauer said to crewmember [redacted] the day after the Incident, "You don't have the gear for" a midspan excursion. (Ex. 61 at 30). That testimony is consistent with what CSHO Willibey learned during his investigation. (Tr. 388-89, 628). ECE does not provide line crews with such gear because what AJ did, according to VP Bauer, is "against the policies." (Ex. 61 at 30). But, ECE had no such policy. (Sec'y Post Hr'g Br. at 28-38). CO Willibey testified that the danger of using the wrong kind of, or inadequate, equipment as AJ and [redacted] had done caused exposure to caught-in and fall hazards. (Tr. 634). He stated that if AJ had been wearing a combination climbing and fall protection harness, he would not have been exposed to caught-in and fall hazards when he went out on the line wearing a climbing belt. (Tr. 634).

Accordingly, ECE failed to comply with the cited standard.

3. Eustis Knew or, With Reasonable Diligence, Could Have Known of the Violative Condition.

Ample record evidence demonstrates that ECE knew, or with reasonable diligence, could have known of the violative condition. First, both PM Becker and Foreman AJ had actual knowledge of the violation because they knew that the Crew's assignment on January 13, 2020 would require it to perform aerial line work without a bucket truck, meaning they would need a ladder, or some alternative means to reach "elevated positions". 29 C.F.R. § 1910.268(n)(8). Yet neither supervisor ensured such equipment was provided or used that day. Second, Foreman AJ knew that he did not use such equipment to reach and repair the lasher at the Incident Worksite. As the project manager and a foreman working in their supervisory capacities, PM

Becker's and Foreman AJ's actual knowledge is imputable to ECE. *Danis Shook*, 2001 WL 881247, at *5. Further, the numerous inadequacies of ECE's safety program, at a minimum, demonstrate ECE's constructive knowledge of the violative condition.

a. ECE had actual knowledge of the violative condition.

During ECE's work on the Armstrong Project, at the start of each workday, ECE's aerial line crews met up at the company's Belmont Field Office and picked up their trucks, tools and PPE. (Tr. 317). The Crew's Foreman AJ (among others) was responsible for the Crew's truck, and he made decisions about the equipment on the truck. (Tr. 95-96, 134; Ex. 61 at 7-8). PM Becker was in charge of issuing work to the Crew. (Tr. 342-43). Typically, the foreman got the daily assignment in the form of a map or "print," that showed information about the day's worksites, including whether they were roadway accessible and whether there were any unique environmental conditions such as bodies of water. (Tr. 92, 317; Ex. 58).

On January 13, 2020, the print PM Becker assigned to the Crew showed that nearly half of the day's work would occur offroad, in an easement. (Ex. 58). The print included the Incident Worksite, where the Crew had been within the prior month. (Tr. 191-92; Ex. 61 at 10). The print showed a pond and an extra-long span between the poles on either side of it. (Ex. 58A). According to crewmember [redacted], these environmental conditions meant that the Crew was more likely to encounter a routine problem endemic to the type of work at the Incident Worksite; i.e. lasher malfunction. (Tr. 222-25). As both PM Becker and [redacted] agreed, lashers are more likely to fall off the strand when the ground hand cannot keep tension under the line, such as when the lasher moved across the pond. (Tr. 222-25, 367-38). When this type of malfunction occurs offroad, like at the Incident Worksite, aerial line crews cannot use the bucket truck to reach working altitude to reach and repair the machine. (Tr.119-121, 124, 209, 364-65,

413; Ex. 46 at 5 (Resp. to Interrog. No. 18), at 11-12 (Resp. to RFP No. 34)). Per PM Becker, a ladder is "the number one best way" to reach and repair a malfunctioning lasher in an easement. (Tr. 413; Ex. 46 at 5-6 (Resp. to Interrog. Nos. 13, 18)). Yet, it is undisputed that ECE provided neither a ladder nor a combination climbing/fall protection harness to the Crew, who instead improvised to reach heights and ultimately traversed the strand without any PPE. (Tr. 581, 628).

b. ECE had Constructive Knowledge of the Violative Condition.

The record also establishes ECE's constructive knowledge of the violative condition. Reasonable diligence includes "reasonable efforts to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work." *Automatic Sprinkler Corp. of Am.*, No. 76-5089, 1980 WL 10595, at *7 (OSHRC, May 9, 1980). An employer "must inspect the area to determine what hazards exist or may arise during the work before permitting employees to work in an area, and the employer must then give specific and appropriate instructions to prevent exposure to unsafe conditions." (*Id.*) "A preliminary inspection must be made even where the employees are experienced." (*Id.,* citing *J.H. MacKay Elec. Co. and U.S. Eng. Co.*, No. 16110, 1978 WL 7086, at *4 (OSHRC, Sept. 12, 1978) (consolidated)). Thereafter, the employer has a "continuing" obligation to exercise diligence specific to the circumstances at the worksite. *Automatic Sprinkler Corp.*, 1980 WL 10595, at *7. Here, ECE failed to take such steps.

On January 13, 2020, the Crew did not inspect the Incident Worksite before starting work there. (Tr. 211-12). The Crew parked the truck and walked right to Pole A. (Ex. 58A). Had AJ conducted a "walk-through" of the Incident Worksite, a step required by ECE's own Safety Manual, they would have discovered that five feet of the mule tape was frozen in the pond before AJ attached the mule tape to the lasher. (Tr. 231; Exs. 61 at 17-18, C at 0108). *See also*

Automatic Sprinkler Corp., 1980 WL 10595, at *7 (finding constructive knowledge based on failure to inspect). Without this knowledge, the Crew used wood they found in the woods to free the mule tape from the ice while it was attached to the lasher that further increased the already heightened likelihood of a midspan lasher malfunction at the Incident Worksite, and with it, the need for tools and PPE the Crew did not have. (Tr. 222-25, 231; Ex. 61 at 17-18).

The "real problem was that [ECE] had failed to implement adequate work rules and training programs to ensure that [the Crew] had been informed of the appropriate safety considerations."[63] *Pride Oil*, 1992 WL 215112, at *7 (finding constructive knowledge). ECE's safety program and implementation thereof was deficient by an absence of relevant, required training. (Sec'y Post Hr'g Br. at 28-38). ECE "did not have a work rule that required the use of [certain tools and] PPE in the circumstances that confronted" the Crew at the Incident Worksite. *See Danis Shook*, 2001 WL 881247, at *5 (rejecting instructions to "wear PPE 'as needed'". Instead, ECE relied on vague instructions; *e.g.*, "Use proper PPE for a give [sic] task and don't perform any work that is unsafe" which did "not explicitly address the need for employees to wear PPE" and/or use of certain tools when performing midspan work at offroad worksites. (Ex. 46 at 11 (Resp. to Req. For Produc. Nos. 30, 34)).

ECE did not take all available precautions to prevent employee exposure to the hazards. On January 13, 2020, ECE had two opportunities to take steps to anticipate, discover and prevent exposure to hazards at the Incident Worksite and missed both: first, upon receipt of the print at

[63] CO Willibey testified that the purpose of training is "to prevent them [employees] from being exposed to hazards." (Tr. 629-30).

the Belmont Field Office, and next, upon arrival to the Incident Worksite. (Sec'y Post Hr'g Br. at 44-48).

4. The Crew Had Access to the Violative Condition.

Foreman AJ and lineman [redacted] were actually exposed to fall and caught-by hazards when, without the tools and PPE needed to perform midspan work at the Incident Worksite, they climbed up about twenty feet on a utility pole, rigged their tool belts as seats and traversed 20-30 feet along the support strand, hand over hand. (Tr. 634). (Sec'y Post Hr'g Br. at 41-42).

5. Item 3 Was Properly Classified as a Serious Violation of the Act.

OSHA classified Item 3 as a serious violation of the Act. (Tr. 633-34). Violations based on the absence of required PPE are routinely affirmed as serious. *See, e.g.*, *Jake Heaton Erecting Co., Inc.,* No. 76-1309, 1977 WL 7762, at *1 (OSHRC, Sept. 28, 1977) (serious violation where foreman failed to use safety belt on twenty-foot roof). CSHO Willibey testified that without the tools and equipment necessary to reach and repair an equipment malfunction that occurs at midspan at twenty feet, ECE exposed the Crew to serious injuries and death. (Tr. 633-34). Here, one employee lost his life while attempting to make the repair without appropriate tools and PPE from twenty feet and another nearly died by repeating the exact same steps in an effort to rescue AJ. (Ex. 61 at 57-59, 61-63). Accordingly, the classification of Item 3 is appropriate and is affirmed.

IV. THE PROPOSED PENALTIES ARE APPROPRIATE.

The Commission has authority to assess civil penalties for violations of the Act. In doing so, the Commission looks to four statutory factors: the employer's size, the violation's gravity, the employer's good faith, and the employer's history of previous violations. 29 U.S.C. § 666(j);

accord Revoli Constr. Co., Inc., No. 00-0315, 2001 WL 1568807, at *11 (OSHRC, Dec. 7, 2001). Among these factors, gravity is the "primary element." *See Contour Erection & Siding Sys. Inc.*, No. 06-0792, 2007 WL 4463127, at *4 (OSHRC, Dec. 13, 2007).

In this case, OSHA proposed an appropriate penalty for Citation 1, Items 2 and 3, and applied the same analysis to both items. The severity of the potential injury was determined to be "high" based on both the kind of injuries that could result from falls from twenty feet and the fact that a death occurred. (Tr. 636-37). The probability or likelihood of an injury occurring was deemed to be "greater" because a fatality occurred. (Tr. 636-38). Although [redacted] survived sliding along the stand, he put himself at great risk by repeating AJ's steps. (Ex. 61 at 57-59, 61-63). Accordingly, this generated a determination of "high/greater" gravity-based penalty of $13,490. (Tr. 639; Exs. FF and GG).[64]

OSHA adjusted the gravity-based penalty. Specifically, as CSHO Willibey explained at trial, ECE received a 10% reduction for employer size. (Tr. 639-40). However, ECE did not receive a reduction for good faith because a fatality occurred, which rendered it a high gravity violation. (Tr. 640). ECE also did not receive an adjustment for history because ECE had an OSHA inspection in the five years prior to the Worksite Incident that resulted in a final order involving serious items. (Tr. 640). Accordingly, OSHA proposed an adjusted penalty of $12,145 for each item. (Tr. 9, 12, 640-41).

The Court finds that the proposed penalties are appropriate and are upheld. ECE is cognizant that it works in "an inherently dangerous industry." (Exs. 56 at 18, C at 130). As an aerial line crew, the Crew's work involved accessing heights of twenty feet or more daily. (Tr.

[64] At trial, CSHO Willibey misstated the GBP by $20 or as $13,470. (Tr. 639).

94, 100-05, 382-83, 637-38; Exs. 3, C at 130).”). According to ECE, such work “routinely” includes midspan work, such as but not limited to the lasher malfunction the Crew encountered on January 13, 2020. (Ex. 46 at 10-11 (Resp. to Req. For Produc. Nos. 27, 34)). About half of such work on the Armstrong Project occurred in offroad worksites like the Incident Worksite, where a bucket truck could not be used to reach working altitude and perform such a repair. (Tr. 119). Yet, ECE sent this Crew out into the field to perform aerial line work unprepared both in terms of training and equipment to address the conditions they anticipated and encountered on January 13, 2020. ECE lost one life and nearly lost a second on that day. On these facts, $24,290 is an appropriate total penalty for both items.

V. ECE DID NOT PROVE ANY OF ITS DEFENSES.

In its Answer to the Second Amended Complaint, ECE pled the “Affirmative Defenses” of: “Infeasibility, Unpreventable employee misconduct (UEM), Greater hazard, Assumption of the risk, and Superseding cause.”[65] (Answer to Second Am. Compl. at 2; J. Pre-Hr’g Statement at 8, § 6). Many of these defenses were not raised further at trial or in ECE’s Post-Trial Brief. Affirmative defenses not raised at the trial are deemed waived and abandoned by Respondent. *Corbesco, Inc. v. Dole,* 926 F.2d 422, 429 (5th Cir. 1991) (Affirmative defenses not argued waived); *Ga.-Pac. Corp.,* No. 89-2713, 1991 WL 132732, at *3 (OSHRC, Jun. 28, 1991) (“Commission declines to reach issues on which the aggrieved party indicates no interest.”).

[65] Two of these defenses – “assumption of the risk” and “superseding cause” – are not recognized in cases before the Commission. *Anheuser-Busch, Inc.*, No. 2441, 1974 WL 4570, at *5 (OSHRC, Dec. 24, 1974).

In its Post Hearing Brief, ECE briefly discussed the UEM as an affirmative defense. ECE asserted:

> The employee, [name redacted], knowingly engaged in an unsafe practice. He did so in violation of ECE rules. The rule is clear that PPE, like climbing belts, are to be used for their intended purposes. Climbing belts are not intended to be used as bosun's chairs. This is particularly true since [name redacted] knew that his decision was an unsafe one and that other, safer, albeit slightly slower, choices were available to him at the time of his accident.
>
> (Resp't Post Hr'g Br. at 13).

UEM is the one affirmative defense that ECE has not abandoned. ECE has not met its burden as to this affirmative defense. Any purported "rule . . . that PPE, like climbing belts, are to be used for their intended purpose," is too general and was not "designed to prevent the hazard." (Resp't Post Hr'g Br. at 13, ¶ 10). *Danis Shook*, 2001 WL 881247, at *5-6 (rejecting defense despite "general rule requiring employees to wear PPE 'as needed[]'"); *Superior Custom Cabinet*, 1997 WL 603024, at *5 (denying defense despite unwritten rule to call the office if delivering to the second floor was "unsafe" because it "gave employees too much discretion in identifying unsafe conditions…."); *Automatic Sprinkler Corp.*1980 WL 10595, *7 ("the formulation and communication of a general work rule is not enough"). Moreover, ECE's written safety materials mandate formal training on the use of positioning devices like belts, and it is clear that such training was not provided to the Crew. (Ex. C at 0045; Sec'y Post Hr'g Br. at 24-36). Because ECE took inadequate steps to prevent the two midspan excursions, it cannot prove that the violation was unpreventable.

To establish unpreventable employee misconduct, an employer is required to prove: "(1) that the employer has established work rules designed to prevent the violation; (2) that it has adequately communicated those rules to its employees; (3) that it has taken steps to discover

violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Precast Servs., Inc.*, No. 93-2971, 1995 WL 693954 at *1 (OSHRC, Nov. 14, 1995) (quoting *Nooter Constr. Co.*, No. 91-0237, 1994 WL 27750 at *6 (OSHRC, Jan. 31, 1994)), *aff'd*, 106 F.3d 401 (6th Cir. 1997); s*ee also, Capform, Inc.*, No. 91-1613, 1994 WL 530815 at *3 (OSHRC, Sept. 29, 1994). In order to prevail on the defense of unpreventable employee misconduct, ECE must prove each of the elements of the defense. On this record, ECE is unable to do so and thus, the UEM defense fails.

A. ECE Cannot Establish UEM as a Defense to Item 2.

Item 2 alleges that ECE failed to provide training in the various precautions and safe practices set forth in ECE's telecommunications standard, including those involving working safely at working altitude. The cited standard required ECE to ensure that such safety training has been provided, by ECE or "prior to employment", before it allowed the Crew, including AJ, to engage in covered work. 29 C.F.R. § 1910.268(c). The violation cited in item 2 is based not on AJ's actions on January 13, 2020 at the Incident Worksite, but on the actions of those responsible for providing training to new employees. Accordingly, for ECE to succeed in its affirmative defense of unpreventable employee misconduct as to Item 2, as a threshold matter, it would have to show that the person in charge of ensuring the Crew had such training, failed to do so. *See CMC Elec., Inc.*, No. 96-169, 1999 WL 261189, at *3 (OSHRC, Apr. 26, 1999), *aff'd in relevant part on other grounds*, 221 F.3d 861, 865-66 (6th Cir. 2000); *Capform*, 2001 WL 300582, at *4. ECE makes no such claim. Instead, it relies solely on the inappropriateness of AJ's conduct. (Resp't. Post Hr'g Br. at 13; J. Pre-Hr'g Statement at 8, § 6). The UEM defense fails as to Item 2.

B. ECE Cannot Establish UEM as a Defense to Item 3.

Item 3 alleges that ECE failed to provide tools and PPE needed to reach and repair a common equipment malfunction that typically occurs midspan at about twenty feet, a condition that was both anticipated and encountered at the Incident Worksite. ECE has not met its burden. ECE admits that it has no specific rule with respect to midspan work, including the tools and PPE to use in lieu of a bucket truck when a lasher malfunctions offroad, and instead relies on vague PPE instructions that give too much discretion to employees and are "too general to be effective." (Ex. 46 at 11 (Resp. to Req. For Produc. Nos. 29-30, 34)). *See Superior Custom Cabinet Co*., 1997 WL 603024, at *3. The evidence also shows that ECE provided no training on midspan excursions and any instructions relevant to the routine problem of a stuck lasher were ineffective. (Sec'y Post Hr'g Br. at 28-39).

ECE witnesses disagreed at the trial about what was the "best" or "easiest" way to address the situation the Crew encountered. (Tr. 146, 237, 413; Ex. 61 at 29). ECE witnesses also provided inconsistent testimony about what was entailed in the various methods they claimed to be viable. (Tr. 312-13, 380-82). Such incoherence undermines any argument about the existence of any unwritten procedures to follow when this problem occurs, as well as the effectiveness of any communication of the same. *See, e.g.*, *Davis H. Elliot Co.*, 2017 WL 3217818, at *45 (Rejecting UEM because "[w]ith no established rule and only on-the-job training, there was no consistency of the procedures or methods that were conveyed to employees…."). To the extent ECE provided any instructions on the proper tools and equipment to use to address the circumstances the Crew encountered on January 13, 2020, it was both too general and left too much discretion to employees to be effective. *Superior Custom Cabinet*, 1997 WL 603024, at *3.

Where, as here, an employer's "precautions against the use of [equipment] by employee were inadequate, the company fail[s] to prove that the violation was unpreventable." *Automatic Sprinkler Corp.*, 1980 WL 10595, at *7 (rejecting UEM). An employer "cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge of their dangerous working practices." *Pride Oil*, 1992 WL 215112, at *8 (quoting *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1247 (8th Cir. 1978)). "An employer who has failed to address a hazard by implementing and enforcing an effective work rule cannot shift to its employees the responsibility for assuring safe working procedures." *Pride Oil*, 1992 WL 215112, at *8 (citing *Stuttgart Mach. Works, Inc.*, No. 77-3021, 1981 WL 18841, at *4 (OSHRC, Feb. 24, 1981)); *Davis H. Elliot Co.*, 2017 WL 3217818, at *45 (same); *Pressure Concrete*, 1992 WL 381670 at *6 (rejecting argument that dangerous conditions at issue were "obvious and a reasonable employee would be aware of" them and "act accordingly" because it "erroneously places the burden on employees to be more aware and alert than their employer….").

It is strong evidence of lax enforcement of the employer's safety program, where, as here, a "supervisor engages in misconduct and is exposed to the hazardous condition." *Pride Oil*, 1992 WL 215112, at *8. PM Becker conceded that he [Becker] was "lax" when it came to some aspects of his role in enforcing ECE's safety program such. (Tr. 425). Specifically, PM Becker admitted that there is no field truck and safety inspection report reflecting any inspection of the Crew during the entire time AJ worked for ECE, even though he [Becker] also admitted that he [Becker] was supposed make a crew report weekly. (Tr. 425-26). There is no evidence that any such field inspections even occurred in this three-month period.

On this evidence, ECE's effort to raise UEM as a defense to liability fails.

The Court finds that all of ECE's defenses raised in its Answer to the Second Amended Complaint are rejected because they either lack merit or have been abandoned, or both.

Citation 1, Items 2 and 3, are affirmed.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

VII. CONCLUSION

As discussed above, the elements of applicability, employee exposure, violation and knowledge of the cited conditions are proved as to both items.

VIII. ORDER

Based upon the foregoing findings of fact and conclusions of law,

IT IS ORDERED that: Citation 1, Item 2, alleging a Serious violation of 29 C.F.R. § 1910.268(c), is AFFIRMED and the Court assesses a penalty in the amount of $12,145; and

IT IS FURTHER ORDERED that: Citation 1, Item 3, alleging a Serious violation of 29 C.F.R. § 1910.268(e), is AFFIRMED and the Court assesses a penalty in the amount of $12,145.

SO ORDERED.

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

Dated: November 10, 2022
Washington, D.C.