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

SECRETARY OF LABOR, Complainant, v. GATE PRECAST COMPANY, Respondent.	OSHRC Docket No. 15-1347

ON BRIEFS:

Brian A. Broecker, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Ann S. Rosenthal, Associate Solicitor for Occupational Safety and Health; Katherine E. Bissell, Deputy Solicitor for Regional Enforcement; U.S. Department of Labor, Washington, D.C.
For the Complainant

J. Larry Stine, Esq.; Mark A. Waschak, Esq.; Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, GA
For the Respondent

DECISION

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

BY THE COMMISSION:

Gate Precast Company manufactures and installs precast concrete structures. In 2015, Gate was a subcontractor for the construction of a six-story hotel in Shenandoah, Texas. Following an inspection of the construction worksite, the Occupational Safety and Health Administration issued Gate a single-item repeat citation alleging a violation of the fall protection standard, 29 C.F.R. § 1926.501(b)(1).[1] Administrative Law Judge John B. Gatto affirmed the violation as repeat and assessed a penalty of $25,667. For the reasons that follow, we affirm.

[1] OSHA also issued Gate a four-item serious citation, which the parties resolved pursuant to a partial settlement agreement that was approved on June 27, 2016.

BACKGROUND

On the morning of May 4, 2015, the day of OSHA's inspection, Gate planned to work on the second floor—the uppermost floor or "roof"—of the partially completed hotel. The edge of the roof was unprotected and approximately 24 feet above the ground. Approximately six feet from the roof's edge, red tape was tied to and strung between sticks that were wedged into the gaps of abutting precast planks of concrete.

Before commencing work, Gate's foreman instructed employees at a safety briefing to use personal fall arrest systems while working on the roof. Two temporary employees arrived at the worksite after the safety briefing had concluded.[2] The foreman instructed these employees to help lay grout and perform cleanup tasks on the roof; he also told them to remain behind the red tape. The temporary employees were not provided with—nor did they use—any fall protection equipment.

During the inspection, the OSHA compliance officer observed Gate's foreman operating a rough-terrain forklift at ground level to lift a load of four-foot-wide precast concrete planks onto the roof. The load of planks hung from the tines of the forklift and swung back and forth as it was delivered to the roof. Three Gate employees—one temporary employee and two permanent employees—helped guide the load into place while the other temporary employee performed work elsewhere on the roof.

DISCUSSION

The Secretary alleges that Gate violated § 1926.501(b)(1) by failing to ensure that its employees were "protected from . . . fall hazards while staging, cleaning and preparing to grout precast concrete sections on the second floor of a building." The cited provision requires that "[e]ach employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level . . . be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems."[3] 29 C.F.R. § 1926.501(b)(1).

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[2] These employees were provided by an employment agency, but there is no dispute that they were considered employees of Gate under the Occupational Safety and Health Act, 29 U.S.C. § 654, at the time of the alleged violation.

[3] Section 1926.501(b)(1) generally applies to "[u]nprotected sides and edges." The citation, as amended by the Secretary before the hearing, alleges in the alternative a violation of 29 C.F.R.

To establish a violation, the Secretary must prove that the standard applies, its terms were violated, employees were exposed to the violative condition, and the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Briones Utility Co.*, 26 BNA OSHC 1218, 1219 (No. 10-1372, 2016). Here, there is no dispute that (1) the roof of the hotel had unprotected edges approximately 24 feet above the ground, and there was no guardrail system or safety net system installed to protect employees from falling; (2) neither temporary employee was provided a personal fall arrest system, and neither one was instructed to, or actually used, such a system while working on the roof; and (3) Gate was aware of these conditions, as the foreman specifically instructed both employees, in lieu of using personal fall arrest systems, to remain behind the red tape six feet from the unprotected edge while working on the roof.[4]

The only element remaining at issue, therefore, is exposure. The Secretary can establish employee exposure to a violative condition by showing either " 'actual exposure or that access to the hazard was reasonably predictable.' " *Nuprecon, LP*, 23 BNA OSHC 1817, 1818 (No. 08-1307, 2012) (citing *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996)). In determining employee access to the hazard, "the 'inquiry is not simply into whether exposure is theoretically possible,' but whether it is reasonably predictable 'either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.' " *Id.* at 1818-19. "The zone of danger is 'that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.' " *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1265 (No. 06-1416, 2008) (citing *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)).

§ 1926.501(b)(12), which is specific to "[p]recast concrete erection." The judge allowed the amendment, but he concluded that paragraph (b)(1) is "more specific to the cited conditions." Gate conceded paragraph (b)(1)'s applicability in its post-hearing brief to the judge, and on review, neither party disputes the judge's conclusion.

[4] Before the judge, Gate did not argue that the red tape was intended to act as a guardrail under § 1926.501(b)(1). In addition, Gate acknowledged in its post-hearing brief that the tape did not constitute a "warning line system" as contemplated under § 1926.501(b)(10)—which, in any event, is not listed as a permissible form of fall protection under paragraph (b)(1)—because the tape "used here was only intended to reinforce the instructions not to go into the zone of danger . . . ."

On review, the Secretary claims that the two temporary employees were exposed to a fall hazard while working on the roof.[5] In finding exposure, the judge relied on the Commission's decision in *Nuprecon* to conclude that access to the fall hazard was reasonably predictable for both employees. 23 BNA OSHC at 1818-20. We agree with the judge that the Secretary has established exposure, but only with respect to the temporary employee who was helping guide the load of planks onto the roof. The evidence shows that this employee, while standing only about six feet from the unprotected edge, had to focus his attention on the swinging load to help guide it and maintain its stability. Keeping the load stable was evidently difficult—as the load was being delivered, it struck a piece of rebar protruding from the roof floor and, at one point, another employee had to dislodge a broom that was stuck between the load and a wall. The temporary employee also had to look up while guiding the load because, for a period of time, it was raised above his head.

Under these circumstances, we find it was reasonably predictable that this employee could have fallen off the roof after being knocked off-balance by the swinging load of planks, or by inadvertently straying toward the unprotected edge while focused on guiding the load, particularly while it was overhead. *See Nuprecon*, 23 BNA OSHC at 1820 (considering circumstances besides distance—presence of pipes and debris as tripping hazards—in assessing zone of danger); *Pete Miller, Inc.*, 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000) (finding that even if employee "never came closer than eight feet from the edge, given the size and weight of the objects he was holding and the nature of his work, it was reasonably foreseeable that he could stagger under the weight of the curb or could stumble, placing him well within the danger zone"). Thus, even though the employee remained behind the red tape, we find that he was "in the zone of danger" posed by the unprotected edge. *See Nuprecon*, 23 BNA OSHC at 1820 (noting that "based on the employer's own instructions that the red tape signified 'danger' and employees were to 'stay out' of such areas, this employee may have had the mistaken impression that as long as he remained outside of the taped-off area, he would not be exposed to a fall hazard"). As for the other temporary employee, the record shows that contrary to the Secretary's assertion that this employee helped

[5] Before the judge, the Secretary alleged that one of Gate's permanent employees who helped guide the load was also exposed, but the judge found, based on photographic evidence, that the Secretary failed to prove this employee was not using fall protection. The Secretary does not challenge this finding on review.

guide the load, he was in fact working at a different location on the roof when the planks were being delivered. There is no evidence specifying his distance from the unprotected edge or showing that he performed work that brought him within the zone of danger. Accordingly, we conclude that the evidence does not support a finding of exposure with respect to the other temporary employee.

On review, Gate makes two arguments, neither of which have merit. First, Gate claims that the construction industry, as well as "countless ALJ and Review Commission decisions," have recognized a "six-foot rule" that requires fall protection only when "employees [are] working six feet or less from an unprotected edge that is six feet or more above the ground." Thus, according to Gate, the judge erred by "summarily invalidat[ing] the lateral component of this long-recognized rule." In support of its claim, however, Gate only cites decisions issued by administrative law judges, which are not binding precedent and, in any event, provide no support for Gate's assertion that a lateral six-foot rule is, in fact, recognized by the construction industry.[6] *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) ("[A] Judge's opinion . . . lacking full Commission review does not constitute precedent binding upon us.").

Even if the evidence had established that such a rule exists, § 1926.501(b)(1) neither includes a lateral six-foot rule nor permits methods of fall protection beyond what is specified; "[a]n employer may not simply substitute its judgment," including one embodied in an industry rule, "for that of OSHA . . . despite its subjective belief that an agency interpretation is invalid."

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[6] Gate incorrectly identified two of the five decisions it cites as having been issued by the Commission. Three of these decisions, all of which are unreviewed, simply note that the employers at issue had a policy requiring that employees tie-off if within six feet of a fall hazard—there is no indication that this policy constituted an industry-wide practice. *Tecta Am. New England, LLC*, 23 BNA OSHC 1944, 1950 (No. 10-0942, 2011) (ALJ); *Stark Excavation, Inc.*, No. 07-1861, 2008 WL 5452425, at *3 (OSHRC Nov. 18, 2008) (ALJ); *Ceco Corp.*, No. 89-22, 1989 WL 223480, at *2 & n.3 (OSHRC Dec. 15, 1989) (ALJ). In another unreviewed decision, the violation was alleged under a different standard (steel erection). *Tricon Indus., Inc.*, 24 BNA OSHC 1427, 1431 (No. 11-1877, 2012) (ALJ). Finally, the facts discussed in the remaining cited ALJ decision show that the cited employer did *not* consider its six-foot lateral policy to be an industry-wide practice. *Cleveland Wrecking Co.*, Docket No. 07-0437, slip op. at 6, 9 (June 28, 2010) (ALJ) (noting that lateral 6-foot policy had been put in place one week prior to accident, and that site superintendent had "*randomly picked six feet* because he thought it was a safe distance" and knew "of *no other demolition company* that used the so called six foot rule as a safety device") (emphasis added). Although this decision was reviewed by the Commission, the company's policy was never addressed. *Cleveland Wrecking Co.*, 24 BNA OSHC 1103 (No. 07-0437, 2013).

Sec'y of Labor v. OSHRC (CF & I Steel Corp.), 941 F.2d 1051, 1059 n.10 (10th Cir. 1991), *on remand from* 499 U.S. 144 (1991); *see Carabetta Enters., Inc.*, 15 BNA OSHC 1429, 1432 (No. 89-2007, 1991) (employer who claims standard's requirements are "arbitrary or inappropriate" may either "apply for a variance" or "seek to have the Secretary alter her standard through rulemaking proceedings," but "[s]uch alterations to OSHA's safety standards cannot . . . be obtained in adjudicatory proceedings before the Commission, which only concerns itself with the employer's alleged violation of an existing standard"; "[i]n these proceedings, employers cannot question a standard's wisdom").

Furthermore, recognizing a six-foot lateral rule would be contrary to longstanding Commission precedent on what constitutes the zone of danger. The Commission has long recognized that exposure is a fact-intensive inquiry that will vary from case to case. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2004 (No. 504, 1976) ("Lest there be any confusion we would emphasize that the touchstone of our decision is stated by the words 'will be . . . in a zone of danger.' We cannot, by this decision, foresee all the possibilities; the question is one of fact to be determined on a case by case basis." (footnote omitted)). Accordingly, the Commission over the years has found the zone of danger to be at varying distances from an unprotected edge, including distances over six feet.[7] *See, e.g., Nuprecon*, 23 BNA OSHC at 1820 (employee engaged in pipe removal was exposed to unprotected edge because, among other things, "the pipes and debris on

[7] In a related argument, Gate asserts that the judge imposed "what amounts to a strict liability standard," in that he did not construe the fall protection provision as pertaining to "a preventable hazard." Defining "preventable hazard" as "one that can reasonably be foreseen by the employer[,]" Gate appears to be arguing that the Secretary must prove the company could have reasonably foreseen that its employees were exposed to a fall hazard while working on the roof. The Commission has consistently held, however, that the knowledge element of the Secretary's burden of proof "is established by a showing of employer awareness of the physical conditions constituting the violation," and does *not* "require a showing that the employer was actually aware that it was violating an OSHA standard" or that "the employer understood or acknowledged that the physical conditions were actually hazardous." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2124 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122, 127 (4th Cir. 2001); *Phoenix Roofing*, 17 BNA OSHC at 1079. Such proof is undisputed here. As we have already found, Gate knew the unprotected edge of the roof was more than six feet above the ground, and that neither a guardrail system nor a safety net system was in place at the time of the inspection. In addition, Gate's foreman knew that the temporary employee was neither provided nor used personal fall protection and, instead, was simply instructed to remain behind the red tape, located six feet from the unprotected edge. Finally, as discussed below, the record shows that the foreman should have known that this employee would assist the two permanent employees with guiding the load.

the floor alongside the wall created a tripping hazard within approximately six feet"); *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2124 (No. 96-0606, 2000) (finding as evidence of exposure that foreman and decedent had "engaged in horseplay . . . at a location within 6-8 feet of the unprotected edge, outside the perimeter cables, without using any fall protection"), *aff'd*, 255 F.3d 122 (4th Cir. 2001); *Phoenix Roofing*, 17 BNA OSHC at 1079 (finding violation under 29 C.F.R. § 1926.500(b)(4), where employees deposited materials within 12 feet of unguarded skylight, and noting that "[t]his is not a great distance"); *Cornell & Co.*, 5 BNA OSHC 1736, 1738 (No. 8721, 1977) (as to employees on coffee break, those 10 feet from elevator shaft were "endangered by the hazard of falling," whereas those 20 to 30 feet from floor opening were not); *Dic-Underhill*, 4 BNA OSHC 1051, 1052 (No. 3257, 1976) (employee exposure to fall hazard "clearly established by the fact that two employees were working on this level ten feet from the unguarded edge").

Second, Gate argues that in analyzing exposure, the Commission should not consider the temporary employee's help in guiding the planks because it was not reasonably predictable that he would perform this job task. For support, Gate points to the discussion of reasonable predictability in *Gilles & Cotting*, in which the Commission stated that it would "expect the proofs to show" that the employees' access to the zone of danger occurred "in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces . . . ." 3 BNA OSHC at 2003. Here, only what "work duties" were "assigned" to the exposed employee is at issue.[8]

According to Gate, the foreman had only assigned the temporary employee to lay grout and perform clean up tasks—not guide the load of planks—and therefore, the temporary employee's exposure was not reasonably predictable. The Secretary responds that it was objectively reasonable to predict that the employee would help with the load of planks because the performance of this task was consistent with the temporary employee's role. We agree with the

[8] Gate maintains that there is no evidence in the record showing the employees' "means of ingress-egress to the [roof]." The Secretary does not dispute this point, and there is no evidence concerning the employees' "personal comfort activities while on the job." *Gilles & Cotting*, 3 BNA OSHC at 2003.

Secretary.[9] When the other Gate employees had trouble securing the load, one of them asked the temporary employee to help guide it, showing that both the temporary employee as well as Gate's permanent employees viewed guiding the load as being within the scope of the temporary employee's assigned tasks. Indeed, in providing this assistance, the temporary employee did not run afoul of the foreman's instructions; as the employee testified, other than being told not to work past the red tape—a rule that the employee followed—the foreman never instructed him on "things that [he] could not do" while working on the roof that morning.[10] Moreover, it should have been obvious to the foreman as he raised the load of planks with the forklift that the unstable nature of the load, along with its weight and size, required more than two workers to stabilize and land it. *Compare Phoenix Roofing*, 17 BNA OSHC at 1079 (finding employee exposure under 29 C.F.R. § 1926.500(b)(4) despite testimony that decedent's work duties did not require him "to leave the guarded strip," because "it was reasonably predictable that [decedent] or another laborer would . . . go into the unprotected area if, for example, he needed to get out of the way or sit down"), *with Anoplate Corp.*, 12 BNA OSHC 1678, 1689 (No. 80-4109, 1986) (concluding OSHA industrial hygienist's testimony that employees might step near floor opening was too speculative to support exposure finding under 29 C.F.R. § 1910.23(a)(5), because Commission could not determine from this testimony "why an employee might approach the [unguarded] pit, which was adjacent to a wall"). Accordingly, we find that the Secretary has established that the temporary employee

[9] According to Gate, the Secretary "cannot conclusively presume . . . that it is 'reasonably predictable' that employees will ignore instructions," because such a presumption "would make a mockery of all safety meetings, plans, programs, and training," and it would "completely eviscerate the unpreventable employee misconduct . . . defense by assuming that employees will never do as they are told." The Commission has held that " 'reasonable predictability' is an objective standard and is not analyzed from a subjective view point." *Phoenix Roofing*, 17 BNA OSHC at 1079 n.6. Thus, our analysis of exposure must be based on what, objectively, an employer could reasonably predict—the contents of that employer's instructions to its employees would certainly factor into any such analysis. But any argument concerning "the extent to which [Gate] was entitled to rely on its employees to comply with its instructions and avoid engaging in violative conduct . . . would relate to the affirmative defense of unpreventable employee misconduct, . . . not to exposure." *Calpine Corp*., 27 BNA OSHC 1014, 1016 n.7 (No. 11-1734, 2018), *aff'd*, 774 Fed. App'x 879 (5th Cir. 2019) (unpublished).

[10] Contrary to the Secretary's assertion, the record does not show that the foreman was aware the temporary employee was helping guide the load. Although the foreman testified that while operating the forklift, he looked in the direction of the employees on the roof who were guiding the load, he also testified that he could not see the temporary employee, who was "back [from] the edge of the roof." Photographic evidence corroborates his testimony.

helping to guide the load of planks had access to the fall hazard and was, therefore, exposed to the violative condition.[11]

For all these reasons, we affirm the violation as repeat and assess a penalty of $25,667.[12]

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: April 28, 2020

[11] Because we find the temporary employee had access to the hazard, we do not reach the Secretary's alternative position that exposure is presumed under the cited standard, i.e., that an employee's presence at any location on a level with an unprotected edge six feet or more above a lower level establishes employee exposure to a fall hazard. We do note, however, that Commission precedent over the years has required the Secretary to prove employee exposure in order to establish a violation under § 1926.501(b)(1). *See, e.g., Nuprecon*, 23 BNA OSHC at 1818-20 (affirming § 1926.501(b)(1) violation as to one employee but not another based on whether exposure to fall hazard was "reasonably predictable"); *N&N Contractors*, 18 BNA OSHC at 2122 (affirming § 1926.501(b)(1) violation where employee was "clearly in the zone of danger" and citing to *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997), for proposition that "exposure exists whenever it is reasonably predictable that employees are or will be in the zone of danger").

[12] On review, Gate does not challenge the judge's characterization of the violation or penalty assessment. *See KS Energy Servs.*, 22 BNA OSHC at 1268 n.11 (assessing proposed penalty where not in dispute).

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SECRETARY OF LABOR, Complainant, v. Gate Precast Company, Respondent.	OSHRC Docket No. 15-1347

DECISION AND ORDER

COUNSEL: Dolores G. Wolfe, Attorney, U.S. Department of Labor, Office of the Solicitor, Dallas, TX, for Complainant.

J. Larry Stine, Mark A. Waschak, Attorneys, Wimberly Lawson Steckel Schneider & Stine, PC, Atlanta, GA, for Respondent.

JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

Gate Precast Company (Gate Precast) manufactures and installs precast concrete structures. On May 4, 2015, Derek Rusin, a compliance safety and health officer for the Occupational Safety and Health Administration (OSHA), observed workers at a Gate Precast worksite in Shenandoah, Texas, working on the second floor of a planned six-story Holiday Inn under construction (Stipulations, ¶ ¶ 4, 5, 8). Rusin believed the workers he observed were not tied off and were working at the edge of the second floor. Rusin stopped and conducted an inspection of the worksite. As a result of the inspection, OSHA issued two citations to Gate Precast on July 16,

2015, for serious and repeated violations of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. §§ 651-678.[13]

Gate Precast timely contested the citations and thereafter, the Secretary filed a formal complaint with the Commission charging Gate Precast with violating the Act and seeking an order affirming the citations and proposed penalties. Gate Precast filed an answer on October 27, 2015. The Commission has jurisdiction of this action under section 10(c) of the Act, § 659(c). (Compl. ¶ I; Answer ¶ 1; Stipulations, ¶ 1). Prior to the trial, the parties reached a partial settlement agreement regarding Citation 1 (Tr.8).[14] Remaining at issue is Citation 2, alleging a repeat violation of 29 C.F.R. § 1926.501(b)(1), for failing to ensure employees were protected from falling while on walking/working surface with an unprotected edge 6 feet or more above a lower level.[15] The Secretary proposes a penalty of $38,500.00 for this Citation 2.

The parties stipulated and the Court finds Gate Precast is engaged in a business affecting interstate commerce and is an employer covered under section 3(5) of the Act, § 652(5). (Compl. ¶ II; Answer ¶ 2; Stipulations, ¶ 2). A one-day bench trial was held in Houston, Texas, on June 29, 2016. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. For the reasons indicated *infra*, the Court concludes the Secretary established a violation of 29 C.F.R. § 1926.501(b)(1) with regard to two of the three workers he alleged were exposed to a fall hazard. Accordingly, the citation is **AFFIRMED** and a civil penalty of $26,000.00 is assessed.

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[13] The Secretary of Labor (the Secretary) delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads OSHA, and assigned responsibility for enforcement of the Act to OSHA. *See* 65 Fed.Reg. 50017 (2000). The Assistant Secretary has promulgated occupational safety and health standards, *see e.g.*, 29 C.F.R. Parts 1910 and 1926, and has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[14] In a *Final Consent Order* dated June 27, 2016, the Court approved the partial settlement agreement and adopted and incorporated the agreement as part of the order.

[15] In the alternative, the Secretary charged Gate Precast with a violation of subsection (b)(12), relating to precast concrete erection. However, although the workers observed by Rusin were preparing to engage in precast concrete erection later in the day, at the time he observed them they were engaged in landing a load of material hoisted by a forklift. Therefore, the Court concludes subsection (b)(1) is more specific to the cited conditions.

II. BACKGROUND

Gate Precast is "in the business of manufacturing and installing precast concrete structures." (Stipulations, ¶ 4.) On May 4, 2015, Gate Precast was "working on a project at 19333 David Memorial Drive, Shenandoah, Texas," and Gate Precast's foreman on the site was Albert Godinez (Stipulations, ¶5). Gate Precast employee Anthony Fay also was working on the site (Stipulations, ¶ 6). The project was a "six-story hotel with a CMU block and steel framing construction with Gate-Core (hollow core) planking floor and roof deck." (Stipulations, ¶ 8.) For this project, Gate Precast "used the services of Labor Ready to provide general helpers to work under the supervision, direction and control of" Gate Precast. "Labor Ready provided Bobby Pitts and Bradley Blaine to work at the job site." (Stipulations, ¶ 7.) Gate Precast foreman Godinez went up on the second floor the morning of May 4, 2015, and verified red tape was placed 6 feet from the edge of the building as a marker (Tr. 88). The red tape "was secured to some sticks in between some cracks." (Tr. 14.) The red tape was not intended as a barrier that would physically prevent employees from accessing the area within 6 feet of the edge. "The warning line used here was only intended to reinforce the instructions not to go into the zone of danger." (*Gate Precast's Br.* p. 12.) The second story was approximately 24 feet high (Tr. 19).

As Rusin[16] was driving to another construction site on May 4, 2015, he observed a worker on the second floor of the Holiday Inn project. Rusin explained OSHA has "a construction emphasis program. When we see somebody on a roof, we need to ensure that they're properly protected from falling." (Tr. 29.) To that end, Rusin parked, exited his vehicle, and met with the general contractor's superintendent for the project. The superintendent informed Rusin the workers he had observed on the second floor were employees of Gate Precast (Tr. 30).

When Rusin arrived at the site, Gate Precast foreman Godinez was operating a rough-terrain forklift located on the ground and was attempting to lift a load of precast panels to the second floor (Tr. 32-35). Rusin observed three workers on the second floor who were attempting to guide the load as it moved toward them (Tr. 37-38). He stated he "did not go on the roof. . . There was no way for me to get up there and I can't do that anyway." (Tr. 39.)[17] From his vantage

[16] Rusin works for OSHA's Houston North Area Office. He had worked for OSHA for seven years and seven months at the time of the trial (Tr. 29).

[17] At the time of the inspection, the planned six-story structure was only two stories high. At times during the hearing, witnesses referred to the second floor as the "roof." It is understood that references in the record to the "roof" indicate the unfinished second story of the building.

point on the ground, Rusin concluded Gate Precast's employees "were wearing harnesses but they were not attached to anything." (Tr. 41.) Rusin took photographs and interviewed Gate Precast employee Anthony Fay and Labor Ready temp Bradley Blaine, who had been assigned by Gate Precast to help lay grout on the second floor of the project on May 4, 2015 (Tr. 12, 23, 70). Based on CSHO's inspection, on July 16, 2015, OSHA issued the Citation at issue.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority the Secretary promulgated the standard at issue in this case.

A. Factors Required to Establish Violation of Cited Standard

Under both Commission precedent and the law of the Fifth Circuit, the jurisdiction in which this case arises,[18] in order to prove a violation of a cited standard, the Secretary "must show by a preponderance of the evidence: (1) that the cited standard applies; (2) noncompliance with the cited standard; (3) access or exposure to the violative conditions; and (4) that the employer had actual or constructive knowledge of the conditions through the exercise of reasonable due diligence." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016) (*citing Jesse Remodeling, LLC*, 22 BNA OSHC 1340 (No. 08–0348, 2006); *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90–1747, 1994)). Further, "hazard is generally presumed in safety standards unless the regulation requires the Secretary to prove it." *Id.*, 811 F.3d at 735. Therefore, where a

[18] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Texas, which is in the Fifth Circuit. In general, where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has applied the precedent of that circuit in deciding the case, "even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

standard presumes a hazard, "the Secretary need only show the employer violated the terms of the standard." *Id.* (*citing Kaspar Electroplating Corp.*, 16 BNA OSHC 1517 (No. 90–2866, 1993)).

1. Alleged Violation

Citation 2 Item 1, as amended,[19] alleges a repeated violation of the Secretary's fall protection standard, 29 CFR § 1926.501, for failing to provide a fall protection system at the worksite. More specifically, the Secretary charged Gate Precast with a violation of subsection (b)(1), relating to unprotected sides and edges, which mandates that each employee "on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." The amended citation asserts Gate Precast "does not ensure that employees are protected from falling while on working services at heights greater than 6 feet."

2. Applicability of the Cited Standard

A "walking/working surface" is "any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties." 29 C.F.R § 1926.500(b). The standard defines "unprotected side or edge" as "any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or guardrail system at least 39 inches (1.0 m) high. *Id.* The second floor of the worksite at issue was a walking/working surface with an unprotected edge within the meaning of the cited and alternative standards. Further, Gate Precast concedes "the fall protection standard applies." (*Gate Precast's Br.* p. 8.) Therefore, the Court concludes section 1926.501(b)(1) applies to the cited conditions.

[19] The Court granted the Secretary's unopposed *Second Motion to Amend Citation and Complaint* on June 21, 2016.

3. Non Compliance with the Cited Standard

The cited standard lists three methods of fall protection for use at an unprotected edge: "guardrail systems, safety net systems, or personal fall arrest systems." The parties agree that Gate Precast erected neither a guardrail nor a safety net system, and that the red tape Gate Precast placed around the unprotected edge did not serve as a method of fall protection. In his brief the Secretary contends, "[t]hree workers were exposed to the hazard of falling as they were not tied off for at least ten to thirty minutes." (*Secretary's Br.* p. 7). A person normally "ties off" by securing a rope lanyard, which is attached to the safety harness worn by the worker, to a cable or some structure capable of supporting the person's weight. *N & N Contractors, Inc. v. Occupational Safety & Health Review Comm'n*, 255 F.3d 122, 125 (4th Cir. 2001).

The three workers the Secretary identifies are Anthony Fay, a permanent employee of Gate Precast, and Bradley Blaine and Bobby Pitts, temporary laborers supplied by Labor Ready.[20] Gate Precast admits it "agreed to provide adequate supervision, direction and control over workers that Labor Ready provided to" it and "no Labor Ready supervisor was present at the project at 19333 David Memorial Drive." (*Responses of Gate Precast to Requests for Admission,* ¶¶13, 21.) Gate Precast does not dispute that, under the test for employment set out in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 316 (1992), and adopted by the Commission in *Don Davis*, 19 BNA OSHC 1477 (No. 96-1378, 2001), it was the employer of Blaine and Pitts at the time of the OSHA inspection. *See Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated)). ("While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers."). The Court determines the temporary workers at the worksite were employees of Gate Precast, as defined by *Darden*.

Temporary employee Blaine testified Labor Ready assigned him to work for Gate Precast on May 4, 2015, at the worksite at issue. It was his first day on the site (Tr. 14). He stated, "When I showed up, I was told that I was going to be helping lay grout and the pieces that were already up on the flooring. . . . And then help with clean-up." (Tr. 12.) While waiting to start his assigned work, foreman Godinez used a rough-terrain forklift to lift a load of precast panels (the crane that

[20] The record indicates there was a second Gate Precast employee named Adams on the second floor at the time of the inspection. The Secretary has not identified this employee as one of the workers in noncompliance with the cited standard.

Gate Precast normally would use to perform this task was not available). Blaine testified none of the employees on the second floor "were tied off because there was nothing to tie off to" (Tr. 17) and he "didn't see anybody tied off." (Tr. 25.)

Rusin singled out Anthony Fay as a Gate Precast employee who was not tied off. When asked how he determined Fay was not tied off, Rusin stated, "He was moving around. So every time he turned or moved around, I can see that his D-ring was empty." (Tr. 39.) Rusin stated he was standing on the ground, looking up two stories, and "could see the upper portion of the two gentlemen that were trying to help land this load on the roof." (Tr. 33). From this position, he stated, he "could see that they had harnesses on but they didn't have anything attached to their D-rings on the back." (Tr. 33.) On cross-examination, Rusin testified he interviewed Fay and stated Fay "did not tell me he was tied off." (Tr. 70.) According to Rusin,

> Fay told me that him and another employee had [gone] up on the second floor and they had brought two yo-yo lanyards with them, and the one that he had was froze up. It wouldn't move. . . And I asked him why if they still have one working, why didn't one person try to land the load or at least one tie off, and he said he didn't know why.

(Tr. 74.) However, Gate Precast foreman Godinez testified the permanent employees who were on the second floor of the structure on May 4, 2015, were wearing harnesses with attached yo-yo lanyards. Gate Precast had installed anchor bolts on the floor of the structure to which the employees could attach their lanyards (Tr. 87). Once the employees were on the second floor, Godinez asked them for verbal confirmation that they were tied off (Tr. 89).

There is a discrepancy in the record: Blaine, the only witness who was present on the second floor, testified he did not observe anyone on the second floor tied off and Rusin testified Fay informed him he was not tied off. On the other hand, foreman Godinez stated he observed the permanent employees on May 4, 2015, before they went up to the second floor. They were wearing harnesses with attached lanyards. Once on the second floor, they informed Godinez they had attached the lanyards to the anchors installed on the floor. However, this evidentiary impasse can be resolved by reviewing the photographic exhibits.

Looking at the Government's Exhibit 5, Godinez identified Fay and stated he could "see the lanyard hooked to the harness." (Tr. 91.) James Stini, vice-president of Gate Precast, also

testified he could see the lanyard. "[H]e is absolutely tied off. You can see the lanyard is pulling from his back away from –away from the edge of the deck. So he's actually tied off. And that man right there is Anthony Fay." (Tr. 145.) Fay can be seen at the right of the photograph as he attempts to dislodge a broom that had become wedged against the structure. Fay is three-quarters facing the camera as he reaches up. He is clearly wearing a harness. Also clearly visible is a yellow lanyard stretched from the floor of the second story towards the back of Fay's harness. Although its connection to the D-ring is not visible, because Fay's back is not turned to the camera, there is no other plausible explanation for the presence of the lanyard in the photograph. The Secretary did not question Godinez or Stini regarding the visible lanyard in this exhibit and does not mention the photograph or the testimony in his post-trial brief. The photographic evidence challenges the reliability of the testimony of Blaine and Rusin. The photograph, taken by Rusin and adduced by the Secretary, is inconsistent with the testimony that Fay was not tied off. Based on the clear evidence established by the Government's Exhibit 5, the Court concludes the Secretary has failed to establish that Gate Precast did not provide a fall protection system to employee Fay in violation of the cited standard.

The Secretary also contends temporary employees Blaine and Pitts were not tied off as required by the cited standard. Gate Precast did not present a safety briefing for the temporary employees or provide them with harnesses and lanyards (Tr. 15). Blaine testified the "only thing I was told about it is not to go over from the red tape" that was placed 6 feet from the open edge of the second floor (Tr. 15). Gate Precast concedes as much, stating neither of the temporary employees were "fitted with a harness and a lanyard, but [their] job was only clean-up and [they were] explicitly instructed never to go past the red tape that Gate [Precast] had installed at the site to remind unauthorized workers not to stray within 6 feet of the edge." (*Gate Precast's Br.* p. 7.) Foreman Godinez himself instructed Blaine and Pitts to go to the second floor and stay inside the red tape. "These workers were not issued harnesses and lanyards because they just did clean-up and had no reason to go outside the tape and into the 6-foot danger zone: only the Gate [Precast] employees had assignments that took them outside of the tape." (*Id.*)

Based on this admission by Gate Precast, the Court concludes temporary employees Blaine and Pitts were on a walking/working surface with an unprotected edge approximately 24 feet above the lower level and were not protected from falling by the use of personal fall arrest systems. The cited standard commands that an employee on an unprotected surface that is six feet or more above

a lower level must be protected by the use of guardrails, safety nets, or safety harnesses. Therefore, the plain language of the regulation identifies both the hazard to be guarded against and the specific safety precautions to be taken. Here, the temporary employees were working on an unprotected surface that was six feet or more above a lower level; therefore the cited standard applies, and they were required to be protected by the use of guardrails, safety nets, or safety harnesses.

Nothing in the standard requires the Secretary to demonstrate a hazard is present before the employer is required to comply with the standard's terms. If an employee is on a walking/working surface 6 feet or more above the lower level, the employee must have some form of fall protection. Such is the case here. The Secretary has established Gate Precast failed to comply with the requirements of the cited standard with regard to temporary employees Blaine and Pitts.

4. Access or Exposure to the Violative Condition

The Secretary establishes employee access to a violative condition "either by showing actual exposure or that access to the hazard was reasonably predictable." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1037, 2012) (*citing Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (*per curiam*)). In determining whether the Secretary has proven access to the hazard, the "inquiry is not simply into whether exposure is theoretically possible," but whether it is reasonably predictable "either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Id.* (*citing Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). Here, there is evidence that the temporary employees were exposed to the unprotected edge.

Blaine stated that he was "[r]oughly three to five foot" away from the open edge of the second story as he assisted with the incoming load (Tr. 17). He conceded, however, that he did not measure the distance between the red warning tape and the open edge. Blaine testified he never crossed the red tape (Tr. 23). CSHO Rusin did not go up on the second floor and so did not take measurements relevant to the red tape. The Court accepts Gate Precast's assertion the red tape was placed 6 feet from the open edge of the second story.

Gate Precast argues the Secretary failed to establish employee exposure to the risk of injury, claiming, "[t]here is no evidence that it was reasonably predictable that the temporary

workers from Labor Ready would be in the zone of danger. The evidence in the record overwhelmingly shows that they were not exposed to the hazard, because they were instructed never to go within 6 feet of any unprotected side or edge." (*Gate Precast's Br.* p. 11.) Gate Precast appears to have taken the "6-foot rule," requiring employees to tie off when they are working vertically 6 feet above a lower level, and applied it horizontally.

However, as the Secretary point out in his brief, OSHA considered and rejected this approach in the Preamble to the Final Rule for fall protection. "In conclusion, after careful and complete consideration of the entire record, OSHA has determined that there is no 'safe' distance from an unprotected side or edge that would render fall protection unnecessary." *Safety Standards for Fall Protection in the Construction Industry*, 59 Fed. Reg. 40672-01 (August 9, 1994). The preamble to a standard is the most authoritative evidence of the meaning of the standard. *Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC 1396, 1398 (No. 08-1292, 2015); *Superior Rigging & Erecting Co.*, 18 BNA OSHC 2089, 2092 (No. 96-0126, 2000); *Tops Markets*, 17 BNA OSHC at 1936. "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context. Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152-55 (1991). The Court finds the Secretary's interpretation in his preamble to be both consistent with the regulatory language and reasonable.

The Commission has also rejected Gate Precast's contention the red tape provided adequate warning to employees of a "safe" distance from the edge, for which they did not require fall protection in *Nuprecon LP*, 23 BNA OSHC 1817 (No. 08-1307, 2012). In that case, Nuprecon employees were engaged in demolishing hangars and other structures, and were working on the third floor of a hangar, one side of which was "an unprotected twenty-one-foot-long, floor-to-ceiling opening." *Id.* at 1818. Similar to the present case, Nuprecon had "'hung red plastic ... tape several feet above the floor from the walls near the open edge to and between stanchions' to create 'a rectangular area in front of the open edge.' Nuprecon trained its employees that red tape signified 'danger' and that they were to 'stay out' of such taped-off areas." *Id.* "[T]he red tape strung parallel to the unprotected edge was positioned at a 15-foot distance from that edge." *Id.* Nuprecon's field safety officer testified that (similar to the red tape Gate Precast placed), at one point "the distance between the tape at the wall on the right side of the edge and the edge itself

was six feet." *Id.* at 1818. The Nuprecon employee at issue was looking up, removing overhead ceiling pipes while standing in a mobile lift located to one side of the unprotected opening. In the present case, the temporary employees were reaching up to help guide the load of precast panels to the second floor.

The Commission nonetheless found it "reasonably predictable that such an employee actively engaged in this type of work would need to move about his entire work area. Nothing prevented him from dismounting the lift in that area and—given the distance between the edge and the red tape on that side—coming within six feet of the edge." *Id.* at 1820. "In fact, based on the employer's own instructions that the red tape signified 'danger' and employees were to 'stay out' of such areas, this employee may have had the mistaken impression that as long as he remained outside of the taped-off area, he would not be exposed to a fall hazard." *Id.* "Under these circumstances, we find it reasonable predictable that this employee would dismount the lift in his work area and come within the zone of danger." *Id.* The Court therefore concludes the temporary employees had access to the hazard since it "was reasonably predictable either by operational necessity or otherwise (including inadvertence)," that the temporary "employees have been, are, or will be in the zone of danger."[21] Thus, the Secretary has established employee exposure to the cited conditions.

5. Actual or Constructive Knowledge of the Conditions

"To prove knowledge, 'the Secretary must show that the employer knew of, or with exercise of reasonable diligence could have known of the non-complying condition.' *Trinity Industries v. OSHRC,* 206 F.3d 539, 542 (5th Cir.2000)." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 736 (5th Cir. 2016). Gate Precast foreman Godinez was aware the temporary employees were not tied off. Gate Precast states in its brief that it intentionally declined to provide the employees with fall protection because the company did not believe the employees were exposed

[21] *Cf. Dic-Underhill*, 8 BNA OSHC 2223 (No. 10798, 1980) (finding access to a fall hazard where two employees grinding ceiling seams 25 or more feet from unguarded edge had to move closer to edge to sand seams extending to that side of building); *Gallo Mech. Contractors, Inc.*, 9 BNA OSHC 1178, 1180 (No. 76-4371, 1980) ("Hazards of tripping and falling ... can occur if matter is scattered about working and walking areas."); *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2122 (No. 96-0606, 2000) (stumbling near unprotected edge resulted in non-tied-off employee falling to his death), *aff'd*, 255 F.3d 122 (4th Cir. 2001). *See also Lancaster Enters*., 19 BNA OSHC 1033, 1037 (No. 97-0771, 2000) (finding exposure where employees used a hatchway and ladder "closely adjacent" to a fall hazard); *Phoenix Roofing*, 17 BNA OSHC at 1079 ("about 12 feet" from unguarded skylights); *Dic-Underhill*, 8 BNA OSHC at 2229-30 (25 or more feet from an unguarded edge, working towards that edge); *Cornell & Co.*, 5 BNA OSHC 1736, 1738 (No. 8721, 1977) (ten feet from an elevator shaft).

to a fall hazard. This knowledge is imputed to the company. *W.G. Yates & Sons Construction Co., Inc. v. OSHRC,* 459 F.3d 604, 607 (5th Cir.2006) ("[W]hen a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge[,] actual or constructive [,] of non-complying conduct of a subordinate.") (quoting *Mountain States Telephone & Telegraph Co. v. OSHRC,* 623 F.2d 155, 158 (10th Cir.1980)). There is substantial evidence on the record to establish that Gate Precast possessed knowledge of the violative conditions. The Secretary has established Gate Precast had actual knowledge of the violative conduct. Therefore, employer knowledge is established.

B. AFFIRMATIVE DEFENSE

Gate Precast contends any violation of the cited standard is the result of unpreventable employee misconduct. "To establish this affirmative defense, an employer must show that it (1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered. *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). Gate Precast predicates this misconduct, however, on the actions of its permanent employee, Fay. The employees who were in noncompliance with the cited standard were the temporary employees. Gate Precast concedes it did not have a work rule requiring temporary employees to tie off. Therefore, it could not communicate this nonexistent rule to the temporary employees or takes steps to discover violations or enforce the rule when its violation was discovered. For this reason, Gate Precast's unpreventable employee misconduct defense fails.

C. REPEAT VIOLATION

Under Fifth Circuit and Commission precedent, a violation is repeated if, at the time it occurred, "there was a Commission final order against the same employer for a substantially similar violation." *Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x 386, 390 (5th Cir. 2013) (*citing Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 837 (5th Cir.1981)) (quotation marks and citation omitted); *Potlatch Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary establishes a prima facie case of substantial similarity by showing that the prior and present violations are for failure to comply with the same standard. *Monitor Constr. Co*., 16 BNA OSHC 1589, 1594, 1993-1995 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994)." *Deep S. Crane & Rigging Co*., 23 BNA OSHC 2099, (No. 09-040, 2012).

Gate Precast does not dispute OSHA previously cited it for a substantially similar violation. OSHA previously cited Gate Precast for a violation of § 1926.501(b)(1) as a result of a May 14-15, 2014, inspection at a Gate Precast worksite in Amarillo, Texas. The Court agrees with the Secretary that the serious violation of 29 C.F.R. § 1926.501(b)(1) found through OSHA Inspection No. 977474 at Amarillo, Texas, set forth in Item 1 of Citation No. 1, issued August 28, 2014, became a final order of the Commission on September 23, 2014 (Gov. Ex. 15-18). Gate Precast's subsequent violation of § 1926.501(b)(1) occurred on May 4, 2015, at the Shenandoah, Texas, worksite. Because Gate Precast failed to comply with the same standard in both instances, the Secretary has established OSHA cited Gate Precast for a substantially similar violation that became a final order before the occurrence of the May 4, 2015, violation. Thus, Gate Precast was properly cited for repeat violations.

IV. PENALTY DETERMINATION

Under the Act, any employer who "repeatedly" violates the requirements of section 5(a) of the Act may be assessed a civil penalty of not more than $70,000 for each violation. 29 U.S.C. § 666(a). The Commission is empowered to "assess all civil penalties" provided in this section, "giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and*

Automation, Inc., 20 BNA OSHC 2196, 2201 (No. 00- 1052, 2005). "Moreover, while gravity is normally the primary factor in assessing appropriate penalties, an employer's substantial history of prior violations may skew the importance of gravity in the final penalty determination." *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994).

Given the repeated violation, and the awareness of the supervisor that the temporary employees were working without fall protection, the Court concludes Gate Precast is not entitled to a reduction for lack of history of previous violations or for good faith. *Gen. Motors Corp., CPCG Okla. City Plant*, 22 BNA OSHC 1019, 1048 (No. 91-2834E & 91-2950, 2007) (consolidated) (giving no credit for good faith when management tolerated and encouraged hazardous work practices). The record does not indicate the size of Gate Precast's business.

As to the gravity of the violation, it was high. The three employees were standing near the edge of the roof and were not tied off, receiving the lift for a duration of at least ten to thirty minutes. (Tr. 46.) The workers were about 24 feet up from the ground with nothing to break their fall, other than the dirt below. (Tr. 19.) The probability of injury was greater because all three employees were receiving the lift with their eyes over their head trying to reach the out of control lift while moving, making the probability of injury extremely likely. The severity was high since the employees were moving back and forth near and edge exposing them to a fall of 24 feet could result in serious injury or death. (Tr. 57 – 60.)

The Secretary proposed a penalty of $38,500.00 for the repeated violation, which the Court concludes was justified due to the gravity of the facts, but should be reduced to reflect two exposed employees, rather than three, as the Secretary alleged.[22] Giving due consideration to the size of the business, the gravity of the violation, good faith, and history, the Court finds the appropriate civil penalty is $25,667.00. Accordingly,

[22] The Secretary identified three employees exposed. Since the Court found the permanent employee was tied off, there were only two exposed employees. Therefore, the Court assesses 2/3 of the proposed penalty.

V. ORDER

IT IS HEREBY ORDERED THAT Item 1 of Citation 2 is **AFFIRMED** and a penalty of $25,667.00 is assessed.

SO ORDERED.

/s/ John B. Gatto

John B. Gatto

Administrative Law Judge

Dated: September 23, 2016

Atlanta, GA