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

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>EMPIRE ROOFING COMPANY SOUTHEAST, LLC,<br><br>Respondent. | OSHRC Docket No. 13-1034 |

ON BRIEFS:

Erin M. Mohan, Attorney, Office of the Solicitor; Heather R. Phillips, Counsel for Appellate Litigation; Ann Rosenthal, Acting Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

McCord Wilson, Esq.; Rader & Campbell PC, Dallas, TX
For the Respondent

## DECISION

Before: ATTWOOD, Chairman; and MACDOUGALL, Commissioner.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued Empire Roofing Company Southeast, LLC a one-item serious citation alleging that Empire employees were working from an aerial lift without fall protection in violation of 29 C.F.R. § 1926.453(b)(2)(v).[1] Following a hearing, Administrative Law Judge Sharon D. Calhoun issued a decision affirming the citation and assessing the $4,900 proposed penalty.

[1] Section 1926.453(b)(2)(v) states: "A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift."

The only issue on review is whether the judge erred in finding that the Secretary established that Empire had knowledge of the violative condition.[2] For the reasons discussed below, we find that the Secretary met his burden of establishing knowledge and affirm the citation.

**DISCUSSION**

On April 9, 2013, an OSHA compliance officer inspected a worksite in Fort Lauderdale, Florida, where Empire was installing metal sheeting on the roof of a commercial building.[3] When the CO arrived at the worksite, Empire's foreman was standing in the basket of an aerial lift, elevated between 16 and 20 feet above the ground, without being tied off to the boom or basket. Two other Empire employees were on the roof of the building. After photographing the worksite, the CO approached the lift, and the foreman lowered the lift to the parking lot and identified himself. The foreman told the CO that he had previously used the aerial lift, and the record shows he made two trips in the lift—he transported himself, along with some materials, and each of the two Empire employees up to the roof. While safety harnesses were available at the worksite, neither the foreman nor the two other Empire employees used safety harnesses during transport in the lift. The CO prepared a written statement following his interview of the foreman, which the foreman reviewed and signed. In the statement, the foreman stated that he "did not have a harness on because he was in a hurry and that he was not going to use the aerial lift very long and he said it was his fault."

In finding that the Secretary established Empire's knowledge of the violative condition, the judge relied on Commission precedent holding that a supervisor's knowledge is imputable to the employer. Accordingly, she concluded that the knowledge of Empire's foreman is properly

[2] Empire concedes that the remaining elements of the Secretary's burden of proving a violation have been established. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982) (to establish a violation of an OSHA standard, the Secretary must prove: "(1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.").

[3] Both the worksite and Empire's principal place of business are in Florida, which is located in the Eleventh Circuit. Therefore, the Eleventh Circuit would have jurisdiction over an appeal filed by either party. *See* 29 U.S.C. § 660(a), (b). Empire could also seek review in the D.C. Circuit. *See* 29 U.S.C. § 660(a).

imputed to Empire. *See, e.g.*, *Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012), *aff'd*, *Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x 386 (5th Cir. 2013) (unpublished); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). The judge found that recent Eleventh Circuit precedent, specifically *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304 (11th Cir. 2013), is not implicated since her analysis does not rest on the foreman's knowledge of his own misconduct but on the foreman's actual knowledge of the violative conduct of his two crew members, which she imputed to Empire.[4]

On review, Empire acknowledges that *ComTran,* which involved a supervisor engaged in violative conduct while working alone in an unprotected trench, does not directly address the factual circumstances here—a supervisor participating in the same violative conduct as that of his subordinates. *Id.* at 1309. Empire argues, however, that the court's rationale and policy considerations outlined in *ComTran* are nonetheless applicable here. Thus, in Empire's view, the judge erred in relying on Commission precedent to impute its foreman's knowledge to Empire because, it contends, the Eleventh Circuit would require the Secretary to show foreseeability. *Id.* at 1317. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.").

We find that pursuant to Commission precedent, the foreman's knowledge of his subordinates' misconduct is imputed to Empire. In addition, we find, albeit for different reasons set out in our concurring opinions below, that Eleventh Circuit precedent—including the court's recent decision in *Quinlan v. Sec'y of Labor*, 812 F.3d 832 (11th Cir. 2016)—does not require a different outcome on this issue. *See Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096 n.4 (No. 10-0359, 2012) (following Commission precedent where not precluded by circuit precedent); *compare Brooks Well Serv., Inc.*, 20 BNA OSHC 1286, 1292 (No. 99-0894, 2003) ("When the law of the circuit to which a case would likely be appealed differs from the

[4] The D.C. Circuit, the only other circuit to which this case could be appealed, has not specifically addressed this issue.

Commission's case law, we apply the law of that circuit . . . ."). Accordingly, we conclude that the Secretary has established knowledge and affirm the citation.[5]

**ORDER**

We affirm Serious Citation 1, Item 1, and assess a penalty of $4,900.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: September 29, 2016

[5] We find no reason to disturb the judge's serious characterization of the violation or the $4,900 assessed penalty, neither of which are challenged by the parties. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming characterization and penalty where neither was in dispute).

ATTWOOD, Chairman, concurring:

The issue before the Commission in this case is whether, as Empire claims, the Eleventh Circuit's *ComTran* decision requires a different result than that reached by the judge on the issue of knowledge. Specifically, Empire claims that the court's holding in *ComTran*—requiring proof of foreseeability when the Secretary attempts to impute a supervisor's knowledge of his own misconduct—applies not only to a supervisor's knowledge of his own misconduct, but also to a supervisor's knowledge of a subordinate's misconduct if the supervisor participated in the same misconduct. I find that the Eleventh Circuit's recent decision in *Quinlan v. Sec'y of Labor*, 812 F.3d 832 (11th Cir. 2016), addressed and rejected this very argument.

In *Quinlan*, the Eleventh Circuit stated that the case presented "an issue of first impression . . . left open by our decision in [*ComTran*]: Is it appropriate to impute a supervisor's knowledge *of a subordinate employee's* violative conduct to his employer under the [Occupational Safety and Health] Act *when the supervisor himself is simultaneously involved in the violative conduct*?" *Id.* at 834-35. Just as in this case, in *Quinlan* a foreman and a subordinate employee were working together without fall protection. The court held that the Secretary met his burden of showing employer knowledge of the subordinate's failure to wear fall protection based on the foreman's knowledge of the subordinate's violative conduct. *Id.* at 839-42. Specifically, the court concluded that "the instant situation is more like the 'ordinary case' than like the exceptional case addressed in *ComTran*." *Id.* at 842. As such, the court found "little or no difference between this case and the classic case in 'which everyone agrees [knowledge] is imputable to the employer.' " *Id.* (quoting *ComTran*, 722 F.3d at 1317).

As the Eleventh Circuit has now made clear that *ComTran* does not cover the factual scenario before us in the instant matter, the judge correctly relied on Commission precedent to find the Secretary established that the foreman's knowledge of the cited condition is properly imputed to Empire. Accordingly, I agree to affirm the citation.

/s/
Cynthia L. Attwood
Chairman

Dated: September 29, 2016

MACDOUGALL, Commissioner, concurring:

The issue before the Commission in this case involves under what circumstances a supervisor's knowledge can be imputed, absent evidence of foreseeability, in a situation where the supervisor's misconduct creates a violative condition, and in doing so he puts his subordinate(s) in concurrent violation of a standard. Empire sought review of the judge's decision contending that she erred in her interpretation of the Eleventh Circuit's decision in *ComTran Group., Inc. v. U.S. Department of Labor*, 722 F.3d 1304 (11th Cir. 2013), on this issue.[1] As I find the facts in this case distinguishable from Eleventh Circuit precedent, I do not interpret the court's precedent as precluding imputation in this case such that the citation alleging a violation of 29 C.F.R. § 1926.453(b)(2)(v) must be vacated. Thus, I concur in the decision to affirm the citation.

**Discussion**

Under Commission precedent, the Secretary can establish the knowledge element of his burden of proof by imputing a supervisor's knowledge of the violative condition, including knowledge of his or her own misconduct, to the employer.[2] *See, e.g., Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012) (noting that under Commission precedent, a supervisor's knowledge of his own misconduct is imputed to the employer), *aff'd*, *Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x 386 (5th Cir. 2013) (unpublished); *Dover Elevator*

[1] In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted).

[2] While I might be inclined to revisit the Commission's precedent given that a majority of the circuits have held that a supervisor's knowledge of his or her own misconduct is not automatically imputed absent proof from the Secretary that the supervisor's misconduct was foreseeable, I am not presented with that opportunity here. *See Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350 (3d Cir. 1984); *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396 (4th Circ. 1979); *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006); *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.3d 155 (10th Cir. 1980); *ComTran Grp., Inc. v. DOL,* 722 F.3d 1304 (11th Cir. 2013) (all decisions requiring that the Secretary meet his prima facie burden of putting forth evidence of knowledge independent of the supervisor's misconduct). *See also See Joel Yandell*, 18 BNA OSHC 1623, 1626 (No. 94-3080, 1999) ("While the Commission normally considers itself bound to follow its own precedent, it has not hesitated to overrule that precedent when further deliberations have led it to conclude that an earlier case was wrongly decided . . . ." (citation omitted)).

*Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (stating that a supervisor's knowledge of a violative condition is imputed to the employer). However, in *ComTran*, the Eleventh Circuit held "the Secretary does not carry [his] burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct." *ComTran*, 722 F.3d at 1316. The *ComTran* court did, however, "draw a distinction between a supervisor's knowledge of a subordinate's misconduct (*which everyone agrees is imputable to the employer*) and knowledge of his own misconduct (which the clear majority of circuits have held is not)." *Id.* at 1316-17 (emphasis added).

***The Eleventh Circuit's Decision in <u>ComTran</u>***

In 2010, ComTran, a communications utilities company, was contracted to relocate some existing Department of Transportation utilities that ran along a road in Lawrenceville, Georgia. On the first day, ComTran's supervisor used an excavator to dig a trench that was approximately four feet deep. The "spoil pile" was placed at least two feet away from the edge of the trench, and the supervisor erected a silt fence between the pile and the trench. On the second day, the supervisor entered the trench and began digging around to locate the utilities conduit, but he was unsuccessful. At some point, ComTran's supervisor took down the silt fence to "dig back" to locate the utilities. By the time the OSHA compliance officer arrived at the site, the trench was no longer compliant—it was six feet deep with a five-foot spoil pile at the edge of the trench, creating an eleven-foot wall of earth that was not sloped, benched, or otherwise properly protected from a cave-in hazard. Only the supervisor was exposed to the hazard. The Secretary issued ComTran two citations for the supervisor's failure to protect against a potential cave-in.

After reviewing similar decisions out of the Third, Fourth, Fifth, Sixth, and Tenth Circuits,[3] the court held that " 'it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate' " because he acts on the employer's behalf as its agent, but where the Secretary seeks to establish an employer's knowledge based on a supervisor's knowledge of his own misconduct, he "must do more than merely point to the misconduct itself." *ComTran,* 722 F.3d at 1317-18 (quoting *Mountain States Tel. & Tel. Co. v. OSHRC,* 623 F.2d 155, 158 (10th Cir. 1980)). According to the *ComTran*

[3] As noted above, the Third, Fourth, Fifth, and Tenth Circuits have all issued decisions requiring a similar showing when supervisory misconduct is alleged as the basis for proving knowledge. *See supra* fn. 2.

court, in such situations the employer is left unaware of the supervisor's misconduct so it "would be fundamentally unfair" to impute the supervisor's knowledge—who "acts as the 'eyes and ears' of the absent employer"—unless the Secretary met his prima facie burden by putting forth evidence independent of the misconduct. *Id*. at 1317. The court observed that the employer is, figuratively speaking, "blind and deaf" when the misconduct is the supervisor's own. *Id*. Therefore, the court ruled, "[t]o meet [his] prima facie burden, [the Secretary] must put forth evidence independent of the misconduct," such as "evidence of lax safety standards." *Id*. at 1318.

Thus, the *ComTran* court held that, absent evidence of foreseeability, it is not fair to impute a supervisor's knowledge of his own misconduct in a situation where the employer's supervisor created the hazard. However, the *ComTran* decision left open whether a supervisor's knowledge can be imputed, absent evidence of foreseeability, in a situation where the supervisor's misconduct not only creates the hazard, but in doing so he puts his subordinate(s) in concurrent violation of a standard.

We are faced with that exact situation in the case before us. Empire argues that the court's decision in *ComTran* does not hinge upon whether other employees were also engaged in the violative conduct, and that the rationale and policy considerations upon which the *ComTran* court based its decision equally apply to the facts of this case. According to Empire, when a supervisor creates and participates in the violative conduct concurrently with subordinates—just as when the supervisor engages in the violative conduct alone—he can no longer be the eyes and ears of the company. Empire argues that imputing the supervisor's knowledge in this situation would be as unfair as the one presented in *ComTran*—in other words, Empire was equally blind and deaf as to what occurred in the aerial lift when its foreman rode in the aerial lift without fall protection and exposed his subordinates to the hazardous condition he himself created, as the company would have been had only the foreman been in the lift. Thus, Empire contends, imputing its foreman's knowledge without evidence of foreseeability—as the *ComTran* decision states—results in relieving the Secretary of his burden to prove knowledge.

In contrast, the Secretary argues that *ComTran* is distinguishable. In the Secretary's opinion, the Eleventh Circuit "sought primarily to avoid the unfairness it believed would result from collapsing two elements of the Secretary's prima facie case." The Secretary contends that this is not the case here as he "seeks to establish [knowledge based on] a subordinate's

misconduct and a supervisor's knowledge of it." Further, the Secretary notes that *ComTran* does not disturb longstanding Commission precedent that, where a violation is caused by the actions of a subordinate employee, a supervisor's knowledge of the subordinate's misconduct is imputable to the employer.

***The Eleventh Circuit's Decision in Quinlan Enterprises***

Following Empire's petition for review and the completion of briefing before the Commission, the Eleventh Circuit for the first time considered in *Quinlan Enterprises v. Secretary of Labor,* 812 F.3d 832 (11th Cir. 2016), the situation where a supervisor and his subordinate simultaneously violated an OSHA standard. In *Quinlan*, the employer was contracted to perform steel erection work at a construction worksite in Albany, Georgia. The record indicates that one day during this project, the general contractor asked Quinlan's foreman to assist with angle bracing. The foreman and a subordinate simultaneously responded to the general contractor's request. While the foreman and employee were assisting the general contractor, an OSHA compliance officer inspected the worksite and observed two Quinlan employees, one of whom was Quinlan's foreman on the job, working on the edge of a 15-foot high concrete block wall without fall protection. Quinlan was cited for alleged fall protection and ladder violations. The judge affirmed these violations, concluding that *ComTran* only applied to scenarios where the supervisor acts alone and not to situations where the supervisor—like Quinlan's foreman—has knowledge of misconduct by his subordinate. Quinlan appealed the judge's decision to the Eleventh Circuit.

The Eleventh Circuit held in *Quinlan* that the general rule regarding imputation should apply—in other words, a supervisor's knowledge of a subordinate employee's violative conduct should be imputed to the employer. *Quinlan,* 812 F.3d at 841. The court reasoned that the situation in *Quinlan* was analogous to the ordinary situation, which it described as "the supervisor is on the scene looking on, sees the subordinate employee violating a safety rule, knows there is such a violation, but nonetheless allows it to continue." *Id.* In the opinion of the court, the situation in *Quinlan*—in contrast to *ComTran*—involved a supervisor and a subordinate employee who simultaneously engaged in violative misconduct, which did not present a fairness problem. *Id.* The court reasoned:

> Proof of the subordinate employee's misconduct does not by itself prove employer knowledge of such. The Secretary still bears the burden of proving employer knowledge, whether through a supervisor's actual or constructive

> knowledge of the subordinate employee's misconduct or through the employer's actual or constructive knowledge of the subordinate employee's misconduct, for example, by failure to implement an adequate safety program. Thus, the "fairness" concern which was at issue in the *ComTran* case is not present in the instant situation.

*Id.* at 841-42.

***Neither ComTran nor Quinlan Are on All Fours***

I find that the facts of this case lie between *ComTran* and *Quinlan*. Like *ComTran*, the supervisor in this case was the source of the violative condition—Empire's foreman entered the lift and transported himself and his subordinates to the roof without using fall protection. If not for the foreman's manner of operation of the lift, no violation of the cited standard would have occurred.[4] Unlike *ComTran*, two subordinate employees were involved in the violative misconduct.

Like *Quinlan*, this case involves a supervisor and subordinates who engaged in the same violative misconduct. However, Quinlan's supervisor and subordinate simultaneously engaged in the misconduct. Here, Empire's foreman did not simply observe a subordinate engaged in misconduct and decide to either overlook the violation or pitch-in and work beside the subordinate; instead, there is more—he created the violative condition to which he and his subordinates were exposed. Thus, this case does *not* present the ordinary situation described by the *Quinlan* court where the supervisor was "looking on, sees the subordinate employee violating a safety rule, knows there is such a violation, but nonetheless allows it to continue." *Id.* at 841. That Empire's foreman created the violative condition raises a fairness concern with imputing the foreman's knowledge to Empire that may be considered akin to that discussed in *ComTran*. Whether it is a supervisor acting alone or a supervisor creating a hazardous condition to which he exposes both himself and his subordinates, the supervisor has not merely overlooked the misconduct of other employees—he has in fact created it. Certainly the "eyes and ears" of an employer are greatly impaired whenever its supervisor created the violative condition.

[4] In *Salah & Pecci Construction Co., Inc.*, 6 BNA OSHC 1688, 1689 (No. 15769, 1978), the Commission has made clear that "working," as it applies to the cited standard, § 1926.453(b)(2)(v), "includes the act of being transported in an aerial lift to or from a work level." *See also Brand Energy Solutions, LLC*, 25 BNA OSHC 1386, 1389 (No. 09-1048, 2015) (citing *Salah* with approval).

In my view, this difference is significant and while I might find this difference dispositive to the outcome of this case, it is one that the *Quinlan* court did not contemplate. Given that there is no clear precedent in the Eleventh Circuit upon which Empire can rely to avoid imputing its foreman's knowledge to it and the Commission's precedent requires imputing the knowledge of a supervisor's own misconduct to his employer, I agree that the Secretary has established Empire had actual knowledge of its employees' violation of the cited standard. Thus, while our reasoning differs, I concur with my colleague to affirm the citation.

/s/
Heather L. MacDougall
Commissioner

Dated: September 29, 2016

United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
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| Secretary of Labor,<br>Complainant,<br>v.<br>Empire Roofing Company Southeast, LLC<br>Respondent. | OSHRC Docket No. **13-1034** |

Appearances:

Brooke D. Werner McEckron, Esquire, U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Complainant

McCord Wilson, Esquire, Rader & Campbell., Dallas, Texas
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

## DECISION AND ORDER

Empire Roofing Company Southeast, LLC, contests a one-item Citation and Notification of Penalty issued to it by the Secretary on June 5, 2013. The Secretary issued the Citation and Notification of Penalty following an inspection conducted by Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) Michael Marquez on April 9, 2013, at a worksite in Fort Lauderdale, Florida. Item 1 of the Citation alleges a serious violation of 29 C.F.R. § 1926.453(b)(2)(v), for permitting employees to work from an aerial lift without adequate fall protection. The Secretary proposed a penalty of $4,900.00 for Item 1. Empire timely contested the Citation and Notification of Penalty.

A hearing was held in this matter on December 4, 2013, in Fort Lauderdale, Florida. The parties stipulate the Commission has jurisdiction over this proceeding under § 10(c) of the Occupational Safety and Health Act of 1970 (Act) and that it is an employer covered under § 3(5) of the Act (Tr. 7). The parties filed post-hearing briefs on February 3, 2014. Empire concedes its employees were not tied off while in the aerial lift but contends they were not "working from" the lift at the time of the inspection. Empire also asserts it was unaware of the

alleged violative activity. Prior to the hearing, Empire asserted the affirmative defense of unpreventable employee misconduct. Empire withdrew this defense at the beginning of the hearing (Tr. 6-7).

For the reasons discussed below, Item 1 of the Citation is AFFIRMED and a penalty of $4,900.00 is assessed.

**Background**

On April 9, 2013, OSHA CSHO Michael Marquez received a referral from the Code Enforcement Office of the City of Fort Lauderdale regarding possible fall hazards at a worksite on West Commercial Boulevard in Fort Lauderdale, Florida (Tr. 11, 15, 17). The referral dovetailed with OSHA's Local Emphasis Program in South Florida targeting fall hazards, which are the "number one fatality in construction" in that region (Tr. 17).

CSHO Marquez drove to the referred address, which is the location of a commercial building in a strip mall (Tr. 20). The CSHO observed an aerial lift parked in the parking lot next to a work truck. Two workers were on the roof of the building. A third worker was in the basket of the aerial lift, operating the controls to transport himself to the roof of the building. He was not wearing a safety harness and was not tied off to the basket. The CSHO took several photographs of the worksite from his vehicle (Exh. C-1; Tr. 17-19).

CSHO Marquez exited his vehicle and approached the aerial lift to get the operator's attention. The operator lowered himself to the parking lot and identified himself as the Foreman for Empire at the site. The CSHO held an opening conference with the Foreman and conducted an interview with him. The Foreman informed him that he and his two-man crew were assigned to install metal sheeting on the roof of the building. The aerial lift was the means they used to transport the materials, equipment, and themselves to the roof and back (Tr. 20, 24-25).

The CSHO prepared a written statement of the interview, which the Foreman reviewed and signed (Tr. 34, 81). The CSHO did not interview the two crew members because they spoke Spanish, which the CSHO does not speak (Tr. 25). In his statement, the Foreman said "[h]e did not have a harness on because he was in a hurry and that he was not going to use the aerial lift very long and he said it was his fault" (Tr. 24). The Foreman also stated he previously had transported the two crew members to the roof "and they did not have fall protection on as well because they were not going to use it very long" (Tr. 24-25). The OSHA inspection interrupted

what was to be the Foreman's third ascent to the roof that day—he had previously taken the two crew members up individually (Tr. 69-70).

CSHO Marquez used a trench rod to measure the height of the roof and found it to be approximately 16 feet high. He estimated the aerial lift was elevated to a height of 16 to 20 feet when he first observed it. The roof of the building was enclosed by a 42-inch high parapet (Exhs. C-1h and C-1i; Tr. 26). Safety harnesses and lanyards were onsite in the work truck parked next to the aerial lift (Tr. 58, 69).

Subsequent to the OSHA inspection, the Foreman's supervisor issued a warning to the Foreman for failing to use fall protection (Tr. 82). Empire issued a written warning to at least one of the crew members for failing to use fall protection (Tr. 71-73). [1]

## The Citation

### Item 1: Alleged Serious Violation of § 1926.453(b)(2)(v)

Item 1 of the Citation alleges Empire permitted its employees to work from an aerial lift "without wearing a body belt with lanyard attached to the boom or basket."

Section 1926.453(b)(2)(v) provides:

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

### Elements of the Secretary's Burden of Proof

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

*JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

[1] The Foreman testified his supervisor issued a warning to him, but did not recall whether it was verbal or written. He stated, "[W]e get a bonus for following the safety rules and since we didn't follow the safety rules, we're not getting any bonus" (Tr. 83). One of the crew members also testified at the hearing through an interpreter. He stated he received a written warning "from the Company" and that he had signed it (Tr. 71, 73). No evidence was adduced regarding whether the second crew member received a verbal or written warning for failing to use fall protection.

*(1) Applicability of § 1926.453(b)(2)(v)*

Section 1926.450(a), the definition section of Subpart L, provides: "The criteria for aerial lifts are set out exclusively in § 1926.453." It is undisputed Empire's Foreman was operating an aerial lift at the worksite.

Empire contends § 1926.453(b)(2)(v) does not apply to the cited conditions because the standard requires employees to tie off "when working from an aerial lift." Empire argues its employees were not working from the aerial lift, but were only riding in it from the parking lot to the roof of the building. Empire states, "The only fair reading of the phrase 'when working from' is that it applies when an aerial lift is stopped in the air so that employees can perform work on a building or structure of some type" (Empire's brief, p. 9).

This very argument was made 36 years ago by the employer in *Salah & Pecci Construction Company, Inc.,* 6 BNA OSHC 1688 (No. 15769, 1978). (At that time, the subsection of the aerial lift standard cited here as § 1926.453(b)(2)(v) was found at § 1926.556(b)(2)(v). The language of that subsection is identical to that of the current § 1926.453(b)(2)(v)). In *Salah*, the Massachusetts Port Authority hired Salah & Pecci to inspect the structural condition of the Tobin Memorial Bridge in Boston, Massachusetts. Salah & Pecci used a crane to which a basket was affixed to raise employees to the structural area under inspection. An employee named John Gulla was in the basket when the crane operator began lowering the basket.

> As the operator began lowering the basket, however, one of the telescopic boom sections unexpectedly fell several feet as a result of a malfunction of an internal, unexposed section of the boom. Gulla fell from the basket to the ground and later died. At the time of the accident Gulla was wearing a safety belt and lanyard but was not tied off to the basket or boom of the crane.

*Id.*

The Commission in that case confronted the same issue now before the undersigned: "The issue in this case is whether an employee who is being lowered in an aerial lift is 'working' with the meaning of the standard at 29 C.F.R. 1926.556(b)(2)(v), and thus must wear a safety belt and lanyard tied off the boom or basket." *Id.* The ALJ found that the standard did not apply while an employee is being lifted to or lowered from the work position. The Commission reversed, holding that "working" within the meaning of the cited standard "includes the act of being transported in an aerial lift to or from a work level." *Id.* at 1689. The Commission determined this broad interpretation of "working" promotes the purpose and policy of the Act:

"We note that the standard's purpose of protecting employees from the hazard of a fall from an aerial lift would be hindered by a narrow reading of the standard." *Id.* at 1690.

In its post-hearing brief, Empire asks the undersigned to ignore *Salah,* which it refers to as "one older Review Commission case that briefly addressed this issue" (Empire's brief, p. 10). Empire argues "the *Salah* opinion is not persuasive authority" (Empire's brief, p.11). Empire is incorrect. The sole issue in *Salah* is whether an employee is "working from" an aerial lift basket when he or she is being transported in the basket, and thus must tie off to the boom or basket. *Salah* is directly on point and remains Commission precedent. The fact it that is an older case does not negate or diminish its precedential value. *Salah* has not been overruled. "Judicial decisions, however, are not spoilable like milk. They do not have an expiration date and go bad merely with passage of time." *Comtran Group, Inc. v. DOL,* 722 F.3d 1304, 1314 (11th Cir. 2013).

Based on the Commission precedent set forth in *Salah,* it is determined that an employee is "working from an aerial lift" when the employee is using the aerial lift as a means of transportation on the worksite. Section 1926.453(b)(2)(v) applies to the activity cited in the instant case.

*(2) Failure to Comply with the Terms of the Standard*

The cited standard requires that "[a] body belt must be worn and a lanyard attached to the boom or basket when working from an aerial lift." It is undisputed that the Foreman and the two crew members were not tied off to the basket or the boom when they were being transported in the aerial lift. The CSHO observed the Foreman in the basket without fall protection and photographed him in the act (Exh. C-1; Tr. 20). The Foreman admitted as much to the CSHO in his written statement and at the hearing. He also admitted that neither of the two crew members was using fall protection when he transported them in the basket of the aerial lift (Tr. 24-25, 81-82). The crew member who testified at the hearing acknowledged that neither he nor his co-workers used fall protection while in the aerial lift that day (Tr. 68-69).

The Secretary has established Empire failed to comply with the terms of § 1926.453(b)(2)(v).

*(3) Access to the Violative Condition*

It is undisputed that each of Empire's employees on the site was elevated at a height of 16 to 20 feet in the basket of the aerial lift without being tied off. The Foreman told CSHO

Marquez "that if he were to fall from the aerial lift at approximately 20 feet that he would have multiple broken bones" (Tr. 25).

The CSHO testified employees are required to tie off while in the basket because an equipment malfunction (such as the one that occurred in *Salah*) could cause them to be ejected "or traffic could also strike the piece of equipment that would cause them to bounce out" (Tr. 28). In *Jesco, Inc*., 24 BNA OSHC 1076 (No. 10-0265, 2013), a crane operator inadvertently swung the boom of the crane into an aerial lift which almost caused the lift to tip over. Here, Empire's aerial lift was parked in an open public parking lot, into which anyone could drive a vehicle (Exh. C-1). Empire had placed a single orange cone next to a portable toilet. The entrance to the parking lot was unobstructed (Tr. 22).

Empire argues the Secretary failed to establish its employees had access to a fall hazard because the basket of the aerial lift was equipped with standard guardrails. Empire states, "There is no credible evidence on the record before this court that anything more than guardrails that were in place on the lift were necessary" (Empire's brief, p. 16). Empire is essentially arguing that the Secretary did not establish that a hazard existed despite its employees' failure to tie off to the basket. This position is contrary to Commission precedent:

> Under Commission and judicial precedent . . . the Secretary bears no burden of proving that failure to comply with such a specific standard creates a hazard. E.g., *Bunge Corp. v. Secretary of Labor*, 638 F.2d 831, 834 (5th Cir.1981) ("[unless the general standard incorporates a hazard as a violative element, the proscribed condition or practice is all that the Secretary must show; hazard is presumed and is relevant only to whether the violation constitutes a 'serious' one"); *Pyramid Masonry Constr*., 16 BNA OSHC 1461, 1464, 1993 CCH OSHD ¶ 30,255, p. 41,674 (No. 91–600, 1993) (if standard presumes that hazard exists when its terms are not met, Secretary need not prove existence of hazard).

*Kaspar Electroplating Corp.,* 16 BNA OSHC 1517, 1523 (No. 90-2866, 1993).

Here, § 1926.453(b)(2)(v) requires employees to tie off "when working from an aerial lift." It presumes that a hazard exists if employees are not tied off when working from an aerial lift. The Secretary need only show employees had access to the violative condition. He has done so in this case. The employees were not tied off while in the aerial lift basket elevated to a height of 16 to 20 feet. A fall from that height would likely result in serious physical injuries, including broken bones.

*(4) Knowledge*

The Secretary must establish that the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. This case arises in the Eleventh Circuit. The Court of Appeals for the Eleventh Circuit recently issued the *Comtran* decision, which holds that where a violation is caused solely by the actions of a supervisor, the Secretary does not satisfy his burden of establishing employer knowledge by imputing the supervisor's knowledge of his or her own actions to the employer. In so holding, the 11th Circuit joined the 3rd, 4th, 5th, and 10th Circuits in holding that in order to impute the rogue conduct of a supervisor to the employer, the Secretary must present evidence that the supervisor's actions were foreseeable, for example, where the Secretary demonstrates that the employer had improper training or lax safety standards. *Comtran,* 722 F.3d at 1316, 1318.

The Circuit Court's holding does not disturb precedent holding that where a violation is caused by the actions of a subordinate employee and the supervisor knew or should have known of the violation, the supervisor's actual or constructive knowledge is imputed to the employer. *Dun-Par Engineered Form Co.,* 12 BNA OSHC 1962 (No. 82-928, 1986). A supervisor's knowledge of a subordinate's misconduct is imputable to the employer. *Comtran,* 722 F.3d at 1317.

In this case, the Foreman had actual knowledge of the violative conduct of his two crew members. Each crew member rode up in the basket of the aerial lift with him during two separate trips from the parking lot to the roof. Empire had a work rule requiring employees to tie off when in an aerial lift basket. The Foreman was aware of the rule and admitted violating it. Empire disciplined the Foreman for the violation. The Foreman admitted to the CSHO and at the hearing that he had actual knowledge of his crew's violative actions. The Foreman's actual knowledge of the crew members' failure to tie off is imputed to Empire.

The Secretary has established a violation of § 1926.453(b)(2)(v). Under § 17(k) of the Act, a serious violation exists if there is a "substantial probability that death or serious physical harm could result" from the violation. A fall from 16 to 20 feet onto the parking lot surface would likely result in serious physical harm. The violation is properly classified as serious.

**Penalty Determination**

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give

due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The record does not reflect the number of employees employed by Empire, but the CSHO testified the company received a reduction in the proposed penalty due to its small size. OSHA had not inspected Empire in the five years prior to the instant inspection (Tr. 45-46). There is no evidence of lack of good faith on Empire's part.

The gravity of the violation is moderate. Three employees were exposed to the fall hazard. Their exposure was of short duration. It is determined that the proposed penalty of $4,900.00 is appropriate for Item 1.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

## ORDER

Based upon the foregoing decision, it is hereby ORDERED that Item 1 of the Citation, alleging a serious violation of § 1926.453(b)(2)(v), is AFFIRMED and a penalty of $4,900.00 is assessed.

*/s/ Judge Sharon D. Calhoun*
JUDGE SHARON D. CALHOUN