UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ACTING SECRETARY OF LABOR, Complainant, v. SUNBELT RENTALS, INC., Respondent.	OSHRC Docket No. **20-0306**

DECISION AND ORDER

Attorneys and Law firms

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

I. INTRODUCTION

An employee of Respondent Sunbelt Rentals, Inc. (Sunbelt) was injured on December 2, 2019, when he was knocked from a ladder while trying to unjam an overhead garage door at the worksite. The United States Department of Labor, through its Occupational Safety and Health Administration (OSHA), investigated the accident and on January 27, 2020, the Secretary of Labor (Secretary) subsequently issued Sunbelt a three-item citation and notification of penalty under the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651-678, alleging violations of OSHA's Occupational Safety and Health Standards with proposed penalties totaling $34,698.00.[1] Item 1 alleges a violation of 29 C.F.R. §1910.135(a) for Sunbelt's failure to ensure

[1] On March 11, 2023, Julie A. Su became the Acting Secretary of Labor and was automatically substituted as a party pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. For ease of reference, she will be referred to as the Secretary herein. The Secretary of Labor has assigned responsibility for enforcement of

employees wore proper Personal Protective Equipment (PPE), relevant here, head protection. Items and 2 and 3 allege violations of 29 C.F.R. §1910.147, the Control of Hazardous Energy (lockout/tagout) (LOTO) standard, for Sunbelt's alleged failure to have a LOTO policy and alleged failure to train its employees on the recognition and control of hazardous energy. After Sunbelt timely contested the citation, the Secretary of Labor (Secretary) filed a complaint with the Commission (court) seeking an order affirming the citation and proposed penalty. Sunbelt answered contesting the citation and raising the unpreventable employee misconduct defense.[2] A bench trial was subsequently held.

Based upon the record, the court concludes it has jurisdiction over the parties and subject matter in this case. (*See* Pretrial Order, Attach. C ¶ 1; *see also* Compl. ¶¶ II, III; Answer ¶¶ II, III). Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 661(j) of the Act. 29 U.S.C. § 661(j).[3] For the reasons indicated *infra*, the court concludes the Secretary has satisfied all the elements of her *prima facie* case and rejects Sunbelt's unpreventable employee misconduct defense. Therefore, the court affirms Citation 1, Items 1, 2, and 3 and assesses a penalty of $10,409 respectively for each item.

II. BACKGROUND

Sunbelt is one of the nation's leading full-service equipment rental companies. (Ex. R-60 at 6). The accident giving rise to OSHA's inspection and subsequent citation occurred at Sunbelt's facility located in Brook Park, Ohio (the "worksite"), which was part of Sunbelt's Climate Control Division. Sunbelt's employees working at that location were HVAC technicians. (Tr. 5:10-19; 284:6-12). On that day, HVAC Technician [Redacted] discovered that an overhead garage door at the worksite was stuck on an overhead beam. (Tr. 69:23-70:16, 71:21-72:8). Sunbelt did not own

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the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order No. 1–2012, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

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

[3] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

the worksite and rented the building and land at the worksite from a landlord and the worksite, including the overhead garage door, was owned by the landlord. (Tr. 752:18-15). The regular job duties of Sunbelt's HVAC technicians are to clean, repair, deliver, and pick up company-owned equipment, such as temporary heating and air conditioning. Technicians are not expected to work on equipment apart from these company owned assets. (Tr. 130:13-22, 352:5-17, 392:14-25, 752:10-17). Sunbelt does not rent overhead garage doors to its customers and HVAC technicians' job duties do not include working on overhead garage doors. (Tr. 285:6-9, 508:4-18,130:13-22, 352:5-17, 751:7-21).

[Redacted] knew that repairing the garage door was not part of the Sunbelt employees' responsibilities. (Tr. 73:14-21). While [Redacted] was an authorized person at Sunbelt for lockout/tagout (LOTO) purposes, [Redacted] had never performed lockout/tagout on a garage door because it was not equipment that Sunbelt technicians are assigned to work on. (Tr. 133:16-23). Instead, Sunbelt routinely contracts out building and door repairs to third-party vendors. (Tr. 755:12-18). After noticing that the garage door was jammed open, [Redacted] called the landlord to notify him that the door needed to be repaired. (Tr. 73:5-13). The landlord told [Redacted] he would send a third-party vendor to repair the garage door who would arrive at the worksite within the hour. (Tr. 73:5-74:1).

Gilberto Torres was the Profit Center Manager (PCM) of the worksite. [4] (Tr. 74:5-15). As the PCM, Torres had primary management responsibility for the worksite. Torres's duties included safety, operations, and sales. (Tr. 746:11-25). In addition to Torres and [Redacted], Sunbelt HVAC Technicians, Lloyd Gilmore, and Antone Medley were present at the worksite on the date of the accident. (Tr. 74:2-5, 352:1-4).

While the garage door remained open, [Redacted], Gilmore, and Medley proceeded to unload a vehicle pursuant to their normal job duties until Torres called the team together for their daily huddle. (Tr. 74:16-19). At that meeting, Torres was informed that the garage door was jammed, and that the landlord had already been contacted and that a third-party vendor was expected to arrive within the hour to repair the garage door. (Tr. 74:22-25). Nonetheless, Torres instructed [Redacted], Gilmore, and Medley to obtain a ladder for one of the employees to get the garage door down. (Tr. 75:9-13). Gilmore and Medley set up a 10-foot ladder and Torres instructed

[4] Each location was called a Profit Center (PC) designated by a number. The workplace at issue here was PC-228, which was managed by Torres.

[Redacted] to climb the ladder to get the garage door down. (Tr. 75:9-13, 78:1-2, 97:3). [Redacted] attempted to exercise his stop-work authority by suggesting a "time-out," because he felt that the work was unsafe. (Tr. 75:17-19, 142:1-5, 149:21-25). However, Torres threatened [Redacted] with a write up or termination for insubordination if [Redacted] refused to climb the ladder and attempt to get the garage door down. (Tr. 75:14-16, 77:19-22). Torres handed [Redacted] a 3-foot piece of metal rebar to pry the door free. (Tr. 77:23-25, 94:6-9).

[Redacted] proceeded as instructed by Torres and climbed the 10-foot ladder. (Tr. 77:23-25, 96:8-11, 96:25-97:3). The ladder was positioned such that it stood perpendicular to the garage door with a part of it outside the threshold of the garage while the other half was inside the garage. (Tr. 86:20-25, 87:4-17; Ex. C-82). [Redacted] climbed the ladder, facing the inside of the building and, while on the ladder, he was partially outside the building. (Tr. 87:11-16, 97:12-16, 137:11-16). [Redacted] turned his upper torso and head to face the garage door and the outside of the building once he was up on the ladder. (Tr. 143:23 – 144:19, 340:2 – 15). [Redacted] used the metal rebar as leverage to unwedge the garage door. (Tr. 97:20-21). [Redacted] knew that the garage door would move once he successfully unwedged the garage door; he just was not sure exactly how far the door would travel. (Tr. 142:24-143:3). At the time that the garage door moved downward, Medley was on one side of the ladder holding the ladder steady. (Tr. 30:10-11, 96:19-22).

None of the employees present at the scene locked out the gravitational or electrical energy to the garage door. Nor was any employee wearing a hard hat. When [Redacted] successfully unjammed the door, it came down and hit his upper back causing him to fall backwards off the ladder towards the outside of the building. (Tr. 97:22-25, 138:11-22). [Redacted] landed on his left side, resulting in serious injuries, including a broken pelvis. (Tr. 98:2-4, 20, 99:18-100:13, 139:3-6).

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). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety & Health Review Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 147 (1991) (*quoting* 29 U.S.C. § 651(b)). 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 standards at issue in this case were promulgated.[5]

The "Commission is responsible for carrying out adjudicatory functions" under the Act. *CF&I*, 499 U.S. at 144. Thus, "[t]he Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (*per curiam*). Therefore, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I*, 499 U.S. at 151.

To establish a violation of the Act in the Sixth Circuit where this case arose, [6] "the Secretary must show by a preponderance of the evidence that (1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence." *Aerospace Testing All. v. Occupational Safety & Health Review Comm'n*, 371 F. App'x 568, 571 (6th Cir. 2010) (unpublished) (citation omitted).

Alleged Violations

The Secretary alleges in Item 1 Sunbelt violated § 1910.135(a)(1) by failing to ensure "each affected employee wear a protective helmet when working in areas where there is a potential for injury to the head from falling object[.]" (Compl. Ex. A). More specifically, the Secretary alleges "during the repair, maintenance, and or trouble shooting of a 14-foot overhead garage door," Sunbelt "did not ensure employees working directly under the employee on the 10-foot fiberglass

[5] As indicated *supra*, the Secretary delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health and the Assistant Secretary promulgated the Occupational Safety and Health Standards at issue.

[6] The employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally 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). Here, the alleged violations occurred in Ohio, which is in the Sixth Circuit and Sunbelt's principal place of business is in South Carolina, which is in the Fourth Circuit. The court applies the precedent of the Sixth Circuit in deciding the case where it is highly probable that the case will be appealed.

ladder were protected from possible danger of head injury from impact, or from falling or flying objects, falling debris from working surfaces of heights approximately 14 feet." (*Ibid.*) The cited standard is a general PPE standard respecting head protection, and mandates that "[t]he employer shall ensure that each affected employee wears a protective helmet when working in areas where there is a potential for injury to the head from falling objects." 29 C.F.R. § 1910.135(a)(1).

The Secretary alleges in Item 2 Sunbelt violated § 1910.147(c)(4)(i) of the LOTO standard by failing to ensure procedures were "developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section[.]" (Compl. Ex. A.) More specifically, the Secretary alleges Sunbelt "did not ensure energy control procedures were utilized when an employee performed service and or repair operations (trouble shooting) on a 14 foot overhead mechanical garage door." (*Ibid.*) The cited provision of the standard mandates that "[p]rocedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section." 29 CFR § 1910.147(c)(4)(i).

The Secretary alleges in Item 3 Sunbelt violated § 1910.147(c)(7)(i)(A) of the LOTO standard by failing to ensure authorized employee(s) "receive[d] training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolat[ion.]" (Compl. Ex. A). More specifically, the Secretary alleges Sunbelt "did not ensure a HVAC Technician who performed service/trouble shooting of a 14-foot mechanical garage door, including, but not limited to freeing the garage door from a closing catch point via prying it free with a piece of rebar, was trained in the methods and means necessary for energy isolation and control of the mechanical garage door." (*Ibid.*) The cited provision of the LOTO standard mandates that "[e]ach authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control." 29 CFR § 1910.147(c)(7)(i)(A).

(1) Whether the Cited Standards Apply to the Facts

"Protective equipment . . . shall be provided, used, and maintained . . . wherever it is necessary by reason of hazards of processes or environment . . . encountered in a manner capable of causing injury or impairment in the function of any part of the body through … physical contact." 29 CFR § 1910.132(a). And as indicated *supra*, § 1910.135 applies when affected

employee are "working in areas where there is a potential for injury to the head from falling objects." 29 C.F.R. § 1910.135(a)(1). It is undisputed that Medley stood below [Redacted] and held the ladder steady while [Redacted] was standing above him on the ladder attempting to pry the door free from the overhead beam using a 3-foot piece of metal rebar. The court concludes there was a potential for injury to Medley's head from the rebar if it was dropped from above and from the garage door if it fell. Therefore, the Secretary has established § 1910.135 applies to the facts in Item 1.

As to Items 2 and 3, the LOTO standard "covers the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy, could harm employees." 29 C.F.R. §1910.147(a)(1)(i). Although the Act does not define "machine" or "equipment," Sunbelt does not dispute or address this issue in its pre or post trial briefs. The Secretary asserts the "overhead garage door such as the one at issue in this case falls into either category." (Sec'y's Br. 32.). The court agrees with the Secretary.

Merriam-Webster defines a "machine" as including: "(a): a mechanically, electrically, or electronically operated device for performing a task . . . (b)(1): an assemblage . . . of parts that transmit forces, motion, and energy one to another in a predetermined manner. ..." Merriam-Webster, https://www.merriam-webster.com/dictionary/machine (last visited July 10, 2023). The Secretary argues, and the court agrees, "[t]he overhead garage door at issue here was a mechanically and electrically operated device for performing the task of allowing Sunbelt employees and equipment to enter and exit the facility." (Sec'y's Br. 33). The garage door was also an assemblage of parts, "in that it was comprised of the door, the tracks the door rode in, the electronic motor connected to the door, the electronic controls, and the manual pull chain." (*Id.*)

Merriam-Webster defines "equipment," among other things, as "the set of articles or physical resources serving to equip a person or thing: such as (1): the implements used in an operation or activity: apparatus. ..." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/equipment (last visited July 10, 2023). Merriam-Webster further defines "implement" to mean "a device used in the performance of a task." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/implement (last visited July 10, 2023). The Secretary argues, and the court agrees, the overhead garage door at issue here is also "equipment" because "it is an implement, or device, used in an operation or activity, i.e., it is used to allow entry into and exit out of Sunbelt's facility." (Sec'y's Br. 33). Further, under the LOTO standard, service

and/or maintenance includes activities such as the "*unjamming* of machines or equipment . . . where the employee may be exposed to the unexpected energization or start up of the equipment or release of hazardous energy. 29 C.F.R. § 1910.147(b) (emphasis added). "Indeed, in promulgating the final rule, OSHA not only repeatedly cites 'unjamming' work as one of the activities covered by the standard, *see* 54 Fed.Reg. at 36,646, 36,647, 36,648, 36,652, 36,661 & 36,688, but in fact lists 'unjamming object(s) from equipment' as statistically the most common source of the workplace injuries that the standard seeks to prevent, *see id.* at Tables III & XII." *Otis Elevator Co. v. Sec'y of Labor*, 762 F.3d 116, 123 (D.C. Cir. 2014). The court concludes the garage door is a machine or equipment within the meaning of the LOTO standard.

Nonetheless, the Sixth Circuit has held that "[b]y its terms, the lockout standard's scope provision limits the applicability of the regulation to machines that could cause injury if they were to start up unexpectedly." *Reich v. Gen. Motors Corp.*, 89 F.3d 313, 315 (6th Cir. 1996). In *Reich*, the Sixth Circuit held "the plain language of the lockout standard unambiguously renders the rule inapplicable where an employee is alerted or warned that the machine being serviced is about to activate." *Id.* at 315. Here, Sunbelt argues the "whole purpose and object of [Redacted]'s actions was to get the garage door to move past the obstruction on the header beam – and that's exactly what happened[,]" and therefore, "the energization of the garage door was not "unexpected" as contemplated by the standard." (Resp't's Br. 27-28). The court does not agree with Sunbelt.

In *Reich*, the machines under repair were specifically designed *not* to start up until an eight to twelve step process was completed, and "audible or visual signals . . . alerted servicing employees that the machines were about to start up." *Reich*, 89 F.3d at 314–315. "Here, by contrast, the only notice [[Redacted]] had that the [garage door] would start moving was the movement itself." *Otis*, 762 F.3d at 122. Thus, as the Secretary argues, and the court agrees, "the LOTO standard still applies because the employees did not *know when* exactly the energy would be released." (Sec'y's Br. 30) (emphasis in original). The court concludes "what is critical to the standard's application in this case is that [[Redacted]] did not know *when* that moment would arrive." *Otis*, at 122. (emphasis in original). Thus, the court concludes the movement of the door was "unexpected" within the meaning of the LOTO Standard, and therefore, the Secretary has established the cited provisions apply to the facts in Items 2 and 3.

(2) Whether the Requirements of the Standards Were Met

As to Item 1, there is no dispute that Sunbelt was aware of the requirements of the standard. Sunbelt's Safety Manual included a PPE policy that explicitly states, "All employees are required to wear an approved hard hat…whenever there is an identified and significant risk of head injury to employees which could be eliminated or reduced by use of a hard hat." (Ex. R-15, p. 2). There is also no dispute that Sunbelt failed to comply with those requirements as it relates to this case. Medley was not wearing a protective helmet while he stood below [Redacted] and held the ladder while [Redacted] used a metal rebar to pry the door free. Therefore, the court concludes the Secretary has established the requirements of the cited standard were not met in Item 1.

As to Item 2, there is no dispute Sunbelt did not ensure energy control procedures were utilized when [Redacted] performed service and or repair operations on the overhead mechanical garage door. The court concludes the Secretary has established the requirements of the cited standard were not met in Item 2. As to Item 3, there is no dispute Sunbelt did not ensure [Redacted] was trained in the methods and means necessary for energy isolation and control of the mechanical garage door. The court concludes the Secretary has established the requirements of the cited standard were not met in Item 3.

(3) Whether Employees had Access to the Hazardous Conditions

As to Item 1, Sunbelt argues "the Secretary has failed to prove either actual exposure or that exposure to potential for head injury from falling objects was reasonably predictable." (Resp't's Br. 20). The court does not agree. The record evidence clearly demonstrates that Medley lacked a hard hat when standing below [Redacted] while [Redacted] used a metal rebar to pry the garage door free. Therefore, Medley was exposed to the danger of a head injury.

As to Items 2 and 3, [Redacted] was knocked off the ladder and received significant injuries resulting from the start-up or release of stored energy from the garage door. And "the Secretary need not show that exposure was 'reasonably predictable' where there is actual exposure." *George J. Igel & Co. v. Occupational Safety & Health Rev. Comm'n*, 50 F. App'x 707, 713 (6th Cir. 2002) (unpublished). The court concludes the Secretary has established exposure to the hazardous conditions cited in Items 1, 2, and 3.

(4) Knowledge

"The fourth and final condition for a prima facie violation of the Act requires that the employer knew of the hazardous condition or could have known through the exercise of reasonable

diligence." *Mountain States Contractors, LLC v. Perez*, 825 F.3d 274, 283 (6th Cir. 2016). The Fourth, Sixth, and D.C. Circuits have all held the Secretary may prove knowledge by imputing a supervisor's actual or constructive knowledge of the violations. *See, e.g.*, *New River Elec. Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.4th 213, 220 (4th Cir. 2022); *Mountain States*, 825 F.3d at 283; *Wayne J. Griffin Elec., Inc. v. Sec'y of Lab.*, 928 F.3d 105, 109 (D.C. Cir. 2019).

As the Secretary notes, and the court agrees, "Torres, the branch manager of PC 228, had actual knowledge of the violations as he 'was right there,' 'looking up at [[Redacted]].'" (Sec'y's Br. 14) (*citing* Tr. 45:21-46:1; *see also* Tr. 96:12-18; 245:9-12). Torres was present and witnessed the hard hat and LOTO violations firsthand. Torres also ordered [Redacted] to climb the ladder and dislodge the garage door. (Tr. 28:22-25; Tr. 75:1-19; Tr. 77:15-22; Tr. 244:8-22.). Torres handed [Redacted] the rebar used to dislodge the door. (Tr. 30:12-16; Tr. 94:6-9; Tr. 248:15-19). Torres stood by and watched [Redacted] performed maintenance on the door without locking out the three sources of hazardous energy. (Tr. 96:15-18). Torres allowed Medley, who had no head protection, to stand at the base of a 10-foot ladder while [Redacted] fought to unjam a 13-foot-high garage door that had not been locked out with a 3-foot piece of metal rebar. (Tr. 30:10-12; Tr. 139:7-11; Tr. 244:23-245:2). Torres's supervisory knowledge of the hazardous conditions is imputed to Sunbelt.

Classification

A violation is a serious one "if there is a substantial probability that death or serious physical harm could result from a condition which exists . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). Here, the cited violations were properly classified as serious since it is substantially probable that being struck in the head by the metal rebar or by a garage door or being knocked off a ladder from the start-up or release of stored energy could result in death or permanent disability.

Unpreventable Employee Misconduct Defense

As the Sixth Circuit has stated, "[t]o establish employee misconduct as an affirmative defense, an employer must carry its burden of showing that due to the existence of a thorough and adequate safety program that is communicated and *enforced* as written, the conduct of its employee(s) in violating that policy was idiosyncratic and unforeseeable." *George J. Igel*, 50 F.

App'x at 714 (citation and internal quotations marks omitted) (emphasis in original). "Highly relevant in evaluating claims of unpreventable employee misconduct is the performance of supervisors and foremen." *Complete Gen. Constr. Co. v. Occupational Safety & Health Rev. Comm'n*, 2005 Fed. App. 0225N, at *2 (6th Cir. Mar. 29, 2005) (unpublished). "As this court has stated on more than one occasion, 'negligent behavior by a supervisor or foreman[,] which results in dangerous risks to employees under his or her supervision, ... raises an inference of lax enforcement and/or communication of the employer's safety policy.'" *Ibid.* (citations omitted).

Here, Sunbelt's supervisor, Torres, directed subordinate [Redacted] to engage in the misconduct. Torres also allowed subordinate Medley to stand at the base of the ladder and hold it for [Redacted] without head protection. Therefore, Sunbelt is not entitled to rely on the unpreventable employee misconduct defense since its own supervisor observed and directed the violative activity, which indicates a lax enforcement and/or communication of Sunbelt's safety policy. See *Sec'y of Lab. v. 4 State Trucks*, 22 BNA OSHC 1929, 1936 (No. 08-1125, 2009) ("A supervisor's failure to comply with a work rule, plus the employees' willingness to break the work rule in the supervisor's presence, indicate lax enforcement or communication of the work rule."). "This is the antithesis of 'unpreventable' misconduct." *United Contractors Midwest, Inc.*, 26 BNA OSHC 1049, 1056 (No. 10-2096, 2016) (view of Chairman Attwood)l see also *Stark Excavating, Inc.*, 24 BNA OSHC 2218, 2221-22 (No. 09-0004, 2014) (consolidated) (rejecting unpreventable employee misconduct defense, finding non-compliance by supervisors/competent persons responsible for worksite condition is "strong evidence" of lax enforcement), *aff'd on other grounds*, 811 F.3d 922 (7th Cir. 2016); *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001), *aff'd per curiam*, 53 F. App'x 122 (D.C. Cir. 2002) (unpublished) (same); *Manganas Painting Co.*, 21 BNA OSHC 1964, 1998 (No. 94-0588, 2007) (rejecting unpreventable employee misconduct defense, finding lack of reasonable diligence to discover or enforce work rule violations when noncompliant condition is in plain view of foreman and company owner). This is true because "it is the supervisor's duty to protect the safety of employees under his supervision." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991), *aff'd*, 978 F.2d 744 (D.C. Cir. 1992) (unpublished).

The Commission has also held that when a work rule is not broad enough to eliminate employee exposure, and where strict compliance with the rule would not have fully protected the employees, the employer cannot make out their employee misconduct defense. *See Sec'y of Labor*

v. Mosser Constr. Co., 15 BNA OSHC 1408, 1417 (No. 89-1027, 1991). Here, Sunbelt's PPE policy only requires its employees "to wear an approved hard hat . . . whenever there is *an identified and significant risk* of head injury to employees which could be eliminated or reduced by use of a hard hat." (Ex. R-15, p. 2) (emphasis added). As the Secretary argues, and the court agrees, Sunbelt cannot make out an employee misconduct defense related to Item 1 since its hard hat work rule is too narrow and its employees could comply with its work rule and still violate § 1910.135(a)(1).

Finally, the LOTO standard mandates that in developing and documenting an energy control procedure, the employer must "clearly *and specifically* outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance." 29 C.F.R. § 1910.147(c)(4)(ii) (emphasis added). As the Secretary argues, and the court agrees, Sunbelt's LOTO procedure is a general policy that fails to offer any guidance regarding LOTO procedures specific to the garage door. (*See* Ex. R-16). Therefore, Sunbelt has also failed to satisfy the "adequate safety program" element as to Items 2 and 3. Thus, the court rejects Sunbelt's unpreventable employee misconduct defense.

IV. PENALTY

Under the Act, the Secretary has the authority to propose a penalty. *See* 29 U.S.C. §§ 659(a). However, Congress vested the Court with the final "authority to assess all civil penalties provided in [the Act]," which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995). In determining an appropriate penalty, the Court is required to give "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). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (citation omitted). Gravity is the primary focus of any penalty analysis, which takes into consideration: (1) how many employees were exposed and for how long; (2) whether Sunbelt took precautions against injury; (3) the probability an accident will occur; and (4) the likelihood an injury will occur. *See, e.g., Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished).

The Secretary proposed a penalty of $11,566 respectively for each of the three items in Citation 1. The Secretary determined the gravity of the violations was moderate, assessing the

severity as "medium" due to the potential injury that could have occurred and assessing the probability as "greater" due to the number of employees in the immediate area and the work being done. The court agrees with the Secretary's determination. The Secretary did not propose a size reduction since Sunbelt "was a very large company with a vast number of employees." (Tr. 267:21-22). The court also agrees with this determination. The Secretary also did not propose a reduction based upon good faith since, during the investigation, documents were requested, and the company refused to provide them. The court agrees with the Secretary's determination. However, the Secretary did not propose an increase or reduction in the penalty related to Sunbelt's history because an injury was involved, even though Sunbelt had a compliant inspection within the last five years. The court does not agree with that determination and concludes a 10% reduction for history is appropriate. Thus, considering Sunbelt's size, the gravity of the violations, the lack of good faith, and its history, the court concludes the appropriate penalty for each item is $10,409. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Items 1, 2, and 3 are **AFFIRMED** and the court assesses a penalty of $10,409 respectively for each item.

SO ORDERED.

/s/
JOHN B. GATTO, Judge

Dated: July 24, 2023
Atlanta, GA