United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant

v.

Williams Brothers Construction Co., Inc.,
Respondent.

OSHRC Docket No.: 22-0916

Appearances:

Holly M. Pope, Esq.
Office of the Solicitor, U.S. Department of Labor, Dallas, TX
For Complainant

Steven R. McCown, Esq. & Barbi McLennan Lorenz, Esq.
Littler Mendelson, P.C., Dallas, TX
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Along Interstate 45 in Houston, Texas, at the intersection of the highway and Dixie Farm Road, Respondent, Williams Brothers Construction Co., Inc. ("Williams Brothers") operates a concrete plant known as the Dixie Farm Cement Plant ("Dixie Plant" or "Plant"). (Exhs. J-4, at 4; J-19, at 5; Tr. 27, 71-72, 105, 137). The Dixie Plant is one of approximately 30 concrete plants located throughout Texas where Williams Brothers mixes concrete for highway construction. (Exhs. J-5, at 1; J-20, at 3; Tr. 105-106, 135).

On March 17, 2022, three Williams Brothers employees, a "plant operator," a "load operator" and a "laborer" were mixing concrete at the Dixie Plant. (Exhs. J-5, at 1; J-21, at 1; Tr. 28, 51, 138). At some point in the day, the employees heard a noise coming from a "bearing" on the Plant's conveyor. (Exhs. J-5, at 1; J-20, at 1-2; J-21, at 1; Tr. 27, 49, 53, 107, 120-21, 145-46). To investigate the source of the noise, the plant operator and the two other employees traversed the Plant's sloped conveyor to get onto the platform of a caged ladder attached to the side of the

Plant's dust collector. (Exhs. J-5, at 1; J-10, at 2-5, 8-10; J-12, at 2, 3, 17-19, 21, 33; J-20, at 1-2; Tr. 32, 49, 51, 54-55). Although a portion of the sloped conveyor and the caged ladder's platform were above six feet from the ground, none of the employees used any form of fall protection while inspecting the bearing. (Exhs. J-5, at 1; J-10, at 1-6; Tr. 31-35, 150).

After the three employees had been working on the platform for approximately five minutes, a Compliance Safety and Health Officer ("CSHO") from the United States Occupational Safety and Health Administration ("OSHA") was driving by the Dixie Plant on Interstate 45 and observed the employees working on the elevated platform without any form of fall protection. (Exhs. J-5, at 1; J-10, at 1-3; Tr. 30, 32, 37-38, 51, 150). Based on his observation, the CSHO drove to the worksite and started an investigation. (Exh. J-5, at 1; Tr. 27-28).

After the CSHO arrived onsite, he spoke with the plant operator and discussed what he had seen regarding the crew's lack of fall protection on the platform. (Exh. J-5, at 1; Tr. 28, 54). The CSHO directed the other two employees to come down from the elevated platform, at which point both employees again traversed the sloped conveyor and jumped down to reach the ground instead of using a ladder. (Exh. J-10, at 3; Tr. 32, 35, 54-55). When the CSHO asked the three employees if there was a portable ladder onsite, he learned there was not. (Tr. 46, 71, 122).

The CSHO interviewed the three employees as well as took photographs of the Plant. (Exhs. J-7, J-9, J-19, J-10, J-21; Tr. 28, 31-35, 54-55). The CSHO measured the height of the platform on which he had observed the employees working and found it was approximately thirteen feet above ground level. (Exhs. J-10, at 3-6; J-19, at 3; Tr. 33-35). He found the point of the conveyor from where he had observed the two employees jump was approximately eight feet above ground level. (Exh. J-19, at 3; Tr. 35). The CSHO also interviewed a supervisor and a safety manager, who had both arrived at the Plant sometime after the CSHO had started his investigation. (Exhs. J-5, at 1-2; J-20; Tr. 28-29, 65-66, 144-45, 149-50).

Following his interviews, inspection of the worksite, and review of Williams Brothers' safety programs and materials, the CSHO concluded Williams Brothers had violated two of OSHA's construction safety standards promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.* ("the Act"). OSHA therefore issued a two-item serious Citation and Notification of Penalty ("Citation") to Williams Brothers alleging as follows:

Citation 1, Item 1 alleged a serious violation of 29 C.F.R. § 1926.501(b)(1) for the three employees working at a height above six feet without using a guardrail system, safety net system,

or personal fall arrest system as a means of fall protection.

Citation 1, Item 2 alleged a serious violation of 29 C.F.R. § 1926.1051(a) for failing to provide a stairway or ladder for the three employees working on a personnel point of access with a break of 19 inches or more.

The Citation proposed a total penalty of $22,792.

Williams Brothers filed a timely Notice of Contest thereby bringing this matter before the Occupational Safety and Health Review Commission ("Commission") and this Court. The Court held a hearing on this matter on March 28, 2023, in Galveston, Texas. The parties have filed post-hearing briefs. For the reasons laid out in detail below, the Court makes the following determinations:

Citation 1, Item 1 is **AFFIRMED** as a serious violation of 29 C.F.R. § 1926.501(b)(1) and the proposed penalty of $11,396 is assessed.

Citation 1, Item 2 is **AFFIRMED** as a serious violation of 29 C.F.R. § 1926.1051(a) and the proposed penalty of $11,396 is assessed.

JURISDICTION AND COVERAGE

The parties agree Williams Brothers timely contested the Citation. (Jt. Pre-Hr'g Statement ¶ D(3)). The parties further agree the Commission has jurisdiction over this action and Williams Brothers is a covered employer under the Act. (*Id.* at ¶¶ D(1) & E(1)). Based on these stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act, and Williams Brothers is a covered employer under § 3(5) of the Act.

BACKGROUND

Williams Brothers Construction & the Dixie Batch Cement Plant

Williams Brothers is a large employer in the highway construction industry, employing over 1,700 people, mainly in the state of Texas. (Exh. J-5, at 1; Tr. 27, 47-48, 105-06). Most of Williams Brothers' construction work consists of contracts with the Texas State Department of Transportation to construct and maintain highways in the State. (Tr. 105-06). To that end, Williams Brothers operates multiple concrete "batch plants," which are scattered throughout several counties in Texas. (Exh. J-20, at 2; Tr. 27, 105-06, 135). At these batch plants, Williams Brothers' employees produce concrete, which is later used in highway construction. (Exh. J-5, at 1; Tr. 86, 105-06, 128, 137-39). Which batch plants are active depends on the geography of a particular plant in relation to Williams Brothers' ongoing construction projects. (Tr. 116-17, 142). Employees at

an active batch plant typically operate in two shifts, a night shift and a day shift, and may operate a given plant seven days a week if necessary. (Exh. J-20, at 2; Tr. 106, 116, 162). The number of employees at a given batch plant may vary depending on the needs of the project the plant is servicing, though typically employees operate in teams of two or three. (Tr. 51, 142).

One particular batch plant, the Dixie Plant, is located off the side of a "feeder road" of Interstate 45 South, near the intersection of Dixie Farm Road in southeast Houston. (Tr. 71-72). The Dixie Plant is structured as follows: a "conveyor" slopes upward between a ground-level "scale" and one of two elevated "mixers." (Exhs. J-10, at 2-5, 8-10; J-12, at 1, 2, 21, 26, 27, 32, 36, 37; Tr. 32, 137-39). The conveyor is mobile and capable of "swinging" between the two mixers, which are approximately fifteen feet apart from each other. (Exhs. J-10, at 9; J-12, at 26, 36; Tr. 139-41, 166). The conveyor transfers "aggregate," like rock and sand, from the scale into whichever mixer the conveyor is currently feeding. (Exhs. J-10, at 2-5, 8-10; J-12, at 1, 2, 21, 26, 27, 32, 36, 37; Tr. 72, 85-86, 138-40). In turn, the mixer mixes the aggregate (and presumably other elements) to produce batches of concrete. (Exhs. J-10, at 9; J-12, at 26, 36; Tr. 72, 85-86, 139-40).

Above a certain portion of the conveyor, approximately halfway between the scale and the mixers, is a "dust collector," which "suctions the dust coming out of the mixer while it's batching a load of concrete." (Exhs. J-10, at 2, 9, 10; J-12, at 2, 3, 21, 23, 24, 26, 27, 34, 37, 38; Tr. 139, 141). On the side of the dust collector is a platform, which is approximately thirteen feet above ground level. (Exhs. J-10, at 2-5, 8-10; J-12, at 2, 3, 21, 23, 24, 26, 27, 34, 37, 38; Tr. 32-34, 37-38, 107, 140-41). This platform has a caged ladder, which runs along the side of the dust collector to its top. (Exhs. J-10, at 5, 8-10; J-12, at 2, 3, 21, 23, 26, 27, 34, 37, 38; Tr. 33, 140-41).

Also onsite is a separate trailer called the "batch control trailer," which acts as a control room for the Plant. (Exhs. J-10, at 1; J-12, at 5; Tr. 141-43). The plant operator operates the Dixie Plant from the back of this trailer by "punch[ing] buttons to make the [P]lant operate and mix the concrete." (Tr. 143).

The Dixie Plant Crew

At the time of the CSHO's inspection, March 17, 2022, Martin Barrios was a Plant Supervisor at Williams Brothers, overseeing approximately 45 employees at as many as 31 batch plants, including the Dixie Plant. (Exh. J-20, at 1; Tr. 65-66, 135). Also on that date, the Dixie Plant was being operated by three employees: a "plant operator," J. Clemente Flores, a "laborer,"

and a "load operator." (Exhs. J-5, at 1; J-6, at 2; J-8, at 2; J-10, at 1-3; Tr. 28, 137-38).

Flores as a "Leadman"

Williams Brothers did not consider Flores, as the plant operator, to be a supervisor at the Dixie Plant. (Tr. 136, 142, 144, 161-62). To this point, Flores could not hire, fire, or discipline the other two employees working at the Dixie Plant or any other Williams Brothers employee. (Tr. 143-44). Flores did not have any authority over who worked at the Dixie Plant or what shift they worked. (Tr. 144). Indeed, Barrios considered himself the sole supervisor at the batch plants he oversaw, including the Dixie Plant, and was responsible for setting the schedules for the plants, determining which plants under his supervision would be active, and deciding which employees would work at which plant. (Tr. 136, 142-44, 161-62).

Nevertheless, Flores had several duties indicative of him being a supervisor or "leadman" at the Dixie Plant. Every day, Barrios would send Flores an email containing instructions for the work to be conducted at the Plant that day. (Exh. J-17 & J-17A; Tr. 59, 75-76, 81, 118). Flores was required to relay the instructions in the daily email to the other two employees at the Plant. (Tr. 48, 59, 69, 80-82, 117-18, 143). If the other two employees had any questions about the instructions for a given day, they would direct those questions to Flores, who would decide how to proceed or whether to elevate the question to Barrios. (Tr. 48-49, 80, 107-08, 143, 161). At least one of the other two employees at the Dixie Plant considered Flores to be "[t]he boss." (Exh. J-21, at 1-2). Although Flores did not have the formal title of "leadman," Barrios considered him the "lead man of the group" at the Dixie Plant. (Tr. 123-24, 126; *see also* Exh. J-20, at 1; Tr. 59, 67, 76, 80).

Every day, before starting work, Flores would hold a safety meeting to complete a "Specific Task Educational Meeting" or "STEM" form with the other two employees at the Dixie Plant. (Exhs. J-16 & J-16A; Tr. 48-49, 69, 80-81, 118). This form contained a list of "[k]ey points" discussed to "[p]roduce [s]afely," a list of "[e]nvironmental issues discussed" at the meeting, a list of "[p]reventative [m]aintenance discussed" at the meeting, and a list of "[n]ear hits or comments from anyone attending." (Exhs. J-16 & J-16A). During this daily safety meeting, Flores would also discuss a specific safety issue designated in Barrios's daily email to Flores. (Exhs. J-17 & J-17A; Tr. 81, 118-19).

In addition to his duties to instruct the other employees and discuss safety issues with them, Flores was tasked with ordering the proper amounts of a "cement and ash" to produce concrete at

the Plant. (Tr. 143). If there was a safety issue onsite, for example if an employee was not obeying a safety rule, Flores would call Barrios to inform him of the issue. (Tr. 157). If an aerial lift was needed to work above six fleet, Flores would "make the decision and call" Barrios to request an aerial lift. (Tr. 161). Once the aerial lift arrived onsite, Flores was the sole person at the Dixie Plant certified to operate it. (Ex. J-22, at 4; Tr. 98-99, 115).

Williams Brothers' Fall Protection Policies

Fall Protection Work Rules

At the time of the CSHO's inspection Williams Brothers had a work rule in place requiring employees working at its concrete plants, like the Dixie Plant, to "[u]tilize 100% fall protection when working at heights greater than 6 [feet.]" (Exh. J-14, at 34[1]; *see also* Exhs. J-6 at 3; J-8, at 3; Tr. 59-60). This policy required employees working at heights above six feet to "tie off" using a harness as a personal fall arrest system. (Exhs. J-14, at 52; Tr. 59-60, 167-68). However, as a general matter, the batch plants operated by Williams Brothers do not contain anchor points for tying off, although sometimes employees can tie off on a part of the structure itself. (Tr. 110-11). For this reason, following a fatal accident in 2020,[2] Williams Brothers instituted an aerial lift policy to address issues with adequate fall protection at its batch plants. (Exh. J-24; Tr. 74-75, 114-15, 168-69).

Pursuant to its aerial lift policy, Williams Brothers owns approximately 60 or 70 aerial lifts, which are stored at its various worksites. (Exhs. J-20, at 2; J-25, at 4; Tr. 111-12). Under the policy, if batch plant employees intended to work at a height above six feet, the employees could attach their harnesses to an anchor point on the basket of a lift, thereby providing the employees with adequate fall protection. (Exhs. J-20, at 2-3; J-24; Tr. 60-61, 75). If an aerial lift was not present on the worksite where fall protection was needed, plant operators were instructed to contact a

[1] Each page of Exhibit J-14, Williams Brothers "Safety Program Manual," contains two page numbers, one which is part of the document itself and one added to the bottom of page for purposes of the document being made an exhibit in these proceedings. The Court's citations to this document will refer to the page numbers contained in the manual itself, as these were the numbers referenced at the hearing. (*E.g.*, Tr. 167-68).

[2] On March 5, 2020, in response to an employee's death, OSHA conducted an inspection of another Williams Brothers worksite. (Exh. J-2, at 2). This inspection resulted in the issuance of at least one citation, which originally included an alleged violation of 29 C.F.R. § 1926.501(b)(1) for failing to ensure the use of fall protection. (*Id.* at 1). Although the violations resulting from this inspection were largely settled, the alleged violation of Section 1926.501(b)(1) was at some point marked as "deleted" in OSHA's records. (*Id.*). Although an outsize portion of the hearing was dedicated to the subject of this fatality and previous citation, including the entirety of the CSHO's testimony as a witness called by Williams Brothers (Tr. 84, 173-80), neither party even mentions the issue in their post-hearing briefs. The Court therefore does not find a need to address the issue any further other than to acknowledge the previous incident led to the aerial lift policy in place at the time of the CSHO's inspection in this case. (Tr. 74-75, 168-69).

supervisor, like Barrios, to request an aerial lift (Exhs. J-20, at 2; J-24; Tr. 59-60, 74-75, 109-11, 114-15, 155, 168-69). Barrios could then contact another worksite where an aerial lift was present and have it sent to the worksite where the lift was needed. (Exhs. J-20, at 2; Tr. 109-10, 112, 155-56). Although the process of obtaining an aerial lift on a given worksite could take as long as a couple of hours, employees were instructed to not perform any work above six feet while waiting for the lift to arrive. (Exh. J-20, at 3; Tr. 112, 120, 128-29).

Training & Detection for Fall Protection

The three employees working at the Dixie Plant on the date of the CSHO's inspection were trained on and aware of Williams Brothers' rule requiring fall protection generally, and the availability of aerial lifts as a means of fall protection specifically. (Exhs. J-6, at 3; J-8, at 3; J-20, at 2-3; J-21, at 1; J-22, J-23; Tr. 60, 75, 96-97, 113-14, 121-22, 136, 152). Yet, the only method Williams Brothers utilized to ensure its employees were complying with its fall protection policies were random worksite visits conducted by supervisors like Barrios. To this end, Barrios would show up at the worksites he oversaw, including the Dixie Plant, randomly throughout the week or when otherwise needed. (Exhs. J-20, at 3; J-21, at 1; Tr. 66-67, 83-84, 97-98, 156, 162, 169-70). However, these site visits were infrequent. Sometimes they occurred at a given site only once a week and other times only two or three times a month. (Exhs. J-20, at 3; J-21, at 1; Tr. 136-37, 157, 162). Other than these random site visits by its supervisors, Williams Brothers had no other programs in place to detect fall protection violations. It conducted no audits or evaluations to determine if its supervisors or employees were following its fall protection policies. (Exhs. J-6, at 3-4; J-8, at 3-4; Tr. 88, 98-99, 109).

Enforcement of Fall Protection Policies

An employee's failure to adhere to Williams Brothers' fall protection policies resulted in mandatory termination of their employment. (Exh. J-14, at 51; Tr. 61-62, 151-52). In line with this policy, all three of the employees working at the Dixie Plant at the time of the CSHO's inspection were terminated the day after the CSHO observed their fall protection violations. (Exh. J-18, at 1-4; Tr. 61-62, 158-59). However, prior to this incident, no other employee was terminated for violating Williams Brothers' fall protection policies. (Tr. 76, 82-84, 129, 159). Williams Brothers produced no evidence of any other form of discipline imposed on employees for fall protection violations.

Events on March 17, 2022

On March 17, 2022, three Williams Brothers employees, Flores, a load operator, and a laborer, were mixing concrete at the Dixie Plant. (Tr. 27, 85-86, 106). At some point, the crew heard a noise coming from a "bearing" on the conveyor, a bearing apparently being some type of moving part involved in the operation of the Plant. (Exhs. J-5, at 1; J-6, at 2; J-8, at 2; Tr. 49, 53-54, 145). Issues with a bearing arose approximately every three or four months at the Dixie Plant. (Tr. 84). This particular bearing was seemingly within reach of the elevated platform on the side of the dust collector.[3] (Exhs. J-6, at 2; J-8, at 2; J-10, at 1 & 2; Tr. 32-33, 107, 138).

Typically, any work on the bearings, which is considered "maintenance" work, would be performed by a team of mechanics, who Barrios would call in at Flores's request. (Tr. 95-96, 111, 113). Indeed, the employees stationed at the Plant did not have the requisite tools to perform "maintenance" work on the Plant's bearings. (Exh. J-21, at 1; Tr. 120-21, 123). However, on the day in question, Flores did at least intend to investigate the source of the noise with the other two employees to determine if a maintenance crew was necessary. (Exhs. J-5, at 1; J-6, at 2; J-8, at 2; Tr. 121, 124, 145-46). Before doing so, Flores called Barrios to report the noise coming from the bearing and inform him of his intent to have the crew inspect it. (Exhs. J-6, at 3; J-8, at 3; Tr. 107-08, 121, 145-46). Barrios did not inquire as to the location of the bearing or how the crew intended to reach it if it were higher than six feet but simply responded "Okay. Go ahead and do it and be careful. Be safe." (Tr. 108; *see also* Tr. 49).

Despite knowing aerial lifts were available, Flores did not call for an aerial lift to be sent to the Dixie Plant to investigate the noise coming from the bearing. (Exh. J-21, at 3; Tr. 171-72). Nor did the crew attempt to find a ladder to reach the platform on the side of the dust collector. Indeed, there were no portable ladders at the Dixie Plant worksite on the day at issue. (Exhs. J-5, at 1; Tr. 46, 55, 122, 167, 171-72). Rather, Flores directed the other two employees to climb up the conveyor, which started at a height of approximately eight feet from the ground, to investigate the source of the noise from the platform, which was approximately thirteen feet above the ground.

[3] Although discussed several times at the hearing, the "bearing" the crew was inspecting was never pointed out in any of the photographs in evidence. According to Barrios, the Dixie Plant has several bearings at various heights on different parts of the Plant's machinery. (Tr. 146-47). The bearings have a cover which needs to be removed to address any mechanical issues. (Tr. 34, 124). In the CSHO's photograph of the laborer and load operator working on the elevated platform, the Court discerns no part of the Plant near the employees the Court recognizes as the bearing referred to at the hearing. (Exh. J-10, at 2). Because Flores had left the platform to obtain additional tools to inspect the bearing, it is possible the cover to the bearing had yet to be removed at the time this photograph was taken. (Tr. 33-34, 51, 54).

(Exhs. J-6, at 3; J-8, at 3; J-10, at 2-6; J-19, at 3; J-20, at 1-2; J-21, at 1-2; Tr. 30, 34-35, 49, 107-08, 145).

Neither the conveyor nor the platform had guardrails, there was no safety net system in place at the Dixie Plant, and no one from the crew was equipped with a personal fall arrest system while climbing up to or working on the platform. (Exhs. J-5, at 1; J-6, at 2-3; J-8, at 2-3; J-10, at 2-5, 9, 10; J-12, at 2, 3, 21, 23, 24, 26, 27, 34, 37, 38; Tr. 32-34, 107, 137-38, 140-41). In other words, no one from the crew utilized any sort of fall protection while climbing up to or working from the thirteen-foot-high platform.

OSHA's Inspection & Citation

The Dixie Plant crew worked for approximately five minutes on the platform. (Exhs. J-6, at 2; J-8, at 2; Tr. 30, 37-38). At that point, CSHO Rodrick Foreman was driving on Highway 45 and observed the three employees working on the platform without any apparent form of fall protection. (Exhs. J-5, at 1; J-6, at 2; J-8, at 2; Tr. 51). He therefore drove to the Dixie Plant worksite to investigate. (Exhs. J-5, at 1; J-6, at 2; J-7, at 1; J-8, at 2; J-9, at 1; J-10, at 1; Tr. 28, 51).

Before the CSHO reached the worksite, Flores had climbed down from the platform to retrieve more tools to inspect the bearing. (Exhs. J-5, at 1; J-6, at 3; J-8, at 3; Tr. 51, 54). The CSHO spoke briefly with Flores before approaching the Plant to take additional photographs. (Exhs. J-5, at 1; J-6, at 3; J-7, at 2; J-8, at 3; J-9, at 2; J-10, at 2; Tr. 28, 54). As he was taking the photographs, the CSHO asked the two employees still on the platform to come down so he could speak with them. (Tr. 54-55). Rather than using a ladder to climb down from the platform, as the CSHO had expected, the two employees walked the length of the conveyor and jumped down from an approximately eight-foot-high point to reach the ground. (Exhs. J-5, at 1; J-6, at 2-3; J-8, at 2-3; J-9, at 6; J-10, at 3; Tr. 55). When the CSHO inquired if there was a ladder onsite, he learned there was not. (Exhs. J-5, at 1; Tr. 46, 55, 122, 167).

The CSHO interviewed the two employees and took additional photographs. (Exhs. J-5, at 1; J-6, at 3; J-7, at 3-5; J-8, at 3; J-9, at 3-6; J-10, at 4-10; J-21; Tr. 55). He measured the height of the platform on which he had observed the employees working and determined it was approximately thirteen feet above ground level. (Exhs. J-6, at 3; J-8, at 3; J-10, at 5-6; J-19, at 3; Tr. 30, 34-35). He also measured the height of the point of the conveyor where he had observed the two employees jump down and determined it was approximately eight feet above ground level.

(Exhs. J-6, at 3; J-8, at 3; J-19, at 3; Tr. 35).

The CSHO also spoke with Williams Brothers' safety manager, Jairo Cortes, and Barrios, who meanwhile had arrived at the Dixie Plant. (Exhs. J-5, at 2; J-6, at 3; J-8, at 3; J-20; Tr. 28-29, 65, 149). During this interview, Barrios referred to Flores as the "leadman" at the Dixie Plant. (Exh. J-20, at 1; Tr. 59, 67, 75-76, 80, 125-26). Based on this description, in conjunction with Flores's daily job duties including holding daily safety meetings and receiving and relaying instructions from Barrios to the other employees, the CSHO determined Flores was a supervisor at the Dixie Plant. (Tr. 48-51, 59, 67-69, 80).

Over the course of his investigation, from the inspection and opening conference conducted on March 17, 2022, until the closing conference conducted on June 8, 2022, the CSHO learned of Williams Brothers' requirement for the use of fall protection when working at heights above six feet and its aerial lift policy. (Exhs. J-6, at 3; J-8, at 3; J-14, at 34 & 52; J-20, at 2; J-24; Tr. 59-60, 74-75, 109-12, 114-15, 155-56, 167-69). Based on his investigation, the CSHO believed all three employees at the Dixie Plant were aware of and had been trained on these policies. (Exhs. J-6, at 3; J-8, at 3; J-20, at 2-3; J-21, at 1; J-22, J-23; Tr. 60, 75, 96-97, 113-14, 121-22, 136, 152).

Regarding Williams Brothers' discovery of fall protection violations, the CSHO learned Barrios might randomly show up at a given batch plant, including the Dixie Plant, but also learned Barrios's visits to any given plant were infrequent. (Exhs. J-20, at 3; J-21, at 1; Tr. 66-67, 83-84, 97-98, 136-37, 156-57, 162, 169-70). Furthermore, Williams Brothers had no program in place to ensure its employees were following its fall protection policies, such as audits or evaluations of its employees or supervisors. (Exhs. J-6, at 3-4; J-8, at 3-4; Tr. 88, 98-99, 109).

Regarding enforcement of its fall protection policy, the CSHO learned all three crewmembers he had observed working on the platform had been terminated for breaking Williams Brothers' fall protection policy. (Exhs. J-6, at 3; J-8, at 3; J-18, at 1-4; J-20, at 3; Tr. 61-61, 158). However, prior to this incident, no other Williams Brothers employee had been terminated or otherwise disciplined for breaking its fall protection policy. (Tr. 76, 82-84, 129, 151-52, 159).

Following his investigation, the CSHO concluded Williams Brothers had violated 29 C.F.R. § 1926.501(b)(1) for failing to ensure its three employees at the Dixie Plant had utilized an adequate fall protection system when working at a height above six feet on the elevated platform. (Exhs. J-5, at 1; J-6). Despite Williams Brothers having a fall protection policy on which the three

crewmembers had been trained and despite the crewmembers' employments being terminated for breaking this policy, the CSHO did not believe this was a case of unpreventable employee misconduct because "were no concrete steps the employer took to discover [violations of the fall protection policy], other than Mr. Barrios saying he randomly shows up to different concrete plants." (Tr. 97-98; *see also* Exhs. J-6, at 3; J-8, at 3).

The CSHO further concluded Williams Brothers had violated 29 C.F.R. § 1926.1051(a) for failing to provide a ladder or stairway to a personnel point of access with a break in elevation of 19 inches or more to reach the elevated platform on the side of the dust collector. (Exh. J-8).

Based on the CSHO's investigation, OSHA issued the two-item serious Citation to Williams Brothers.

THE CITATION

The Secretary's Burden of Proof

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atl. Battery Co., Inc., No. 90-1747, 1994 WL 682922, at *6 (O.S.H.R.C. Dec. 5, 1994).

Applicable Law

The employer or the Secretary may appeal a final decision and 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 may also appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) & (b). Here, the violation occurred in Houston, Texas in the Fifth Circuit, where Williams Brothers' principal place of business is also located. Where it is highly probable a case will 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. *Kerns Bros. Tree Serv*., No. 96-1719, 2000 WL 294514, at *4 (O.S.H.R.C., March 16, 2000). Although Williams Brothers points to Fifth Circuit precedent which differs from the Commission on the imputation of supervisor knowledge, the Court does not find that precedent affects the outcome of this case.[4]

[4] As set forth in more detail below, the Fifth Circuit's law regarding the imputation of a supervisor's knowledge of his own misconduct does differ from the Commission's law on the subject by requiring a showing of foreseeability. *W.G. Yates & Son Constr. Co.*, 459 F.3d 604, 608-09 (5th Cir. 2006) ("*Yates*"). However, in the factual scenario presented in this case, the Fifth Circuit recently clarified "ordinary principles of imputation" apply. *TNT Crane &*

The parties have not identified, and the Court has not found, any other Fifth Circuit precedent differing from the Commission's on any material issue raised in this case.

Citation 1, Item 1: Alleged Serious Violation of § 1926.501(b)(1)

The Alleged Violation Description

Citation 1, Item 1 alleges the following:

> 29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which was 6 feet (1.8m) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.
>
> a) On or about March 17, 2022, at the dixie farm cement plant, a fall protection system was not used while employees worked near an unprotected edge, exposing them to fall hazards greater than 6 feet.

The Cited Standard

29 C.F.R. § 1926.501(b)(1) provides: "Unprotected sides and edges. 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."

(1) The Applicability of the Cited Standard

Section 1926.501(b)(1) applies to all "walking/working surfaces with an unprotected side or edge which is 6 feet … or more above a lower level …." Here, there is no dispute the platform on which the CSHO observed the three Williams Brothers employees working was approximately thirteen feet above ground level, which meets the definition of a "lower level." *See* 29 C.F.R. § 1926.500(b) (defining "lower level" as "those areas or surfaces to which an employee can fall" including "ground levels"); *see also* (Exhs. J-6, at 3; J-8, at 3; J-10, at 5 & 6; J-19, at 3; Tr. 30, 34-35). Williams Brothers does not contest the platform meets the definition of a "walking/working surface," which is defined broadly as "*any* surface, whether horizontal or vertical on which an employee walks or works …." *Id.* (emphasis added).

The Court finds the standard applies.

(2) Compliance with the Standard's Terms

Williams Brothers has not disputed the CSHO's observations, corroborated by

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Rigging, Inc. v. Occupational Safety & Health Review Comm'n, 74 F.4th 347, 359 (5th Cir. 2023) ("*TNT Crane*"). Thus, the application of Fifth Circuit versus Commission law would not alter the imputation issue in this case. *See* note 5, *infra.*

photographic evidence, of the three Williams Brothers employees working on the 13-foot platform without any form of fall protection. (Exhs. J-5, at 1; J-6, at 2; J-8, at 2; J-10, at 1 & 2; Tr. 51).

The Court finds Williams Brothers failed to comply with the cited standard.

(3) Employee Access to the Violative Condition

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 n.6 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996).

Here, the CSHO's observations and photographs depict the three Williams Brothers employees' actual exposure to the fall hazard while working on the 13-foot platform without any form of fall protection. (Exhs. J-5, at 1; J-6, at 2; J-8, at 2; J-10, at 1 & 2; Tr. 51). Williams Brothers has not disputed this element of the Secretary's case.

The Court finds there was actual exposure to the hazard.

(4) Employer Knowledge

To prove the knowledge element of a violation, the Secretary must demonstrate the employer's actual knowledge or constructive knowledge of the violation. *Jacobs Field Servs., N.A.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015). In the Fifth Circuit, a supervisor's actual or constructive knowledge of a violation can be imputed to Williams Brothers "under ordinary imputation principles," where, as here, "a subordinate employee engaged in conduct that violated the standard [and the] supervisor had knowledge of the subordinate's conduct …." *TNT Crane*, 74 F.4th at 359, quoting *Angel Bros. Enters., Ltd. v. Walsh*, 18 F.4th 827, 832 (5th Cir. 2021); *see also Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Flores not only observed the employees working on the platform without fall protection but directed them to do so. (Exhs. J-6, at 3; J-8, at 3; J-20, at 1-2; J-21, at 1-2; Tr. 49, 107-08, 145). Thus, in the first instance, this element of the Secretary's case turns on whether Flores was a "supervisor" for purposes of imputing knowledge to Williams Brothers. If Flores was a supervisor, his actual knowledge of the other two employees' fall protection violations is imputed to Williams Brothers,[5] and the Court need not determine whether another supervisor, particularly Barrios,

[5] In the Fifth Circuit, a supervisor's knowledge of his own misconduct cannot be imputed to an employer absent a showing from the Secretary the supervisor's conduct was foreseeable. *Yates*, 459 F.3d at 608-09. However, recently in *TNT Crane*, issued after the parties submitted their briefs in this matter, the Fifth Circuit clarified its holding in *Yates* and held where "a subordinate employee engaged in conduct that violated the standard(s) [and] a supervisor had knowledge of the subordinate's conduct … that knowledge is imputed to the employer under ordinary imputation principles." *TNT Crane*, 74 F.4th at 359. This is the scenario presented in this case. The Court therefore rejects

acted with reasonable diligence for the purpose of imputing his constructive knowledge to Williams Brothers.[6] *See generally Danis Shook Jt. Venture XXV*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001) ("Reasonable diligence involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations."), *aff'd*, 319 F.3d 805, 811 (6th Cir. 2003).

The Secretary argues Flores was a supervisor because Williams Brothers "entrusted Mr. Flores with the responsibility to assign tasks to the two employees on site …." Sec'y's Br. 9-10. Williams Brothers contests the issue, pointing out Barrios did not consider Flores to be a supervisor and further highlighting Flores's inability to: "hire, fire or discipline employees"; "determine shift schedules or which employees would work a given shift"; or determine "which batch plants would be in operation, or what work would be performed on a given day." Resp't's Br. 12-13. Williams Brothers also highlights it paid Flores hourly and classified him as a "non-exempt" employee for purposes of federal wage and labor laws. *Id.* at 12-13. Finally, Williams Brothers argues the CSHO determined Flores was a supervisor "without applying and analyzing the above factors that determine whether an individual is truly a 'supervisor.'"[7] *Id.* at 13.

On this record, the Court finds Flores was a supervisor at the Dixie Plant for purposes of imputing his knowledge to Williams Brothers. The Commission has held it is the substance of a delegation to an employee, not formal titles, which determines whether or not the employee is a supervisor for imputing knowledge. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000); *Dover Elevator*, 16 BNA OSHC 1281, 1286 (No. 91–862, 1993). "An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a

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Williams Brothers' argument that a finding of foreseeability is necessary here. Resp't's Br. 13. *TNT Crane*, which is the Fifth Circuit's most recent case on the issue of imputation of knowledge, makes clear a finding of foreseeability is only necessary where the Secretary seeks to impute the supervisor's knowledge of his own misconduct, not the misconduct of a subordinate. *TNT Crane*, 74 F.4th at 359.

[6] Below, the Court rejects Williams Brothers' affirmative defense of unpreventable employee misconduct. The Court notes the Commission considers the "same factors in evaluating both an employer's constructive knowledge and the merits of an employer's unpreventable conduct affirmative defense." *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished). Thus, were the Court to reach the issue, Barrios's constructive knowledge would be established, largely for the same reasons Williams Brothers' affirmative defense fails.

[7] The Court notes Williams Brothers makes this argument without a single citation to a Circuit or Commission case applying the factors it has identified in its brief to determine whether an employee was a supervisor for the purpose of imputing knowledge.

supervisor for the purposes of imputing knowledge to an employer." *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-630, 1992).

Here, Flores had several designated duties indicative of him being a supervisor at the Dixie Plant. First, he had regular contact with Barrios in the form of a daily email, which contained instructions for the work to be conducted that day. Flores was charged with relaying Barrios's daily instructions to the other two crewmembers. (Exhs. J-17 & J-17A; Tr. 48, 59, 69, 75-76, 80-82, 117-18, 143). If there were questions about the work to be performed at the Dixie Plant, Flores was tasked with contacting Barrios to clarify the instructions. (Tr. 48-49, 80, 107-08, 143, 161). Flores would also contact Barrios if there were other issues with work proceeding at the Plant. The events in this case are illustrative: Leading up to the CSHO's inspection, Flores contacted Barrios regarding the sound coming from the bearing and the crew's intent to investigate the source of the noise. (Exhs. J-6, at 3; J-8, at 3; Tr. 107-08, 121, 145-46). Flores's duty to maintain regular contact with Barrios and relay his instructions to the other two employees is indicative of his status as a supervisor. *See Tampa Shipyards, Inc.*, 15 BNA OSHC at 1538 n.10 (employee was supervisor where he was "responsible to higher supervision for the progress and execution of the work"); *Mercer Well Serv.*, 5 BNA OSHC 1893, 1894 (No. 76-2337, 1977) (crew chief was supervisor for purposes of the Act where he maintained contact with designated supervisor to relay orders to crew and report problems to that supervisor).

Flores also had responsibilities regarding safety at the Dixie Plant. He was responsible for holding a daily safety meeting, during which he filled out a "STEM" form with the other employees and discussed a daily safety topic. (Exhs. J-16, 16A, 17, 17A; Tr. 48-49, 80-81, 118-19). Although Flores did not have the ability to directly discipline the other employees if they committed a safety violation, he would call Barrios to report any safety issues arising at the Plant. (Tr. 157). If an aerial lift was needed as means of fall protection, it was Flores who would "make the decision and call" Barrios to request the lift. (Tr. 161). Once it arrived onsite, Flores was the sole person at the Dixie Plant certified to operate the aerial lift. (Ex. J-22, at 4; Tr. 98-99, 115). Flores's safety obligations, although not plenary, are further indicative of his status as a supervisor at the Dixie Plant. *See Diamond Installation, Inc.*, 21 BNA OSHC 1688, 1690 (No. 02-2080, 2006) (finding a "gang foreman" to be a supervisor based, in part, on him being the sole employee responsible for a forklift key and being one of only three employees authorized to operate the forklift); *Tampa Shipyards, Inc.*, 15 BNA OSHC at 1538 (leadman was a supervisor, in part,

because he was responsible for informing other supervisors of safety problems at the worksite); *cf. TNT Crane & Rigging Co. v. Occupational Safety & Health Review Comm'n*, 821 Fed. App'x 348, 354-55 (5th Cir. 2020) (crane operator was a supervisor, in part, because he was designated as the competent person and "was responsible for making sure TNT's crew worked safely and conformed with the Act.").

Finally, at least one of the crewmembers at the Dixie Plant considered Flores to be his supervisor. In his statement to the CSHO, one of the crewmembers referred to Flores as "the boss" and indicated he was working at the direction of Flores on the date of the inspection. (Exh. J-21, at 1-2). Moreover, although Barrios testified Flores did not have the title of "lead man," he later admitted plant operators are "the lead man of the group, but we don't … give them that title."[8] (Tr. 123-24, 126). Indeed, according to Williams Brother's own safety manual, Flores carried out similar duties to those of a "leadm[a]n," including "daily safety performance," "[c]onduct[ing] pre-task safety training with employees," "monitor[ing] performance," and "correct[ing] problems." (Exh. J-14, at 5). The Court finds these factors further support the conclusion Flores was a supervisor at the Dixie Plant. *See TNT Crane & Rigging, Inc.*, 821 Fed. App'x at 354 (crane operator was a supervisor in part based on two employees testifying he was the supervisor and thus "was recognized by other employees as being in charge of this job"); *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) (finding an employee was "at least temporarily, a leadman or supervisor" where one higher supervisor considered him to be "in charge of" the other two employees onsite and another considered him to be "like the lead person" for the other two employes); *see also Tampa Shipyards, Inc.*, 15 BNA OSHC at 1538 (basing a finding of "leadermen" being supervisors based, in part, on written documentation concerning the duties of the position).

[8] The CSHO's testimony and interview notes are replete with references to Barrios telling the CSHO Flores was the "lead man" of the Dixie Plant crew. (Exh. J-20, at 1; Tr. 59, 67, 76, 80). To the extent Barrios's testimony at the hearing conflicts with the CSHO's account of what Barrios told him on the date of the inspection, the Court credits the CSHO's account over Barrios's. The CSHO's testimony never wavered with regard to Barrios telling him Flores was the "lead man" at the worksite (Tr. 59, 67, 76, 80), and his contemporaneous notes of his interview with Barrios corroborate his testimony. (Exh. J-20, at 1). Barrios, on the other hand, waffled on the subject, first testifying Flores did not have the title of "lead man" but then later admitting plant operators are considered "the lead man of the group …." (*Compare* Tr. 123-24, *with* Tr. 126). Finally, the Court notes, at another point during the hearing, Barrios referred to another employee listed in an email chain as a "lead man." (Tr. 153 ("Well in this case I didn't send [the email]. The lead man sent it."); *see also* Ex. J-17, at 4 (the email being discussed)). This leads the Court to believe the title of "lead man," while perhaps not a formal title bestowed on certain Williams Brothers' employees, was used as shorthand for certain employees with some supervisory authority. *See* J-14, at 5 (Williams Brothers' safety manual laying out the duties and responsibilities of "leadmen").

Based on the foregoing, the Court finds Flores was a supervisor at the Dixie Plant. His actual knowledge of the two other employees' fall protection violations is therefore imputed to Williams Brothers.[9] *TNT Crane*, 74 F.4th at 359; *Dover Elevator Co.*, 16 BNA OSHC at 1286.

Characterization of the Violation

The Secretary characterized the violation of Section 1926.501(b)(1) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result from … one or more practices …." 29 U.S.C. § 666(k). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1824 (No. 88-2572, 1992).

Here, the three Williams Brothers employees were working on the platform thirteen feet above the ground without any form of fall protection. (Exhs. J-6, at 3; J-8, at 3; J-10, at 5 & 6; J-19, at 3; Tr. 30, 34-35). The Court finds serious physical serious harm could result from a fall at this height. *See* Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672, 40,682 (Aug. 9, 1994) (to be codified as 29 C.F.R. pt. 1926) (noting the risk of fatality or injury from falling from heights of even six to ten feet). Williams Brothers has advanced no arguments on the classification of the violation.

The Court finds the violation was properly characterized as serious.

Unpreventable Employee Misconduct Defense

Williams Brothers argues its employees' violations were the result of unpreventable employee misconduct. Resp't's Br. 16-20. To establish this affirmative defense, Williams Brothers "must show that it "1) has established work rules designed to prevent the violation, 2) has adequately communicated these rules to its employees, 3) has taken steps to discover violations, and 4) has effectively enforced the rules when violations have been discovered." *S. Hens, Inc. v. Occupational Safety & Health Review Comm'n*, 930 F.3d 667, 678 (5th Cir. 2019); *see also George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1933 n.15 (No. 94-3121, 1999). Williams Brothers bears the burden of establishing each element by a preponderance of the evidence. *See Excel Modular Scaffold & Leasing Co. v. Occupational Safety & Health Review Comm'n*, 943 F.3d 748, 756 (5th Cir. 2019) (employers bear the burden of proof for affirmative defenses);

[9] As laid out in more detail in note 5, *supra*, the Court rejects Williams Brothers' statement of the law of the Fifth Circuit requiring a finding of foreseeability on the facts presented in this case. The Court therefore finds no reason to address Williams Brothers' arguments on this issue. *See* Resp't's Br. 13-14.

Marson Corp., 10 BNA OSHC 1660, 1662 (No. 78-3491, 1982) (burden of proof for unpreventable employee misconduct defense lies with the employer).

Williams Brothers asserts its affirmative defense to the Citation "in full." *Id.* at 16. However, the Court concludes the defense has only been properly advanced for the fall protection violation alleged in Item 1 of the Citation, not the violation for failure to provide a ladder alleged in Item 2. No evidence was adduced at the hearing regarding any work rule or training on the use of ladders, nor was any evidence adduced regarding discovery or enforcement of violations related to the use of ladders. Williams Brothers' briefing of its defense, particularly on the first two elements of having an adequate work rule and communicating it to employees, focuses on its fall protection policies, not on any policies related to the use of ladders. *See, e.g.*, Resp't's Br. 3 ("Respondent's Safety Manual, which contains specific provisions addressing fall protection safety; and comprehensive records of safety training specifically regarding fall protection …") (emphasis added); *id.* at 17 ("Respondent maintains a comprehensive safety manual, which demonstrates the Company's commitment to safety, including fall protection policies and procedures.") (emphasis added); *id.* ("Respondent has shown that it effectively communicated its safety policy and work rules governing fall protection, to its employees.") (emphasis added); *id.* at 18 (The CSHO "admitted … that the Company had, in fact, effectively communicated the rule to its employees, and that the employees in question were aware of the fall protection policy.") (emphasis added). As to Williams Brothers' aerial lift policy, while it might be an adequate work rule to provide fall protection to Williams Brothers' employees, it was never framed as a policy designed to comply with OSHA's regulations on the provision and use of ladders. *See* Exh. J-24. Indeed, OSHA's regulations on "Fall Protection" are in an entirely different subpart from its regulations on "Stairways and Ladders." *Compare* Subpart M of 29 C.F.R. Section 1926, *with* Subpart X of 29 C.F.R. Section 1926. Based on these considerations, the Court will analyze Williams Brothers' unpreventable employee misconduct defense only with regard to Item 1 of the Citation for the fall protection violation.[10]

[10] Were the Court to analyze the defense with regard to the alleged violation of 29 C.F.R. § 1926.1051(a), the defense would fail on the first element. The emphasis of Williams Brothers' argument regarding work rules and training is on its aerial lift policy. Resp't's Br. 17-18. As concluded below, however, provision of an aerial lift is insufficient to demonstrate compliance with 29 C.F.R. § 1926.1051(a) because it is not a "personnel hoist," as Williams Brothers has argued here. Other than pointing generally to its "comprehensive safety manual," Williams Brothers has pointed to no specific evidence in the record concerning a safety rule in place at the time of the violation designed to ensure compliance with 29 C.F.R. § 1926.1051(a) requiring the use of stairways or ladders for breaks in elevation of 19 inches or more. Where a party has failed to point to any evidence on an issue on which it bears the burden of proof,

Work Rules & Communication

The record evidence establishes Williams Brothers had a work rule requiring the use of fall protection above six feet, and a policy of providing aerial lifts to its employees for them to tie off on the basket of the lifts as a means of providing fall protection. (Exhs. J-6, at 3; J-8, at 3; J-14, at 34; J-20, at 2; J-24; Tr. 59-60, 74-75, 109-11, 114-15, 155, 168-69). The record evidence also establishes the three employees involved in the incident at the Dixie Plant were aware of and trained on Williams Brothers' fall protection policies, including its aerial lift policy. (Exhs. J-6, at 3; J-8, at 3; J-20, at 2-3; J-21, at 1; J-22, J-23; Tr. 60, 75, 96-97, 113-14, 121-22, 136, 152). In her post-hearing brief, the Secretary has not contested either of these elements of Williams Brothers' affirmative defense.

The Court finds Williams Brothers had work rules designed to prevent fall protection violations and further finds these rules were adequately communicated to the three employees working at the Dixie Plant.

Monitoring & Discovery of Violations

"Effective implementation of a safety program requires a diligent effort to discover and discourage violations of safety rules by employees." *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999).

At the outset of analyzing this element of Williams Brothers' defense, the Court notes the Commission has held a "supervisor's misconduct is strong evidence that the employer's safety program is lax." *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2220 (No. 09-0004, 2014), *aff'd* 811 F.3d 922 (7th Cir. 2016); *see also Propellex Corp.*, 18 BNA OSHC at 1682. Here, the Court has concluded Flores was a supervisor at the Dixie Plant, and it is undisputed he participated in the fall protection violation by failing to call for an aerial lift and then proceeding to work alongside the other two employees on the 13-foot platform without any form of fall protection. Flores's

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the Court need not go in search of such evidence on its accord. *See Roberts Pipeline*, 16 BNA OSHC 2029, 2030 (No. 91-2051, 1994) (the Commission is not required to develop arguments on behalf of parties), *aff'd* 85 F.3d 632 (7th Cir. 1996) (table); *Courtney B. v. Kijakazi*, No. 4:19-CV-04525, 2021 WL 4243512, at *8 n.12 (S.D. Tex., Sept. 17, 2021) ("It is not the court's responsibility to scour the record looking for evidence to support a party's arguments."); *cf. also Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003) ("When evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court."); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Absent such evidence, Williams Brothers cannot establish unpreventable employee misconduct for the violation of 29 C.F.R. § 1926.1051(a). *See S. Hens, Inc.*, 930 F.3d at 678 (unpreventable employee misconduct defense requires a work rule "designed to prevent the violation").

participation in the violation is, therefore, "strong evidence" Williams Brothers' safety program was lax. *See Stark Excavating, Inc.*, 24 BNA OSHC at 2224; *Propellex Corp.*, 18 BNA OSHC at 1682.

As to the substance of Williams Brothers' safety program, the only evidence of Williams Brothers' efforts to "discover and discourage violations" of its fall protection rules were Barrios's random site visits to the various batch plants he oversaw. (Exh. J-20, at 3; J-21, at 1; Tr. 66-67, 83-84, 97-98, 156, 162, 169-70). According to Barrios himself, these site visits were infrequent, "maybe once a week," though sometimes more often on an "as needed" basis. (Exh. J-20, at 3; Tr. 136-37, 169-70). However, according to one of the employees interviewed by the CSHO, these visits were sometimes as infrequent as two or three times a month, an assertion affirmed by Barrios. (Exh. J-21, at 1 ("Martin [Barrios] does random check-ups. [redacted] maybe 2 or 3 times a month. Depending on what is going."); Tr. 157 (agreeing the assertion about site visits in Exhibit J-21 is accurate); *see also* Tr. 162). These site visits were apparently not documented, or at least Williams Brothers failed to introduce any documentation of them. *See TNT Crane & Rigging, Inc.*, No. 16-1587, 2022 WL 2102910, at *7 (O.S.H.R.C., June 2, 2022) (finding lack of sufficient monitoring where documentation did not reflect the monitoring efforts of remote worksites), *aff'd* 74 F.4th 347 (5th Cir. 2023); *cf. also P. Gioioso & Sons, Inc. v. Occupational Safety & Health Review Comm'n*, 115 F.3d 100, 110 (1st Cir. 1997) (finding "the absence of any vestige of documentary proof was not only a relevant datum but a telling one" with regard to employer's monitoring efforts).

Other than these site visits, Williams Brothers had no other audits or evaluations in place to ensure compliance with OSHA's regulations on fall protection. (Exhs. J-6, at 3-4; J-8, at 3-4; Tr. 88, 98-99, 109); *cf. TNT Crane & Rigging, Inc.*, 2022 WL 2102910, at *7 (finding insufficient monitoring "absent sufficient evidence to evaluate the frequency of the company's audits"); *Sw. Bell Tel. Co.*, 19 BNA OSHC 1097 (No. 98-1748, 2000) (worksite visits were inadequate monitoring where there was no evidence that either the program or the worksite visits pertained to enforcing the cited provision), *aff'd*, 277 F. 3d 1374 (5th Cir. 2001). This point was epitomized in an exchange between the Secretary's attorney and Barrios at the hearing:

> Q: What types of reviews does Williams Brothers conduct to assess if employees are in compliance with OSHA regulations?
>
> A: We don't.

(Tr. 109).

Indeed, even when directly confronted with a scenario where the use of fall protection might be implicated, Barrios did not monitor the Dixie Plant employees' use of fall protection. When Flores called Barrios to tell him they intended to inspect the bearing, Barrios did not ask any follow-up questions to determine whether the crew had or would need fall protection to reach the bearing. He simply responded "Okay. Go ahead and do it and be careful. Be safe." (Tr. 108; *see also* Tr. 49); *cf. also Getty Oil Co. v. Occupational Safety & Health Review Comm'n*, 530 F.2d 1143, 1146 (5th Cir. 1976) (reasonable diligence includes the "simple expediency … of making inquiry").

With Barrios overseeing as many as 31 batch plants, the Court does not find his undocumented site visits, standing alone and occurring as infrequently as twice a month, to be sufficient to establish this element of Williams Brothers' defense. *Cf. Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2182 (No. 00-1268, 2003) (adequate supervision found where crews were widely spread geographically but the employer's supervisors nonetheless were "expected to visit each worksite at least once a day, and the record indicate[d] that they c[a]me close to meeting this goal."); *Propellex Co.*, 18 BNA OSHC at 1682 (unscheduled site visits standing alone were found inadequate where they failed to detect the cited violations); *Paul Betty*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981) (inadequate supervision found where there was "no evidence that Respondent made any efforts to ascertain whether its safety rules were followed.").

The Court finds Williams Brothers has failed to establish a "a diligent effort to discover and discourage violations of safety rules by employees."[11] *Propellex Corp.*, 18 BNA OSHC at 1682.

Enforcement

Finally, to establish unpreventable employee misconduct, Williams Brothers is required to demonstrate it "has effectively enforced [its] rules when violations have been discovered." *S. Hens, Inc.*, 930 F.3d at 678.

[11] Willliams Brothers briefly argues "the violative condition at issue here was admittedly only in existence for no more than ***five minutes*** before OSHA arrived …." Resp't's Br. 18 (emphasis in original). "Thus, even though Respondent's safety oversight is extensive, they could not have reasonably been expected to uncover this specific issue." *Id.* Given the foregoing analysis, the Court does not find Williams Brother's monitoring efforts to be "extensive." Moreover, although the duration of a violative condition can be a relevant consideration in determining whether an employer made diligent efforts to discover violations (*see, e.g.*, *Propellex Corp.*, 18 BNA OSHC at 1682 (finding lack of monitoring efforts where supervisor's unscheduled visits to worksites failed to detect a violative condition that "was ongoing for a period of weeks"), the Court does not find the short duration of this single fall protection violation determinative in light of the other insufficiencies already identified.

> The conventional way to prove the enforcement element is for the employer to introduce evidence of a disciplinary program by which the company reasonably expects to influence the behavior of employees…. To prove that its disciplinary system is more than a "paper program," an employer must present evidence of having actually administered the discipline outlined in its policy and procedures.

Propellex Corp., 18 BNA OSHC at 1683.

Here, Williams Brothers terminated all three employees involved in the fall protection violations at the Dixie Plant the day after the CSHO's inspection. (Exh. J-18, at 1-4; Tr. 61-62, 158-59). Other than the post-inspection discipline of the three employees involved in this incident, however, Williams Brothers has never terminated another employee for violating its fall protection policies. (Tr. 76, 82-84, 129, 159). Indeed, Williams Brothers produced no evidence it has *ever* disciplined any other employee for a fall protection violation, by terminating their employment or otherwise. [12] *See Precast Servs., Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) ("Commission precedent does not rule out consideration of post-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline." (emphasis added)), *aff'd*, 106 F.3d 401 (6th Cir. 1997). This is so despite having over 1,700 employees, many of them operating the multiple batch plants owned by Williams Brothers. (Exhs. J-5, at 1; J-20, at 2; Tr. 27, 47-48, 105-06, 135); *see TNT Crane & Rigging, Inc.*, 2022 WL 2102910, at *8 ("As a large crane-industry employer with more than 250 employees and numerous offices, we find it highly unlikely that no TNT employee had ever previously violated these rules"), citing *Angel Bros. Enters, Ltd. v. Walsh*, 18 F.4th 827, 833 (5th Cir. 2021) ("the Commission did not have to accept the statistically implausible claim that although OSHA found violations during 80% of its five inspections, the company committed no safety violations the other 6,000 or so times it performed excavations").

Finally, Flores and the other two employees being "collectively involved in the violative conduct" highlights Williams Brothers' insufficient enforcement of its work rules related to fall protection. *See TNT Crane & Rigging, Inc.*, 2022 WL 2102910, at *8; *Propellex Co.*, 18 BNA OHC at 1682; *Gem Indus., Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) *("*Where all the

[12] The only other documentary evidence Williams Brothers introduced of disciplining its employees for *any* safety rules violations whatsoever were "Environmental & Safety Counseling Notice[s]" for three incidents unrelated to fall protection violations. (Exh. J-18, at 5-7). Although Barrios testified two other employees were terminated for unrelated "zero-tolerance" offenses, no documentary evidence was submitted to corroborate his claim. (Tr. 164-65). In any event, the Court does not consider this evidence relevant for determining whether Williams Brothers adequately enforced its fall protection policies. *See TNT Crane & Rigging, Inc.*, 2022 WL 2102910, at *8 (discounting disciplinary action unrelated to the power line safety violations at issue).

employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule."), *aff'd* 149 F.3d 1183 (6th Cir. 1998) (table).

The Court rejects Williams Brothers arguments to the contrary. Williams Brothers correctly points out the three employees involved in this incident were terminated. Resp't's Br. 19. However, the Court finds this alone to be inadequate evidence of an effective enforcement program for the reasons set forth in detail above. Williams Brothers also points to certain testimony from the CSHO.[13] *Id.*, citing Tr. 61-62. The Court finds this testimony simply represents the CSHO's understanding that the three employees in this instance were terminated pursuant to Williams Brothers' disciplinary policy; it does not speak to Williams Brothers' broader efforts (or apparent lack thereof) of enforcing its fall protection policies. In any event, "the Commission is not bound by the representations or interpretations of OSHA Compliance Officers." *Kaspar Wire Works, Inc.*, 268 F.3d 1123, 1128 (D.C. Cir. 2001); *see also Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1113 n.6 (No. 11-2559, 2016).

The Court finds Williams Brothers has failed to demonstrate effective enforcement of its work rules related to fall protection.

The Court finds the Secretary has established all elements of his burden of proof. Williams Brothers has failed to establish its affirmative defense of unpreventable employee misconduct. Therefore, Citation 1, Item 1 is **AFFIRMED** as a serious violation.

Citation 1, Item 2: Alleged Serious Violations of § 1926.1051(a)

The Alleged Violation Description

Citation 1, Item 2 alleges a serious violation of the cited standard as follows:

> 29 CFR 1926.1051(a): Stairway(s) or ladder(s) were not provided at all personnel points of access where there was a break in elevation of 19 inches (48 cm) or more, or no ramp, runway, sloped embankment, or personnel hoist was provided:
>
> a) On or about March 17, 2022, at the dixie farm cement plant, where employees were not provided ladders to access an elevated work area, exposing them to fall hazards.

The Cited Standard

[13] Williams Brothers points to three separate statements from the CSHO: 1) "My understanding, based on [the] termination of these three employees, after my inspection is that they did enforce their policy."; 2) "When I actually requested to conduct follow-up interviews with the employees, that's when I learned that the employees were terminated because they violated a company rule."; and 3) "I did learn that if they did violate the rule they would be disciplined because they were disciplined, they were terminated." (Tr. 61-62).

29 C.F.R. § 1926.1051(a) provides: "A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided."

(1) The Applicability of the Cited Standard

Section 1926.1051(a) applies to "all personnel points of access where there is a break in elevation of 19 inches … or more …." Here, there is no dispute the employees traversed the conveyor to reach the 13-foot platform on which the CSHO observed them working. (Exhs. J-6, at 3; J-8, at 3; J-10, at 2-6; J-19, at 3; J-20, at 1-2; J-21, at 1-2; Tr. 30, 34-35, 49, 107-08, 145). Likewise, there is no dispute the employees again traversed the conveyor when the CSHO asked them to come down and jumped to the ground from a point on the conveyor which was approximately eight feet from the ground. (Exhs. J-5, at 1; J-6, at 2-3; J-8, at 2-3; J-9, at 6; J-10, at 3; Tr. 55).

Williams Brothers does contest whether the conveyor and the elevated platform, as used by the Williams Brothers employees, met the definition of a "point of access" thereby triggering the requirements of Section 1926.1051(a).[14] Resp't's Br. 14-15. A "point of access" is defined broadly to include "all areas used by employees for work-related passage from one area or level to another. Such open areas include doorways, passageways, stairway openings, studded walls, and various other permanent or temporary openings used for such travel." 29 C.F.R. § 1926.1050(b). Here, even if the Dixie Plant operators did not regularly work on the top of the conveyor or the platform, as Williams Brothers argues, the Court finds they were used by the three employees as a point of access on the date in question as they were used for "work-related passage from one … level to another," i.e., from the ground level to the elevated platform on the side of the dust collector.

Williams Brothers argues the platform is "not an area where the Dixie [Plant] crew was supposed to be conducting any work." Resp't's Br. 14. However, the testimony from Barrios cited by Williams Brothers does not support this contention. Barrios testified: "*When the plant is operating correctly*, there is no need to be up [on the platform]." (Tr. 141 (emphasis added)). Prior to this statement, Barrios also testified employees would need to access the dustbin "[e]very month

[14] Williams Brothers makes this argument in the portion of its brief for noncompliance with the standard. Resp't's Br. 14-15. However, the Court finds the issue of whether something meets the definition of "point of access" goes to whether the standard applies at all.

if the plant runs every day." (Tr. 141). Barrios described the optimal method (at least in his view) for employees to access the platform on the dustbin, which involved the use of a ladder: "They would use a portable ladder and set it up next to the catwalk and they just go from ladder to ladder." (Tr. 141).

Williams Brothers goes on to argue employees needing to work from the top of the conveyor is a "rare occurrence" and when it is performed it generally is performed by a maintenance crew using an aerial lift. *Id.* at 15. Thus, "this is not a work area requiring a personnel point of access." *Id.* This argument is contradicted by the record. Although perhaps not occurring frequently, issues with the Plant's bearings occurred approximately "every three to four months" when the Plant was in operation. (Tr. 84). And although a maintenance crew was responsible for performing the actual maintenance work on the Plant's bearings, the Plant crew would assist the maintenance crew with "lighter type maintenance activities." (Tr. 96; *see also* Tr. 123 (Barrios testifying the Plant crew might help out the maintenance crew with cleaning and greasing)). Moreover, as evidenced by the events in this case, the Dixie Plant crew was apparently also responsible, at least in the first instance, for investigating potential issues with the Plant's bearings to determine whether a maintenance crew was necessary. When Flores called Barrios to tell him he intended to investigate the noise coming from the bearing, Barrios did not tell him to wait for a maintenance crew; rather, he gave him permission to investigate the noise and simply told him to "be safe." (Tr. 49, 108).

The Court finds the Secretary has demonstrated the existence of "personnel points of access where there is a break in elevation of 19 inches … or more" to which the standard applies.

(2) Compliance *with the Standard's Terms*

Williams Brothers does not dispute no ladder was provided to the three employees working on the 13-foot platform or even argue one was available onsite at the time of the CSHO's inspection. Rather, it argues the Secretary has failed to demonstrate noncompliance for two reasons.

First, Williams Brothers argues "the conveyor is a piece of equipment that swings back and forth, up to fifteen feet, between concrete mixers, when in operation … It would be impossible to affix any sort of permanent ladder to this piece of equipment." Resp't's Br. 14. However, the standard does not require a specific type of ladder to comply with its terms, only a "ladder"

generally. As the definition section for Subpart X, which governs "Stairways and Ladders," makes clear, there are many types of "ladders" which can satisfy the standard including a "fixed ladder" or a "portable ladder." *See* 29 C.F.R. § 1926.1050(b) (defining a "fixed ladder" as "a ladder that cannot be readily moved or carried because it is an integral part of a building or structure"); *id.* (defining a "portable ladder" as "a ladder that can be readily moved or carried"). Thus, even if it is "impossible to affix [a] permanent ladder" to the conveyor, as Williams Brothers argues, the standard allows for Williams Brothers to provide many kinds of ladders, including a portable ladder, to be in compliance. Indeed, Barrios opined a portable ladder was the preferred method for safely reaching the elevated platform. (Tr. 141).

Second, Williams Brothers argues the standard allows employers to provide a "personnel hoist" in order to comply with its terms, and, since Williams Brothers provided aerial lifts (or "manlifts" as Williams Brothers refers to them) to its employees at their request, this was sufficient to comply with the standard. Resp't's Br. 15. However, an "aerial lift" is different from a "personnel hoist." Aerial lifts are defined and regulated by Section 1926.453 and generally include different "types of vehicle-mounted aerial devices used to elevate personnel to job-sites above ground …" like the "manlifts" described at the hearing. 29 C.F.R. § 1926.453(a); *see also* (J-12, at 5 (photograph of an aerial lift)). The criteria for personnel hoists, on the other hand, are set forth in Section 1926.552 and describe a tower-like structure with a "car" operated by a system of "ropes" and "hoists." *See generally* 29 C.F.R. § 1926.552(c). Thus, Williams Brothers' provision of aerial lifts to its employees does not demonstrate compliance with the cited standard.

The Court finds the Secretary has demonstrated noncompliance with the standard.

(3) Employee Access to the Violative Condition

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC at 1079 n.6.

Here, the CSHO directly observed two Williams Brothers employees leave a 13-foot platform to traverse the Plant's conveyor and jump to ground level from a height of approximately eight feet, all without the use of a ladder. (Exhs. J-5, at 1; J-6, at 2-3; J-8, at 2-3; J-9, at 6; J-10, at 3; Tr. 55). Williams Brothers has not disputed the CSHO's observations of the two employees' actual exposure to the hazard.

The Court finds there was actual exposure to the hazard.

(4) Employer Knowledge

To prove the knowledge element of a violation, the Secretary must demonstrate the employer's actual knowledge or constructive knowledge of the violation. *Jacobs Field Servs., N.A.*, 25 BNA OSHC at 1218; *see also TNT Crane*, 74 F.4th at 353. A supervisor's actual or constructive knowledge of a subordinate employee's violation is imputed to Williams Brothers under "ordinary imputation principles." *TNT Crane*, 74 F.4th at 359; *see also Dover Elevator Co.*, 16 BNA OSHC at 1286.

For the reasons stated above in its analysis of employer knowledge of the fall protection violation, the Court finds Flores was a supervisor at the Dixie Plant. His actual knowledge of the violative condition is therefore imputed to Williams Brothers. *See TNT Crane*, 74 F.4th at 359. The Court again rejects Williams Brothers' arguments, incorporated by reference, contending Flores was not a supervisor for purposes of imputing his knowledge. Resp't's Br. 16. The Court also rejects Williams Brothers' argument, incorporated by reference, concerning the necessity of a finding of foreseeability to impute Flores's knowledge to Williams Brothers. *Id.*; *see also* note 5. Finally, because the Court finds actual knowledge of the violation, the Court finds no reason to address Williams Brothers' arguments on the issue of constructive knowledge. Resp't's Br. 16; *see also* note 6.

The Court finds the Secretary has established all elements of her burden of proof. Therefore, Citation 1, Item 2 is **AFFIRMED.**

Characterization of the Violation

The Secretary characterized the violation of Section 1926.1051(a) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result from … one or more practices …." 29 U.S.C. § 666(k). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *ConAgra Flour Milling Co.*, 15 BNA OSHC at 1824.

Here, without the availability of a ladder, the three Williams Brothers traversed the conveyor to reach platform, starting at a height of approximately eight feet and ending at a height of approximately thirteen feet. (Exhs. J-6, at 3; J-8, at 3; J-10, at 2-6; J-19, at 3; J-20, at 1-2; J-21, at

1-2; Tr. 30, 34-35, 49, 107-08, 145). The employees then repeated this action when the CSHO asked them to come down from the platform. (Exhs. J-5, at 1; J-6, at 2-3; J-8, at 2-3; J-9, at 6; J-10, at 3; Tr. 55). The Court finds serious physical serious harm could result from a fall at these heights. *See* Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672, 40,682 (Aug. 9, 1994) (to be codified as 29 C.F.R. pt. 1926) (noting the risk of fatality or injury from falling from heights of even six to ten feet). Williams Brothers has advanced no arguments on the classification of the violation.

The Court finds the violation was properly characterized as serious.

PENALTY

When OSHA issues a Citation, it may include a proposed penalty amount. *See* 29 U.S.C. § 659(a). OSHA has published a Field Operations Manual (FOM) to, among other things, act as a guide for its CSHOs in proposing penalties. FOM at 1.I, 6.I, Directive No. CPL-02-00-163 (eff. Jan. 23, 2023). However, the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *See Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0293, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995); *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975). In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Court to give due consideration to four criteria: (1) the size of the employer's business; (2) the gravity of the violations; (3) the good faith of the employer; and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Citation proposed a total penalty of $22,792, as follows:

For the serious violation of 29 C.F.R. § 1926.501(b)(1), the Citation proposed a penalty of $11,396. This was based on the CSHO's determination the severity, i.e., the "most likely injury … to occur when the employees are exposed to that particular hazard," was "high" because any injury from exposure to the fall hazard was "likely to result in death or permanent disability injuries." (Exh. J-6, at 1; Tr. 42-43). The CSHO also took into account the number of employees exposed, the duration of their exposure, and any precautions taken by Williams Brothers to prevent exposure. (Tr. 43). The CSHO also determined the probability, i.e., the "likelihood that that actual

injury will occur," was "lesser" because of "the amount of employees and the time of exposure." (Exh. J-6, at 1; Tr. 42, 44). This combination of severity and probability led to the CSHO classifying the violation's gravity as "moderate" and an initial gravity-based penalty of $10,360. (Exh. J-6, at 1). The CSHO did not apply a reduction based on Williams Brothers' size as a large employer and did not apply a reduction for good faith. (Exh. J-6, at 1; Tr. 44). Finally, the CSHO applied a ten percent increase in the initial penalty based on Williams Brothers' inspection history, particularly based on a "serious-high gravity penalty" within the five years preceding this inspection. (Exh. J-6, at 1; Tr. 44).

For the serious violation of 29 C.F.R. § 1926.1051(a), the Citation proposed a total penalty of $11,396. This was based on the CSHO's determination the violation was of "high" severity "[b]ased on employees being exposed over six feet. They could sustain their death or permanent disability-type injuries." (Exh. J-8, at 1; Tr. 45). The CSHO also took into account the number of employees exposed, the duration of their exposure, and any precautions taken against potential injury, noting there was no ladder available at all at the Dixie Plant. (Tr. 45-46). On the subject of probability, the CSHO determined it was "lesser" because of "the short duration of exposure." (Exh. J-8, at 1; Tr. 46). This combination of severity and probability led to the CSHO classifying the violation's gravity as "moderate" and an initial gravity-based penalty of $10,360. (Exh. J-8, at 1). The CSHO again did not adjust the penalty for size or good faith and applied a ten percent increase based on Williams Brothers' inspection/citation history. (Tr. 46).

The Secretary asks the Court to assess all of the proposed penalties; Williams Brothers has advanced no arguments specific to the penalty amount.

Having weighed the relevant factors, the Court finds the proposed penalties for both violations are appropriate and therefore assesses them for each of the Citation items. The Court finds the CSHO's determinations as to the violations' gravity accurately accounted for the severity and probability of harm for each of the subject violations and accounted for environmental factors such as the number of employees exposed, the duration of their exposure, and Williams Brothers efforts (or lack thereof) to prevent the violations. Williams Brothers has not argued a reduction for good faith is warranted, and the Court finds no basis in the record to reduce the penalties on that basis. With over 1,700 workers, Williams Brothers is a large employer, and the Court therefore finds no basis to reduce the penalty based on size. *Cf.* FOM, at 6.III(B)(4)(b). Williams Brothers has not challenged the CSHO's representations as to its violation history, and the Court therefore

adopts his increase of ten percent based on history.

The Court therefore assesses the proposed penalty of $11,396 for each of the Citation items.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a) and Commission Rule 90(a), 29 C.F.R. § 2200.90(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED:**

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(1), is **AFFIRMED**, and a penalty of $11,396 is assessed;

2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.1051(a), is **AFFIRMED**, and a penalty of $11,396 is assessed;

SO ORDERED.

/s/_____
Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: **December 26, 2023**
Atlanta, GA