UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. OVATION PLUMBING, INC., Respondent.	DOCKET NO. 17-0196

Appearances:

Sean J. Allen, Esq. & Timothy S. Williams, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado
For Complainant

Stephen B. Shapiro, Esq. & Alexis A. Reller, Esq., Shapiro Bieging Barger Otteson LLP, Denver, Colorado
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

Compliance Safety and Health Officer Fred Peterson conducted an inspection of the Elevate Wolff-Havana worksite in Englewood, Colorado on October 20, 2016. (Stip. No. 6). During the course of his inspection, CSHO Peterson observed two of Respondent's employees cross through a set of guardrails onto an unprotected balcony. (Tr. 94; Ex. C-2). After observing the site of the violation and conducting interviews, CSHO Peterson determined Respondent violated 29 C.F.R. § 1926.501(b)(1).

CSHO Peterson recommended, and Complainant issued, a *Citation and Notification of Penalty* ("Citation") to Respondent, which alleges a single serious violation of 29 C.F.R. §

1926.501(b)(1). Complainant proposed a total penalty of $4,811.00. Respondent timely contested the Citation, claiming the exception found in the scope and application paragraph of 29 C.F.R. § 1926.500(a)(1). This brought the matter before the United States Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act").

The Chief Judge designated this matter for Simplified Proceedings. A trial was conducted in Denver, Colorado on September 25, 2017. Four witnesses testified at trial: (1) CSHO Fred Peterson; (2) Clyde George, Superintendent for Martines Palmeiro Construction (MPC); (3) Paul Wilson, Respondent's site foreman; and (4) Edward McMillan, Respondent's owner. Both parties timely submitted post-trial briefs for the Court's consideration.

Jurisdiction & Stipulations

The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act. (Tr. 38–39). The parties also stipulated that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 39). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The parties also stipulated to other factual matters, which were read into the record.[1] (Tr. 38–40).

Factual Background

The Inspection

CSHO Fred Peterson conducted an inspection of the Elevate Wolff-Havana project pursuant to Complainant's construction inspection program. The construction program uses a randomly generated list of construction sites, which are assigned to individual area offices to be

1. References to the parties' stipulations shall be as follows: "(Stip. No. ___)".

inspected within a one-month time frame. (Tr. 53). Elevate Wolff-Havana is a multi-unit residential construction project with eleven to twelve multi-story buildings. (Tr. 63–64). At the time of the inspection, the individual buildings were in various stages of completion, ranging from 10 to 85 percent complete. (Tr. 63). After he arrived, CSHO Peterson met with the superintendent, Clyde George, and the project manager, Lisa Marini, both of whom worked for the general contractor, MPC. (Tr. 65). George, Marini, and Chris Feagle, a representative from Safety First,[2] accompanied CSHO Peterson during his inspection.

During the walkaround, CSHO Peterson saw two workers cross through a guardrail onto a second-floor balcony of Building 5. George and Feagle confirmed to CSHO Peterson they saw the employees cross through the guardrail. (Tr. 72). At that time, the guardrail was located at the entrance onto the balcony, which was accessed through an opening designed for a sliding glass door. Wilson testified he asked MPC multiple times to move the guardrails to the perimeter of the balcony but received no response. (Tr. 244). Thus, once on the balcony and beyond the guardrail, the two workers were not protected from the fall hazard posed by the open balcony, which was more than 10 feet above the ground below. (Tr. 72, 122; Ex. C-2, C-8). CSHO Peterson was only able to observe the two workers enter onto the balcony, after which they remained out of sight until he met with them inside of the building.[3]

As he went upstairs to meet with the workers, CSHO Peterson came across a different, unrelated violation, which he stopped to address. (Tr. 75–76). According to CSHO Peterson, work activities were occurring throughout all of Building 5, including the second floor. By the time he

2. Safety First is a private safety consulting firm hired by MPC specifically for the Elevate Wolff-Havana project. (Tr. 143–44).
3. CSHO Peterson testified he had George call the individuals on the balcony so he could identify and speak to them. Wilson does not recall receiving a telephone call during his time on the balcony. (Tr. 73, 249).

reached the second floor and actually encountered the two workers, approximately twenty minutes had passed, at which point they had already returned to the safe side of the guardrail. (Tr. 77).

Once he arrived upstairs, CSHO Peterson met with Paul Wilson and Brad Pezick, who work for Ovation Plumbing. Paul Wilson, Ovation's foreman, told CSHO Peterson he went onto the balcony in order to access the utility closet, which was designed to eventually hold a hot water heater. At that point in the construction process, Ovation's crew had installed the hot and cold water taps in the closets on all floors of Building 5, but the hot water heaters had not yet been installed. (Tr. 192–93). Wilson told CHSO Peterson he went onto the unguarded balcony and into the closet solely to take measurements for the placement of a regulator vent. (Tr. 83). A regulator vent is designed to remove minute amounts of excess gas produced by the water heaters. (Tr. 194). Building code dictates the regulator must be placed three feet away from an open window, so Wilson wanted to ensure proper placement. (Tr. 201).

Wilson testified he told Pezick, a non-supervisory employee, to stay behind the guardrail and he would demonstrate where to install the vent while Pezick observed though the spaces between the studs separating the utility closet from the main living area. (Tr. 201). Instead, Pezick followed Wilson through the guardrail, onto the balcony, and into the closet. (Tr. 72–73, 78). It is unclear whether Pezick disregarded Wilson's instructions or did not hear him. (Tr. 209). Regardless, Wilson said he was unaware Pezick was behind him until he was doing his measurements, after which they returned to the protected side of the balcony guardrail. (Tr. 197–98). At trial, Wilson estimated they were on the balcony/closet area for no more than 45 seconds; however, CSHO Peterson testified Wilson told him they had been on the balcony for approximately five minutes. (Tr. 82–85; 248).

CSHO Peterson determined Respondent violated 29 C.F.R. § 1926.500(b)(1) when Wilson and Pezick went beyond the guardrail to the balcony and were exposed to a ten-foot drop without proper fall protection. According to CSHO Peterson, the balcony was roughly six feet wide between the guardrail and the edge. (Tr. 74; Ex. C-8A). The entrance to the closet was closer, roughly two feet away from the edge. (Tr. 110). Due to the height of the balcony, the lack of fall protection, and Wilson's and Pezick's proximity to the edge, CSHO Peterson determined the violation was serious.

A Coincidental Day of Training

On the morning of the inspection, MPC held/sponsored a toolbox talk, which addressed fall protection. (Tr. 164–69; Ex. C-7). As part of the presentation, Clyde George discussed 29 C.F.R. § 1926.500(a)(1), which, in addition to describing the scope of Subpart M, provides a limited exception to the general rule of fall protection. Prior to this point, Wilson had never heard of this exception, which applies to inspection-related activities under certain conditions. *See* 29 C.F.R. § 1926.500(a)(1). Respondent espouses a 100% fall protection policy and has never discussed this exception in any of its training programs, manuals, or handbooks.[4] (Tr. 208).

When it came time to address the placement of the regulator vents in the second floor closets, Wilson found that the guardrails had not been moved to the edge of the balcony as requested, thereby leaving any occupant of the balcony exposed to a fall. (Tr. 244). Wilson determined a limited excursion onto the balcony for the sole purpose of taking measurements for future construction activities would be within the ambit of the exception discussed by the general contractor earlier that morning. Equipped with nothing more than a tape measure, Wilson testified he carefully stepped through the guardrail and stayed close to it as he moved toward the closet.

4. The Court notes that Respondent's safety program appeared only to supply fall protection instruction as it relates to scaffolding. (Tr. 213–14; Ex. C-12, C-14).

(Tr. 246–47). Once he completed his measurements—and discovered the presence of his subordinate—Wilson returned to the protected side of the guardrail. (Tr. 247–48). Wilson testified he had no intention of beginning the installation of the regulators that day owing to the placement of the guardrail and thus limited his activities to measurements. (Tr. 198–99).

Discussion

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which was 6 feet 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) Building 5: On or about November 20, 2016, and at times prior, two worker[s] were exposed to falling approximately 10 feet to the ground below when they crossed the guardrail at the entrance to a second floor balcony with an unprotected edge.

Citation and Notification of Penalty at 6.[5]

Undisputed Matters

To establish a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

5. There appears to be a scrivener's error in the narrative of the violation. The parties stipulated the inspection occurred on October 20, 2016, and the Citation indicates an inspection on "10/20/2016 – 10/20/2016". *Citation and Notification of Penalty* at 6. But, the citation alleges the violation occurred on "November 20 and at times prior to". *Id.* Throughout the trial, the parties consistently referenced the October 20, 2016 date, and the error in the citation narrative appears to have been overlooked. Further, Wilson testified the fall protection training illustrated in exhibit R-24, which occurred on October 28, 2016, took place after the inspection occurred. In essence, the parties amended the *Citation* by consent. *See* Fed. R. Civ. P 15(b)(2). Thus, the Court *sua sponte* amends the *Citation* to reflect the appropriate date of October 20, 2016.

During trial, and also in its brief, Respondent agreed that certain matters were not in dispute, including: (1) that Wilson and Pezick were exposed to the fall hazard; (2) that the terms of the cited standard were violated; and (3) that the standard applies insofar as the exception found at 1926.500(a)(1) does not apply. (Tr. 96–103). *See also Resp't Br.* at 3. The trial record supports these conclusions. The cited standard requires fall protection when employees are exposed to unprotected sides and edges over six feet above the ground. Wilson and Pezick crossed through the guardrails onto an unprotected balcony, which was more than six feet above the ground below, and did not use any other form of fall protection. Accordingly, the remaining issues are: (1) whether the exception found at 29 C.F.R. § 1926.500(a)(1) applies to Wilson and Pezick's activities on the day of the inspection; (2) whether Respondent had knowledge of the violation; and (3) whether Respondent established the violation was the product of unpreventable employee misconduct.

The Standard Applies

On its face, the cited standard applies to the facts of this case. It requires "[e]ach employee on a walking/working 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." 29 C.F.R. § 1926.501(b)(1). Wilson and Pezick circumvented the existing guardrail, which placed them on a balcony with an unprotected edge more than 6 feet above the ground. Thus, the standard mandates the use of fall protection. In most cases, this alone would be sufficient to establish the applicability of the standard; however, Respondent asserts the activities of Wilson and Pezick were covered by the exception found at 29 C.F.R. § 1926.500(a)(1).

The Exception Found at 29 C.F.R. § 1926.500(a)(1) Does Not Apply

Located at the very beginning of subpart M, there is a limited exception to the general rule of fall protection. It states:

> This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926. Exception: The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed.

29 C.F.R. § 1926.500(a)(1). Thus, even if the cited standard applies in the most technical sense, the exception in 1926.500(a)(1) prohibits application of the subpart M standards when employees are conducting inspections, investigations, or assessments prior to the beginning of construction or after it has been completed. According to the preamble to the standard:

> OSHA has set this exception because employees engaged in inspecting, investigating and assessing workplace conditions before the actual work begins or after work has been completed are exposed to fall hazards for very short durations, if at all, since they most likely would be able to accomplish their work without going near the danger zone. Also, the Agency's experience is that such individuals who are not continually or routinely exposed to fall hazards tend to be very focused on their footing, ever alert and aware of the hazards associated with falling. These practical considerations would make it unreasonable, the Agency believes, to require the installation of fall protection systems either prior to the start of construction work or after such work has been completed. Such requirements would impose an unreasonable burden on employers without demonstrable benefits.
>
> . . . .
>
> Therefore, OSHA has decided to reword the provision to make it clear that the exclusion only applies when the employer establishes that employees are inspecting, investigating, or assessing workplace conditions prior to the actual start of work or after the work has been completed. It was OSHA's intent when it proposed this provision that the exclusion would only apply at the two times stated above, not during the period when construction work is being performed.

Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672, 46,675 (August 9, 1994).

Complainant promulgated a narrow exception that is limited to a specific subset of activities (inspection, assessment, or investigation) and to specific points in time (before construction starts or after it concludes). Prior to construction beginning or after it ends, the amount of time required to install fall protection systems would likely be greater than the length of time the inspector needs to perform his inspection, especially, as noted in the preamble, "since they most likely would be able to accomplish their work without going near the danger zone" or would only be exposed to fall hazards for "very short durations". *Id.*

Commission ALJs have consistently applied Complainant's interpretation. *See, e.g.*, *Kirtley Roofing*, 25 BNA OSHC 2250 (No. 15-0613, 2015) (ALJ Gatto) (finding employees who were moving materials to set up a lifeline and applying sealant were not engaged in inspection, investigation, or assessment of workplace conditions); *R&S Roofing, LLC*, 24 BNA OSHC 2151 (No. 12-2427, 2014) (ALJ Coleman) (finding employees engaged in seam work were engaged in "an essential part of the roofing work itself, and not part of 'an inspection, investigation, or assessment of workplace conditions'"); *Modern Bldg. Solutions, LLC*, 23 BNA OSHC 1787 (No. 10-2559, 2011) (ALJ Welsch) (finding exception did not apply to employee examining sheathing, who was also responsible for replacing missing nails, removing 2x4 boards, and finishing the roof with tar paper and shingles); *Cleveland Constr., Inc.*, 18 BNA OSHC 1648 (No. 97-1356, 1998) (ALJ Simko) (finding inspection conducted by employee was integral to his primary activity of cutting the mezzanine floor edge, which occurred while construction was ongoing, and, thus, exception did not apply).

Notwithstanding the foregoing, Respondent places significant emphasis on *Seyforth Roofing Co.*, 16 BNA OSHC 2031 (No. 90-0086, 1994). In *Seyforth*, an employer was charged

with violating 29 C.F.R. § 1926.500(g)(1),[6] because it did not have any fall protection systems installed when an employee fell to his death. *Seyforth*, 16 BNA OSHC 2031 at *1. At the conclusion of the previous workweek, Seyforth's employees took down the roof's warning line system due to high winds. *Id.* When they returned the following Monday, the employees did not re-install the warning lines on the main roof because they only planned to work on the penthouse roof, where they would not be exposed to the main roof's perimeter. At some point after lunch, Seyforth's manager asked the designated foreman whether more roofing materials were needed for the main roof. The foreman and three other employees went to the edge of the parapet wall around the perimeter of the roof to take measurements. While in the process of measuring, one of the employees fell to his death. *Id.*

The ALJ vacated the citation on the grounds of unpreventable employee misconduct. *Id.* Although the Commission affirmed the result, it did so on different grounds.[7] According to the Commission, the case was controlled by 1926.500(g)(2), which states:

> The provisions of paragraph (g)(1) of this section do not apply at points of access such as stairways, ladders, and ramps, *or where employees are on the roof only to inspect, investigate, or estimate roof level conditions*. Roof edge materials handling areas and materials storage areas shall be guarded as provided in paragraph (g)(5) of this section.

29 C.F.R. § 1926.500(g)(2) (amended Feb. 6, 1995) (emphasis added).[8] Because it was undisputed the "employees were at the edge of the roof for the sole purpose of taking measurements", the Commission determined "this type of measurement is precisely *the type of work* that was intended to be exempted from the standard." *Seyforth*, 16 BNA OSHC 2031 at *2 (emphasis added). The

6. As will be discussed in more detail below, this case was decided prior to the promulgation of the final rules for fall protection in construction. *See* 59 Fed. Reg. 40,672. Thus, the numbering and, to some extent, the content of the rules at issue will be different.
7. The exception was not discussed by either party or the ALJ prior to Commission review.
8. Some provisions in the prior version of subpart M were repealed, whereas some others were simply renamed and amended. *See* 59 Fed. Reg. 40,672.

Commission was further persuaded by the Secretary's inability to prove other employees were working on the main roof at the time the measurements were being taken, because the exception's applicability appeared to be limited to when employees "are on the roof *only* to inspect, investigate, or estimate roof level conditions." 29 C.F.R. § 1926.500(g)(2) (emphasis added). In other words, the exception was only applicable when (1) an inspection, investigation, or estimate was being performed, and (2) the inspection, investigation, or estimate was the ONLY activity being performed on the roof at the time.

Respondent's reliance on *Seyforth* is misplaced for two reasons. First, the exception the Commission relied upon is materially different than the exception at issue in this case. As previously noted, subpart M was substantially amended in 1995, roughly six months after *Seyforth* was decided. *See* 59 Fed. Reg. 40,672 (discussing effective date of amended subpart M). Coincident with the amendment, the exception, which was previously found only in subparagraph (g), was broadened to address fall hazards in construction generally, as opposed to those found on low-pitched roofs during built-up roofing operations. *Compare* 29 C.F.R. § 1926.500(a)(1) (current) *with* 29 C.F.R. § 1926.500(g) (amended Feb. 6, 1995). Second, though the exception was broadened in terms of whom it applied to, it was also narrowed to the extent that it only applied at specific points in time: before the actual beginning of construction and after construction has been completed. *See id.* § 1926.500(a)(1). While application of the old exception was limited based on the activity being performed, the exception at issue in this case added a restriction as to when those activities can occur. Because the Commission in *Seyforth* did not have to address whether the events occurred before or after construction, its precedential value is limited.

The burden of proving an exception to the general requirements of a standard lies with the party claiming the benefit of the exception. *See Falcon Steel Co.*, 16 BNA OSHC 1179 (No. 89-

2883 *et al.*, 1993). Exemptions from remedial legislation should be narrowly construed and limited to effect the remedy intended. *See Pennusco Cement and Aggregates, Inc.*, 8 BNA OSHC 1378 (No. 15462, 1980). Applying these principles to the case at bar, the Court finds Respondent failed to meet its burden.

The plain language of 1926.500(a)(1) is sufficient to divine its meaning. There are only two times when an employer is excused from complying with subpart M: (1) inspections occurring "prior to the *actual start* of construction work", and (2) inspections occurring "after *all* construction work has been completed." *Id.* § 1926.500(a)(1) (emphasis added). The time-related restrictions on the exception are framed in absolute terms, not as a series of interim "starts" and "finishes" that may occur during the course of a construction project. This understanding is clarified in the discussion of the standard provided in the preamble to the final rule, which states:

> OSHA has decided to reword the provision to make it clear that the exclusion only applies when the employer establishes that employees are inspecting, investigating, or assessing workplace conditions prior to the actual start of work or after the work has been completed. It was OSHA's intent when it proposed this provision *that the exclusion would only apply at the two times stated above, not during the period when construction work is being performed*. As explained in the preamble to the proposed rule, the exception would apply where an employee goes onto a roof in need of repair to inspect the roof and to estimate what work is needed. During such an inspection, guardrails, body belts, body harnesses, safety nets, or other safety systems would not be required. However, if inspections are made while construction operations are underway, all employees who are exposed to fall hazards while performing these inspections must be protected as required by subpart M. The intent of the provision is also to recognize that after all work has been completed, and workers have left the area, there may be a need for building inspectors, owners, etc. to inspect the work. OSHA recognizes that in these situations, all fall protection equipment, such as perimeter guardrail systems, may have been removed. OSHA is not requiring the installation of the systems for a second time for inspectors, because the Agency recognizes it would be unreasonably burdensome to require the reinstallation of fall protection equipment after all the work has been completed.

59 Fed. Reg. at 40,675 (emphasis added). The examples in the preamble illustrate the absolute nature of the time restrictions and the reason for their implementation. According to the preamble,

the installation of fall protection during an initial assessment or after the completion of all construction would impose an unnecessary burden on the employer. In both examples, the act of installing the fall protection for the sole purpose of conducting an inspection would likely expose the installer to far greater hazards for a longer period of time than the person conducting the inspection, who will be "exposed to fall hazards for very short durations, if at all, since they most likely would be able to accomplish their work without going near the danger zone." *Id.* That the preamble refers specifically to "the two times stated above" further buttresses the Court's conclusion the limitation is absolute.

Although Wilson was engaged in inspection/assessment when he and Pezick entered onto the balcony, the Court finds the exception does not apply because the inspection did not occur prior to the actual start of construction, nor after all construction had been completed. Respondent had started construction in the water heater closets long before Wilson and Pezick entered onto the balcony to perform their inspection. Even though Respondent's crew had not yet installed the regulator vents on the second floor, it had already installed the plumbing for the water heaters throughout Building 5 and was in the process of installing regulator vents on the first floor. (Tr. 195). Wilson's measurements were simply a part of the ongoing project to install regulator vents throughout the building, which, itself, was part of the process of installing water heaters in the utility closets. His 'inspection' did not occur "prior to the actual start of construction", nor was there any sense that it occurred "after all construction ha[d] been completed

Nor does this situation fit into the underlying rationale for the exception in the first place—the exposure was entirely unnecessary. Unlike a roof repair, wherein an on-site assessment is necessary to ascertain required materials and anchor point locations at the outset, fall protection was already installed on the balcony, just incorrectly for the purposes of Respondent's necessary

work on the balcony. In other words, we are not talking about employees that did not use fall protection because it was more hazardous or unduly burdensome to install; rather, we are talking about employees circumventing existing fall protection because it was incorrectly placed and inconvenient. It was not more hazardous nor unduly burdensome to properly re-install the guardrails because many construction projects were still scheduled to occur on or about the balcony. The installation of the regulator vent, the water heater, and the door to the balcony would all eventually require fall protection.

Based on the foregoing, the Court finds Respondent failed to establish it is entitled to the exception found in 29 C.F.R. § 1926.500(a)(1). Accordingly, the Court finds the standard applies and was violated.

Respondent Had Knowledge of the Violation

As described above, Wilson crossed through the guardrails onto the balcony and was followed shortly after by Pezick. Wilson testified he told Pezick to remain behind the guardrails and proceeded towards the closet, where he took measurements and planned the installation of the regulator vent. Wilson claims he did not recognize Pezick went beyond the guardrails until he completed his measurements and turned around to go back inside the building. At that time, Wilson recalled, he told Pezick to return to the other side of the railing. Thus, the Court is confronted with the issue of knowledge from the standpoint of Wilson's awareness of Pezick's misconduct, as well as Wilson's knowledge of his own misconduct.

Respondent contends it did not, indeed could not, have knowledge of the violation for three primary reasons: (1) Wilson did not know Pezick had followed him onto the balcony even after he told him not to do so; (2) Wilson's knowledge of his own misconduct cannot be imputed to Respondent under Tenth Circuit precedent because his misconduct was not foreseeable; and (3)

Wilson had a good faith belief his actions were in conformity with the exception found at 1926.500(a)(1). In response, Complainant argues Wilson was actually aware of Pezick's presence on the balcony and that Respondent should be charged with Wilson's knowledge as Respondent's supervisory agent. *See John H. Quinlan d/b/a Quinlan Enters. v. Sec'y of Labor*, 812 F.3d 832, 841 (11th Cir. 2016). Further, Complainant argues Respondent should be charged with knowledge of Wilson's misconduct because it was foreseeable in light of Respondent's deficient fall protection program. The Court agrees with Complainant.

In order to prove Respondent had knowledge, Complainant must show that Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act.[9] *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of the noncomplying conduct of a subordinate, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980). But, if the misconduct is committed by the supervisor, a different situation is presented. *Id.*

"When the law of the circuit to which a case would likely be appealed differs from the Commission's case law, we apply the law of that circuit . . . ." *Brooks Well Serv., Inc.*, 20 BNA OSHC 1286, 1292 (No. 99-0894, 2003). In the Tenth Circuit, to which this case could be appealed,

9. In this regard, Wilson's good faith belief that his actions were in compliance with the exception is not relevant to the question of whether Respondent had knowledge. However, to the extent that the morning's presentation on the exception may have an impact on whether Wilson's actions were foreseeable, the Court shall consider it as a factor.

a supervisor's knowledge of his own misconduct is not imputable to his employer unless it can be shown the misconduct was otherwise foreseeable. *Mountain States*, 623 F.2d at 158. Like other circuits, the Tenth Circuit requires Complainant to show foreseeability under these circumstances to prevent what it perceives to be a misappropriation of the burden of proof. *See id*. The court found that imputing to the employer the supervisor's knowledge of his own misconduct would be to remove Complainant's burden to establish one of the prima facie elements and, consequently, place the risk of nonpersuasion on Respondent. *Id.*

Respondent's Knowledge of Pezick's Actions

After reviewing the entire record, the Court finds Respondent's argument that Wilson was unaware of Pezick's presence on the balcony is unconvincing. Wilson may have told Pezick to remain behind the guardrail, but he also testified he intended to provide instructions to Pezick through the closet studs inside the apartment unit while he was taking measurements inside the closet. (Tr. 201). The Court finds it hard to believe Wilson was unaware Pezick was standing behind him—when he was supposed to be in an adjacent room looking through gaps in the studs—given the relatively small amount of space inside the closet, which CSHO Peterson testified was no more than four-feet wide by four-feet deep.

From this set of facts, the Court finds it is reasonable to infer Wilson knew or, at the very least, should have known Pezick was right behind him on the balcony. If the purpose of Wilson's trip into the closet was, as he testified, to both take measurements and "line out"[10] to Pezick the process for installing the regulator vents, then one of two conclusions is possible: (1) either Wilson was instructing Pezick inside the closet, or (2) Wilson should have been aware that Pezick followed him, because Pezick was not on the other side of the closet studs where he was supposed to be to

10. Though there was some confusion regarding Wilson's description of "lining it out", the Court interprets this to mean to outlining the process of measuring and installing the regulator vents. (Tr. 82–83).

receive instructions. According to CSHO Peterson, he observed two employees, one after another, cut through the guardrail and walk across the balcony out of sight. (Tr. 73). The only location that would place them out of sight is the area immediately adjacent to or in utility closet, which only measured four feet by four feet, square. In fact, CSHO Peterson testified that Wilson and Pezick both told admitted they were in the closet while Wilson was taking measurements, which explains why CSHO Peterson lost sight of them after they entered the balcony. (Tr. 78). Even though Wilson estimates he spent less than a minute inside the closet, this was more than enough time for him to realize Pezick was not where he was supposed to be, especially when he started "lining out" the project. *See ComTran Group, Inc. v. U.S. DOL*, 722 F.3d 1304, 1308 (11th Cir. 2013) ("An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have."). Accordingly, the Court finds Respondent, through Wilson, had constructive knowledge of Pezick's violation of 29 C.F.R. § 1926.501(b)(1).

Respondent's Knowledge of Wilson's Actions

The key to establishing employer knowledge in this context is foreseeability. In order to prove foreseeability, Complainant must show Respondent's safety program is deficient in a way that would show the supervisor's misconduct was preventable.[11] This burden can be met through proof of "inadequacies in safety precautions, training of employees, or supervision." *Capital Elec. Line Builders of Kansas Inc. v. Marshall*, 678 F.2d 128, 130 (10th Cir. 1982). In the context of fall protection, Respondent's safety program was deficient in all three areas.

11. The assessment of foreseeability tracks the elements of unpreventable employee misconduct. *See Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 571 (5th Cir. 1976) (holding an employer may not be penalized "for the unforeseeable, implausible, and therefore unpreventable acts of his employees").

In the particular arena of fall protection, Respondent's safety program was inadequate. Respondent has multiple safety program documents, including an Employee Handbook, a printed Safety Program, and a safety program specific to the Elevate Wolff-Havana project, but the only discussion of fall protection relates specifically to the use of scaffolds, which are covered by subpart L and were not part of Wilson's work on the day of the inspection. (Ex. C-12 at 16, C-14, C-15).[12] The Employee Handbook does not discuss fall protection, and the site-specific safety program appears to be little more than a reproduction of Respondent's general safety program, with no additional measures regarding fall protection outside of scaffolds. (*Compare* Ex. C-12 *with* C-15). The lack of any fall protection rules, let alone a comprehensive program, is a substantial deficiency.

Respondent claims, though there is no documentation, that it has a 100% fall protection rule. (Tr. 208). The only documentation of Respondent's fall protection "program", other than that related to scaffolds, consists of a single worksite safety meeting on June 6, 2016, which covered fall protection on roofs. (Tr. 219–20; Ex. R-33). The remaining weekly training topics covered other safety issues, ranging from GFCIs to forklifts. (Ex. R-25). The only other documented training sessions for fall protection were the MPC toolbox talk, which discussed the disputed exception, and the fall protection training Respondent provided after the inspection occurred. (Ex. R-16, R-24). McMillan testified Wilson and Respondent's other foreman were required to take the OSHA 10-hour course, which purportedly discusses fall protection, but no documentation of the course materials was submitted into evidence. (Tr. 263; Ex. C-20).

While the absence of a written rule does not, itself, prove Wilson's actions were foreseeable, verbal rules, such as Respondent claims here, must be clearly and effectively

12. After the inspection, Respondent updated its safety program to include extensive information on fall protection and conducted comprehensive fall protection training. (Ex. C-13, R-24).

communicated to employees. *See Aquatek Systs. Inc.*, 2006 WL 741751 (No. 03-1351, 2006) (citing *Capform, Inc.*, 16 BNA OSHC 2040, 2043) (No. 91-1613, 1994)). The only fall protection training provided by Respondent prior to the inspection was specific to roofing and did not address the hazards confronted by its crew at Building 5 on the day of the inspection. (Tr. 220). With a workforce of 149 employees, the Court is not convinced that Respondent's verbal rule was effectively communicated given that its fall protection program was little more than an *ad hoc* compilation of training modules that only tangentially addressed the hazards present at the Elevate Wolff-Havana project. *Cf. Aquatek Systs., Inc.*, 2006 WL 741751 at *2 (No. 03-1351, 2006) ("Indeed, Aquatek's small size—a total of four employees, including owner Ken Morris and his brother, foreman Morris—makes it an unlikely candidate for a formal written safety program of the kind typically associated with larger companies.").

Respondent presented evidence of a disciplinary program and a safety committee, which is comprised of five different members of management. (Tr. 262–63). The committee is charged with developing safety programming and training. (*Id.*). According to McMillan, Respondent's general superintendent, Bill Lund (who is also a member of the safety committee) is responsible for overseeing all project foremen at the job sites Respondent is working on. (Tr. 265). McMillan testified that Lund monitored various worksites and served as "an extra set of eyes", but there was no evidence regarding how, when, or the frequency at which such monitoring occurs. *See Burford's Tree, Inc.*, 22 BNA OSHC 1948 (No. 07-1899, 2010) (determining monitoring efforts were inadequate when audits of equipment were performed sporadically and only involved brief walk-around inspections); *L.E. Meyers Co.*, 16 BNA OSHC 1037, 1042 (No. 90-945, 1993) (finding safety program inadequate, in part, because company safety officials failed to monitor supervisor's adherence to safety rules during "the month or more" he was assigned to cited

worksite). *But see Stahl Roofing, Inc.*, 19 BNA OSHC 2179 (No. 00-1268 *et al.*, 2003) (finding adequate supervision where supervisors visit sites once per day, safety manager visits 10 to 15 sites per week, and company president makes unannounced visits to various worksites). Indeed, in this case there was no testimony or evidence indicating Wilson's crew—or any Ovation crew for that matter—had ever been audited or monitored during its time at Elevate Wolff-Havana prior to the inspection on October 20, 2016. Because Respondent (1) had no written fall protection rule applicable to the conditions in this case; (2) had a verbal, vague, non-specific 100% tie-off policy; and (3) failed to establish that it took reasonable steps to discover violations or monitor compliance with safety requirements, the Court finds Respondent's safety program was inadequate. *See Stanley Roofing Co., Inc.*, 21 BNA OSHC 1462 (No. 03-0997, 2006).

Finally, the Court also rejects Respondent's argument that the training Wilson received on the 1926.500(a)(1) exception was unforeseeable and his subsequent trip over the guardrail was unpreventable. The question of whether Respondent had knowledge is directed at the conditions constituting a violation, not whether the law characterizes those conditions as such. *See Phoenix Roofing*, 17 BNA OSHC at 1079–80. That fact notwithstanding, the Court finds it unsurprising Wilson acted upon the fall protection exception information he received during the MPC toolbox talk. To that point in time, Wilson's conduct was not governed by any specific Respondent-generated, written fall protection rules or programs; the training he (and Pezick) received did not govern the specific hazards present at the worksite; and Respondent had no discernible program for monitoring fall protection compliance at this location. Under these circumstances, Wilson's violative actions were foreseeable and preventable.

Further, the Court notes that the guardrails had been installed "incorrectly" for a long time. Clyde George testified the orientation of the guardrails at the entry to the balcony was determined

in a pre-construction meeting with his framers. (Tr. 177–78). Prior to his foray onto the balcony on the day of the inspection, Wilson testified he and the other crew members entered into the closet through the spaces between the interior studs. Subsequent installation of plumbing and electrical wiring, however, impeded their ability take that route. (Tr. 209). According to Wilson, he asked MPC to move the guardrails "[a]bout three or four" times, but he received no response. (Tr. 244). Instead of requiring MPC to move the guardrails to the perimeter of the balcony prior to performing additional work—or refusing to work in the area until the guardrail condition was corrected—Wilson's crew continued to walk onto the balcony to get to the closet, even though there was no protection from the unprotected edge of the balcony only a couple of feet away. Wilson and crew had been on site for 6 months, 5 days a week, during which time Wilson testified he was the highest ranking official for Respondent on the worksite. (Tr. 190). During that time, Respondent installed roughly 90 percent of the plumbing on all floors of Building 5, including the closets, even though the fall protection on the balconies was inadequate. (Tr. 192). Given that the guardrails were situated at the entrance to the balcony for a substantial period of time, Respondent could have insisted that the problem be corrected before its employees were exposed to the hazard. The length of the time the condition existed, the lack of explicit fall protection rules, and the lack of an effective worksite monitoring program, cause this Court to conclude that Wilson's actions on the day of the inspection were foreseeable and preventable. Respondent is charged with constructive knowledge of the violation.

Respondent Failed to Prove the Affirmative Defense of Unpreventable Employee Misconduct

In order to prevail on a claim of unpreventable employee misconduct, Respondent must show: (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations of the rules;

and (4) it must effectively enforce the rules when violations are detected. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096–97 (No. 10-0359, 2012). As noted above in footnote 11, the analysis of foreseeability closely tracks the elements of a claim for unpreventable employee misconduct. As such, the Court will not revisit the foregoing elements in depth; rather, it shall herein incorporate by reference the previous section's findings of fact and conclusions of law. The foregoing analysis illustrates Respondent failed to establish its claim of unpreventable employee misconduct with respect to Wilson or Pezick.

Respondent failed to implement effective work rules designed to prevent the violation. Prior to the inspection in this case, Respondent's written fall protection program consisted of a patchwork of training modules (undetailed in court); a half-page, written section on fall protection as it relates to scaffolding; and a vaguely worded, verbal 100% tie-off policy. The training Respondent did provide apparently did not cover the hazards on the Elevate Wolff-Havana site, and there is no evidence it was provided consistently to account for new employees, such as Pezick, who started at Ovation within one month of the inspection and missed the last Respondent-provided fall protection training provided on June 6, 2016. (Tr. 255). Finally, though Respondent had a disciplinary program, there was insufficient evidence of the steps Respondent took to monitor compliance with safety regulations and to detect violations.

Accordingly, the Court finds Respondent failed to meet its burden to establish the defense of unpreventable employee misconduct.

The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only

show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

CSHO Peterson credibly testified that a fall from over 10 feet would cause injuries such as contusions and broken bones. (Tr. 88). Respondent did not dispute CSHO Peterson's testimony. Because the possible injuries caused by a fall from the balcony could cause serious injuries, and possibly death, the Court finds Complainant has proved the violation was serious. Accordingly, the Court finds Complainant met its burden, and Citation 1, Item 1 shall be AFFIRMED as issued.

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 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 Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that 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. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Complainant assessed a penalty of $4,811.00. This penalty is premised on CSHO Peterson's determination the violation was of medium- to high-gravity and the likelihood of an

accident was low. While the Court generally agrees with Complainant's assessments, the Court finds the short duration of Wilson and Pezick's exposure, coupled with a low likelihood of injury, warrants a reduction in penalty. Neither Wilson nor Pezick worked on or near the edge of the balcony; instead, after they crossed the guardrail, they cut across the back corner of the balcony and went straight into the closet. By Wilson's own estimate, he and Pezick were on the balcony for no more than a minute, during which time they occupied the closet. Indeed, as Wilson testified, he was cognizant of the fall hazard and made sure to keep close to the guardrail and the back corner of the balcony as he walked into the closet. Considering the totality of the circumstances, the Court finds a penalty of $1,000.00 is appropriate.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1(a) is AFFIRMED, and a penalty of $1000.00 is ASSESSED.

/s/

Date: April 17, 2018
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission