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

SECRETARY OF LABOR, Complainant, v. KENVIL UNITED CORP., dba KENVIL STEEL, INC., Respondent.	OSHRC Docket No. 21-1040

Appearances:

Audrey Winn, Esquire
Andrew Karonis, Esquire
Department of Labor, Office of the Solicitor
New York, New York
For the Secretary

Kenneth D. Kleinman, Esquire
Brad M. Kushner, Esquire
Stevens & Lee
Philadelphia, Pennsylvania
For Respondent

Before:

Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

BACKGROUND

Kenvil United Corp., dba Kenvil Steel, Inc. (Respondent or Kenvil) is engaged in the business of commercial steel erection. (JX-2 SF# 1). Kenvil contracted with Dobco, Inc., a general contractor, to perform steel erection for the Montgomery Municipal Building project at 100-200 Headquarters Drive, Belle Meade, NJ (Worksite or Montgomery project). (Tr. 292; JX-2 SF# 2). Kenvil's work at the Montgomery project began mid-January 2021. (Tr. 433-34).

While driving south on Route 206 in Belle Mead, New Jersey, on February 25, 2021, Compliance Officer (CO) Michael Pelton observed employees working at heights on a steel structure under construction. (Tr. 117-18; JX-2 SF# 5). In accordance with the local emphasis program on fall protection in construction, CO Pelton opened an inspection regarding the use of fall protection at the worksite. (Tr. 28-29; JX-2 SF# 5).

As a result of the inspection, OSHA issued a citation and notification of penalty on August 16, 2021, to Kenvil for a repeat-serious violation of 29 C.F.R. §1926.760(a)(1) with a proposed penalty of $30,037. (Citation). (JX-2 SF# 10). The citation alleged that employees working at heights above 15 feet were not protected from falls at the Montgomery project. Kenvil timely contested the citation. (JX-2 SF# 11).

The Secretary filed its complaint on December 10, 2021, and Respondent filed its initial answer on January 27, 2022. Respondent filed an amended answer and affirmative defenses on July 22, 2022.[1]

A three-day hearing for this matter was held via the Webex video conference platform on October 18, October 19, and November 1, 2022. The Secretary presented CO Michael Pelton as its sole witness. Respondent called four witnesses: Gerald Fahy, Kenvil's president and owner; Joseph Seck, Kenvil's foreman at the Montgomery project; Luis Rodriguez, ironworker for Kenvil at the Montgomery project; and Peter Migliorini, ironworker for Kenvil at the Montgomery project. The parties set forth fifteen fact stipulations. [2] (JX-2; Tr. 9-10, 41-42).

---

[1] Here, as the Secretary did not meet his proof burden to establish a prima facie case, by a preponderance of the evidence, Respondent's asserted affirmative defenses are not addressed. *See generally*, *New River Elec. Corp. v. O.S.H.R.C.*, 25 F.4th 213, 219 (4th Cir. 2022), quoting *ComTran Grp., Inc. v. US Dep't. of Labor,* 722 F.3d 1304, 1308 (11th Cir. 2013).

[2] The parties stipulated to facts and principles of law as set forth in JX-2. These will be referenced throughout this Decision as JX-2 SF# for stipulated facts and JX-2 SL# for stipulated law.

At the conclusion of the hearing on November 1, 2022, the hearing record was closed with the parties' main post-hearing briefs due January 10, 2023. (Tr. 691-95).

On December 13, 2022, Secretary filed a Motion to Amend citation and complaint (Motion). The Secretary moved to allege that, in the alternative, Respondent violated 29 C.F.R. §1926.502(d)(8). On December 27, 2022, Respondent filed its Opposition to the Secretary's Motion to Amend citation and complaint (Opp'n). On January 3, 2023, the undersigned issued an Order ruling that the Secretary's Motion would be held in abeyance and decided in conjunction with the instant Decision and Order. The briefing schedule was modified. Both parties filed main and reply post-hearing briefs. Post-hearing briefing concluded on March 3, 2023.

The key issues in dispute in the instant Decision are whether employees working at heights above fifteen feet at the Montgomery project were protected from falls in accordance with 29 C.F.R. § 1926.760(a)(1) and whether Respondent had knowledge of the alleged violation of the cited standard.

Further, in a separate Order Denying the Secretary's Motion to Amend citation and complaint the undersigned denies the Secretary's Motion to cite the Respondent under 29 C.F.R. § 1926.502(d)(8), in the alternative.

For the reasons set forth below Citation 1, Item 1 is Vacated. Any argument set forth by the parties that is not specifically addressed below has been considered and determined to have no merit.

Prior OSHA Citations

As the basis for its repeat characterization of the Citation, OSHA provided information of three prior OSHA inspections of Kenvil worksites. Kenvil was previously cited for a violation of 29 C.F.R. § 1926.760(a)(1) related to inspection number 1339256 at a workplace located at 595 W. State St., Doylestown, PA 18901 (Doylestown Citation). The Doylestown Citation was affirmed as a final order on November 13, 2018. (JX-2 SF# 12).

Kenvil was previously cited for a violation of 29 C.F.R. § 1926.760(a)(1) for inspection number 1190269 with respect to a workplace located at 485 Marin Blvd., Jersey City, NJ (Jersey City Citation). The Jersey City Citation was affirmed as a final order on September 17, 2017. (JX-2 SF# 13).

Kenvil was previously cited for a violation of 29 C.F.R. § 1926.760(a)(1) for inspection number 1189561with respect to a workplace located at Burlington County College Circle, Mount

Laurel, NJ (Mount Laurel Citation). The Mount Laurel Citation was affirmed by a final order on June 1, 2017. (JX-2 SF# 14).

JURISDICTION

Based on the record, the undersigned finds Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5).[3] The undersigned finds the Commission has jurisdiction over the parties and subject matter in this case.

FINDINGS OF FACT

The Company & Project

Gerald Fahy is the president and owner of Kenvil. (Tr. 261). Since its founding in 2006, the company has installed structural steel, iron, and precast concrete at commercial worksites throughout New Jersey, New York, and Pennsylvania. (Tr. 261). Mr. Fahy is a member of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Union, Local 11 (the Union). (Tr. 261, 389-90. *See* CX-2 at 6). The Company employs between 80 to 100 employees. (Tr. 262). The ironworkers employed at Kenvil's worksites are represented by the Union. (Tr. 263, 388).

Kenvil contracted with Dobco, Inc. to erect structures at the Montgomery Municipal project in Belle Meade, New Jersey (Montgomery project or worksite). (JX-2 SF## 1, 2). Mr. Fahy is involved in the company's projects in a variety of ways, including bids, manpower issues, accounting, corporate safety, and coordination with the worksite foreman. (Tr. 261-62). Kenvil's project managers provide estimates for prospective jobs, which include an assessment of the safety requirements for a site. (Tr. 262).

Joseph Seck was the lead foreman at the Montgomery project. (JX-2 SF# 3). Mr. Seck's role at the site was ensuring that revisions and specifications of the building process were followed, assigning daily tasks, and ensuring that safety equipment was available and utilized. (Tr. 435, 449). Mr. Seck had worked for Kenvil since 2000. (Tr. 396).

[3] "The Occupational Safety and Health [Review Commission] has jurisdiction over this contest, pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 659(c), (The "Act") as amended." (JX-2 SL# 1). "Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section l0(c) of the Act." (JX-2 SL# 4). "Respondent Kenvil was an 'employer' within the meaning of section 3(5) of the Act, and was engaged in commerce within the meaning of sections 3(3) and 3(5) of the Act." (JX-2 SL# 5).

Kenvil began its work at the Montgomery project in mid-January 2021. (Tr. 433-34). The work initially consisted of using cranes to set columns and beams, boxing out the structure, bolting connections, and welding the structure. (Tr. 434). On the day of the inspection, February 25, 2021, the raising gang had left the worksite and the crane was no longer in use; the crew was finishing up details on the decks and preparing for the stud machine, which would shoot studs into the floor to prepare for the concrete work. (Tr. 448, 450). The day before had been spent clearing out scrap materials in the work areas and gathering tools and equipment from various areas on the site.[4] (Tr. 448-50).

Four of the union ironworkers engaged in steel erection activity at the site on February 25, 2021, and the day before, were Luis Rodriguez, Pete Migliorini, Teddy Heffner, and Michael Ramirez. (Tr. 446; JX-2 SF# 4). Mr. Seck had worked with Luis Rodriguez for about two years, with Pete Migliorini for over ten years, with Michael Ramirez for four years, and with Teddy Heffner for five or six years. (Tr. 464, 466).

The Two Decks

Two roof decks at the Montgomery worksite were the focus of the citation at issue here—the courtyard deck (north side roof) and the library deck. To get to the library deck, an employee used a ladder to get onto the structure's main deck and then another ladder to ascend to the library deck. (Tr. 439). When working on the library and courtyard decks the employees were working at heights between 15 and 30 feet above the ground. (Tr. 41).

For fall protection, anchor points were set up on the working decks for attachment. (Tr. 425-27, 445, 605-06; JX-2 SF# 8). These anchor points were installed by the decking crew and Mr. Seck. (Tr. 478, 497). For example, Mr. Seck installed a deck-level system on the southwest corner of the library deck for use as a tie-off point when entering and dismounting from boom lifts. (Tr. 495).

An employee's personal fall arrest harness with a retractable lanyard could be attached to a certain type of anchor point, such as a steel sling or a plunger that was inserted into a hole in the steel structure. (Tr. 425-26, 446, 462). A retractable lanyard extends with tension from the back

[4] Prior to February 25, 2021, Mr. Seck indicated there had been multiple snowstorms which slowed the overall pace of the project because there were days the crew did not work and then on the days following, the crew used boom lifts to remove snow from the structure before proceeding with work. (Tr. 425-26, 434).

of an employee's fall arrest harness to the anchor point. (Tr. 440, 605, 613, 625-26). This tension pulled against the employee as he worked. (Tr. 440, 605-06, 608, 619).

Another type of anchor point was at the level of the floor or deck the employee worked on. (Tr. 427). This deck-level system consisted of a cable that ran along the deck between two butterfly D-rings screwed into the deck. (Tr. 427, 496). Mr. Seck acknowledged that he had heard this deck-level system referred to as a horizontal lifeline. (Tr. 496). When attaching to a deck-level system, an employee used a "free" lanyard that attached to and slid along the cable as the employee moved. (Tr. 428, 440). While doing decking work, a "free" lanyard was used because it did not have the resistance or pull of a retractable lanyard. (Tr. 440, 605-06, 608, 619).

Employees chose the type of anchor point and lanyard depending on the work being done and their location on the surface. When they worked near the edge of the deck, they generally tied-off using the retractables; when further away from the edge, they tied off to the deck-level systems that allowed the lanyard to slide along the cable as they worked. (Tr. 437, 439-40, 479-80, 493-94, 497, 499, 507, 605-06, 608, 616, 619). These deck-level systems were not removed each day but would stay in place through various phases of work. (Tr. 479-80).

On the courtyard deck, an employee could tie off either with the deck-level cabling system or use a retractable lanyard. (Tr. 446, 462). The night before the OSHA inspection, Mr. Seck had been on the courtyard roof to ensure it was prepared for work, including the safety equipment. (Tr. 437, 445, 469-70, 499-500). Mr. Seck had used the deck-level system for tie-off the day before the inspection, when he worked from the courtyard deck's west side gathering scrap materials to load into the telehandler. (Tr. 499-500).

The library deck had options for anchoring fall safety equipment, including retractables, beamers, and a deck-level system (cable shackled between butterfly D-rings). (Tr. 438, 477-78). Mr. Migliorini confirmed that while on the library deck they used either the retractables or a deck-level system. (Tr. 605-06). Mr. Seck had last been on the library deck sometime during the week prior to the OSHA inspection. (Tr. 498-99, 515).

February 25, 2021-Day of the Inspection

On February 25, 2021, work began at the usual time of 7:00 a.m. (Tr. 448, 606-07). The usual morning break time was about 10:30 a.m. (Tr. 606-07). Mr. Seck arrived at the worksite 30-45 minutes before the start of work. (Tr. 448-49). He verified that snow had been cleaned off the

necessary work locations. (Tr. 449). [5] Because he had been the last person on the courtyard deck the day before, he knew the safety equipment was in place. (Tr. 449). He conducted a typical toolbox talk that morning regarding the use of safety equipment, tools and explained the assignments for the day. (Tr. 403, 449-50). A toolbox talk usually lasted about 30 minutes. (Tr. 405, 428). On that day the decking crew was tasked with securing the deck with tack welding and screws. (Tr. 607). The decking crew was Luis Rodriguez, Pete Migliorini, Ted Heffner, and Mike Ramirez. (Tr. 497).

Mr. Seck worked at various locations that morning, on the deck and on the ground. (Tr. 634). Just before the CO came onto the worksite, Mr. Seck was on the ground on the west side of the building acting as a spotter for the telehandler that was moving scrap materials to the dumpster. He was also assessing where to place the welding machine that would be delivered for the upcoming stud work.[6] (Tr. 450-452, 459-60). With respect to the employees working on the library deck, Mr. Seck had seen them that morning when describing the tasks for the day and when he passed from the second floor down the ladder to the ground to help as a spotter for the telehandler. (Tr. 452).

Around 10:00 a.m., Mr. Seck received a call from Mr. Migliorini that someone was watching the worksite from the road and appeared to be taking photographs. (Tr. 450-53). Mr. Seck notified the general contractor. (Tr. 454).

The CO Notices the Worksite

On February 25, 2021, as CO Pelton was driving south on Route 206 near Belle Meade, New Jersey, he pulled onto the shoulder of Route 206 to observe and take photographs of a construction worksite pursuant to a regional emphasis program for fall protection in construction. (Tr. 82, 118, 121-22; JX-2 SF# 5). It was approximately 9:45 to 10:00 a.m. (Tr. 62-63). Between the CO's position on Route 206 and the worksite was a large open field. (Tr. 118, 134). From this

[5] In an unhelpful effort to dispute the worksite deck conditions on February 25, 2021, Respondent cites to exhibits never offered into evidence at the hearing. (Tr. 692-93; CX-15, CX-16, CX-17, CX-18). Resp. Reply 8. These exhibits are not in the official hearing record or before the undersigned. Respondent's argument regarding these exhibits is disregarded.

[6] Mr. Seck identified this general location using exhibit CX-12. He stated that he was to the right of the orange JLG boom where the telehandler (with a yellow boom section and orange base) was located below the structure's pitched roof section. (Tr. 460).

position (first vantage point), the CO saw that four employees were working on an elevated deck. (Tr. 122-23, 173; CX-12A).

The CO then turned westbound onto Orchard Road and then turned onto Community Drive, which was next to the worksite. (Tr. 121, 123, 138). From Community Drive he photographed three employees working on the upper deck (library deck) for roughly two to three minutes. (Tr. 121-22, 123, 138; CX-29, CX-31; CX-33). The CO did not know the distance from his position on Community Drive (second vantage point) to the three employees. (Tr. 138). At the time the CO took the photographs, he believed the three employees on the library deck were tied off. (Tr. 174-75). Later, when the CO downloaded the photographs and enlarged them on the computer, he decided they had not been tied off. (Tr. 163, 654). The CO did not interview the three employees working on the library deck. (Tr. 651).

As he was leaving this second vantage point on Community Drive, he noticed that a fourth employee, Luis Rodgriguez, appeared to be leaning over the edge of the courtyard deck. (Tr. 175-76). He did not photograph Mr. Rodriguez leaning over the edge. (Tr. 182). The CO drove back to Route 206 (third vantage point) for a better angle to observe and take photographs of Mr. Rodriguez. (Tr. 175-76). Mr. Rodriguez was the sole focus of observation and photographs from the third vantage point. (Tr. 134, 176-77).

From this third vantage point, the CO observed and photographed Mr. Rodriguez walking on the courtyard deck and welding near the edge. (Tr. 177-78; CX-21, CX-21A, CX-23, CX-23A, CX-26, CX-28, CX-28A). Initially, Mr. Rodgriguez was facing the camera so the CO could not see the back of the fall arrest harness where the connector was located. As the CO observed Mr. Rodriguez walking across and making welds on the deck over the next three to five minutes, the CO could see the back of his fall arrest harness; he observed no tie-off to an anchor point. (Tr. 75-76, 176-78, 233-34).

After photographing and observing Mr. Rodriguez, the CO then drove to the worksite. (Tr. 77-78). From the time the CO initially stopped at the first vantage point on Route 206, until he ultimately entered the worksite itself, roughly fifteen to twenty minutes elapsed. (Tr. 119, 136, 173-74).

The CO Enters the Worksite

The CO opened the inspection with the general contractor's representative to request entry into the fenced worksite area. (Tr. 77, 82). He asked to speak to the foreman of the employees

working on the decks, so Mr. Seck was called. (Tr. 83). The CO estimated the time from leaving the third vantage point to meeting Mr. Seck was about five minutes. (Tr. 77-78).

The CO entered the worksite around the time the decking crew took lunch that day, between 10:00 to 10:30 a.m. (Tr. 457-58). The decking crew stopped working and went to their vehicles for their break not long after the CO entered the worksite. (Tr. 457-58).

When the CO approached the structure with the general contractor, there were no employees working on the library deck.[7] (Tr. 136). The general contractor introduced CO Pelton to Mr. Seck, since he was Kenvil's foreman at the site. (Tr. 136, 456). The CO conducted an opening conference with Mr. Seck explaining that he was conducting an inspection based on a regional emphasis program for fall hazards in construction. (Tr. 82, 466-67).

The CO showed Mr. Seck a photograph on the CO's camera of an employee—Rodriguez—on the courtyard roof.[8] (Tr. 456, 461-62). Mr. Rodriguez was on the courtyard deck (the north side roof) finishing up minor tack welds. (Tr. 453). Where he stood on the ground, Mr. Seck could not see Mr. Rodriguez on the courtyard roof. (Tr. 453, 461). Further, Mr. Seck stated that when standing on the ground, about 30-40 feet away from the building and with the deck's surface 23 feet above the ground, the edge of the structure would have obstructed his view. (Tr. 514-15). The CO told Mr. Seck that Mr. Rodriguez was not tied off while the CO observed him. (Tr. 466-67). Mr. Seck recalled that Mr. Rodriguez was the only person the CO mentioned not using fall protection. (Tr. 461-62, 689).

When the CO asked Mr. Seck about the fall protection safety equipment, Mr. Seck recalled that he told the CO that the worksite's inventory included retractables, lanyards, personal retractables, and cable systems for beams. (Tr. 687-88).[9]

---

[7] The CO initially testified that the employees on the library deck came down as he spoke with Mr. Seck. (Tr. 62) However, because this testimony was in response to a leading question on direct examination, the undersigned gives weight to the CO's later testimony that there were no employees on the deck when he entered the area near the structure. ("I didn't see any employees on the deck as the GC and I approached."). (Tr. 136).

[8] At the CO's request, Mr. Seck called Mr. Rodriguez to ask him if he was tied off. (Tr. 456, 687).

[9] The CO recalled that Mr. Seck had stated the attachment point for fall protection was retractables to the screen wall; however, the CO admitted it was unclear whether Mr. Seck's description was in regard to both decks or just the courtyard deck where Mr. Rodriguez worked. (Tr. 228, 238-39). The undersigned finds that because the CO had only mentioned to Mr. Seck that Mr. Rodriguez was not tied off, that Mr. Seck was describing the fall protection on the courtyard deck.

Mr. Seck contacted Kenvil's president, Gerry Fahy, to notify him the CO wanted to talk to Kenvil's safety consultant, Jerry Ford. (Tr. 462). Mr. Seck contacted Mr. Ford by phone and gave the phone to the CO; Mr. Seck did not recall hearing much of the conversation the CO had with Mr. Ford. (Tr. 462-63). Mr. Ford acted as Kenvil's representative for the inspection. (Tr. 83). The CO then held an opening conference with Mr. Ford by phone. (Tr. 83, 244). The CO told Mr. Ford that it appeared the three employees working on the library deck were tied off, but he would make a final determination after he reviewed the photographs on his computer where they could be enlarged. (Tr. 156-57, 163-64; CX-2 at 1).

The CO spoke primarily with Mr. Ford; his discussion with Mr. Seck was limited to identifying the employees working on the deck and asking about attachment points. (Tr. 225, 228, 230, 238-39). When the CO interviewed Mr. Rodriguez that day, Mr. Seck was not present. (Tr. 688-89).

Based on Mr. Seck's understanding that the CO had observed Mr. Rodriguez working without being tied off, Mr. Seck told Mr. Rodgriguez to leave the worksite for the rest of the day and to not report to work the following day—this was unpaid time off. (Tr. 466-67).

The CO took limited contemporaneous notes while at the worksite.[10] (Tr. 678-79; CX-35). The CO explained the purpose of the limited notes had been to either note specific statements made to him or to jog his memory for follow-up later at the office. (Tr. 678; CX-35). The CO admitted he did not write down everything a witness told him during an interview. (Tr. 678-79). CO Pelton interviewed Luis Rodriguez at the worksite. (Tr. 547, 651). The CO contemporaneously noted that Mr. Rodriguez told him "I was setting up – I moved and just didn't re-connect." (Tr. 658-60; CX-35). Mr. Rodriguez, however, testified that he remembered telling the CO he had been tied off. (Tr. 547, 569). The undersigned finds that the CO's notes, taken contemporaneously, are credited rather than Mr. Rodriguez's recollection nineteen months later.

The parties stipulated the employees CO Pelton observed were provided with fall arrest systems and used butterfly D-rings and harnesses attached to retractable ribbon lanyards. (JX-2 SF## 6, 7). Further, the parties stipulated there were anchor points available for employees to use

[10] The CO's limited worksite notes consist of a single page with Mr. Rodriguez's name and address and a single sentence from that interview. It listed the names of the 3 library deck employees and the phrases: "10 onsite . . library roof 23' . . .-not connected-." (CX-35).

throughout the walking/working surfaces on which Kenvil employees were working. (JX-2 SF# 8).

While on the worksite, the CO climbed the ladder to the courtyard deck, but did not go onto the courtyard deck or library deck because there were no guardrails. (Tr. 144-46). The CO did not personally take measurements during his inspection. (JX-2 SF# 9). However, the parties stipulated the employees were working at heights between 15 and 30 feet above the ground. (Tr. 41-42).

After the CO left the worksite, the CO stopped again on Community Drive (fourth vantage point) to photograph the employees on the library deck. The three employees had finished their break and were again at work on the library deck. (Tr. 202, 235-36). The CO admits that he was not standing in the same location on Community Drive for this final photograph, CX-20. (Tr. 203-04). The CO also could not identify whether the employees were in the same place on the library deck as they had been earlier, before their break. (Tr. 235-36). The CO stated that it was his perception the three employees were in a different location on the library deck—"They were closer to the main—the tall part of the building structures where the anchor points were for the employees when they went back up there." (Tr. 224-25).

The CO Estimates Mr. Seck's Position

CO Pelton estimated that when he first saw Mr. Seck walking toward him on the worksite that Mr. Seck was somewhere near the area of the port-a-john and JLG equipment. (Tr. 87, 90; CX-12A). The CO stated that when he stood in the area of the worksite near the port-a-john and JLG equipment, he was about 50-75 feet from the library deck. (Tr. 87, 90, 92; CX-12A). The CO stated that from this position, if employees had been working on the library deck at the time, he would have been able to see them. (Tr. 92). Based on this, the CO believed that the employees working on the library deck must have been in plain view of Mr. Seck. (Tr. 87-92). However, the CO admitted that he did not know where Mr. Seck would have been when he photographed employees from the first, second, and third vantage points before entering the worksite. (Tr. 138).

The Inspection Photographs

The Secretary relied heavily on the photographs in evidence to support the alleged violation. The worksite photographs submitted into evidence generally did not reflect the scene from the view of the human eye; instead, they were taken utilizing the camera's zoom function or were also digitally manipulated (enlarged and cropped) on the CO's computer. (Tr. 139-40).

The CO noted that in OSHA case file documentation, he uses the word zoom[11] not as a reference to the built-in camera feature but instead to mean that the camera's digital photo was later enlarged, enhanced, cropped, or otherwise manipulated on the computer. (Tr. 151). In this decision the photographs modified in some way on the computer will be referred to as manipulated. Zoom or zoomed will refer to the feature built into the camera that allowed the CO to take a photograph closer than was visible with the naked eye.

The only photographs in evidence that appear to reflect the view as it would be with the naked eye are CX-12 and CX-12A; however, this is based on the undersigned's assessment of these photographs, not testimony. They show a wide view of the entire worksite with the open field visible in the foreground. (CX-12, CX-12A). In these photographs the employees are quite small and visible due to the bright red and yellow sweatshirts they are wearing; otherwise, they are barely visible.

Photos taken from vantage point three show Mr. Rodriguez working on the courtyard deck. (Exs. CX-21, CX-21A, CX-23, CX-23A, CX-26, CX-28, and CX-28A; Tr. 446-47). In exhibit, CX-23A, Mr. Rodriguez is fully visible from head-to-toe on the courtyard deck. Mr. Rodriguez appears to be mid-step in the photograph and there is no visible lanyard extending from the back of the fall arrest harness to an anchor point. Given the CO's testimony that all of these photographs were taken from the third vantage point, which was across a field from the worksite, it is clear each

[11] The CO described the ways the photographs varied from what would be seen by the naked eye.

> Q: Are you saying that when you took the picture you didn't use the zoom feature of your phone -- of your camera to take this picture?
>
> A: I did, but the way that I understood it from your original question or your original clarification when you were talking about zoomed pictures, you were talking about pictures that were altered on the computer that I had to look at. That was a picture that I used the camera in its natural -- in its state that is part of the camera function.
>
> Q: Right. Okay. So let me clarify that. You're obviously familiar with the zoom function of the camera, right?
>
> A: Yes, sir.
>
> Q: Okay. And that's a separate issue from downloading the photographs and enhancing them on the computer, right?
>
> A: Yes, sir.

(Tr. 151-52).

of these were taken using the zoom feature of the camera. CX-26, CX-31, and CX-33 were also manipulated (enlarged and cropped) on the computer. (Tr. 151).

With respect to the employees working on the library deck, the Secretary presented four photographs into evidence.[12] Exhibits CX-29, CX-31 and CX-33 were taken by the CO from the second vantage point on Community Drive prior to his entrance onto the worksite. (Tr. 140-41). Exhibit CX-20 was taken by the CO after leaving the worksite from a different location on Community Drive (fourth vantage point). (Tr. 203). The distance from the photographer to the building is unknown in all four photographs. (Tr. 138, 201-02). Photographs CX-31, CX-33, and CX-34 photographs are zoomed and/or manipulated.[13] (Tr. 139-41, 149, 152, 609-611).

CX-29 can be described as a photograph of two employees on the library deck, with an employee on the left, wearing red, with his back to camera and an employee on the right, wearing yellow, with his left side toward the camera. Both employees are only visible from the waist up; the steel structure in the foreground obscures the lower half of both employees' bodies. (CX-29). The CO admitted the photo at CX-29 was likely taken using the zoom function of the camera. (Tr. 150).

In CX-29, the CO identified two connection options on the back of the fall arrest harness of the employee in red. (Tr. 52). One could connect to a retractable lanyard and the other was a lanyard extension. (Tr. 52-53, 58, 65; CX-29). The connectors on the back of the individual's fall arrest equipment appear to hang vertically. (Tr. 53; CX-29).

The CO believed that if the employee in CX-29 had been tied off one of these connectors would likely appear be at an angle away from, rather than lying flat on the employees back. (Tr. 58). To the contrary, Mr. Seck believed a connector would not necessarily be at any angle if the employee was attached to a deck-level cabling system (cable between two butterfly D-rings), which allowed the employee to do his decking work without resistance or pull to the connector on his back. (Tr. 444). The CO admitted that in CX-29, based on the photograph alone, he would

[12] The undersigned notes that within the Safety Narrative, Exhibit CX-2, and the Violation Worksheet, Exhibit CX-3, there are apparent worksite photographs. The undersigned finds these unhelpful as they are not in color and of low quality for observation of any detail.

[13] The CO testified that if the date stamp is visible in the corner of the photograph, it was not manipulated on the computer. (Tr. 151).

not be able determine whether the employee in the red sweatshirt was tied off to an anchor point at the deck level. (Tr. 149-50).

Exhibit CX-20 was taken from Community Drive (just after the CO left the worksite) outside the construction zone fence (fourth vantage point). (Tr. 202). In CX-20, there are two employees visible. The employee on the right is facing the camera and can be seen from approximately the knees to the top of his head. The employee on the left is visible from approximately the knee to the top of the shoulder with about one-third of the left half of his body obscured by the structure. The employee on the left has his right side slightly turned toward the camera so the view of his back is at an angle. (CX-20).

The Secretary focuses on the fall arrest harness of the employee on the left. (CX-20). The connector on the back of the fall arrest harness is partially visible and appears to be horizontal, parallel to the deck floor. The employee is standing just to the right of a large column that partially obscures the section of the connector between the harness to its point of attachment to a lifeline or lanyard. (CX-20). To the left of the steel column, the lifeline or lanyard appears to extend horizontally at chest-height, parallel to the deck's surface, at approximately the same height as the connector on the fall arrest harness. The other end of the lifeline or lanyard seems to be connected to a beam or wall at the left edge of the photograph. (CX-20). The undersigned notes the lifeline is barely visible in the photograph. It is apparent the employee is many feet away from the beam or wall that served as the anchor point. The CO asserts this is proof the employee on the left is anchored to the screen wall with a retractable lanyard. (Tr. 61). The foreman, Mr. Seck, agreed the photograph appears to show that employee is anchored with a retractable lanyard. (Tr. 441).

The demonstrative exhibit, CX-34, was presented to show the employees on the library deck had not been tied off when the CO initially observed them. The undersigned finds this unhelpful. CX-34 consists of an enlarged and cropped portion from two photographs at CX-29 (second vantage point) and CX-20 (fourth vantage point) to attempt to show the difference between an employee who was tied off to an employee that was not tied off. (S. Br. 7; CX-34). Even though they were both taken from Community Drive, these two cropped photographs cannot be reasonably compared.

The CO stated that CX-20 was not taken from the same place on Community Drive as the earlier photographs; the library deck was from a different viewpoint than in CX-29. (Tr. 203-04).

To the undersigned, based on the relative size of the employees shown, the photograph in exhibit CX-20 appears to be at a distance further than the photograph in CX-29. (CX-34).

The employees were not standing at the same location of the library deck in the two photographs. The employee in CX-20 was not the same employee shown in CX-29. (Tr. 205; CX-34). The record is silent as to whether all employees wore the same type of fall arrest harnesses that used similar connectors. Finally, in CX-29 the employee's body is not visible below the waist; in CX-20, the body is shown from the knee to top of shoulder with the left one-third of the body obscured. The undersigned finds the differences are too great in the two photographs for CX-34 to provide any meaningful comparison.

Kenvil's Safety Program

Policy Manual

When Kenvil's Safety & Quality Manual (Safety Manual) (RX-12) was revised on April 14, 2015, Mr. Fahy, company president, reviewed the manual with Kenvil's project managers to ensure that safety guidelines were used at all projects. (Tr. 264-65). In November 2019, a supplement was added to the Safety Manual (Supplement) with detailed information on safety requirements, including fall protection, and a procedure for gathering information after any safety-related incidents, with the goal of making the foreman more accountable if one of the workers they oversaw did not follow safety policies. (Tr. 284-85; RX-13 at 9-13, 18-21).

A section of Kenvil's safety manual entitled Fall Protection Program states that employees working at heights over 15 feet, with an unprotected edge, shall be protected by "guardrail systems, safety net systems, personal fall arrest systems, [or] positioning device systems for fall restraint systems." (RX-12 at 26). The Supplement notes that when there is not a guardrail in place or work cannot be done from a ladder or man-lift, the senior project manager or company president selects the method of fall protection. (RX-13 at 11). The Supplement sets forth minimum strength requirements of personal fall arrest system components and that horizontal lifelines will be designed, installed, and used under the guidance of a qualified person. (RX-13 at 11).

Mr. Fahy stated that after the 2017 and 2018 OSHA citations, Kenvil stepped up the penalties for lack of safety compliance and formalized the disciplinary process. They also hired Jerry Ford's consulting company, J. Ford Environmental & Safety, Inc., to routinely monitor Kenvil's worksites for safety compliance. (Tr. 284, 370-73).

Training

The employees are initially trained through the Union. (Tr. 263). Kenvil provides additional training through the annual fall protection seminar held at its main office. (Tr. 185-86, 221, 267-68, 416-22, 424-25; RX- 6). The seminar covers topics including the "proper fitting of the harness, the attachment of putting it all together on your body, inspecting it, knowing what to look for on the body harness, the anchor points that you can use with the body harness, the equipment that you use with the body harness for proper anchorage." (Tr. 424).

Kenvil's fall protection work rules were also communicated through toolbox talks presented by the foreman at the worksite each morning. (Tr. 185-86, 397-98, 400-03, 415, 428). Each week Kenvil's main office assigned a topic that the foreman covered each day along with additional safety instruction based on that day's work and site conditions. (Tr. 400-14, 428; RX-11). The daily safety meetings that the foreman, Mr. Seck, held at the Montgomery worksite lasted for about half an hour, included fall protection and tie off requirements, and other job-specific safety issues. (Tr. 404-05, 428; RX-11). Mr. Seck described the morning safety meeting as an "open conversation" where employees could ask questions and raise safety concerns. (Tr. 405). Mr. Seck stated Kenvil's fall protection rule was to "tie off all the time." (Tr. 428).

Safety Oversight

Kenvil monitored safety compliance at its worksite through its on-site foreman. (Tr. 268-69). When Kenvil's safety equipment was delivered to a worksite, Mr. Seck checked to see if it was undamaged and functional.[14] (Tr. 436-37). During each morning meeting, Mr. Seck also observed each employee's safety equipment including the fall arrest body harness. (Tr. 482). Once he concluded a morning safety meeting, foreman Mr. Seck continued to monitor safety rules at the Montgomery worksite by regularly observing each employee while he performed his own tasks. (Tr. at 397-99, 436). Mr. Seck monitored safety at the worksite by daily walk-throughs of the site to determine what safety measures were required and through discussing safety with the union stewards. (Tr. 435-36). He did not have a regular schedule to go up onto the decks, it varied with the phase of the project. (Tr. 469-72).

In addition, J. Ford Environmental & Safety, Inc., visits Kenvil's jobsites to conduct safety compliance spot checks. (Tr. at 268-69, 370, 372, 390). Mr. Ford's company was hired after the

[14] Mr. Seck stated that Mr. Fahy knew the specifications of the fall arrest equipment supplied to the worksites. (Tr. 502-03).

2018 Doylestown OSHA inspection. (Tr. 390). Kenvil also conducts in-house audits to verify safety policy compliance. (Tr. 268-69; CX-2 at 7).

Discipline

The Safety Manual includes a section, Safety Tie-Off Violation Policy (Policy), for violations of Kenvil's requirement to use fall protection. (RX-12 at 28). After Kenvil received citations for three worksites in 2017 (Rowan College and Marine Blvd) and 2018 (Doylestown Hospital), the company changed their Policy to include formal warnings to employees. (Tr. 370; RX-3; JX-2 SF## 12, 13, 14).

Employees knew of the Policy for safety violations because they were required to sign-off and acknowledge the rules and consequences as a new employee. (Tr. 429). When the foreman observes a violation, he approaches the employee. If the employee does not comply, the foreman elevates the problem to Kenvil's office. (Tr. 428-30). The Policy sets forth a progressive plan that requires sending the employee home from work immediately that day and the following day, without pay, for a first offense. (RX-12 at 28) The second offense requires a three-day suspension. *Id.* The third offense results in termination of employment. *Id.*

The Policy also includes discipline for the foreman. The first violation of an employee under the foreman's supervision results in a warning to the foreman. *Id.* A second offense is a formal review. *Id.* The third offense is a mandatory one-day suspension, and the fourth offense is termination. *Id.* A foreman is not assessed for a violation if he enforces the tie-off policy by reporting a worker's fall protection violation when it occurs. *Id.*

When Mr. Fahy, Kenvil's president, is informed of the worksite safety issue, he then documents the infraction and sends a copy to the employee and keeps a copy in his office files. (Tr. 359). Kenvil documents its discipline for safety infractions on an Employee Discipline Citation form (discipline form), ten of which were submitted into evidence. (Tr. 357-58; RX-3). The dates ranged from July 2019 to November 2020. (RX-3). The company's president, Mr. Fahy, issued and signed each discipline form. (Tr. 357-58). The following is an overview of the ten discipline forms in evidence.

a. Employee E.G. received a 3-day suspension for lack of tie off in a boom lift on August 15, 2019, at the Fairlawn worksite. (Tr. 379; RX-3 at 1). Mr. Fahy stated two employees received this level of discipline because they had recently attended a training on tying off in lifts and then did not tie off. (Tr. 379-80).

b. Employee A.W. received a 3-day suspension for lack of tie off in a boom lift on August 15, 2019, at the Fairlawn worksite. (Tr. 380; RX-3 at 4). Mr. Fahy stated these two employees, E.G. and A.W., received this level of discipline because they had recently attended a training on tying off in lifts and then did not tie off. (Tr. 379-80).

c. J.M., the foreman of E.G. and A.W. at the Fairlawn worksite, received a warning for allowing employees to work in the lift without being tied off on August 15, 2019. (RX-3 at 5).

d. Employee A.S. received 1-1/2 day suspension for lack of tie off on July 19, 2019 at Respondent's Hackensack, N.J., worksite. (RX-3 at 2).

e. Employee E.S. received a 1-1/2 day suspension for lack of tie off on July 19, 2019, at Respondent's Hackensack, N.J., worksite. (RX-3 at 3).

f. Employee G.H. received a 1-1/2-day suspension for lack of tie off on July 17, 2019, at Waterpark worksite. (RX-3 at 6).

g. Employee B.K. received a first warning for improper use of harness in lift on July 24, 2020, at Valley worksite. (RX-3 at 7).

h. Employee A.B. received a 1-day suspension for lack of tie off on August 27, 2020, at Valley worksite. (RX-3 at 8).

i. Employee S.M. received a warning for lack of face covering related to COVID-19 protocol on September 20, 2020, at Valley worksite. (RX-3 at 9).

j. Employee O.C. was issued a notice of noncompliance because on August 25, 2020, at the Matrix worksite, he was not anchored to available equipment and sustained a fall despite warnings from the supervisor at the site. (Tr. 381, RX-3 at 10). No suspension was issued because the employee was hospitalized for quite some time after the fall. (Tr. 381).

With respect to the above August 15, 2019, disciplinary actions related to the Fairlawn site, Mr. Fahy stated they were based on the information that he received from the worksite supervisor. (Tr. 379-80). Mr. Fahy acknowledged there had been an OSHA inspection around that time. (Tr. 380-81). On rebuttal, CO Pelton testified that he had reviewed the OSHA database and found that four of the above disciplinary actions (August 15, 2019 and August 25, 2020) were related to OSHA inspections. (Tr. 667-69). The Secretary did not provide documentary evidence to support the CO's statements that two OSHA inspections were directly related to these four disciplinary actions. (Tr. 667-70, 683-85).

During the two years that Mr. Seck worked with him, Mr. Rodriguez was always tied off and knew how to use the safety equipment. (Tr. 464-65). Mr. Seck's experience with the three employees working on the library deck was that they also knew how to use and apply the fall protection safety equipment. (Tr. 466).

CITATIONS

To establish a violation of an OSHA standard, the Secretary must prove by a preponderance of the evidence: (1) the cited standard applies; (2) there was noncompliance with the terms of the cited standard; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Donahue Indus., Inc.,* 20 BNA OSHC 1346, 1348 (No. 99-0191, 1994); *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Citation 1, Item 1

Citation 1, Item 1 alleges a repeat-serious violation of 29 C.F.R. § 29 C.F.R. 1926.760(a)(1):

> *General requirements*. (1) Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.[15]

The requirements for the components of various fall protection systems are set forth in subpart M, 29 C.F.R. § 1926.500, *et seq.,* which is incorporated by reference. *See* 29 C.F.R. § 1926.760(d) (components shall conform to the criteria in § 1926.502). The following requirements and definitions are relevant to the instant case.

29 C.F.R. § 1926.500(b) *Definitions*

> *Personal fall arrest system* means a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body belt or body harness and may include a lanyard, deceleration device, lifeline, or suitable combinations of these. As of January 1, 1998, the use of a body belt for fall arrest is prohibited.
>
> *Lifeline* means a component consisting of a flexible line for connection to an anchorage at one end to hang vertically (vertical lifeline), or for connection to anchorages at both ends to stretch horizontally (horizontal lifeline), and which serves as a means for connecting other components of a personal fall arrest system to the anchorage.

[15] The exception set forth in 29 C.F.R. § 1926.760(a) does not apply. *See* 29 C.F.R. § 1926.760(a)(1). The exception, which applies to connectors and employees working in a controlled decking zone, is not applicable here. 29 C.F.R. § 1926.760(a)(3).

Applicability

Kenvil is a steel erection company that was engaged in constructing a structural steel building at the Montgomery worksite. (JX-2 SF# 1). The four employees worked at heights between 15 and 30 feet on February 25, 2021. (Tr. 41). The parties stipulated that the cited standard, 29 C.F.R. § 1926.760(a)(1) is applicable to the work performed by Kenvil's employees on February 25, 2021, at the Montgomery worksite. (JX-2 SL# 2). The cited standard is applicable.

Employee Exposure

The Commission has long held the test for hazard exposure requires the Secretary to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Products, Inc*., 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (*Fabricated Metal*), citing *Gilles & Cotting*, 3 BNA OSHC 2002, 2003 (No. 504, 1976) (holding "that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure").

Respondent asserts that because the employees were not near the edge of the structure, they were not exposed to a fall hazard.[16] (R. Br. 21-22). Respondent focuses solely on the time the CO observed them. (R. Br. 22-26). Whether the employees were within a few feet of the edge of the structure during the CO's observations does not determine whether exposure is established.[17]

Exposure is not limited to where the employees were working when the CO observed them. Further, the area of exposure is not limited to the area the employe is assigned to work, it also includes the areas the employees traverse to get to that working position. *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995) ("The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces,

[16] The undersigned notes that one of the cases Respondent cited regarding the Commission's precedent on exposure is not considered. (R. Br. 22). *See Seward Ship's Drydock, Inc.,* 26 BNA OSHC 2303 (No. 09-1901, 2018), *rev'd and remanded*, 937 F.3d 1301 (9th Cir. 2019), *vacated*, 2020 WL 2141956 (OSHRC April 30, 2020).

[17] The two cases cited by the Respondent are unreviewed administrative law judge decisions and have no precedential value. *See Leone Constr. Co.,* 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (*Leone*) ("[A] Judge's opinion ... lacking full Commission review does not constitute precedent binding upon us.").

employees have been in a zone of danger or that it is reasonably predictable that they will be in a zone of danger.") (citations omitted). Further, it includes any location where it was reasonably predictable an employee could be, including through inadvertence. *Fabricated Metal*, 18 BNA OSHC at 1074.

The record shows that to get to their working positions on the deck, the employees used a ladder up to the deck and then moved from the deck's edge to the particular area where they worked. (Tr. 439-40). Mr. Seck pointed out that it was necessary for employees to have attachment points available for the transition from a ladder or a lift onto the deck, as they made their way to their assigned work position. (Tr. 438-40). The worker could "piggy-back" from anchor point to anchor point as he moved from the edge of the structure toward the middle of the deck. (Tr. 440).

The employees working the day of the inspection were not stationary. The record shows that employees were routinely moving around the deck while engaged in tack welding; thus, their work positions changed throughout the work shift. (Tr. 616, 626). While Mr. Migliorini stated that most of the morning they were not working near the edge, he also admitted that at times they might have been working near the edge. (Tr. 607-09).

The language of the cited standard is clear. Respondent was required to protect each employee with either "guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems." 29 C.F.R. § 1926.760(a)(1). Here, the facts show that to get to the middle of the deck, an employee had to be near the edge at some point when moving to his assigned work position. The evidence also shows the employees were moving across the deck while tack welding and were not limited to a particular area of the deck. Further, there was nothing on the surface to prevent the employees from venturing near the edge.

Finally, Commission case law does not provide an exception for an employee working in the middle of the deck.[18] *See Gate Precast Co.*, No. 15-1347, 2020 WL 2141954, at *3-4 (OSHRC Apr. 28, 2020) (rejecting claim the case law supported a general rule that employees further than

[18] In the preamble for the related standard for fall protection in construction at subpart M, 29 C.F.R. § 1926.500, *et seq.*, OSHA "determined that there is no 'safe' distance from an unprotected side or edge that would render fall protection unnecessary." Safety Standards for Fall Protection in the Construction Industry, *Final Rule,* 59 Fed. Reg. 40672, 40683 (Aug. 9, 1994). The requirements of subpart M are incorporated by reference as part of the fall protection requirements for steel erection. *See* 29 C.F.R. § 1926.760(d).

a lateral six feet from the edge were not required to have fall protection); *see also, George Campbell Painting Corp*., 18 BNA OSHC 1929, 1932 (No. 94-3121, 1999) ("fall protection is required whenever, as here, a fall hazard is *accessible* to employees"); *Walker Towing Corp.,* 14 BNA OSHC 2072, 2074 (No. 87-1359, 1991) ("It is well settled that brief exposures involved in passing or standing near an open edge constitute access.")

Respondent's argument the employees were not working in a hazardous area on the deck is rejected. The undersigned finds that all four employees were working on a walking/working surface at heights greater than fifteen feet and were thus exposed to a fall hazard. Exposure is proved.

Violation of Standard

The parties stipulated the employees observed by CO Pelton were provided with fall arrest systems and used butterfly D-rings and harnesses attached to retractable ribbon lanyards. (JX-2 SF## 6, 7). Further, the parties stipulated there were anchor points available for employees to use throughout the walking/working surfaces where Kenvil employees worked. (JX-2 SF# 8).

The Secretary asserts Mr. Rodriguez was not tied off while working on the courtyard deck. (S. Br. 6-7). The Secretary asserts the three employees on the library deck—Migliorini, Heffner, and Martinez—also worked without being tied-off to an anchor point. (S. Br. 7).

With respect to the three employees on the library deck, Respondent's primary argument is that the photographs the Secretary uses as proof were taken from too great a distance to establish the violative condition. (R. Br. 15, 22-26). In particular, Respondent points to the CO's testimony that while at the site, even with the use of the zoom feature on the camera, the CO initially believed these three employees were tied off.[19] (R. Br. 15-16). Further, Respondent asserts the three

[19] The Safety Narrative from the OSHA case file included the following:

> At the time of the inspection, it could not be determined if the first three employees were anchored to the building. The fourth employee was clearly not attached to the structure with a lanyard. CSHO explained to the Safety Consultant, Jerry Ford, that it appeared that the first three employees were attached, but final determination would be made after CSHO reviewed the photographs on a computer where they could be enlarged.

(CX-2 at 1).

It is unknown when the narrative was written; however, it would have been at some time prior to the issuance of the Citation on August 16, 2021.

employees were using a horizontal lifeline (deck-level system) for attachment, which would not be visible in the photographs. (R. Br. 14).

With respect to the employee on the courtyard deck, Mr. Rodgriguez, the Respondent also argues the CO's statement that Mr. Rodriguez was leaning out over the edge of the deck was inaccurate and that Mr. Rodriguez was likely tied off at all times. (R. Br. 12-13).

The undersigned agrees that the photographs, alone, are insufficient to establish a violation. The photographs presented to support the Secretary's claim were taken from a distance utilizing the zoom feature. There were no comparative photographs taken from each vantage point without the zoom feature. Mr. Fahy, Respondent's president, estimated the distance from the vantage points on Route 206 (first and third vantage points) to the building structure was about 200 to 300 yards. (Tr. 344). The Secretary does not refute this distance estimate. The CO did not know the distance to the employees or structure from any of the four vantage points. (Tr. 118, 138, 186, 201-02).

The photographs alone, without any corresponding measurements or context, offer little information to support proof of a violation. This is especially so when the purpose is to show whether a single lanyard or lifeline (which could easily blend into the background) was attached to an anchor point.[20] *See Stormforce of Jacksonville,* No. 19-0593, 2021 WL 2582530, at *8 (OSHRC Mar. 8, 2021) (Commission declined to rely on photograph alone to establish safety monitoring system was not in use); *David Weekley Homes,* 19 BNA OSHC 1116, 1120 (No. 96-0898, 2000) (*David Weekley*) (finding "the photographs submitted in support of this violation simply do not support [compliance officer's] claims regarding the ladder's visibility, let alone the visibility of its violative condition"); *Phoenix Roofing, Inc*., 17 BNA OSHC 1076, 1079 n.7 (No. 90-2148, 1995) (*Phoenix*) (declining to rely on compliance officer's distance estimate that was solely based on a photograph), *aff'd*, 79 F.3d 1146 (5th Cir. 1996); *see also, Rice v. United States*, 179 F.2d 26, 28 (D.C. Cir. 1949) (noting unreliability of photograph and finding that a photograph can be "deceiving because of the angle at which it was taken and the fact that perspective in two

[20] Respondent cites to opinions from administrative law judges with respect to photographic reliability; however, because these decisions are unreviewed by the Commission, they have no precedential value. *See Leone,* 3 BNA OSHC at 1981.

dimensional pictures does not give one an accurate idea of relative sizes and distances without some ascertainable scale to which various objects can be compared.")

In the reply brief, the Secretary asserts the CO took many photographs from various angles around and inside the jobsite and photographed the courtyard roof from the ladder. (S. Reply 6). The undersigned does not take a position on whether the CO took photographs inside the jobsite during the inspection; however, with respect to what is within the record, there are no photographs from the ladder or otherwise taken from within the worksite. The photographs in evidence were taken from outside the worksite itself, from either Route 206 or Community Drive. The Secretary's assertion that photographs were taken while the CO was inside the worksite is disregarded.

Nonetheless, with respect to Mr. Rodriguez, the undersigned finds that based on the record as a whole, Mr. Rodriguez was not tied off. In exhibit, CX-23A, Mr. Rodriguez is fully visible from head-to-toe. Mr. Rodriguez is at mid-step in the photograph and there is no visible lanyard extending from the back of the fall arrest harness to an anchor point. The photograph is only one factor in finding that Mr. Rodriguez was not tied off. In addition to the photograph, the CO observed Mr. Rodriguez moving around on the deck and saw no evidence that he was tied off; unlike the other three employees, the CO had a complete head-to-toe view as Mr. Rodriguez moved around, so could have seen either a retractable lanyard attachment or a horizontal lifeline attachment. (Tr. 73-75).

The key evidence is the CO's contemporaneous notes taken at the worksite during the inspection. (CX-35). In those notes, the CO wrote that Mr. Rodriguez admitted that he had moved and "just didn't reconnect." (CX-35). This evidence is credited rather than Mr. Rodriguez's testimony at the hearing nineteen months later.[21] (Tr. 568-69). Further, during his testimony Mr. Rodriguez was equivocal when questioned about whether he had been tied off at all times that day. His testimony suggests that when he was further than six feet from the edge, he was not always connected. (Tr. 542-44, 554-55).

[21] Mr. Rodriguez initially testified that during the onsite interview he told the CO he had been tied off. (Tr. 547, 568). Mr. Rodriguez stated that he could not tell from the photographs whether he was tied off. (Tr. 544, 546; CX-21; CX-23). However, when confronted with the CO's contemporaneous notation that Mr. Rodriguez had stated he "just didn't reconnect," Mr. Rodriguez simply stated that he did not remember saying that to the CO. (Tr. 569)

On the other hand, with respect to the three employees working on the library deck, the Secretary relies solely on the photographs. The Secretary argues that if the employees had been tied off there would be a visible tautness of the lines from an anchor point to the connector on the back of the fall arrest harness or the connector on the back would be pulled at an angle away from the body rather than hanging vertically. (S. Br. 7; S. Reply Br. 9-10). This argument is unpersuasive.

The photographs are insufficient to establish these three employees were not tied off. (CX-29, CX-31, CX-33). First, the photographs are not a complete head-to-toe view of the employees.[22] From roughly the waist down, the employees are blocked from view by the surrounding steel structure. Thus, it is unlikely an attachment to a horizontal lifeline at deck-level would be visible. (Tr. 149). Also, there is nothing in the record regarding the location of the available anchor points relative to where each employee stood.

With respect to the photograph which shows the back of Mr. Heffner's fall arrest harness and the connector, the photograph is a straight-on, direct view of his back; he is not turned to the side at all. (Tr. 610-14; CX-29, CX-31). From this perspective, a deflection away from the body would likely not be visible unless it was to the left side or the right side. Extrapolation from a photograph of only the upper half of the body, taken from an unknown distance, requires too much speculation to adduce the tautness or angle of a lanyard or lifeline.

To find these three employees were not tied off based solely on a photograph, requires too great an inferential leap. Even with the assistance of the zoom feature on the camera, the CO believed the employees were likely tied off while he was at the worksite. Further, given that horizontal lifelines were anchor points, and the employees cannot be seen below the waist there is insufficient evidence to conclude they were not tied off. Finally, the CO did not conduct interviews of the employees at the worksite, so there is no record of any contemporaneous information provided by these three employees. The undersigned finds the photographs in

[22] As discussed above, in the Findings of Fact section, "The Inspection Photographs," the undersigned finds demonstrative exhibit, CX-34, unhelpful. This demonstrative was presented to show the employees on the library deck had not been tied off when the CO initially observed them. CX-34 is a single page with two photographs inset on the page. Each photograph shows an enlarged, cropped version of a single employee. It is not the same employee in each photograph. The employees were not standing at the same location in the two photographs. One photograph was taken prior to the CO's entry onto the worksite and the other after the CO left the worksite. The photographs were taken from two different vantage points on Community Drive. The differences in the photographs make comparison futile.

evidence are insufficient to support the Secretary's assertion the three employees on the library deck were not attached. In addition, Mr. Migliorini testified that on the morning of February 25, 2021, he worked with Mr. Heffner and Mr. Ramirez, on the library deck. Mr. Migliorini testified that he, Mr. Heffner, and Mr. Ramirez used fall protection while working: "[W]e were all tied [off]." (Tr. 607-08, 610, 613). Mr. Migliorini's testimony is unrebutted.

In conclusion, the totality of evidence shows Mr. Rodriguez was not always utilizing fall protection that morning. However, evidence does not support a finding that the other three employees working on the library deck were not using their fall protection equipment. Thus, a violation of the standard is found only with respect to Mr. Rodriguez.

Knowledge

The Secretary asserts knowledge can be imputed through Mr. Seck, as foreman, because employees worked in plain view, so Mr. Seck must have or should have seen they were not tied off. (S. Br. 15-16). Further, the Secretary asserts constructive knowledge can be established because Respondent did not implement a reasonably diligent safety program. (S. Br. 17; S. Reply Br. 9-12). Respondent asserts there was no actual or constructive knowledge of the alleged violative condition. (R. Br. 29-32).

To establish knowledge, the Secretary must show that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition. *Peacock Eng'g, Inc.,* 26 BNA OSHC 1588, 1592 (No. 11-2780, 2017) (citations omitted). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix*, 17 BNA OSHC at 1079-1080 (citations omitted). Knowledge of crew leaders and foremen have been imputed to the employer. *Am. Eng'g & Dev. Corp*., 23 BNA OSHC 2093, 2095-96 (No. 10-0359, 2012) (The formal title of an employee is not controlling for imputation of knowledge to the company.)

The workers were not in plain view of the foreman.

The Secretary's support that the employees were in plain view is based on the CO's estimate of Mr. Seck's location on the work site that morning. (S. Br. 15-16).

When CO Pelton was on the worksite, he stood in the general area that he believed Mr. Seck had been while the CO was observing and photographing the employees from Route 206 and Community Drive. The CO described the area as somewhere between the port-a-john and the JLG equipment. (Tr. 87, 90, 92; CX-12A). There is no record evidence of the distance between the

port-a-johns and the JLG equipment. The only evidence regarding the distance from the CO to the structure was the CO's statement that he believed it was somewhere between 50-75 feet away. (Tr. 87, 90, 92). The CO did not measure the distance. The CO opined that from this estimated position Mr. Seck could have observed whether the employees working on the decks above were properly tied off. (Tr. 92). However, this assumption by the CO is built on faulty premises.

First, the CO's estimate of where he believed Mr. Seck had been standing that morning is based solely on the CO's perception of the apparent direction Mr. Seck seemed to be walking from when the CO entered the worksite. (Tr. 87, 90). There is no other support in the record for the CO's estimate. To the contrary, Mr. Seck testified that he had been working in a different location on the worksite near the telehandler. (Tr. 455, 459-60). Because the CO's estimate was based on conjecture, the undersigned gives more weight to Mr. Seck's testimony.

Second, the photograph used to explain where the CO believed Mr. Seck had been standing is not useful. It is a photograph of the worksite taken approximately 200-300 yards from the structure at the first vantage point on Route 206. (CX-12A). The estimated position for Mr. Seck was on the opposite side of the structure. In other words, this estimated position was not on the side of the building that was closer to the vantage point of the camera but on the other side. The undersigned finds there is too vast a difference in perspective to use a photograph taken from the opposite side of the structure approximately 200-300 yards away to establish with any certainty where Mr. Seck had been standing. *See generally, Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999) (*Ragnar*) (finding photographs unhelpful and compliance officer's estimate of distance and possible duration relative to work patterns too vague to establish a lack of reasonable diligence in discovering the violative condition)

Next, the CO admitted that while he was standing in this position where he estimated Mr. Seck had been, there were no employees at work on the decks. (Tr. 136). The library deck was approximately 90-100 feet wide by 240 feet long. (Tr. 318). The Secretary did not establish where on the library deck the employees were at work that morning. Thus, it was speculation that the CO could have observed, from that estimated position, whether an employee working anywhere on the deck, 15-30 feet above the ground, was tied off.

Finally, the photographs of the employees on the library deck were taken from Community Drive, not from the vantage point of where the CO stood on the worksite. The undersigned finds

there is too much guesswork to support the CO's belief that the employees on the library deck must have been in plain view of Mr. Seck.

The Secretary also asserts the employees were in plain view based on Mr. Migliorini's testimony that Mr. Seck had been 20-30 feet away while they were working. (S. Br. 16; Tr. 634). However, this was not precisely Mr. Migliorini's testimony; rather, Mr. Migliorini testified that, at times, he had seen Mr. Seck that morning—Mr. Seck had been at several areas throughout the morning, at one time Mr. Seck was 20-30 feet away on the first-floor deck and at other times at various locations on the ground. (Tr. 632-34). Mr. Migliorini went on to say that he didn't know where Mr. Seck was during the time period around 9:30 a.m., approximately when the CO was observing the worksite. (Tr. 632-34). Mr. Migliorini's testimony does not support Secretary's premise that Mr. Seck was within 20-30 feet of the workers during the time the CO observed them.

The Secretary also cited Mr. Seck's testimony as support the employees were in his plain view that morning. (S. Br. 16). The cited testimony, however, was not a description of where Mr. Seck had been that morning; instead, it was Mr. Seck's description of his general routine at the Montgomery worksite. (Tr. 435-36, 470-71). Rather, Mr. Seck stated that during the time just prior to the CO's arrival on the worksite he was the spotter for the telehandler that was moving trash to the dumpster and was also trying to find a suitable location on the site to place a welding machine that would be delivered that day. (Tr. 451, 459-61). Further, Mr. Seck testified that while on the ground near the building, the building's structure would have partially obstructed a view of employees working 15-30 feet above. (Tr. 514-15). *See generally, Thomas Indus. Coatings, Inc,* 23 BNA OSHC 2082, 2085 (No. 06-1542, 2012) (*Thomas*) (no knowledge where foreman's view "was restricted by the small gap through which the employee was visible" and earlier foreman had observed the lanyard was attached). The cited testimony does not show that Mr. Seck was in an area where he could have discerned whether the employees were tied off.

The Secretary's assertion that the employees must have been in plain view is rejected.

Secretary did not prove lack of reasonable diligence.

The Secretary asserts Respondent had constructive knowledge because it did not implement its safety program with reasonable diligence. (S. Br. 16-18). "To prove constructive knowledge, the Secretary must show that the employer, with the exercise of reasonable diligence, could have known of the hazardous condition." *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1406 (No. 99-0707, 2001). The "inquiry into whether an employer was reasonably diligent

involves several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003) (*Stahl*) (citation omitted); *see also PSP Monotech Indus.*, 22 BNA OSHC 1303, 1306 (No. 06-1201, 2008) (citation omitted) ("the Commission considers whether the employer has established work rules designed to prevent the hazards from occurring, has adequately communicated the work rules to the employees, has taken steps to discover noncompliance with the rules, and has effectively enforced the rules in the event of noncompliance" when determining whether a safety program is adequate).

CO Pelton testified that Kenvil had a strong, written safety program and effective communication through training and onsite toolbox talks. (Tr. 220-21). The Secretary does not argue that Respondent's work rules, or training and communication of those rules to its employees, were inadequate. Rather, the Secretary asserts Respondent's safety program was inadequate with respect to monitoring to discover noncompliance with fall protection rules and the lack of discipline when an employee violated a work rule. (S. Br. 16-18; S. Reply Br. 11-13).

Respondent asserts that it was reasonably diligent in monitoring for safety compliance at its worksites, especially considering the employees were all experienced ironworkers that had worked for Respondent for a significant time with good safety records.[23]

Duration insufficient to find a lack of reasonable diligence.

[23] The Secretary asserts the Respondent relies on "pace of work" to determine whether employees were using fall protection during the workday. (S. Br. 1, 18; S. Reply Br. 10-11). The undersigned finds that Respondent did not assert this was a method of safety compliance monitoring. The testimony the Secretary relies on for this point was not presented as an actual method relied on by Respondent. Instead, it was in response to a question about how Mr. Seck determined the employees were using fall protection on the morning of the inspection as he observed them at work. (Tr. 452). He responded that he could tell by the way they moved on the structure. (Tr. 452). On cross examination the Secretary further explored this comment to discern Mr. Seck's meaning. What followed was a colloquy that provided no additional information. Mr. Seck ultimately said that he did not have a correlation between work pace and fall protection due to varying factors of the worksite. (Tr. 472-76). When asked to further elaborate on the means Mr. Seck used for compliance with fall protection requirements, he stated that he reminded them during the morning toolbox talks and ensured safety equipment was in the work area. (Tr. 517). The undersigned finds this discussion during Mr. Seck's testimony is not particularly useful, as for the most part it was unfocused, and its meaning unclear. The undersigned finds this testimony was not illuminating to the question of reasonable diligence and benefits neither the Secretary's nor the Respondent's position. The undersigned finds the related testimony is not useful in evaluating the issues in the instant case.

Respondent asserts the violative condition was of too short duration to demonstrate a lack of reasonable diligence. (R. Reply Br. 9).

The Secretary asserts that employees working for up to 15 to 20 minutes without fall protection is evidence that Respondent did not adequately monitor the safety compliance of its employees. (S. Br. 16; S. Reply Br. 12-13). This 15-to-20-minute time frame is the approximate total time the CO observed the worksite from Route 206 and Community Drive prior to entering the worksite.

The case law presented by the Secretary to support the argument that 15 to 20 minutes is sufficient time to indicate a lack of adequate monitoring is not persuasive. First, *AAA Roofing*, 26 BNA OSHC 1075 (No. 15-0586, 2016) (ALJ) and *Lakeside Constr., L.L.C.*, 24 BNA OSHC 1445 (No. 12-0422, 2012) (ALJ) are both unreviewed decisions of an administrative law judge (ALJ) and thus have no precedential value. *See Leone*, 3 BNA OSHC at 1981.

Next, the Secretary cites *Domino Window Cleaning*, 24 BNA OSHC 1393, 1403 (No. 11-0753, 2012) (ALJ). However, *Domino* does not support the Secretary's asserted position. In *Domino*, the judge found that 10-15 minutes was a too-short duration to find the employer was not reasonably diligent. *Id*. at 1403. Instead, there the judge found a lack of reasonable diligence on a different basis. [24] *Id.* In addition to not supporting the Secretary's position, this unreviewed ALJ decision has no precedential value. *See Leone*, 3 BNA OSHC at 1981. The Secretary also cites *Summit Contracting Grp., Inc.,* No. 18-1451, 2022 WL 1572848 (OSHRC May 10, 2022) (*Summit*), which is unavailing to the Secretary.[25] (S. Reply Br. 12-13). In *Summit*, the Commission stated that, even though:

> [T]he compliance officer was able to observe the violative conditions from ground level, the record establishes that these conditions existed for only 10 to 15 minutes. Thus, Summit would likely have had to continuously monitor the framers' work to discover the violative conditions during that limited timeframe, an obligation that we have never extended to even an exposing employer.

[24] "[T]he more significant point is that [Respondent's owner] learned of [the employee's] unsafe work habits in 2009 and fired him, but then rehired him in 2010 without taking the necessary steps to ensure that [his] future work for Domino was done safely." *Domino*, 24 BNA OSHC at 1403.

[25] The Secretary's citation to *Summit,* 2022 WL 1572848, at *23, to support the Secretary's contention that Respondent did not exercise reasonably diligence by failing to observe violative worksite conditions, is an apparent inadvertent citation to the administrative law judge's decision, which decision was reversed by the Commission. *See Id.*, at *5.

Id. at *5. *Summit* does not support the Secretary's premise and instead supports Respondent's position that the alleged violative conduct was of too short duration to demonstrate a lack of reasonable diligence.

Additionally, Respondent asserts the violative condition for Mr. Rodriguez may have existed for as little as the five minutes the CO observed him. (R. Br. 31). The CO stated that he observed Mr. Rodriguez on the courtyard deck for three to five minutes. (Tr. 75-76, 176-78, 233-34). Mr. Seck and Mr. Migliorini both stated that as employees moved across the deck, they would "piggy-back" attachments, in other words, as they moved they disconnected from one point and then reconnected to the next. (Tr. 440, 616, 626). Given this dynamic, the duration that Mr. Rodriguez was unattached could have been less than 15-20 minutes.

The Commission has determined that a lack of reasonable diligence cannot be established when there is little evidence to determine the condition lasted more than a short period of time. *See*, *e.g.*, *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2196-97 (No. 90-2775, 2000) (concluding that "in the absence of any evidence indicating how long the violative conditions had been in existence, we are unable to evaluate whether [the employer] could have known of them even if it had been reasonably diligent in inspecting its equipment"), *aff'd,* 268 F.3d 1123 (D.C. Cir. 2001); *Ragnar*, 18 BNA OSHC at 1940 (the lack of evidence of violation's duration precluded Commission from determining whether employer could have known of conditions with exercise of reasonable diligence); *David Weekley*, 19 BNA OSHC at 1119-20 (rejecting Secretary's position that violations were "surely in view" because the compliance office saw the violation and finding knowledge was not established where subcontractor's violations "were of brief or indeterminate duration" and Secretary failed to show that controlling employer could have discovered their existence with exercise of reasonable diligence).

The Secretary's position, that 15-20 minutes was a sufficient duration to expect a reasonably diligent employer to detect a violation, is not supported. The undersigned finds the Secretary has not proved the Respondent was not reasonably diligent in monitoring for safety compliance.

Respondent's safety policy adequate

The Secretary asserts Respondent's past citation history required Respondent to take additional measures to monitor the worksite for safety. (S. Br. 17; S. Reply Br. 10-11). For example, the Secretary asserts that reasonable diligence required Mr. Seck to move to a different

location where he could better observe whether the employees were using fall protection all morning. (S. Br. 16; S. Reply 10-11). The cases relied on do not aid the Secretary's argument.[26]

First, the Secretary relies on *Dun-Par Eng'd. Form Co. v. Marshall*, 676 F.2d 1333, 1337 (10th Cir. 1982) (*Dun-Par*), to support the assertion that Respondent's prior citations put it on notice that additional measures were needed to prevent violations. (S. Br. 17; S. Reply Br. 11). *Dun-Par* is not an apt comparison to the instant case. The primary issue in *Dun-Par* was whether a prior OSHA citation supported the repeated characterization of a subsequent citation, not whether the employer had exercised reasonable diligence in monitoring for safety compliance. *Id.* There, the Tenth Circuit determined the Secretary need not show the employer was flouting the Act to justify a repeated characterization. *Id.* The *Dun-Par* court stated that a citation put an employer on notice that "special attention may be required to prevent future violations of that standard." *Id.*

Here, Respondent had been cited for fall protection violations at its worksites in 2017 and 2018. In response to the prior citations, Respondent changed its safety program to formalize its discipline policy and hired a third-party consultant to routinely visit its worksites to evaluate safety compliance. The Secretary does not specify what further changes should have been made by Respondent.

The Secretary also relies on *Hackensack Steel Corp*., 20 BNA OSHC 1387, 1390-91 (No. 97-0755, 2003) (*Hackensack*) to support its position that Respondent's monitoring for safety violations was insufficient. (S. Reply Br. 11). In *Hackensack*, the Commission found the employer, which had been cited by OSHA on six prior occasions, was not reasonably diligent because it did not require the foreman to monitor the employees more frequently. *Hackensack,* 20 BNA OSHC at 1390-91. The comparison to the instant case is inapt.

As discussed above, after the Respondent was cited in 2017 and 2018 it implemented changes to its safety program to provide additional workplace monitoring through a third-party consultant. The Secretary has provided no evidence that Respondent was on notice that it needed additional actions beyond these changes. Further, the Commission specifically stated that it didn't

[26] Another case the Secretary cited to support this position, *Daniel Int'l Corp.,* 9 BNA OSHC 1980 (No. 15690, 1981), *rev'd*, 683 F.2d 361 (11th Cir. 1982) has not been considered here. (S. Br. 16). The Eleventh Circuit rejected the Commission's finding that the employer's work rule had not been adequately enforced. *See Daniel Int'l. Corp. v. Sec'y of Labor,* 683 F.2d 361 (11th Cir. 1982) (finding employer's affirmative defense of unpreventable employee misconduct was successful and overruling Commission's position that safety plan was inadequate).

mean "to suggest that [foreman] had to monitor the connectors the entire time they were on the steel." *Id.,* 20 BNA OSHC at 1390-91. *Hackensack* does not support Secretary's position that Respondent's worksite safety monitoring was not reasonably diligent.

As counterpoint, Respondent directs the undersigned to *Stahl Roofing, Inc.,* to support its position that it was reasonably diligent in its monitoring of safety violations and was not on notice it needed to do more. (R. Reply Br. 11-13-). *Stahl*, 19 BNA OSHC 2179, 2182 (No. 00-1268, 2003) ("Where the evidence fails to show that the employer should have perceived a need for additional monitoring or that such an effort would have led to the discovery of instances of employee misconduct, increased supervisory efforts to monitor employee compliance are not required.")) citing *Dover Elevator Co.*, 16 BNA OSHC 1281, 1287 (No. 91-862, 1993). *Stahl* required its supervisors to visit a worksite at least once a day and both the company's safety director and safety manager made unannounced visits to the company's worksites. *Stahl,* 19 BNA OSHC at 2181-82. Even though the supervisor was not on site at the time of the inspection, he had observed employees using fall protection on two visits to the site the day before and had confirmed earlier on the day of the inspection that safety equipment was in place before leaving the site to perform other duties. *Id.* at 2181.

The Commission found that Stahl had conducted additional fall protection training for supervisors and included more frequent inspections at its worksites since its citation two years prior. *Id.* at 2183. The Commission also noted that the employees observed by the CO violating the fall protection rule had not previously been found in violation of Stahl's work rules, so the employer was not on notice that additional monitoring was needed. *Id.* at 2182-83.

The Commission also held that an employer is not required to find every instance of a hazard and that constant supervision of employees was an "unworkable burden on employers." *Id* at 2183 (citation omitted). Despite having a history of OSHA citations, the Commission found Stahl had adequate work rules that were communicated to its employees, a progressive discipline policy, and adequate supervision for site safety. *Id.* at 2182-83. The Commission concluded the employer in *Stahl* had been reasonably diligent.

Additionally, Respondent cites to *Thomas Industrial Coatings,* to support its position that it was not on notice that additional monitoring was necessary. (R. Reply Br. 12). In *Thomas*, the Commission found there was adequate supervision where the employer had a crew foreman on site at all times, the superintendent walked the job every week, the owner periodically visited the

worksite, and the safety manager conducted random inspections. *Thomas*, 23 BNA OSHC at 2088. The Commission further found that because the crew consisted of experienced laborers that had never been previously disciplined for fall protection, there had been no reason for Thomas to believe additional monitoring was required. *Id.* at 2088-89.

Here, the employees were trained and experienced with no prior history of noncompliance. The foreman, Mr. Seck, was on site, ensured safety equipment was installed and that the employees had the necessary personal fall arrest systems. The foreman provided a reminder each morning during the toolbox talk to use safety equipment at the worksite where he also determined whether the employees wore the necessary safety equipment for that day's tasks. Throughout the workday, the foreman was at various places on the worksite observing the employees at work. Respondent also contracted with a third-party safety consultant to visit worksites on a routine basis to evaluate safety compliance. Further, Respondent improved its safety program after its previous OSHA citations.

The Secretary also asserts that Respondent cannot consider the experience of its employees when monitoring for safety compliance. (S. Reply Br. 11). The Secretary cites *J.H. MacKay Electric Company*, 6 BNA OSHC 1947, 1950 (No. 16110, 1978) (*MacKay*), as support that Respondent may not rely on the experience of its employees when determining the necessary degree of supervision. (S. Reply Br. 11). *MacKay* is an inapt comparison to the instant case.

In *MacKay,* the employer was an electrical subcontractor on a multi-employer worksite. Instead of assessing the work area prior to assigning employees to work there, the employer told its employees to notify the employer if they came across a hazard at the worksite. *Id.* The employees then worked in an area where the perimeter guarding was missing. Even though the employer had no authority to erect perimeter guarding, the Commission found that at a minimum, as the employer, MacKay was required to assess possible hazards at the work location prior to assigning its employee to work in that area. *Id.* There, the fact the electricians were experienced did not relieve the employer of the duty to assess the potential hazards at the worksite. *Id.* The facts here are not comparable.

Here, Kenvil assessed the hazards at the site and provided fall protection equipment. The employees used butterfly D-rings and harnesses attached to retractable ribbon lanyards. (JX-2 SF# 6). There were anchor points available for employees to use on the surfaces on which Kenvil

employees were working. (JX-2 SF# 8). The foreman verified the employees wore their fall arrest harnesses and knew anchor points were available for tie-off during the morning meeting.

Further, as set forth in *Thomas*, the experience of employees can be considered to determine the degree of monitoring required. *Thomas,* 23 BNA OSHC at 2088 (finding employer had no reason to believe additional monitoring was needed for a crew of experienced laborers not previously disciplined for lack of fall protection).

The Secretary has not established that Kenvil's monitoring of its employees' safety compliance was not reasonably diligent.

Disciplinary policy adequate

The Secretary asserts that multiple employees violating the tie off requirement suggests that Respondent did not adequately enforce its work rules. (S. Br. 16-17). The Secretary cites *Falcon Steel Co.* 16 BNA OSHC 1179, 1194 (No 89-2883, 1993) (*Falcon*) and *Daniel Constr. Co*., 10 BNA OSHC 1549, 1552 (No. 16265, 1982) (*DCC*) as support.

In *DCC*, the Commission found the employer's unpreventable employee misconduct defense was not supported where there had been no training on the work rule, there were numerous instances of employees failing to tie off, the supervisor had actual knowledge the employees were not tied off, the supervisor was not tied off, and two of the employees had not been provided with fall protection equipment. *DCC*, 10 BNA OSHC at 1552. In contrast, Kenvil's employees received training, fall protection equipment was provided to all employees, and anchor points were in place in their work areas. *DCC* is inapt.

Falcon Steel is also unpersuasive. In *Falcon*, the issue was the employer's affirmative defense of unpreventable employee misconduct. There, the Commission found the employer had a weak work rule with inadequate communication and that four of seven employees violating the work rule at the site constituted a pattern of disregard for the employer's work rule. *Falcon*, 16 BNA OSHC at 1194. Unlike *Falcon*, here only one employee was found to be noncompliant and Kenvil had a strong work rule that it effectively communicated to its employees.

Additionally, the Secretary cites *Dun–Par* for the position that Respondent's prior citation history was an indication it needed to improve its disciplinary program. (S. Br. 17). As discussed above, Respondent made changes to its safety program after its prior citations, including formalizing its disciplinary process. Thus, the case is inapt here.

Finally, the Secretary asserts that Respondent only disciplines its employees in response to an OSHA inspection. (S. Br. 18). This assertion is rejected. Ten instances of discipline were entered into the record, as set forth above. The Secretary asserts that four of the ten were related to an OSHA inspection.

Respondent asserts there is no evidence these four events were related to an OSHA inspection. (R. Reply Br. 13-14). CO Pelton testified, on rebuttal, that after a review of the OSHA database he believed that four of the disciplinary events in evidence were directly related to OSHA inspections (August 15, 2019 and August 25, 2020). (Tr. 667-69). However, despite having information regarding past OSHA inspections in their control, the Secretary provided no documentation to support that these four instances of discipline were related to particular OSHA inspections. (Tr. 667-70, 683-85). Due to the lack of documentary support, the undersigned gives little weight to the representation that four of these disciplinary events occurred as the direct result of an OSHA inspection.[27]

Respondent also asserts there is no evidence that a Kenvil employee was not disciplined for a work rule violation. (R. Reply Br. 13-14). There is one instance of discipline where the employee was not immediately disciplined, Employee O.C. (Tr. 381; RX-3 at 10). In that instance, Kenvil did not issue a suspension from work because the employee was hospitalized for some time after the incident. The undersigned does not find this single instance indicates an inadequate disciplinary policy. *See Thomas*, 23 BNA OSHC at 2088-89 (finding lack of discipline for one instance did not reflect a lack of reasonable diligence when considering the company's record as a whole). Thus, there is no support that Respondent was not reasonably diligent in enforcing its work rules.

The undersigned finds that as a whole, the disciplinary records in evidence demonstrate the Respondent had an adequate disciplinary program. *See Stahl*, 19 BNA OSHC at 2183 (finding employer disciplined its employees "on the few occasions when it found them violating safety rules") (citation omitted).

[27] *See Precast Serv., 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"), *aff'd per curiam,* 106 F.3d 401 (6th Cir. 1997) (unpublished table decision). Here, of the ten records in evidence there were events of discipline both prior to and later than the dates alleged to relate to OSHA inspections. (RX-3).

Because the Secretary has not demonstrated that Respondent's overall safety program was inadequately implemented, constructive knowledge is not established.

In Conclusion

As discussed above, the Secretary proved the cited standard was applicable and the employees were exposed to the cited hazard. The Secretary proved that one employee's actions were in violation of the requirements to use fall protection. However, the Secretary did not prove the employer had actual or constructive knowledge of the violative conduct of any employee. Thus, the issued citation is VACATED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Commission Rule 90(a). 29 C.F.R. § 2200.90(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

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

Citation 1, Item 1 alleging a repeat-serious violation of 29 C.F.R. § 1926.760(a)(1) is VACATED.

SO ORDERED.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC

DATE: February 20, 2024
Washington, D.C.