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. SHELLY & SANDS, INC., Respondent.	OSHRC Docket No. 17-0190

ON BRIEFS:

Ronald Gottlieb, Attorney; Charles F. James, Counsel for Appellate Litigation; Edmund C. Baird, Acting Associate Solicitor of Labor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Tod T. Morrow, Esq. and Corey V. Crognale, Esq.; Morrow & Meyer LLC, Canton, OH
For the Respondent

DECISION

Before: ATTWOOD, Chairman; SULLIVAN and LAIHOW, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued a two-item citation to Shelly & Sands, Inc., alleging repeat fall protection violations with a proposed penalty of $68,591 for each item. Following a hearing, Administrative Law Judge Sharon D. Calhoun affirmed only Instance (c) of Item 2, which alleges a violation of 29 C.F.R. § 1926.501(b)(1),[1] and assessed a $25,000

[1] Section 1926.501(b)(1) requires as follows: "Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems."

penalty.[2] For the reasons discussed below, we reverse the judge and vacate the one remaining item.

BACKGROUND

Shelly & Sands was hired by the Ohio Department of Transportation in July 2016 to remove and replace the concrete "deck" (or roadway) of a bridge above Interstate 77 in Cambridge, Ohio. The first step of the project was to install plywood, called "false work," underneath the bridge structure to prevent debris from falling onto the highway below. The plywood was secured to four-by-fours that were placed at various increments and rested on the bottom flanges of the bridge's I-beams. The false work was installed over the highway's northbound and southbound traffic lanes but not under the portion of the bridge spanning the median. The false work also did not extend to the bridge abutments.

On August 8, 2016, a Shelly & Sands crew removed the bridge's concrete deck. At about noon the next day, an OSHA compliance officer commenced an inspection of the worksite and observed two crew members preparing the bridge for poured concrete by installing metal brackets onto the I-beams and then placing wooden beams into the brackets. To perform this task, the crew members worked from the false work and the bridge's I-beams. Both crew members were tied off while walking on some areas of the I-beams. However, neither crew member was tied off while standing on the false work, even though there is no dispute that the edges of the false work were unprotected and that horizontal lifelines extended across it.

DISCUSSION

The only issue on review is whether the judge erred in finding the Secretary established that Shelly & Sands had knowledge of the violative conditions.[3] To establish this element of his prima facie case, the Secretary must show "by a preponderance of the evidence that . . . the cited

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[2] The judge vacated Item 1, which alleged a repeat violation under 29 C.F.R. § 1926.453(b)(2)(iv), and Instances (a) and (b) of Item 2. None of these vacated items are before the Commission on review.

[3] Shelly & Sands concedes that § 1926.501(b)(1) is applicable here and that its two workers were not compliant with the provision's requirements, exposing them to a fall hazard. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) (listing prima facie elements of violation), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982). Shelly & Sands does argue that the judge erred in rejecting its claim that any violation was due to unpreventable employee misconduct. But given our decision to vacate this item, we need not reach the company's affirmative defense.

employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharm. Prods., Inc.*, 9 BNA OSHC at 2129.

The judge concluded that the Secretary established constructive knowledge based on evidence showing that Shelly & Sands "failed to adequately communicate" to the work crew and its foreman that there was no exception to the company's fall protection rule when standing on the false work.[4] *See Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001) ("Reasonable diligence involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations."), *aff'd*, 319 F.3d 805, 811 (6th Cir. 2003). Specifically, the judge found that "[f]or reasons unknown," the foreman "believed fall protection was not required when employees were using false work as a platform," referencing the CO's testimony that, at the time of the inspection, the foreman told him the workers were not tied off "[b]ecause they're on the false work." The judge also relied on a January 2015 citation, in which OSHA alleged that Shelly & Sands violated the same provision cited here for failing to use fall protection while on false work;[5] as the judge noted, this same foreman, who was both an exposed employee and the foreman for the project at issue in the 2015 citation, believed at that time that fall protection was not required. Finally, based on the testimony of Shelly & Sands' crew members who worked at the bridge worksite, the judge found that the crew had "adopted" the foreman's "mistaken belief" that fall protection was not required while working on false work.

For the following reasons, we agree with Shelly & Sands that the evidence paints a different picture than the one the judge presents. First, the judge's focus on the foreman's comment to the CO is misplaced. At the hearing, the CO testified as follows:

> Q: And the same with respect to employees being on a false work and working on the false work and not being tied off. [The foreman] did not admit to you that he was aware that that was occurring.

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[4] The Secretary argued below that the foreman of the work crew had actual knowledge of the violative conditions, but the judge rejected this claim because the foreman "was not on the bridge at the time of the OSHA inspection and he could not see the [company's] employees on the bridge as he sat in his truck." The Secretary has not raised this argument as a basis for knowledge on review and we therefore decline to address it.

[5] This citation became a final order following an informal settlement and provides the basis for the current citation's repeat characterization.

> A: Now, I did ask – when I asked [the foreman] when I first arrived to the site, we did talk about them standing on the false work and why they weren't tied off. And he said, "Because they're on false work."
>
> Q: Well, that's basically then admitting to a violation of the fall protection standard, correct?
>
> A: He didn't – he didn't completely come out and admit that he knew that it was a violation.

Without more explanation, we cannot discern what the foreman meant by this statement. Maybe the foreman assumed that the crew was making the same mistake he himself had previously made concerning the use of fall protection on false work. Maybe he believed that the crew was likely to ignore the company's fall protection rule because they were standing on false work. Or maybe—as the judge found "[f]or reasons unknown"—the foreman erroneously believed there was a false work exception to the company's fall protection rule. Perhaps none of these explanations are correct. But it is the Secretary who bears the burden of establishing that Shelly & Sands' fall protection rule was inadequately communicated to the foreman and the CO's vague testimony regarding what the foreman may or may not have believed at the time of the inspection fails to meet that burden. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC at 2129 (noting that Secretary must establish each element by a preponderance of the evidence). In fact, there is nothing in the CO's contemporaneous inspection notes to suggest he viewed the foreman's statement at the time it was made to be the "smoking gun" evidence the Secretary would have us believe it is.

Second, the judge's reliance on the CO's testimony is difficult, if not impossible, to reconcile with the circumstances surrounding the 2015 citation. That citation was issued just 20 months before this inspection and alleged an almost identical violation—"[a]t the edge of the false decking on the underside of the bridge where employees entered and exited the decking, fall protection was not used, thereby exposing employees to a 20[-]foot fall hazard." At the hearing, the foreman confirmed that at the time of the violation that gave rise to the 2015 citation, he "thought it was okay to stand on the false work . . . without fall protection." As a consequence of that violation, and his mistaken belief, Shelly & Sands suspended the foreman without pay for seven weeks, resulting in $14,000 of lost income. The company also issued him a written notice documenting his violation and required him to attend fall protection refresher training. The foreman was even required to meet personally with the owner of the company and the safety director about the infraction and was told that he would be closely monitored going forward for

safety compliance. Indeed, as a result of this incident, a "full-time bridge safety person" was put in place to "not only monitor [the foreman] closely, but . . . to monitor all bridge activities."

Notwithstanding this undisputed evidence, the judge came to the conclusion that the foreman had either completely forgotten that there was no false work exception or somehow still did not understand the company's fall protection rule. We decline to make this inferential leap. To the extent the prior citation is relevant to the company's knowledge, it supports the contrary finding that the foreman could *not* have possibly believed at the time of the 2016 inspection that there was a false work exception to the company's fall protection rule.

There is also no support for the judge's conclusion that the company's fall protection rule was not adequately communicated to the other crew members.[6] One of the crew members who worked on the false work testified that fall protection was not used because he "did not feel there was a possibility of [him] falling," and another testified that he "personally thought that there was no threat of a fall in that area" because he would have had "to step over too many cross-bracings" to reach the edge of the false work. This testimony only shows that these workers failed to *follow* Shelly & Sands' fall protection rule, not that Shelly & Sands failed to *communicate* its rule or that employees misunderstood the rule.[7] On the contrary, the record establishes that all of Shelly & Sands' employees receive a copy of the company's safety handbook each year, which includes the company's fall protection rule. And the employees on the bridge at the time of OSHA's inspection, as well as the foreman, had all been given the company's written fall protection program and were provided on-site fall protection training from the company's safety personnel. In addition to this

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[6] The Secretary does not dispute that the company's fall protection rule prohibited the violative conduct at issue, only that it failed to adequately communicate and enforce this rule.

[7] We note that in her discussion of knowledge, the judge references the testimony of a third employee who, at the time of the inspection, was working on an aerial lift. In Item 1 of the citation, which the judge vacated, the Secretary alleged that this employee and a fourth crew member were exposed to a fall hazard when exiting the lift without tying off. According to the third employee, at the time of OSHA's inspection, he "thought it was okay to exit from the lift [without fall protection] . . . [s]o long as there was false work below [him.]" The fourth employee testified, however, that he understood at the time of the inspection that he needed fall protection when exiting the lift even when working above false work. The fact that one employee appears to not have fully understood the fall protection rule as it related to his work from the aerial lift is insufficient to show that Shelly & Sands failed to adequately communicate the rule to its employees overall, particularly where there is undisputed evidence that all employees received fall protection training. *See Thomas Indus. Coatings, Inc.,* 23 BNA OSHC at 2087; *Stahl Roofing, Inc.*, 19 BNA OSHC at 2182.

training, the foreman conducted toolbox talks once a week, some of which specifically concerned fall protection. *See Thomas Indus. Coatings, Inc.,* 23 BNA OSHC 2082, 2087 (No. 06-1542, 2012) (finding fall protection work rules were adequately communicated based on evidence showing how company trained employees); *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2182 (No. 00-1268, 2003) (consolidated) (same).

The Secretary maintains that even if Shelly & Sands adequately communicated its fall protection rule, constructive knowledge is proven through the company's failure to enforce it. *See Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1187-88 (No. 00-0553, 2005) (finding constructive knowledge where employer's "safety program was poorly enforced"). To support this claim, the Secretary again points to the foreman, arguing that his testimony "shows his repeated non-enforcement of safety rules over at least a three-year period." Although the judge did not address enforcement in her discussion of constructive knowledge for this citation item, she found in analyzing Shelly & Sands' unpreventable employee misconduct defense that "the totality of the evidence, including testimony and exhibits establishing [that Shelly & Sands] implements field monitoring and safety audits, a progressive disciplinary system, and disciplinary measures" shows that the company had "effectively enforced its safety program."

We agree. Shelly & Sands has a progressive disciplinary policy in place and, since at least the beginning of 2014, its safety personnel have enforced this program by documenting over 100 verbal and written warnings, some of which concerned fall protection violations. Moreover, the employees (including the foreman at issue here) whose fall protection violations resulted in the instant citation and prior citation in 2015 were all disciplined pursuant to this policy. *See Stahl Roofing, Inc.*, 19 BNA OSHC at 2185 (finding that Secretary failed to establish lack of reasonable diligence where employer "had consistently issued written reprimands and fines before the two citations here"). According to Shelly & Sands' disciplinary records, the crew members in both cases who committed fall protection violations were issued written warnings. And after the inspection at issue here, Shelly & Sands removed the foreman from his supervisory position while the company investigated whether he had engaged in any wrongdoing. This demotion resulted in lost income of $30,000 to $40,000. Shelly & Sands only reinstated the foreman as a supervisor after determining that he "provid[ed] the equipment and the direction necessary to be in compliance with the [fall protection] requirements" and that he did not "have knowledge of employees working in the manner that they were working."

While the foreman conceded at the hearing that he had never "disciplined" a crew member for a fall protection violation, he also testified that he has given crew members verbal reminders in the past after observing safety violations. The record also lacks evidence as to whether the foreman ever observed a safety violation between January 2014 and October 2016—the time period covered by the disciplinary records—that would have required him to give, let alone document, a verbal warning. Nor is there evidence that this documentation policy was even in effect prior to 2014. Accordingly, we find that there is insufficient evidence in the record to support a finding that the foreman failed to adhere to Shelly & Sands' progressive disciplinary policy.[8] *See Thomas Indus. Coatings, Inc.,* 23 BNA OSHC at 2089 (holding based on "record as a whole," which included disciplinary procedures and records, that employer's decision to forgo disciplining employees in one instance "does not support a finding that it failed to exercise reasonable diligence and had constructive knowledge").

We therefore find that the Secretary has failed to establish that Shelly & Sands had knowledge of the violative conditions alleged in Instance (c) of Item 2. In reaching our decision, we do not disturb the judge's credibility determinations, including her decision to credit the CO's testimony and discredit portions of the foreman's testimony. Even in the face of these determinations, the preponderance of the evidence does not establish the company's knowledge of the violative conditions. Accordingly, we reverse the judge's decision and vacate the remaining citation item.

SO ORDERED.

/s/
James J. Sullivan, Jr.
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: February 1, 2021

[8] For the same reasons, we reject the Secretary's claim that the crew's violative conduct reflects a failure by Shelly & Sands to enforce its safety program. The Secretary has presented no evidence showing that the foreman ever failed to admonish a crew member at this worksite for not adhering to Shelly & Sands' fall protection rule, or that a crew member violated this rule while the foreman was either on the bridge or in a position to observe the worker at the time. Indeed, the judge found that the foreman lacked actual knowledge of any of the alleged violations.

ATTWOOD, Chairman, dissenting:

Because I conclude that the Secretary established Shelly & Sands, Inc., had constructive knowledge of the violative conditions alleged in Instance (c) of Repeat Citation 1, Item 2, I dissent from my colleagues' decision and would affirm the violation.

I agree with my colleagues that the judge should not have centered her finding of constructive knowledge on the foreman's statement to the CO that the exposed workers were not tied off "[b]ecause they're on false work." As my colleagues point out, it is not possible to discern from the CO's testimony what the foreman meant by this statement. Nonetheless, I find that the judge's conclusion regarding constructive knowledge is supported by the record as a whole because the company not only failed to adequately communicate its fall protection work rule, but also failed to adequately enforce it. *See Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001) ("Reasonable diligence involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations."), *aff'd*, 319 F.3d 805, 811 (6th Cir. 2003); *see also Kokosing Constr. Co.*, 21 BNA OSHC 1629, 1631 (No. 04-1665, 2006) ("The actual or constructive knowledge of the employer's foreman or supervisor can generally be imputed to the employer."), *aff'd*, 232 F. App'x 510 (6th Cir. 2007) (unpublished).

Communication

As to the company's communication of its fall protection rule, the judge did not base her finding of constructive knowledge on the foreman's statement alone. Rather, she also weighed heavily "[t]he misconception among several crew members," based on their own testimony, "about the need for fall protection when on or over false work" and found that this misconception shows the company "failed to adequately communicate this specific application of the fall protection rule to [the foreman's] crew." My colleagues dispense with this key finding on the basis that it merely establishes a failure by the crew to follow the fall protection rule, not a failure by the company to communicate it.

I disagree. First, it is not entirely clear which fall protection rule my colleagues believe the crew was failing to follow given that *four* different versions appear in the company's Employee Safety Handbook and its Fall Protection Program. Specifically, the paragraph on "Fall Arrest," within the section of the Handbook on "Specific Safety Guidelines," states: "Whenever there is *a*

possibility to free fall greater than 6 feet, fall arrest equipment must be utilized. All employees that are working at heights greater than 6' shall be tied off 100% of the time or be protected by the use of a handrail system." (emphasis added.) Then the paragraph on "Personal Protective Equipment" within the section of the Handbook on "Specific Safety Guidelines" states: "Fall protection equipment will be provided (i.e. harnesses, lifelines, etc.) AND must be worn *where a fall hazard exists or is likely to exist* at heights 6 [feet] or above in accordance with OSHA CFR 1926.500 subpart M." (emphasis added.) Next, the "General Safety Guidelines" section of the Handbook states: "When working more than six (6') feet off of ground level, fall protection must be utilized." And finally, the company's Fall Protection Program simply states: "Whenever there is *a possibility* to free fall greater than 6 feet, fall arrest equipment must be utilized." (emphasis added.)

Three of the four versions of the company's rule therefore give employees discretion not to use fall protection if, in their opinion, there is no "possibility" of a free fall or if a "fall hazard" does not exist or is not likely to exist. Treating this safety measure as an option is directly at odds with § 1926.501(b)(1), which requires the "use of guardrail systems, safety net systems, or personal fall arrest system" whenever an employee is "on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level." *See El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1425 n.6 (No. 90-1106, 1993) ("Employers must model their rules on the applicable requirements."); *compare Stahl Roofing Inc.*, 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003) (consolidated) (finding fall protection rule adequate where it "reflects the requirements of the cited standard"). In my view, having four different, conflicting versions of its fall protection rule—all of which presumably apply to the same work activities—casts a deep shadow on the company's claim that it adequately communicated the rule to its employees, particularly since three of these versions of the rule are contrary to the cited standard.

Second, as the judge found, the testimony of the crew members at the hearing provides no saving light. The two crew members observed on the false work without fall protection plainly stated that they did not have to wear it because, in their opinion, there was no fall hazard while they stood on the false work. Specifically, one of the exposed workers testified that he "did not feel there was a possibility of [him] falling," and the other worker testified that he "personally thought that there was no threat of a fall in that area" because he would have had "to step over too

many cross-bracings" to reach the edge of the false work. Their testimony essentially mirrors the company's versions of the work rule that, contrary to the requirements of the cited standard, allow for a "possibility" or "hazard" determination by employees. Thus, I would find it more likely than not that both employees believed the company's 100% tie-off rule applied only when, in their view, this possibility or hazard existed. In short, they did not understand at the time of the violation that fall protection is *always* required on false work "with an unprotected side or edge which is 6 feet . . . or more above a lower level."[1] 29 C.F.R. § 1926.501(b). Another crew member working elsewhere on the bridge also misunderstood the company's fall protection rule, confirming at the hearing that at the time of the 2016 inspection, he "thought it was okay to exit from the lift [without fall protection] . . . [s]o long as there was false work below [him]."[2]

In context, the crew members' testimony more persuasively shows their failure to understand the requirements of the *correct* fall protection rule, not their failure to follow that rule. *See Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1287 (No. 02-0520, 2005) ("[W]hile an employer need not have a *written* work rule, it must have a rule that reflects the requirements of the cited standard and is clearly and effectively communicated to employees." (emphasis in original)). For all these reasons, I find that a majority of the crew members did not understand what the correct fall protection rule required and, therefore, conclude that Shelly & Sands failed to adequately communicate it. *See PSP Monotech Indus.*, 22 BNA OSHC 1303, 1306 (No. 06-1201, 2008) (concluding that employer "had an inadequate safety program because the work rule was not adequately communicated to employees and, therefore had constructive knowledge of the violative conditions").

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[1] Although the two exposed workers also testified that there is no exception to the company's 100% tie-off rule, and one of them specifically testified that tie-off is required when working on false work, this testimony appears to reflect their understanding of the fall protection rule at the time of the hearing. Given their additional testimony concerning their motivations for not tying off while on the false work, as well as the variations in the company's work rule described above, I would find that it is more likely than not that at the time of the inspection, these two workers misunderstood the company's 100% tie-off rule.

[2] A fourth crew member at the worksite testified that he understood at the time of the 2016 inspection that he needed fall protection even when working above false work. His apparent understanding of the company's rule stands alone and hardly outweighs the testimony of his three fellow crew members.

Enforcement

In my view, the record also establishes that the foreman's enforcement of the company's fall protection work rule was inadequate. I agree with my colleagues that, given the circumstances of the 2015 citation and the subsequent discipline and training the foreman received from Shelly & Sands, it is highly unlikely that he misunderstood the company's fall protection rule at the time of the current violation. Despite this history, the evidence shows that the foreman's own efforts to enforce the company's fall protection rule with his crew were lacking. According to the foreman, he has given crew members oral reminders in the past after observing safety violations. And while the company's vice president of safety and risk management asserted that the foreman has "verbally warned [workers] for fall protection . . . at some point in time," the vice president conceded that the foreman has never issued a "written . . . formal fall protection discipline measure." Moreover, the foreman himself admitted that in his 18 years as a supervisor with Shelly & Sands, he has "never disciplined anyone for fall protection," and the only disciplinary records in evidence—covering January 2014 to October 2016—show that he did not document any oral warnings or issue any written notices under the company's progressive disciplinary policy for any type of safety violation during that time.[3] Given that four of the foreman's workers were simultaneously violating the fall protection standard when the CO inspected the worksite, I find it highly implausible that the foreman had never found it necessary to discipline any worker for such a violation in the past. *Cf.* GEM Indus., Inc., 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) (noting in rejection of employer's unpreventable employee misconduct defense that "[w]here all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule"), *aff'd*, 149 F.3d 1183 (6th Cir. 1998).

When viewed in the context of other circumstances in this case, it is clear to me that the foreman made no attempt to ensure that his crew complied with the company's fall protection rule. It is undisputed that the foreman was not on the bridge during the entire morning on the day of the OSHA inspection, and all four crew members who testified at the hearing said that they could not

[3] Shelly & Sands has a four-step progressive disciplinary policy with an "informally documented" oral warning as the first step, a written warning documented in the employee's file as the second step, a three-day suspension as the third step, and termination for "repeated serious safety infractions" as the fourth step.

see the foreman from where they were working. It is also undisputed that during the OSHA inspection, the CO observed these four crew members working without fall protection in violation of the company's fall protection rule.[4] The foreman's assurance that he orally corrects workers when he observes safety violations does not overcome evidence showing that he has known at least since the 2015 citation that fall protection compliance required his close attention, yet he has failed to follow the company's progressive disciplinary policy. Indeed, on the day in question, he left his crew to work on the bridge the entire morning without observing whether fall protection was being used. Under these circumstances, I find that the record evidence shows that the company also failed to adequately enforce its fall protection work rule. *See Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1187-88 (No. 00-0553, 2005) (finding constructive knowledge where employer's "safety program was poorly enforced").

For all these reasons, I conclude that the Secretary has proven Shelly & Sands had constructive knowledge of the violative conditions and thus would affirm Repeat Citation 1, Item 1.[5]

/s/
Cynthia L. Attwood
Chairman

Dated: February 1, 2021

[4] In addition to the two crew members who were exposed to fall hazards while on the false work, two other crew members were exposed to fall hazards when they exited an aerial lift without tying off.

[5] Shelly & Sands does not dispute the violation's repeat characterization, or the $25,000 penalty assessed by the judge.

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

Secretary of Labor,
Complainant
v.
Shelly & Sands, Inc.,
Respondent.

OSHRC Docket No.: **17-0190**

Appearances:

Adam Lubow, Esq., U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Secretary

Corey Crognale, Esq., Ice Miller, LLP
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Shelly & Sands, Inc., (S&S) contests a two-item Citation and Notification of Penalty (Citation) issued November 2, 2016, by the Secretary. The Secretary issued the Citation as a result of an inspection by the Occupational Safety and Health Administration (OSHA) on August 9, 2016, of a bridge worksite near Cambridge, Ohio. A compliance safety and health officer (CSHO) observed a number of S&S employees engaged in work activities he believed exposed them to fall hazards.

Item 1 of the Citation alleges a repeat violation of 29 C.F.R. § 1926.453(b)(2)(iv) for permitting two employees to climb over the guardrails of an elevated aerial lift. The Secretary proposes a penalty of $68,591.00 for this item. Item 2 alleges a repeat violation of 29 C.F.R. § 1926.501(b)(1) for permitting, in three instances, employees to stand or walk on walking/working surfaces with unprotected edges six feet or more above a lower level, without the use of fall protection. The Secretary proposes a penalty of $68,591.00 for this item.

S&S timely contested the Citation. The Court held a hearing in this matter on October 25 and 26, 2017, in Columbus, Ohio. The parties filed briefs on December 20, 2017. S&S argues

any violation of the standards cited in Items 1 and 2 resulted from unpreventable employee misconduct. S&S also argues the Secretary failed to prove noncompliance with the terms of the standard cited in Instance (b) of Item 2.

For the reasons discussed below, the Court **VACATES** Item 1 and Instances (a) and (b) of Item 2. The Court **AFFIRMS** Instance (c) of Item 2 and assesses a penalty of $25,000.00 for that instance.

JURISDICTION AND COVERAGE

S&S timely contested the Citation and Notification of Penalty on November 30, 2016. The parties stipulate the Commission has jurisdiction over this action and S&S is a covered business under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act) (Tr. 19). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and S&S is a covered employer under § 3(5) of the Act.

STIPULATED FACTS

The parties stipulated the following:

> 1. On August 9, 2016, Respondent was performing construction work at a worksite in Cambridge, OH.
>
> 2. The worksite was a bridge where CR-35 crossed over I-77.
>
> 3. The CR-35 bridge ran southwest to northeast, while I-77 ran north-south.
>
> 4. Respondent was previously cited for a violation of 29 C.F.R. 1926.453(b)(2)(iv) in OSHA inspection number 1014739, citation 1, item 1, which was affirmed as a final order on February 22, 2015.
>
> 5. Respondent was previously cited for a violation of 29 C.F.R. 1926.501(b)(1) in OSHA inspection number 1014739, citation 1, item 3, which was affirmed as a final order on February 22, 2015.
>
> 6. On August 9, 2016, CSHO Schnipke commenced a program planned inspection initiated by a CSHO referral based on a local emphasis program for fall hazards in construction.

(Exh. J-1, Attachment C—Stipulated Facts)

The parties presented an additional stipulation at the start of the hearing (Tr. 19-20). It states,

> On August 8, 2016, CSHO Matthew Marcinko was driving northbound on I-77 and passed under the CR-35 worksite. He believed he saw a fall protection violation, but, admittedly, was travelling at highway speed. Based on this belief, CSHO Marcinko attempted to pull over and initiate an inspection. He was unable to safety

> do so. He then proceeded to the Columbus Area OSHA office, and informed a supervisor of his purported observations. The supervisors sent CSHO Dustin Schnipke to the site the next day to initiate the inspection. CSHO Marcinko took no photos or videos of the CR-35 worksite.

(Exh. J-2)

CSHO SCHNIPKE'S INSPECTION

As stipulated in Exhibit J-2, on August 8, 2016, after CSHO Marcinko reported to his supervisor his perception that the S&S employees were not using fall protection at the County Road 35 (CR-35) bridge, the supervisor assigned CSHO Dustin Schnipke to inspect the worksite. CSHO Schnipke met with CSHO Marcinko to confirm the location of the worksite (Exh. C-14; Tr. 33-35).

On August 9, 2016, CSHO Schnipke arrived at the worksite at approximately 11:45 a.m. (Tr. 37). At the hearing, he explained his approach to the worksite.

> Once I found the job site, I actually rode up and down the road -- up and down [Interstate] 77 and side roads to find a good location where I could pull over and view the bridge. … I needed to see a fall hazard prior to opening the inspection. … If I didn't see a fall hazard, I would have not opened an inspection and possibly, I have done in the past sometimes, just went up to the employees there and just stated that someone did report to us that someone was seen exposed to a fall hazard and review the fall protection requirements with them.

(Tr. 36)

CSHO Schnipke observed the bridge construction project was in its early stages. S&S had removed the road bed on the west side of the bridge and had installed a horizontal lifeline. S&S was in the process of removing the CR-35 road bed from the east end of the bridge and was installing a horizontal lifeline on that side. The horizontal lifeline consisted of stanchions attached to each of the bridge's four I-beams with a wire rope running through loops at the top of the stanchions (Tr. 38). Each S&S employee wore a harness with a single lanyard attached, which he could clip to the completed lifeline with a carabiner to provide fall protection (Tr. 53).

S&S had installed "false work" underneath the bridge, which CSHO Schnipke explained "is basically plywood that is installed beneath the bridge so when … the deck of the bridge is being removed, debris does not fall into the road or the highway down below, down to the traffic." (Tr. 39) The false work served a secondary function on the C-35 bridge worksite. "Also, on this project, the false work was used as, employees were observed using it as a walking working surface as well." (Tr. 39)

CSHO Schnipke took photographs from his initial vantage point, but did not observe any safety violations (Tr. 42). "Next, I actually drove, tried to find another -- a better location I could - I could sit and I could view the bridge. And then it appeared that work stopped or halted for some time, so I thought that they went to lunch, the workers went to lunch, so I went to lunch." (Tr. 42-43) After returning from lunch, CSHO Schnipke "went to another road on the east side but north of the bridge that was a better vantage point to clearly observe activities on the bridge." (Tr. 43) While situated at the new location, CSHO Schnipke observed two S&S employees exit an elevated aerial lift by climbing over the lift's guardrails (Tr. 45-46). He photographed the employees as they climbed over the guardrails (Exh. C-13, pp. 17-20; Tr. 45-46). He then watched as the two employees stood on one of the bridge's I-beams and installed lifeline stanchions and wires (Tr. 53). They were not using fall protection while standing on the I-beam (Tr. 47-48).

Having observed what he believed were safety violations, CSHO Schnipke drove to the west side of the bridge and took additional photographs. He observed employees standing on the false work without using fall protection (Tr. 59-60). He then approached the employees on the bridge. They did not notice CSHO Schnipke so, he stated, "I hollered at them to get their attention and said I was with OSHA." (Tr. 54) He asked one of the employees to contact the person in charge. The employee called foreman Sye Thompson, who was sitting in a truck parked below the bridge on the shoulder of the northbound lane of I-77, doing paperwork (Tr. 57-58). When Mr. Thompson arrived on the worksite, he ordered the S&S employees off the bridge. As they were exiting the bridge, they unclipped their carabiners from the lifeline approximately 9 feet before the end of the bridge (Tr. 91).

CSHO Schnipke questioned Mr. Thompson for approximately 10 minutes, and then Mr. Thompson stated he needed to call the safety director for S&S (Tr. 68-71). CSHO Schnipke took statements from several S&S employees at the worksite (Tr. 73). Based on his recommendation, the Secretary issued the Citation and Notification of Penalty in this case to S&S on November 2, 2016.[1]

THE CITATION

[1] S&S devotes several pages of its brief impugning CSHO Schnipke's competence and knowledge of bridge construction (S&S's brief, pp. 15-18). The Court disagrees with S&S's assessment. CSHO Schnipke's testimony demonstrated he conducted a thorough, well-documented inspection. His testimony was clear, detailed, and forthright.

The Secretary's Burden of Proof

"An employer is liable for violating an OSHA safety standard if the Secretary of Labor can show the following by a preponderance of the evidence: (1) the standard applies to the cited conditions, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or should have known of the hazardous condition with the exercise of reasonable diligence." *R.P. Carbone Const. Co. v. Occupational Safety & Health Review Comm'n*, 166 F.3d 815, 818 (6th Cir. 1998).

Item 1: Alleged Repeat Violation of § 1926.453(b)(2(iv)

Item 1 of the Citation alleges,

> On or about August 9, 2016, at the bridge construction site, employees climbed over the guardrails and out of an elevated aerial lift to gain access to bridge beams while installing components of horizontal lifeline systems, thereby exposing employees to an approximately 20 foot fall hazard.

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

> Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.

S&S does not dispute its employees violated this standard. S&S asserts the two employees who climbed over the guardrails of the elevated aerial lift were engaged in unpreventable employee misconduct when they did so.

(1) Applicability of the Cited Standard

Section 1926.450(a), the definition section of *Subpart L--Scaffolds*, provides: "The criteria for aerial lifts are set out exclusively in § 1926.453." It is undisputed S&S's employees were operating an aerial lift at the worksite. Section 1926.453(b)(2)(iv) applies to the cited condition.

(2) Terms of § 1926.453(b)(2)(iv) Were Violated

CSHO Schnipke observed Employee #1 and Employee #2 exit the aerial lift in which they were riding by climbing over the guardrails of the lift onto the bridge deck, approximately 20 feet above the highway (Tr. 45-49). He took photographs of the employees as they climbed over the guardrails (Exh. C-13, pp. 17-20). S&S admitted its employees "climbed over the guardrails and out of an elevated aerial lift to gain access to bridge beams while installing components of horizontal lifeline systems." (Exh. C-18, p.2)

The Secretary has established S&S failed to comply with the terms of the cited standard.

(3) Employees Had Access to the Violative Condition

S&S admits Employees #1 and #2 were "exposed to an approximately 20 foot fall hazard." (Exh. C-18, p. 2) The Secretary has established the employees had access to the violative condition.

(4) Employer Knowledge

Actual Knowledge

In the Sixth Circuit, in which this case arose, a supervisor's knowledge of a safety or health violation may be imputed to the employer. "The knowledge of a supervisor or foreman, depending on the structure of the company, can be imputed to the employer. *See Danis–Shook Joint Venture XXV*, 319 F.3d at 812 (observing that 'the knowledge of a supervisor may be imputed to the employer' and ascribing the foreman's knowledge of his own failure to wear protective gear to the defendant company)[.]" *Mountain States Contractors, LLC v. Perez,* 825 F.3d 274, 283–84 (6th Cir. 2016).

Here, Sye Thompson, S&S's foreman, was in his truck parked on the shoulder of the highway running underneath the bridge at the time of the OSHA inspection. Nevertheless, the Secretary argues, Mr. Thompson had actual knowledge of the violative conditions: "Thompson initially parked his Ford F-250 truck in the northbound lane of I-77. … As the day proceeded, he moved the truck to the shoulder of I-77. .. When CSHO Schnipke first arrived on the scene, [an S&S employee] pointed to Thompson sitting in the truck. … From this vantage point, where he was at least twice during the day, Thompson could see the activity on the bridge and would have observed the cited violations in plain view." (Secretary's brief, p. 12) (citations to the transcript omitted)

Mr. Thompson testified he was in charge of another worksite approximately 5 miles away from the CR-35 bridge worksite. He spent part of his morning at that worksite. He was also responsible for traffic protection of vehicles passing under the bridge worksite. He coordinated with law enforcement personnel and periodically cleared fallen debris from the highway. At other times, Mr. Thompson sat in his truck and completed paper work (Tr. 242-43, 282). He stated that when he was in his truck in the afternoon, at the time CSHO Schnipke had an employee summon him to the bridge, he could not see the work activity taking place on the bridge. "I could see that top of that hoe, I could see the operator, but I couldn't see what these—I mean, you might be able to see the top of a hard hat, but not where I was." (Tr. 283)

CSHO Schnipke did not view the bridge from the vantage of Mr. Thompson's truck, and conceded he had no evidence Mr. Thompson had actual knowledge of the violative conduct (Tr. 121-22). The Court credits Mr. Thompson's testimony he could not see what the S&S employees were doing from the location of his truck at the time of the OSHA inspection.

The Secretary also relies on written statements of two employees taken by CSHO Schnipke at the time of the inspection to establish actual knowledge. Employee #1 stated, "Sye is my supervisor. He was around watching us." (Exh. C-20) Employee #4 stated, "Sye lifted up brackets for us[,]" meaning Mr. Thompson used a forklift operated from a cab staged below the bridge to raise the brackets to the bridge level (Exh. C-22).[2] Neither of these statements proves Mr. Thompson had actual knowledge of the violative conduct. Regardless of whether Mr. Thompson was "around watching" the employees earlier in the day or operated a forklift at some point to lift brackets to the bridge, it is undisputed that at the time CSHO Schnipke observed the cited violative conduct, the foreman was sitting in his truck and could not see what the members of his crew were doing.

The Secretary has not established Mr. Thompson could have seen the employees climb over the guardrails of the elevated aerial lift from where he sat. He has failed to prove Mr. Thompson had actual knowledge of the violative conduct.

Constructive Knowledge

The Secretary also contends S&S had constructive knowledge of the violative conduct, because Mr. Thompson should have known of the hazard with the exercise of reasonable diligence. "In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring. *See* [*Burford's Tree, Inc.,* 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010), *aff'd,* 413 F. App'x 222 (11th Cir. 2011) (unpublished).] (*citing Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003))." *S. J. Louis Construction,* 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016). The Court finds, at the time of the OSHA inspection, S&S had implemented adequate work rules and a training program, adequately supervised employees, anticipated hazards, and took measures to prevent violations from

[2]At the hearing, Employee #4 testified he was mistaken when he told CSHO Schnipke that Mr. Thompson had lifted the bracket, claiming it was an operator named Jordan (Tr. 445-46).

occurring. These factors are analyzed in detail in the following section addressing S&S's unpreventable employee defense. An additional factor in this instance is the duration of the violative conduct.

Mr. Thompson inspected the bridge worksite the morning of August 9, 2016 (Tr. 255). After that, he cleared fallen debris from the highway and went to check on another worksite. Upon his return to the vicinity of the bridge worksite, he sat in his truck and completed paperwork. When Employee #1 was asked how long he engaged in the violative activity at issue, he responded, "Climbing on the handrail would just be momentarily, to get out of the lift and to get back into the lift." (Tr. 352) Employee #2 stated his safety infraction lasted "a matter of seconds." (Tr. 387) The relatively short time it takes for employees to climb over the guardrails of an aerial lift is a key factor in finding the Secretary failed to establish Mr. Thompson should have known of the violative conduct. "[T]he employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard. *Pennsylvania Pwr. & Light Co. v. OSHRC,* 737 F.2d 350 (3d Cir.1984); *see Jones & Laughlin Steel Corp.,* 10 BNA OSHC 1778, 1982 CCH OSHD ¶ 26,128 (No. 76–2636, 1982)." *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) (emphasis in original). The Commission has declined to find constructive knowledge when the Secretary has failed to establish the violative conduct persisted long enough for a reasonably diligent supervisor to observe it.

> [W]e find that there is insufficient evidence to show that the condition was present for a long enough time that the employer should have known about it. *See Major Constr. Corp., Inc.*, 20 BNA OSHC 2109, 2111, 2004-2009 CCH OSHD ¶ 32,860, p. 53,042 (No. 99-0943, 2005) (constructive knowledge not established where violation might only have been capable of being observed for a short period); *see also Cranesville Block Co.*, 23 BNA OSHC 1977, 1986, 2009-2012 CCH OSHD ¶ 33,227, p. 56,017 (No. 08-0316, 2012) (consolidated) (knowledge not established where violative condition was in plain view but evidence did not establish how long it existed or that supervisors were in area); *Williams Enters., Inc.*, 10 BNA OSHC 1260, 1263, 1982 CCH OSHD ¶ 25,830, p. 32,306 (No. 16184, 1981) (knowledge not established absent evidence that violative condition existed "for a sufficient period of time that [the employer] should have discovered it").

LJC Dismantling Corp., 24 BNA OSHC 1478, 1481 (No. 08-1318, 2014).

Here, the record establishes the violation occurred fleetingly and Mr. Thompson was not in a position to observe it. The Secretary has not established Mr. Thompson could have known of

the violation with the exercise of reasonable diligence. He has failed to prove S&S had constructive knowledge of the violation.

Unpreventable Employee Misconduct Defense

Even if the Court found the Secretary had proven S&S knew of the violative conduct, the company would prevail with its affirmative defense of unpreventable employee misconduct. The Commission has recognized this defense when "the actions of the employee were a departure from a uniformly and effectively communicated and enforced work rule." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991).

The Secretary and S&S analyzed this defense under the Commission's standard: "To establish unpreventable employee misconduct, the employer must show that it: (1) has established work rules designed to prevent the violation; (2) has adequately communicated the rules to its employees; (3) has taken steps to discover violations of the rules; and (4) has effectively enforced the rules when violations were detected." *Rawson Contractors, Inc*., 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003). This case arose in the Sixth Circuit. "Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000.

The Sixth Circuit's standard for proving unpreventable employee misconduct is more stringent than that of the Commission. "'In the Sixth Circuit, in order to successfully assert this defense, an employer must show that it has a thorough safety program, it has communicated and fully enforced the program, the conduct of the employee was unforeseeable, and the safety program was effective in theory and practice.' *Danis–Shook Joint Venture XXV v. Sec'y of Labor,* 319 F.3d 805, 812 (6th Cir. 2003)." *All Erection & Crane Rental Corp. v. Occupational Safety & Health Review Comm'n,* 507 F. App'x 511, 516 (6th Cir. 2012). "[T]o be effective, the safety program must be designed such that, if followed, it would prevent the violations at issue. *See National Engineering & Contracting Co. v. U.S., Occupational Safety and Health Review Comm'n,* 838 F.2d 815, 819 (6th Cir.1987) (affirming rejection of unpreventable employee misconduct defense based on absence of work rule designed to prevent violation)." *Danis-Shook Joint Venture XXV v. Sec'y of Labor,* 319 F.3d at 812. The record supports finding S&S met the requirements of the

unpreventable employee misconduct defense as set forth by both the Commission and the Sixth Circuit.

Thorough Safety Program

Gary Tuttle is S&S's vice president of safety and risk management (Tr. 160). He explained the structure of his department.

> Safety department, right now we have a position we call a safety representative in our various area offices. These folks have other responsibilities outside of safety, but they assist us with auditing and doing investigations, collecting the various documentation that's, you know, that's necessary. There's five safety representatives. And then in the safety department, as a full-time position, not including myself, I have five safety personnel. Out of those five, one is a -- does administrative work, and then the other four are field safety personnel that would do various activities related to the implementation of our program. And we -- one fellow does a lot of the industrial hygiene work for us and assessments, as well as making sure we're complying with our respiratory protection programs. They also do – that individual also does site audits and training. Then I have two other individuals that, pretty much we'd split the state, one on the east side of the state, one on the west side of the state. They have responsibility to conduct training in the field, do site audits, assist in planning and implementation of the safety program. So that's those two. And then the last, the fifth safety department employee, focuses primarily on the bridge work, and auditing, and training, and assisting in planning and getting equipment as necessary to our bridge division.

(Tr. 166-167)

In addition to S&S safety department employees, the company contracts with outside safety consultants (Tr. 167-168). Mr. Tuttle testified S&S employs only union carpenters, operators, cement finishers, and laborers on its projects (Tr. 164-165).

S&S's safety program is documented in its *Employee Safety Handbook*, which it provides to each of its employees (Exh. R-12; Tr. 170). Mr. Tuttle stated he and his safety team review the handbook annually and make "modifications based on regulatory changes, areas that we feel like we need to focus on a little stronger, and distribute that to all our workers." (Tr. 169) The handbook contains a section on "General Safety Guidelines" and a section on "Specific Safety Guidelines," which addresses safety rules for particular work activities, including fall protection and the use of aerial lifts. The section on aerial lifts includes the following rules:

- Always keep feet on floor. Climbing or sitting on the handrail is prohibited.
- Use no additional means to gain height (i.e. ladders, planks, standing on guardrail).

- Operator shall be tied off to designated location inside the lift at all times. Restraint shall consist of a harness and Self Retracting Line (SLR).

(Exh. R-12, p. 25)

CSHO Schnipke testified S&S's safety program was adequate (Tr. 119-120). The Secretary concedes, "S&S did have established work rules with regard to aerial lifts and fall protection." (Secretary's brief, p. 14) The Court finds S&S had a thorough safety program in place at the time of the inspection, and it had specific rules designed to prevent the violative conduct at issue.

Communication of Safety Program

S&S provides a safety orientation to each of its new hires under the direction of the jobsite foreman. The orientation includes a review of the *Employee Safety Handbook* (Exh. R-12; Tr. 170). When employees are hired whose assigned tasks will expose them to fall hazards, an S&S safety representative provides them with specialized fall protection training. Mr. Tuttle stated, "When we get a new hire that is going to be exposed to a fall hazard, the foreman is to contact the safety department. The safety department will go to the site and conduct a training, issue -- fall protection training, issue the fall protection equipment, and instruct on the use of the equipment, the inspection of the equipment, and the general elements of the fall protection program." (Tr. 169)

The foreman conducts weekly toolbox talks using prepared memos provided by S&S. Mr. Tuttle testified the toolbox talks are "designed to cover every section that is identified in our safety handbook." (Tr. 185). Employees attending the toolbox talks must sign a sign-in sheet afterwards (Tr. 187). Foreman Thompson conducted toolbox talks on February 22 and May 16, 2016, addressing the fall protection standard (Exh. R-10, pp. 3, 17; Tr. 185-187).

At the beginning of a project, the foreman conducts a safety assessment to "identify the specific hazards that the employees are going to deal with for various tasks." (Tr. 187) The foreman conducts the safety assessment in the presence of the crew members, who sign the assessment form to show they participated in the assessment (Tr. 189-190). Foreman Thompson completed one for August 9, 2016, at 6:30 a.m. The assessment identifies possible hazards, including falls. Under "Eliminate/Manage Risks," Mr. Thompson wrote, "Put up Proper Fall Protection, Wear Approved Safety Harness." In answer to the question, "What is the most likely way you or a coworker could be injured performing this job?," Mr. Thompson wrote, "Fall." Responding to the

question, "What additional preventative actions have you taken to avoid this injury?," Mr. Thompson wrote, "Fall Protection, Harness, Tie Off." (Exh. R-11, p. 10; Tr. 189)

Although the Secretary concedes S&S "did have a training program to communicate these rules to its employees, including annual training programs and weekly 'toolbox talks' to briefly remind employees of specific work rules," he contends S&S's safety program

> was not entirely adequate. On the morning of the inspection, August 9, 2016, Thompson actually gave a toolbox talk on fall protection to all of his crew. … One problem with the effectiveness of Thompson's talks were their repetition. Thompson gave the same series of weekly toolbox talks in a regular rotation. … A safety director for S&S would prepare the talks over the winter and simply photocopy pages for Thompson before starting a project. … As Thompson had much of the same crew members working for him on many projects over many years, they heard the exact same toolbox talks repeated many times. … Sometimes Thompson would allow employees to simply read the talk to themselves instead of listening to it. … [An employee] even testified that "a lot of us know [the toolbox talks] -- we've been on the job quite a few times. We actually know what this all means. We will look it over and then sign off on it." … This indicates a disregard for the usefulness of the information conveyed in the toolbox talks. Thompson did not quiz his crew on lessons learned from the toolbox talks, did not solicit any feedback from them regarding the hazards, did not demonstrate proper safety techniques, or do anything to make the toolbox talks interactive. … He simply lectured them and had them sign to confirm their attendance. … These toolbox talks did not adequately communicate the work rules, as clearly evidenced by the number of violations that occurred the very day of the toolbox talk.

(Secretary's brief, pp. 21-22) (citations to transcript omitted)

The Secretary seeks to impose obligations on S&S not required by the either the Commission or the Sixth Circuit for establishing the unpreventable employee misconduct defense. The Commission requires the employer to prove it adequately communicated the work rules to its employees. The Sixth Circuit requires the employer to prove "it has communicated and fully enforced the program." S&S has established it effectively communicated the rules prohibiting climbing the guardrails of an aerial lift. Each of the employees testified they had received extensive training and were aware of the safety rules (Tr. 335-36, 377-79, 395-97, 419-23). Having effectively communicated the safety rules, S&S was not required to quiz the employees on the rules or solicit their feedback or make the toolbox talks interactive.

The Court finds S&S effectively communicated its safety program, including the safety rules prohibiting employees from climbing the guardrails of the lift, to its employees.

Enforcement of Safety Program

S&S has a written disciplinary program. Mr. Tuttle explained,

> We have a progressive policy, meaning that, you know, the first observation you'll be verbally warned. The second observation of non-compliance with programs and policies you'll receive a written warning. Third violation you would receive another written warning, or suspension, or termination, depending upon the severity and the -- if it was blatant disregard.

(Tr. 176-177)

Exhibit R-7 comprises copies of spreadsheets of safety notifications issued in 2014, 2015, and 2016 (Tr. 194). Foremen and representatives of S&S's safety department issued approximately 115 verbal and written warnings for safety rule violations during those three years (Exh. R-7). The exposed employees cited in this proceeding each received written warnings (Exh. R-9; Tr. 201). Mr. Thompson's discipline was more severe. Once S&S received the Citation, S&S suspended him for four months without pay. He was required to take a refresher safety course and meet with the owner, president, vice-president, and Mr. Tuttle before being allowed to work again (Tr. 197-198). S&S also demoted Mr. Thompson, which resulted in significant economic costs.

> Thompson: [W]hen they brought me back it wasn't a supervisor -- I went and worked for another supervisor.
>
> Q.: Is that at less pay?
>
> Thompson: Oh yeah. Lot less pay. … I lost my expense, my vehicle, gas card, you know, money. You know, pride.
>
> Q.: How much money?
>
> Thompson: It probably $30,000, $40,000 difference for the months that I missed.

(Tr. 288)

The Commission has found progressive disciplinary policies and disciplinary records are adequate to establish enforcement of an employer's safety policy.

> SJL's disciplinary log shows that over the two-year period predating the OSHA inspection, SJL warned and suspended employees on dozens of occasions for safety violations, four of which were for confined space violations during 2009. Although, as the Secretary points out, the log shows no disciplinary records related to confined space issues following a 2009 verbal warning, the log shows that SJL implemented a progressive disciplinary policy for safety violations. *See Stahl* [*Roofing Inc.,*], 19 BNA OSHC [2179,] 2182 [(No. 00-1268, 2003) (consolidated) (finding progressive discipline program sufficient to establish adequate enforcement element of

> reasonable diligence). We find that, in light of SJL's record of numerous safety-related disciplinary actions, the lack of evidence that the Crew Leader or his crew members were disciplined shows simply that they had not committed safety violations for which they would be subject to discipline, rather than, as claimed by the Secretary, that discipline with respect to this crew, or employees in general, was lax. *See Am. Eng'g*, 23 BNA OSHC [2093,] 2097 [(No. 10-0359, 2012)] (discipline adequate where employer had progressive disciplinary program and had imposed extensive discipline for safety violations in year prior to incident); *Thomas Indus.*, 23 BNA OSHC [2082,] 2088-89 (No. 06-1542, 2012)] (discipline adequate where employer had disciplined employees for violations of its safety program and disciplinary reports show that employees involved in fall protection violation at issue had never been disciplined for personally violating fall protection rules). On the contrary, the record shows that when SJL discovered safety work rule violations, corrective informal training was provided and other corrective measures, including disciplinary actions, were taken. *See Aquatek Sys. Inc.*, 21 BNA OSHC 1400, 1402 (No. 03-1351, 2006) (finding that verbal reprimand demonstrates employer enforced safety rules).

S. J. Louis Constr. of Texas, 25 BNA OSHA 1892, 1900 (No. 12-1045, 2016).

The Commission also has held, "[O]ne of the factors considered in determining whether an employer effectively enforced its safety rules are the efforts it took to monitor adherence to those safety rules by supervisory employees." *L. E. Myers Co.,* 16 BNA OSHC 1037, 1042 (No. 90-945, 1993). Mr. Tuttle testified safety department employee Robin Sichina monitored Mr. Thompson's supervision of the bridge worksite, located near Cambridge, Ohio. Mr. Sichina had inspected the bridge worksite the day before the inspection (Tr. 437).

> Actually, Robin didn't live -- doesn't live too far from those locations. Those are in the Cambridge area, and Robin lives just outside of Cambridge. So he was able to stop by. ... And I know on this particular bridge at question, CR-35, even though they hadn't been working but for at -- I believe just a few days; Robin had already stopped at that job, mainly because it was so close, and it -- truly, we were, for lack of any other word, bird-dogging.

(Tr. 192-193)

The Secretary faults the enforcement of S&S's safety program based on his perception foreman Thompson is too soft on the employees he supervises.

> As every one of S&S's employees testified, Thompson is a really nice guy. … All of the workers have worked for Thompson on many different projects, many of them for years. … Most of the crew lives near Thompson, they socialize outside of work, and their families know each other. … [Employee John] Bintliff is even married to Thompson's sister. … In short, Thompson is too close and too connected to his crew to effectively discipline them. Thompson admitted that in his 22 years

> at S&S, 18 years as a foreman, he has never disciplined anyone for a fall protection violation. … Other S&S personnel have disciplined members of Thompson's crew for fall protection violations… and CSHO Schnipke observed four separate violations in just a few minutes. Tuttle could not think of any other supervisor who had worked for as long Thompson without having disciplined workers. ... The fact that Thompson had not observed a fall protection violation in 22 years of working on bridges is simply unbelievable. Instead, it belies the fact that Thompson is too nice to effectively enforce the work rules.

(Secretary's brief, pp. 16-17) (citations to transcript omitted)

The Secretary's focus solely on Mr. Thompson's administration of discipline is too narrow and his contention Mr. Thompson overlooked instances of safety violations is too speculative. The affability of a supervisor is not a ground for finding failure to enforce safety rules. Although it is not unlikely in his 22 years working for S&S that Mr. Thompson had observed members of his crew violate safety rules and failed formally to discipline them, establishing adequate enforcement of a safety program does not require an employer to prove its enforcement is perfect. *See S. J. Louis Corp.,* 25 BNA OSHC at 1899 ("Thus, we find that these few errors do not amount, as the Secretary suggests, to employee violations that are too numerous to find that SJL's safety ruler were effectively enforced.").

Mr. Thompson had extensive training in OSHA's safety standards. He has completed the OSHA 30-hour course twice, as well as OSHA's 10-hour course. He has received training in aerial lifts operation, rigging, and crane standards, and attends S&S's annual supervisor training (Tr. 230-231). He was well-qualified to supervise a work crew.

Based on the totality of the evidence, including testimony and exhibits establishing S&S implemented field monitoring and safety audits, a progressive disciplinary system, and disciplinary measures, the Court finds S&S effectively enforced its safety program.

Unforeseeability of Employee Misconduct

This element, not required by the Commission to establish unpreventable employee misconduct, applies to supervisory personnel. The employees engaged in the violative conduct in this case were not supervisors. Therefore, S&S is not required to prove the violative conduct was unforeseeable. *See Dana Container, Inc.,* 25 BNA OSHC 1776, 1783 n. 15 (No. 09-1184, 2015), *aff'd* 847 F.3d 495 (7th Cir. 2017) ("[F]oreseeability is not an additional element; rather, it is an

issue proved or disproved by an analysis of the four [unpreventable employee misconduct] elements, and only in the context of imputing a supervisor's knowledge of his own misconduct to the employer in circuits, such as the Third Circuit, which require a showing of foreseeability.").

Effectiveness of Safety Program

Finally, the employer must prove its safety program "was effective in theory and practice." This element correlates to the requirement by the Commission that the employer establish it has taken steps to discover violations of its rules.

It is clear from the record that S&S's safety program was effective in theory. It has a fully staffed safety department, a comprehensive written safety program, and a disciplinary system in place. The issue is whether the theoretical program leads to practical results. *See Precast Servs., Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995) ("To prove that its disciplinary system is more than a 'paper program,' an employer must present evidence of having actually administered the discipline outlined in its policy and procedures.").

In *S. J. Louis Construction,* the Commission found (in assessing the adequacy of the company's safety program) the employer took steps to discover violation based on its monitoring and auditing system.

> With regard to discovering violations of its work rules, SJL has a full-time safety director and five field safety supervisors who conduct random and planned field safety audits . . . *See Stahl Roofing Inc.*, 19 BNA OSHC 2179, 2182 (No. 00-1268, 2003) (consolidated) (safety director's unannounced visits as part of monitoring system deemed adequate); *N.Y. State Elec. & Gas Corp.*, 19 BNA OSHC 1227, 1231 (No. 91-2897, 2000) (same); *Burford's Tree*, 22 BNA OSHC at 1950-51 (discussing audits as a means to discover safety violations).

25 BNA OSHC at 1899.

S&S also has a full-time safety director (Mr. Tuttle's title is vice president of safety and risk management) and a staff of approximately five full-time safety department employees. The safety employees conduct site auditing and training (Tr. 166-167). In a three year period, S&S issued approximately 115 verbal and written warnings to employees who violated safety rules (Exh. R-7). The Court finds S&S's safety program was effective in theory and practice.

Having established the elements of the unpreventable employee misconduct defense under both the Commission and the Sixth Circuit, S&S has prevailed with its affirmative defense with regard to the violation of § 1926.453(b)(2)(iv). Item 1 is vacated.

Item 2: Alleged Repeat Violation of § 1926.501(b)(1)

Item 2 of the Citation alleges,

> a. On or about August 9, 2016, at the bridge construction site, on the Northeast side of the bridge, employees installed components of horizontal lifeline systems while standing on bridge beams without the use of fall protection, thereby exposing employees to an approximately 20 foot fall hazard.
>
> b. On or about August 9, 2016, at the bridge construction site, on the West end of the bridge, employees walked out approximately nine feet on a bridge beam without the use of fall protection before reaching an attachment point to the horizontal lifeline system, thereby exposing employees to an approximately nine foot fall hazard.
>
> c. On or about August 9, 2016, at the bridge construction site, over I-77 Southbound traffic, employees installed walers while standing on false work that had an unprotected side within approximately 12 feet without the use of fall protection, thereby exposing employees to an approximately 17 foot fall hazard.

Section 1926.501(b)(1) provides:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

(1) Applicability of the Cited Standard

A "walking/working surface" is "any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties." 29 C.F.R § 1926.500(b). The standard defines "unprotected side or edge" as "any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or guardrail system at least 39 inches (1.0 m) high. *Id.* The bridge beams and the false work at the worksite were walking/working surfaces with unprotected edges within the meaning of the cited standard. The Court concludes section 1926.501(b)(1) applies to the cited conditions of each instance alleged by the Secretary.

INSTANCE (A)

(2) Terms of § 1926.501(b)(1) Were Violated

CSHO Schnipke observed Employees #1 and #2 standing on the I-beams in the center of the bridge after they exited the aerial lift. As they were installing the lifeline stanchions and wire, they stood and walked on a section of I-beam that lacked any false work plywood flooring below. The employees were not tied off (Exhs. C-13, pp. 6, 17; Tr. 51). The I-beam was approximately 20 feet above the ground (Exh. C-18, p. 2). S&S does not dispute Employees #1 and #2 failed to comply with the requirements of § 1926.501(b)(1).

(3) Employees Had Access to the Violative Condition

S&S admits its employees were exposed to a fall of 20 feet (Exh. C-18, pp. 2-3).

(4) Employer Knowledge

As with the aerial lift violation cited in Item 1, the Secretary contends Mr. Thompson had actual knowledge of the violative conduct based on his presence in his truck parked below the level of the bridge. The Court, in keeping with the determination made in discussing Item 1, credits Mr. Thompson's testimony he could not see the employees as they worked on the bridge from his vantage point (Tr. 283).

The Secretary's argument S&S had constructive knowledge of the violative conduct because Mr. Thompson should have known of the hazard with the exercise of reasonable diligence is similarly unavailing here. As the Court noted previously, at the time of the OSHA inspection, S&S had implemented adequate work rules and a training program, adequately supervised employees, anticipated hazards and took measures to prevent violations from occurring.

As in Item 1, the short duration of the violative activity weighs in favor of finding no constructive knowledge. CSHO Schnipke testified Employees #1 and #2 worked on the bridge at the cited location for "approximately 10, 15 minutes." (Tr. 53) *See Major Constr. Corp., Inc.*, 20 BNA OSHC at 2111 (constructive knowledge not established where violation might only have been capable of being observed for a short period.).

The record establishes the violation was of short duration and Mr. Thompson was not in a position to observe it. The Secretary has not established Mr. Thompson could have known of the violation with the exercise of reasonable diligence. He has failed to prove S&S had constructive knowledge of the violation.

Unpreventable Employee Misconduct Defense

The Court finds that, even if the Secretary had established the element of knowledge, S&S would prevail regarding Instance (a) on the affirmative defense of unpreventable employee misconduct. As stated previously, in order for an employer to prevail with this defense in the Sixth Circuit, it must prove it has implemented "a thorough safety program, it has communicated and fully enforced the program, the conduct of the employee was unforeseeable, and the safety program was effective in theory and practice.' *Danis–Shook Joint Venture XXV v. Sec'y of Labor,* 319 F.3d 805, 812 (6th Cir. 2003)." *All Erection & Crane Rental Corp. v. Occupational Safety & Health Review Comm'n,* 507 F. App'x at 516. "[T]o be effective, the safety program must be designed such that, if followed, it would prevent the violations at issue. *See National Engineering & Contracting Co. v. U.S., Occupational Safety and Health Review Comm'n,* 838 F.2d 815, 819 (6th Cir.1987) (affirming rejection of unpreventable employee misconduct defense based on absence of work rule designed to prevent violation)." *Danis-Shook Joint Venture XXV v. Sec'y of Labor,* 319 F.3d at 812.

For the reasons discussed in Item 1 addressing the unpreventable employee misconduct defense, S&S has established it implemented a thorough and effective (theoretically and practically) safety program that was enforced (again, the foreseeability of a supervisor's misconduct is not at issue). Because the employer must establish in each instance it had a work rule designed to prevent the cited violation and communicated it, the Court makes further findings on this issue.

S&S's *Employee Safety Handbook* addresses fall protection:

> **FALL PROTECTION**
>
> Fall Protection is the means used for preventing a fall. The following are some examples of fall protection devices:
>
> - guardrails
> - ladders
> - scaffolds/work platforms
> - personnel lifts
> - fall arrest equipment (anchors, harnesses, lanyards)
> - positioning devices
>
> Please Note: Areas that require fall arrest equipment (i.e., open sides and edges) 6 feet or greater require additional training. See equipment use manual.
>
> When using any means of fall protection certain guidelines must be observed. The following information addresses these guidelines.

> ***
> Whenever there is a possibility to free fall greater than 6 feet, fall arrest equipment must be utilized. All employees that are working at heights greater than 6' shall be tied off 100% of the time or be protected by the use of a handrail system. Check with your supervisor or safety administrator for the proper equipment selection and anchorage points. Always review the manufacturer's use manual for specific devices.
>
> Anchorage points must meet 5,000 lb. rating per employee for fall arrest.

(Exh. R-12, pp. 24, 26)

S&S has established it had work rules designed to prevent the violation cited in Item 2. It also effectively communicated these work rules. It provides a safety orientation to each of its new hires. If the employees will be exposed to fall hazards, S&S's safety department sends a representative to the worksite to conduct fall protection training (Tr. 169).

The Court determines S&S has established the unpreventable employee misconduct defense, under the requirements of both the Sixth Circuit and the Commission, with respect to Instance (a) of Item 2.

INSTANCE (B)

(2) The Secretary Failed to Prove Terms of § 1926.501(b)(1) Were Violated

CSHO Schnipke observed employees detach the carabiners of their lanyards from the horizontal lifeline as they exited the bridge during the OSHA inspection (Exh. C-1, p.7). He contends the distance from the walking/working surface at that point was 9 feet above the ground of the embankment below. He did not measure the distance, but rather calculated it based on his observations and measurements listed on a drawing of the bridge. He stated, "[Nine] feet out with a 45-degree angle is a 9-feet drop. I was unable to get directly up against the bridge due to the steep slope and the -- and there was also some rubble there as well." (Tr. 92)

Mr. Thompson testified he had measured the distance from the bridge to the ground beneath where the last stanchion was located (where employees would have to disconnect their lanyards). He stated the distance from the top of the bridge to the ground below was less than 6 feet, starting from the last stanchion to the end of the bridge. Mr. Thompson did not document this measurement (Tr. 271-272).

The Secretary explains how CSHO Schnipke arrived at his conclusion the employees at issue were exposed to a fall of 9 feet.

> As he did not want to expose himself or others to a possible fall hazard, CSHO Schnipke did not make a vertical measurement of the height above the ground at the attachment point. Tr. at 143. He also did not want to expose himself to a fall hazard climbing down the bridge's embankment to measure the height from underneath. Tr. at 92. To indirectly determine the height at the attachment point, CSHO Schnipke first measured the distance between the west end of the bridge and the first stanchion as between five and six feet. Tr. at 65. This can be seen in Ex. C13, Pg. 63, particularly the digital version. Tr. at 325; Ex. C13, Pg. 63. He then measured the distance between a series of metal brackets that were also attached to the I-beams. Tr. at 65; Ex. C13, Pg. 63. These brackets were approximately 30 inches apart from one another. Tr. at 67; Ex. C13, Pg. 63. Looking at a still of the video, Ex. C16, he was then able to determine that employees were detaching from the lifeline between the second and third brackets after the first stanchion on the I-beam, counting a bracket that was directly at that stanchion. Tr. at 67; Ex. C13 Pg. 79. This meant that employees were disconnecting approximately three feet after the first stanchion. Tr. at 67. Adding the distances before and after the first stanchion, CSHO Schnipke determined that the attachment point was at least nine feet from the end of the bridge. Tr. at 151. As an alternate calculation, he determined that the employees were disconnecting between the fourth and fifth brackets from the west end of the bridge, counting a bracket that was directly at the end. Tr. at 67. With brackets 30 inches apart, this also results in approximately nine feet from the end of the bridge to the attachment point. *Id.* CSHO Schnipke then examined the construction diagrams of the bridge, which depicted the angle of the embankment under the west end as 45 degrees. Tr. at 91-92. With that angle, the attachment point nine feet out on the bridge would be nine feet above the ground. Tr. at 92.

(Secretary's brief, pp. 21-22)

S&S takes issue with CSHO Schnipke's calculations. The company contends he "engaged in a computation in which he made unverified assumptions that a typical embankment slope is forty-five degrees and then deemed employee exposure to a 9' fall. … CO Schnipke acknowledged that there was [a] substantial amount of concrete debris underneath the center bridge beams and that such debris would reduce the distance of the fall hazard. However, CO Schnipke failed to incorporate this height reduction into his computation." (S&S's brief, pp. 22-23)

The record indicates the bridge drawing CSHO Schnipke consulted does not reflect the siting of the existing bridge in the physical terrain of the worksite.

> Q.: Now, this bridge, it shows this -- at the end, the concrete abutment and then there are concrete piers in the middle of the bridge, and the I-beams of 36 inches runs the entire length of the bridge. Now, as far as your understanding, you were unaware as to whether or not those I-beams merely sat on the end abutment of the bridge and sat directly on the concrete piers, or they would've sat on a bridge seat or beam seat, correct?

CSHO Schnipke: That's correct. I'm not familiar with the construction of the end of the bridge.

***

Q.: Now, in Exhibit Page No. 9, at the west end of the bridge where the first stanchion is located, I believe you see two individuals, one worker wearing an orange hat, hard hat; another worker wearing a white hard hat. That's the west end, correct?

CSHO Schnipke: That's correct, yes. That's the west end.

Q.: And the first stanchion is the area where you identified as there being a fall hazard when the workers would unhook their lanyard and walk to the apron or walk off the beams.

CSHO Schnipke: That's correct.

Q.: And you had indicated in your computations that the distance from the first stanchion or where they were unhooking down to the ground was approximately 8, 9 feet.

CSHO Schnipke: Correct.

Q.: Okay. In your computations, I did not hear you referencing this concrete abutment that's underneath the I-beam, as depicted in photograph No. 9 of Respondent's Exhibit 18, correct?

CSHO Schnipke: No, I did not reference an abutment.

(Tr. 118-119)

CSHO Schnipke also conceded the debris underneath the area of the bridge where he asserts the employees were exposed to a 9-foot fall would affect the distance.

Q.: With respect to your computation as to the fall hazard, the height of the fall hazard on that west end of the bridge, you did not factor into that computation the debris that had built up underneath that first stanchion on the west end of the bridge, correct?

CSHO Schnipke: That's correct. The -- it was just based on the ground level.

Q.: And the ground level meaning under the plans referencing the embankment, the 45-degree slope.

CSHO Schnipke: That's correct.

Q.: So, in other words, when we're talking about in your computation of the 9 feet, you have the 45-degree embankment and then your computation, the area where they were tying off is 9 feet from the end of the bridge, correct?

CSHO Schnipke: That's correct.

Q.: And one thing that it's safe to say that would reduce the height of this fall hazard would be whether there was any debris, any concrete debris that had accumulated in that area, correct?

CSHO Schnipke: Accumulation of anything would raise the -- yeah, if anyone would fall, they would fall on the debris.

Q.: And which would, in other words, lessen the distance of your fall hazard?

CSHO Schnipke: If they would fall onto the debris, that's correct.

Q.: So for the sake of example, in other words, if there were -- you had the embankment and there was 5 feet of debris, there would be a fall hazard of 4 feet, according to your computations?

CSHO Schnipke: Correct, if he had landed on the debris.

(Tr. 146-148)

Counsel for the Secretary asked CSHO Schnipke to look at a photograph showing the side of the bridge (Exh. C-13, p. 67). He then asked him if he could "see enough debris underneath the bridge that would change your estimation that there was at least a 9-foot fall?," to which CSHO Schnipke replied, "[N]ot at the point where they would be disconnected." (Tr. 151) Viewing the same photograph, the Court cannot agree the estimation of a 9-foot fall is established. It is not possible to conclude accurately the distance from the top of the bridge to the area below by looking at the photograph.

Section 1926.501(b)(1) requires employers ensure that each employee on a walking/working surface with an unprotected side or edge which is 6 feet or more above a lower level use some form of fall protection. The distance of 6 feet is specified in the standard and is part of the Secretary's burden of proof. Here, the Secretary has failed to establish by a preponderance of the evidence that the fall distance was greater than 6 feet. The bridge drawing CSHO Schnipke used to calculate the fall distance does not represent the area under the bridge as it existed at the time of the OSHA inspection.

The Secretary has failed to prove the S&S violated the terms of § 1926.501(b)(1). Instance (b) of Item 2 is vacated.

INSTANCE (C)

(2) Terms of § 1926.501(b)(1) Were Violated

CSHO Schnipke observed two employees standing on the false work installing walers. They were not using fall protection and were exposed to a fall of 17 feet. S&S admits the employees "installed walers while standing on false work without being tied off." (Exh. C-18, Pg. 3: Tr. 102).

(3) Employees Had Access to the Violative Condition

S&S admits its employees were exposed to a fall of 17 feet (Exh. C-18, pp. 3).

(4) Employer Knowledge

It has been established foreman Thompson was not on the bridge at the time of the OSHA inspection and he could not see the S&S employees on the bridge as he sat in his truck. The Secretary has not established actual knowledge with regard to Instance (c).

The Secretary has, however, established constructive knowledge of the violative conduct in this instance. Mr. Tuttle correctly noted false work is not an exception to § 1926.501(b)(1). "[I]t's considered a walking/working surface that they've got to either guard with a guardrail or be tied off with personal fall arrest." (Tr. 200) For reasons unknown, Mr. Thompson believed fall protection was not required when employees were using false work as a platform. When CSHO Schnipke asked him at the worksite why the employees standing on the false work were not tied off, Mr. Thompson replied, "Because they're on false work." (Tr. 127)[3]

The Secretary had previously cited S&S for a violation of § 1926.501(b)(1) in 2014, when Mr. Thompson had been observed standing on false work without using fall protection (Tr. 327). Mr. Thompson testified that, at the time of the 2014 citation, he believed fall protection was not required when standing on false work. "Well at the time I thought that it was a working platform, which it wasn't. We evidently had to have a cable run through it to be hooked off." (Tr. 236-237)

This mistaken belief was adopted by Mr. Thompson's crew members. Employee # 2 testified he believed he was permitted to exit the aerial lift to the bridge without using fall protection if false work was installed below the bridge (Tr. 389-390). Employee #3, one of the

[3] Mr. Thompson initially denied he made this statement (Tr. 286). His demeanor when questioned regarding false work became nervous and uneasy (Tr. 311-315). He conceded he did discuss the use of false work with CSHO Schnipke (Tr. 315). The Court credits CSHO Schnipke's testimony that Mr. Thompson made this statement the day of the inspection, indicating he believed fall protection was not required for employees standing on false work.

exposed employees cited for standing on the false work without fall protection in this case, testified he was not tied off because "I did not feel there was a possibility of me falling." (Tr. 408) Employee #4, the other exposed employee, testified he was not tied off while standing on the false work the day of the OSHA inspection (Tr. 429). When asked why he was not tied off, he responded, "I personally thought that there was no threat of a fall in that area." (Tr. 431)

The misconception among several crew members about the need for fall protection when on or over false work indicates the employer failed to adequately communicate this specific application of the fall protection rule to Mr. Thompson's crew. Mr. Thompson previously had been cited for standing on false work without the use of fall protection. As supervisor, he had an obligation to ensure his crew members recognized there was no exception to § 1926.501(b)(1) for false work. With the exercise of reasonable diligence, he could have effectively communicated this information to his crew members, a measure which could have prevented the violation. The Court concludes S&S had constructive knowledge of the violation of § 1926.501(b)(1).

Unpreventable Employee Misconduct Defense

The Court determines S&S failed to establish the defense of unpreventable employee misconduct with respect to Instance (c). Under both the Commission and the Sixth Circuit, the employer must establish the effective communication of a work rule designed to prevent the violative conduct. S&S established it has a rule requiring the use of fall protection for employees exposed to falls of 6 feet or more. For some reason, however, Mr. Thompson and his crew members believed there was an exception to the rule when standing on false work. S&S's failure to communicate effectively to its employees that there is no exception for false work when it comes to fall protection forecloses establishing its affirmative defense.

The Secretary has established a violation of § 1926.501(b)(1) with regard to Instance (c).

REPEAT CHARACTERIZATION

The Secretary characterized Instance (c) of Item 2 as a repeat violation. Under § 17(a), 29 U.S.C. § 666(a), a violation may be characterized as repeat where there is a "Commission final order against the same employer for a substantially similar violation." *See Potlatch Corp*., 7 BNA OSHC 1061, 1063, (No. 16183, 1979).

OSHA cited S&S for a violation of the same standard, § 1926.501(b)(1), resulting from an inspection in 2014 (Exh. J-1, Attachment C—Stipulated Facts). Page 6 of Exhibit C-6 is a copy of a citation and notification of penalty issued to S&S on January 21, 2015. Pages 8 and 9 of Exhibit

C-6 are copies of the Informal Settlement Agreement the parties signed on February 11, 2015. The citation was affirmed as a final order on February 22, 2015 (Exh. J-1, Attachment C—Stipulated Facts).

The Court finds S&S's violation of § 1926.501(b)(1), as set out in Instance (c) of Item 2 of the Citation, is properly characterized as repeat.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc*., 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc*., 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

During its high season, S&S employs as many as 1,500 employees (Tr. 164). OSHA had issued citations to S&S five times since 2001, most recently, prior to the citation at issue, in 2014 (Tr. 74-75). The Court does not credit S&S with good faith because it is a repeat violation.

The gravity of the violation is high. Two employees were standing on the false work without fall protection for an unknown period of time (they exited the bridge because Mr. Thompson called them off once he arrived on the bridge worksite). The likelihood of injury had they fallen 17 feet to the highway below is great. Based on these factors, the Court assesses a penalty of $25,000.00 for Instance (c) of Item 2 of the Citation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

1. Item 1 of Citation No. 1, alleging a repeat violation of § 1926.453(b)(2)(iv), is **VACATED** and no penalty is assessed; and

2. Instances (a) and (b) of Item 2 of Citation No. 1, alleging a repeat violation of § 1926.501(b)(1), are **VACATED** and no penalty is assessed; and

3. Instance (c) of Item 2 of Citation No. 1, alleging a repeat violation of § 1926.501(b)(1), is **AFFIRMED,** and a penalty of $25,000.00 is assessed.

SO ORDERED.

/s/

Judge Sharon D. Calhoun
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Date: March 30, 2018