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. INTERNATIONAL FIRE PROTECTION, INC., Respondent.	OSHRC Docket No. **18-0643**

DECISION AND ORDER

Attorneys and Law firms

Jaslyn Johnson, Attorney, Karen Mock, Attorney, Office of the Solicitor, U.S. Department of Labor, Atlanta, GA for Complainant.

Aaron Dean, Attorney, Kelly Engebretson, Attorney, Moss & Barnett, Minneapolis, MN, for Respondent.

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

I. INTRODUCTION

This case results from a fall accident that occurred at the James F. Crist Generating Plant (Plant Crist), on October 2, 2017, in Pensacola, Florida. International Fire Protection, Inc. (IFP) was subsequently cited[1] by the United States Department of Labor's Occupational Safety and Health Administration (OSHA) for an alleged "serious" violation of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 651–678, for violating the scaffolding requirements of 29 C.F.R. § 1926.451(b)(2), with a proposed penalty of $12,934.00.[2] After IFP timely

[1] The Secretary of Labor delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads OSHA, and assigned responsibility for enforcement of the Act to OSHA. *See* 65 Fed.Reg. 50017 (2000). The Assistant Secretary has promulgated occupational safety and health standards, *see e.g.*, 29 C.F.R. Parts 1910 and 1926, and has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[2] Initially OSHA issued a two-item citation, but the Secretary withdrew Citation 1, Item 1, which alleged a violation of 29 C.F.R. § 1910.140(d)(2)(ii) and dismissed so much of the Complaint as was based

contested the citation, the Secretary filed a formal complaint with the Commission charging IFP with violating the Act and seeking an order affirming the citation.

The parties stipulated that IFP is an employer engaged in a business affecting commerce within the meaning of section (5) of the Act, 29 U.S.C. § 652(5), and the Commission has jurisdiction of this action under section 10(c) of the Act, 29 U.S.C. § 659(c). (Compl. ¶¶ 1, 2, Answer ¶¶ 3, 4; J. PreHr'g Statement ¶¶1, 2). A bench trial was held in Pensacola, Florida. Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings.[3] For the reasons indicated *infra*, the Court concludes all the elements necessary to prove a serious violation have been established by the Secretary. Accordingly, the citation is **AFFIRMED** as a Serious violation and IFP is assessed a civil penalty of $12,934.00.

II. STIPULATED FACTS[4]

The worksite at issue in this case is located in Pensacola, Florida, where IFP was engaged in construction work. (J. PreHr'g Statement ¶¶IV(1), (3)). Plant Crist hired IFP to replace the hangers that supported the sprinkler piping with new stainless-steel hangers, replace all sprinkler nozzles, and readjust the elevation of the sprinkler piping. (J. PreHr'g Statement ¶¶ IV(2), (8)). All of this fire sprinkler work was located at the top of the cooling tower, meaning that IFP employees were working approximately 40-50 feet above the ground at all times. (Tr. 21, 31, 147; *see also* Ex. R-7.)

On October 2, 2017, four employees from IFP — Project Foreman [redacted], Sam Gilchrist, Apprentice Jonathan Andrew Sullivan, and Apprentice Rodrecequz Magwood —were working inside a cooling tower at Plant Crist. (J. PreHr'g Statement ¶¶ IV(2)-(4); Tr. 30.) [redacted] and Gilchrist were both sprinkler fitter foremen for IFP, although [redacted] served as IFP's working foreman that day and was in charge of IFP's personnel at the worksite. (J. PreHr'g Statement ¶ IV(6); Tr. 44.) Sullivan was [redacted]'s apprentice, and Magwood was Gilchrist's apprentice. (Tr. 143, 231.) Gilchrist and Magwood first started working at the Plant Crist site on

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thereon.

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

[4] The parties Joint Prehearing Statement contains the following Stipulated Facts and Issues of Law. (Jt. Pre-Hr'g (April 22, 2019)).

October 2, 2017, and the day of the accident was their first day on the worksite. (Tr. 51.) [redacted] and Sullivan had been working at the jobsite for approximately three weeks. (Tr. 43, 44.)

The cooling tower is approximately 50 feet high. (Tr. 21, 31, 147.) The cooling tower at the Plant Crist site had nine cells, and IFP employees were working in one of the interior cells on October 2, 2017. (Tr. 82,; *see also* R-17, p. IFP 001120). Fire sprinklers and their supports are installed at the top of the cooling tower. (Ex. R.-7.) IFP's employees were always working on one level inside the cooling tower—when not standing on the exterior deck of the cells before descending access ladders—and IFP's employees had to be working about four to five feet below the top of the cooling tower to perform their fire sprinkler work. (Tr. 21, 31, 147; *see* also Ex. R-7.)

Access to the cooling tower was limited. To access the interior of the cooling tower, IFP employees had to climb stairs to reach the "deck" of the cooling tower, walk across the deck to reach the interior cell that they were working on, and descend a ladder within a 2-foot by 2-foot hatch opening cut into the deck. (Tr. 31-32, 86, 126; Ex. R-17 at pp. 1118-1120.) The ladder inside the hatch was approximately 6 feet tall. (Tr. 32, 87.) At the bottom of the ladder was a cramped labyrinth of metal pipes and wood structural beams where maneuverability was extremely limited. (Tr. 89-90; Ex. R-17 at pp. 1114-18.)

The interior of the cooling tower consists entirely of wood beams installed previously by Crist Plant or its other vendor. The wood beams crisscross in a dense pattern of vertical, diagonal, and horizontal wood beams of various sizes and dimensions throughout the entire interior of the tower from ground level to about 50 feet high off the ground. (Tr. 33, 36, 38; Ex. R-7; R-8; R-10; R-11; R-12; Ex. R-17 at pp. 1102-1112.)

The sprinkler system inside the cooling tower has two different sized pipes that hang at different elevations. (Tr. 97-99.) The smaller pipe, known as the pilot line, carries air and hangs at the higher level. (*Id.*) The larger pipe, known as the branch pipe, carries water to the fire system once the system is triggered, and hangs slightly below the pilot line. (*Id.*) IFP employees were working to re-hang both the pilot lines and the branch pipes. (*Id.*) IFP employees were tied off the entire time they worked inside the cooling tower. (Tr. 53, 89, 94, 95-96, 171, 173-174.)

Both the pilot lines and the branch pipes were at the top of the cooling tower and were within about 1 to 2 feet of the top of the cooling tower, just below the fans. (*See* Ex. R-7; R-17 at

p. 1102.) To rehang the pilot lines and branch pipes, IFP employees would drill holes in the wood beams, insert a rod into the hole, place a new hanger around the pipe, and secure the hanger to the closest wooden beam. (Tr. 32-33.) IFP employees, led by Project Foreman [redacted], had been performing this same work at the Plant Crist site for weeks prior to the accident. (Tr. 44.)

While IFP employees were performing this re-hanging work, they could either stand on the set of structural joists that are part of the cooling tower located immediately below the pipes, or they could stand on a board that IFP Superintendent McKeough, had purchased for the jobsite. (Tr. 203.) The board was approximately 2-inch thick by 10-inch wide by 8-foot long wood and was long enough to stretch across three sets of joists inside the cooling tower. (Tr. 93.) IFP employees testified that they did not believe they could have fit a wider 18-inch board of the same length into the cooling tower because an 18-inch board could not be maneuvered down the 2-foot-by-2-foot access hatch and ladder from the exterior deck of the cooling tower. (Tr. 104, 207, 241-242; Ex. R-17 at pp. 1113-1120.)

IFP employees could pick up the boards and move them freely throughout the work area. (Tr. 37, 64.) IFP employees had not nailed or otherwise secured the boards to the structure of the cooling tower during their work because they believed it would have been more dangerous and taken more time. (Tr. 113-114, 181.) It would have been dangerous to nail down the board because an employee could trip, slip, or fall while trying to pry the board off the structure of the cooling tower. (Tr. 182.)

The majority of IFP employees performed their work inside the cooling tower while standing on the set of joists and only used the boards to move from one set of joists to another set of joists. (Tr. 59, 148-149, 174, 230-231, 236.) When IFP employees moved the board from one set of joists to another, they stood on the joists to move the board. (Tr. 37.) The set of joists were approximately 7 inches thick. (Tr. 38.) The board was a matter of convenience and was used while ensuring that employees were always tied off with two points of contact with lanyards at some points and one point of contact with a lanyard at other points. (Tr. 171-173.) [redacted] was the only IFP employee who used the board as both a working platform and a walking surface. (Tr. 37, 52-53, 59, 65, 95.) [redacted] performed his hanging work either standing on the joist underneath the branch lines or standing on the board. (Tr. 37, 92, 100, 174.)

Between 11:30am and noon on October 2, 2017, [redacted] was standing on one of the boards inside the cooling tower. (Tr: 44-45.) [redacted] had just finished installing a hanger and as he turned to speak to Sullivan, the board twisted underneath him, and he fell 5 to 6 feet. (*Id.*) [redacted] tried to grab onto anything he could to stop his fall, and in the process, his left arm hit the joist immediately underneath him while he fell. (*Id.*; Tr. 154.) [redacted] was wearing a personal fall arrest system at the time of his fall, which stopped his fall within 5 to 6 feet, although [redacted] seriously injured his left arm during the fall. (Tr. 45-46, 154; J. PreHr'g Statement ¶¶ 10-11.) The board that [redacted] had been standing on fell with him but came to a stop on the set of joists one level below where [redacted] and the other IFP employees had been working. (Tr. 106-107.)

Following the accident, OSHA Compliance Safety and Health Officer Esley Chester, Jr. visited the worksite on October 4, 2017, and conducted an inspection. (J. PreHr'g Statement ¶ 13.) As a result of its inspection, OSHA issued a two-item citation to IFP on March 19, 2018, alleging serious violations of 29 C.F.R. § 1910.140(d)(2)(ii) and 29 C.F.R. § 1926.451(b)(2). (J. PreHr'g Statement ¶ 14.) The Secretary subsequently withdrew Citation 1, Item 1, which alleged a violation of 29 C.F.R. § 1910.140(d)(2)(ii) and dismissed that portion of the Complaint as is based thereon. (J. PreHr'g Statement ¶ 15; *see also* Order of Partial Dismissal (May 1, 2019)).

III. ANALYSIS

In the Eleventh Circuit, the jurisdiction in which this case arose,[5] the circuit court has noted, "[p]assed by Congress in 1970, [the Act] sought to assure that " 'every working man and woman in the Nation [had] safe and healthful working conditions.' " *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1306 (11th Cir. 2013) (*citing Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1151 (11th Cir.1994) (quoting 29 U.S.C. § 651(b))). To this end, the Secretary is authorized to promulgate safety and health standards applicable to the workplace and to enforce

[5] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Florida, which is in the Eleventh Circuit. IFP's principal address is in Alabama, also in the Eleventh Circuit. In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission 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) (citation omitted). Therefore, the Court applies the precedent of the Eleventh Circuit in deciding this case.

those standards in appropriate proceedings. *Id.*; *see also Florida Peach Growers Ass'n v. United States Department of Labor*, 489 F.2d 120, 123-24 (5th Cir. 1974); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 518 F.2d 990, 995-1000 (5th Cir. 1974), *aff'd*, 430 U.S. 442 (1977).[6] "Standards promulgated under [the Act] have the force of law because Section 5 of the Act, 29 U.S.C.A. § 654, imposes upon every employer a duty to 'comply with occupational safety and health standards promulgated under this chapter' or face civil and criminal penalties set forth in section 17, 29 U.S.C.A. § 666." *Florida Peach Growers*, 489 F.2d at 123-24. However, "OSHA does not impose strict liability on an employer but rather focuses liability where the harm can in fact be prevented." *Central of Ga. R.R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620, 623 (5th Cir.1978).

A. Alleged Violation

Under the law of the Eleventh Circuit, "the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer "knowingly disregarded" the Act's requirements." *ComTran Grp.*, 722 F.3d at 1307 (citations omitted). The citation alleges a serious violation of the Secretary's fall scaffold platform construction requirements when employees working inside of a cooling tower at the Christ Plant were installing sprinklers to the rafters, and an IFP employee used a platform that was not at least 18 inches wide, which exposed the employee to a 30-foot fall hazard. The cited standard mandates that "each scaffold platform and walkway shall be at least 18 inches (46 cm) wide." 29 C.F.R. § 1926.451(b)(2).

1. Regulation Applied

The parties stipulated that the Construction standards set forth at 29 C.F.R. Part 1926 applied to the work IFP was performing at the worksite. (Stip. Issues of Law ¶ 3). However, IFP argues that the specific standard cited does not apply because, according to IFP, "the boards IFP's employees were using on the day of the accident do not constitute 'scaffolding' within the

[6] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995. The Eleventh Circuit has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). This body of precedent is binding unless and until overruled by the Eleventh Circuit en banc. *Id.* Further, the decisions of the continuing Fifth Circuit's Administrative Unit B are also binding on the Eleventh Circuit, while Unit A decisions are merely persuasive. *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377 (11th Cir. 2006).

meaning of 29 CFR § 1926.451(b)(2)." (Resp't's Br. at 8.) According to IFP, "[w]ithout supporting structure, a singular board cannot be considered scaffolding[.]" (*Id.* at 14). The Court finds no merit in these arguments.

A "scaffold" is "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." 29 CFR § 1926.450(b). A "platform" is "a work surface elevated above lower levels," which "can be constructed using *individual wood planks*, fabricated planks, fabricated decks, and fabricated platforms." (*Id.*) (emphasis added).

Here, the wood plank was a platform within the meaning of the standard since it was "constructed using individual wood planks," was a "work surface elevated above lower levels," and was "used for supporting employees or materials or both." IFP admits the wood plank was resting on the pre-existing vertical joists, which were part of the cooling tower structure. (Resp't's Br. at 14.) Therefore, the wood plank used by [redacted] meets the definition of a "supported scaffold" since it was a platform "supported by outrigger beams, brackets, poles, legs, uprights, posts, frames, or similar rigid support." 29 CFR § 1926.450(b).

Therefore, the Court agrees with the Secretary that "[b]ased on the plain language of the cited standard and definitions cited above, IFP created scaffold platforms and walkways every time its employees placed individual wood planks across three vertical joists in the cooling tower and used them as working surfaces and access points." (Sec'y's Br. at 9.) Thus, the Court concludes the cited standard applied to the cited condition.[7]

2. Regulation Was Violated

A "walkway" is "a portion of a scaffold platform used only for access and not as a work level." 29 CFR § 1926.450(b). At the time of [redacted]'s accident, all four members of the work crew were using the individual wood planks as walkways so they could access different joists in the cooling tower, which they would then step off onto and work from. (Tr. 30-31, 39,

[7] IFP also argues the "inconsistency of OSHA's interpretation of 'scaffolding' is further evident in § 1926.451(g)[,]" which according to IFP, "requires an employer to install guardrails 'along all open sides and ends of platforms.'" (Resp't's Br. at 17.) The Court also finds no merit in this argument. Paragraph (g)(1)(vii) provides that "[f]or all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems *or* guardrail systems[.]" 29 CFR § 1926.451(g)(1)(vii). Since the scaffold was not of a type otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, IFP used a personal fall arrest system, and was therefore not required to use a guardrail system.

149, 204, 242-243.) There is no dispute that if the cited standard applied it was violated since the board was only approximately 10-inches wide.

However, the cited standard does contain an exception: "Where scaffolds must be used in areas that the employer can demonstrate are so narrow that platforms and walkways cannot be at least 18 inches (46 cm) wide, such platforms and walkways shall be as wide as feasible, and employees on those platforms and walkways shall be protected from fall hazards by the use of guardrails and/or personal fall arrest systems." 29 C.F.R. § 1926.451(b)(2)(ii).

Under well-established court and Commission precedent, it is IFP's burden to prove that the exceptions applies. See *U.S. v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (party claiming benefit of exception to statute's prohibition bears burden to prove entitlement to claimed exception); *see also Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2150 (No. 08-1656, 2016) (same). Thus, to establish applicability of the exception, IFP must show (1) the area inside the cooling tower was so narrow 18-inch platforms would not fit, (2) the wood planks it used were "as wide as feasible," and (3) employees on those platforms and walkways were protected from fall hazards by the use of guardrails and/or personal fall arrest systems.

As to the third prong, IFP has met its burden since employees were protected from fall hazards by the use of personal fall arrest systems. However, IFP failed to meet its burden on the other two prongs. IFP contends that employees could not physically fit an 8-foot long board that was 18-inches wide down the hatch of the cooling tower. (Resp't's Br. at 19.) However, the testimony elicited from [redacted] does not support this assertion. [redacted] testified that it was possible to get 18-inch wood planks into the cooling tower by taking the structural sides off the interior cell. (Tr. 102-103.)[8] Further, IFP did not establish that it could not have used a board that was shorter than 8-feet. Although the board used by the employees was long enough to stretch across three sets of structural joists, there was no evidence presented by IFP that the board was required to stretch across three sets of joists. IFP also proffered no evidence the wood planks it used were "as wide as feasible." To the contrary, McKeough testified that that a wood

[8] [redacted] testified:

> You'd have to, there's just a lot of things you'd have to do to get that siding off. First of all, you've got to get permission from the plant to do it. Then you have to have a boom lift to get you up there where you can do it. You can't take these sides off. And when you bring it in from the side, you're not coming directly into this area that you're working in right here, this open area. You're coming into the apron area here. Because that's the first part of the cell coming from the outside in. You're coming through the apron part. Then you've got to get that board in here.

(*Id.*)

plank that was wider than 10 inches could possibly fit into the cooling tower's hatchways. (Tr. 207:3-7.) Therefore, IFP failed to meet its burden to establish applicability of the exception. Thus, the Secretary established IFP violated the cited regulation.

3. Employee Exposed to Hazard Created

"[F]or purposes of proving 'employee exposure to a hazard,' the Secretary must establish that 'it is reasonably predictable, either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.'" *Pepper Contracting Servs. v. Occupational Safety & Health Admin.*, 657 F. App'x 844, 848 (11th Cir. 2016) (*quoting D.T. Constr. Co.*, 19 BNA OSHC 1305, 1308 (No. 99–0147, 2000) (ALJ)). The Commission has defined the zone of danger as the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)).

As the Commission noted in *Gilles & Cotting*, the scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. *Gilles & Cotting*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). Here, there is no question that IFP's employees were exposed to a fall hazard when they used wood planks as scaffold platforms and walkways that were less than 18 inches wide. (Tr. 35, 37, 39, 149, 204, 242-243.) [redacted]'s accident serves as a prime example of such exposure being realized. Therefore, the Secretary has established employee exposure to the cited conditions.

4. Employer "Knowingly Disregarded" Act's Requirements

"The Secretary may prove that an employer had knowledge of a violation in one of two ways—(1) by imputing the actual or constructive knowledge of a supervisor or (2) by demonstrating constructive knowledge based on the employer's failure to implement an adequate safety program." *Samsson Constr., Incorp. v. Sec'y, U.S. Dep't of Labor*, 723 F. App'x 695, 697 (11th Cir. 2018) (*citing ComTran*, 722 F.3d at 1307. "The general rule in this Circuit is that knowledge of a supervisor is imputed to the employer—unless the supervisor is the 'actual malfeasant' who created the hazard that violated the Act." *Id.* at 698 (*citing ComTran*, 722 F.3d at 1316). "If the supervisor is the 'actual malfeasant,' then his 'rogue' conduct will not be imputed to the employer—unless, by his roguish malfeasance, the supervisor exposes not only

himself but also his subordinates to the hazard, in which case the supervisor's knowledge of the violation is imputed." *Id.* (*citing Quinlan v. Sec'y of Labor*, 812 F.3d 832, 841 (11th Cir. 2016).

The Secretary has established that IFP had knowledge of the conditions at the worksite. Both non-management and supervisory employees regularly used the wood planks as scaffold platforms and walkways on October 2, 2017, and for three weeks prior. [redacted] was IFP's Project Foreman on the day of his accident. (J. PreHr'g Statement ¶ IV(6); Tr. 29.) Further, although Gilchrist was not the Project Foreman for IFP on the day of [redacted]'s accident, he was still "employed" as a foreman for IFP. (J. PreHr'g Statement ¶ IV(7); Tr. 139-140, 145; *see also* Ex. C-10, Answers to Interrog. No. 5. Ex. C-11, Answers to Interrog. Nos. 9, 15.) McKeough was also IFP's Superintendent at the time of [redacted]'s accident. (Tr. 198-199.) Their conduct exposed not only themselves but their subordinates to the hazard and their knowledge of the violation is imputed to IFP. Therefore, the Court concludes the Secretary established that IFP possessed knowledge of the violative conditions.

B. Serious Violation

A serious violation exists "if there is a substantial probability that death or serious physical harm could result from [the] condition[s]." *Sanderson Farms*, 811 F.3d at 737 (*citations omitted*). "The gravamen of a serious violation is the presence of a 'substantial probability' that a particular violation could result in death or serious physical harm." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir.1979). The employer's intent to violate an Act standard is irrelevant to find a serious violation. *Id.* Here, OSHA properly classified this item as "serious" because a fall from a height of 50 feet, even if an employee was wearing a personal fall arrest system, would result in serious injury or death. (Tr. 74.) This possibility of bodily injury and death was realized by [redacted]. Therefore, the Court concludes the violation was a "serious" one.

C. Affirmative Defenses[9]

1. Infeasibility Defense

To establish the affirmative defense of infeasibility in the Eleventh Circuit, IFP must prove "(i) that compliance with a particular standard either is impossible or will render

[9] Although IFP raised numerous affirmative defenses in its Answer, it only preserved in the parties' Joint Prehearing Statement the affirmative defenses of employee misconduct, greater hazard, and infeasibility of compliance. However, since IFP only addressed the infeasibility of compliance and greater hazard defenses in its post-trial brief, it has abandoned the employee misconduct defense.

performance of the work impossible; and (ii) that it (the employer) undertook alternative steps to protect its workers (or that no such steps were available)." *M.C. Dean, Inc. v. Sec'y of Labor*, 505 F. App'x 929, 936–37 (11th Cir. 2013) (*quoting Harry C. Crooker & Sons, Inc. v. Occupational Safety & Health Review Comm'n*, 537 F.3d 79, 82 (1st Cir.2008)). The same analysis the Court applied in concluding IFP had not met its burden to prove the § 1926.450(b) exception also applies to IFP's infeasibility defense, and for the same reasons, the Court concludes IFP failed to prove this affirmative defense.

2. Greater Hazard Defense

"To establish the affirmative defense of greater hazard, the employer must prove that: (1) the hazards of complying with the cited standard would have been greater than the hazards of noncompliance; (2) alternative means of protecting employees were either used or were not available; and (3) a variance was unavailable or inappropriate." *M.C. Dean*, 505 F. App'x at 937). The only argument IFP made in its brief regarding this defense was "the wider board would have been heavier and more difficult to maneuver on the jobsite, exposing IFP employees to the additional hazards of slipping, tripping, and falling while trying to move a heavier board between joists." (Resp't's Br. at 19.) Since it did not address all three factors, it has failed to establish this defense.

IV. PENALTY DETERMINATION

When the Citation was issued, the maximum statutory penalty for a serious citation was $12,934.[10] *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018, 83 FR 7-01 (Jan. 2, 2018); 29 C.F.R. §1903.15(d)(3)(2018). The Secretary proposed the maximum penalty for the violation. Under Section 17(j) of the Act, the Commission is empowered to "assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the

[10] As originally written, the Act mandated that "[a]ny employer who has received a citation for a serious violation . . . shall be assessed a civil penalty of up to $7,000 for each such violation." 29 U.S.C. §666(b). However, on November 2, 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114-74, sec. 701 (Inflation Adjustment Act), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 as previously amended by the 1996 Debt Collection Improvement Act (collectively, the "Prior Inflation Adjustment Act"), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The Inflation Adjustment Act required agencies to: (1) Adjust the level of civil monetary penalties with an initial "catch-up" adjustment through an interim final rule (IFR); and (2) make subsequent annual adjustments for inflation, no later than January 15 of each year.

employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citing Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992)).

The Commission instructs that a violation's gravity depends on: (1) the number of exposed employees; (2) the duration of the exposure; (3) whether there were precautions against injury; and (4) the probability of an accident's occurrence. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178 (No. 87-922, 1993). The Court concludes IFP is not entitled to a reduction since the violation is properly classified at the highest gravity (high severity and greater probability). The Court agrees with the Secretary the severity was "high" as indicated when [redacted] sustained serious injuries requiring hospitalization and two surgeries. The probability of injury in the matter was also "greater" since the wood planks were not the required minimum width and were not secured to the cooling tower.

As to good faith, the Court also finds a reduction is not appropriate given this serious violation was classified by the Court at the highest gravity and further, based on Underwood's testimony that IFP was uncooperative during OSHA's inspection and investigation. With respect to the size of the business, IFP had approximately 300 employees at the time of the accident and therefore was not entitled to a penalty reduction for size. Further, IFP presented no evidence that it was entitled to a credit based upon its lack of history of previous violations. Thus, giving due consideration to the size of the business, the gravity of the violation, good faith, and history, the Court finds the appropriate civil penalty to be imposed is $12,934.00. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT the citation is **AFFIRMED** as a serious violation and IFP is assessed and directed to pay to the Secretary a civil penalty of $12,934.00.[11]

SO ORDERED.

/s/

JOHN B. GATTO, Judge

Dated: August 20, 2019

[11] *See* section 17(l) of the Act, which mandates that civil penalties owed under this Act "shall be paid to the Secretary for deposit into the Treasury of the United States[.]" 29 U.S.C. §666(l).

Atlanta, GA