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. Harvestland Constructors, Inc., Respondent.	OSHRC Docket No. **20-0691**

Representatives:

Kristin Murphy, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, GA, for Complainant

Mark A. Waschak, Esq. and J. Larry Stine, Esq., WIMBERLY, LAWSON, STECKEL, SCHNEIDER & STINE, P.C., for Respondent

JUDGE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On October 9, 2019, employees of Harvestland Constructors, Inc., (Harvestland) were constructing a feed mill in Crawfordville, Georgia. A carpenter (Carpenter NM) had been assigned the task of covering openings in an upper floor with plywood where equipment would be installed later. While working alone on the upper floor in the afternoon, Carpenter NM fell through an uncovered opening to the concrete floor below and died as a result of his injuries. A personal fall arrest system was available on the upper floor, but Carpenter NM was not using it when he fell.

A compliance safety and health officer (CSHO) for the Occupational Safety and Health Administration investigated the fatality. On April 8, 2020, the Secretary issued a Citation and Notification of Penalty to Harvestland for a serious violation of 29 C.F.R. § 1926.501(b)(4)(i), for failing to protect Carpenter NM from falling through holes more than 6 feet above the lower level.

Harvestland timely contested the Citation. The Secretary filed a *Complaint*, to which Harvestland filed its *Answer*. Discovery ensued. Now before the Court is Harvestland's *Motion*

and Memorandum for Summary Judgment (*Motion*), filed in January 2021. Harvestland seeks summary judgment because, it contends, the Secretary cannot establish Harvestland had actual or constructive knowledge of the alleged violative condition. In February 2021, the Secretary filed his *Response in Opposition to Respondent's Motion for Summary Judgment* (*Response*), arguing there are genuine disputes of material fact regarding the adequacy of Harvestland's fall protection measures and its supervision of the worksite. In March 2021, Harvestland filed its *Reply to Complainant's Opposition to Motion for Summary Judgment* (*Reply*), in which it contends the Secretary's *Response* misstates facts and makes unfounded assertions.

Having reviewed the documents and exhibits filed by the parties, the Court finds there is no genuine dispute regarding any material fact in this proceeding and concludes Harvestland is entitled to summary judgment. Accordingly, Harvestland's *Motion* is **GRANTED** and Item 1 of the Citation is **VACATED.**

JURISDICTION AND COVERAGE

Harvestland timely contested the Citation on April 23, 2020. The parties agree the Commission has jurisdiction over this action and Harvestland is a covered employer under the Act (*Complaint,* ¶¶ I & II; *Answer,* ¶¶ I & II). Based on the agreements and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Occupational and Safety Act of 1970, 29 U.S.C. §§ 651-678 (Act), and Harvestland is a covered employer under § 3(5) of the Act.

BACKGROUND

Facts Not in Dispute

In its *Motion*, Harvestland provides a *Statement of Undisputed Material Facts* (*Statement*), in which it lists twenty-two statements it regards as undisputed. In his *Response*, the Secretary disputes seven of these statements.[1] The fifteen undisputed "undisputed material facts" are:

> 1. Harvestland Constructors, Inc. ("Harvestland") is engaged in the construction of feed mills.
>
> 2. [Carpenter NM] was a carpenter approximately 66 years of age and was very experienced, as he had been working for Respondent Harvestland for 5 years. . . . During those 5 years, one of [Carpenter NM's] assigned tasks was to cover penetrations in the floor.

[1]The Court will address the disputed statements later in this decision.

3. Matthew Munson is an experienced certified safety and health officer (CSHO) employed by the Occupational Safety and Health Administration (OSHA) and conducted the investigation of [Carpenter NM's] death.[2]

4. On October 9, 2019, [Carpenter NM] had been assigned to cover openings or "penetrations" in the floor that were necessary to allow for the installation of equipment to pass from one level of the structure to another.

5. [Carpenter NM] was the only worker assigned this task and had been doing it at this worksite for approximately 3 weeks before the accident, and customarily worked alone.

6. The floor covers were full sheets (8 feet x 4 feet) of ¾ inch plywood and with cleats (2 x 4 lumber cut and nailed to the plywood) so they would be stable and not slip when placed over floor penetrations.

7. On October 9, 2019, [Carpenter NM] had successfully completed the hole-covering task on 9 of the 13 floor penetrations on the work level before the accident occurred, at approximately 3:30 p.m.

. . .

9. [Carpenter NM] had been observed on a regular basis properly utilizing fall protection.

. . .

12. Harvestland had records of disciplinary actions that were taken in the past for violating safety rules to include fall protection infractions; however, the most recent disciplinary action was dated in 2012 and there had been no documented disciplinary action for the current worksite. . . . However, the employees understood that if they violate a safety rule, they would be disciplined.

13. All Harvestland workers are required to use fall protection when working 4 feet or more above ground level.

14. [Carpenter NM] was current on his training and had never received any disciplinary actions against him in the course of his five years of employment with Harvestland.

. . .

16. Harvestland hired an outside consultant to conduct monthly safety inspections.

. . .

18. On the day of the accident, [Carpenter NM] had been overheard having a heated argument with his wife over the telephone.

. . .

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[2]The Secretary nominally disputes this statement but only to correct the position title of OSHA's investigator:

> The Secretary agrees that Matthew Munson is an experienced *compliance* safety and health officer (CSHO) employed by the Occupational Safety and Health Administration (OSHA) and conducted the investigation of Mr. Maldonado's death.

(*Response*, pp. 4-5) (italics added)

21. [Carpenter NM] had been working in the basement that day and immediately after the afternoon break, he went to the second floor and was out of sight of other workers and managers for approximately 10 to 15 minutes before he fell.

22. No one witnessed [Carpenter NM's] fall.

(*Motion*, pp. 2-5) (citations to CSHO's deposition and exhibits omitted)

Deposition of CSHO Matthew Munson

Counsel for Harvestland deposed CSHO Matthew Munson on November 17, 2020, regarding his fatality investigation. His deposition testimony is summarized here.

Carpenter NM fell to his death at the construction site in Crawfordville, Georgia, on October 9, 2019. The next morning, CSHO Munson arrived at the worksite to conduct a fatality investigation. He met with Harvestland personnel, including Superintendent AM, who was Carpenter NM's nephew. Superintendent AM was the "inside superintendent." He spent eighty to ninety percent of his time in Harvestland's job trailer "dealing with vendors, dealing with any other issues that may arise, but most of the time was spent in the trailer doing paperwork[.]" (*Munson Dep.,* Tr. 18) Superintendent DR was the "outside superintendent," who spent most of his time supervising crews as they worked. Foreman FT was a working foreman (*Munson Dep.,* Tr. 18-19).

The CSHO held an opening conference with the personnel. CSHO Munson learned from management and from employees that Superintendent DR and Foreman FT conducted "frequent and regular inspections throughout the day." (*Munson Dep.,* Tr. 19-20) He also learned Harvestland contracted with an outside consulting company who performed monthly safety inspections. Harvestland provided fall protection training. Carpenter NM's training was current (*Munson Dep.,* Tr. 20).

After the opening conference, CSHO Munson went to the upper level where Carpenter NM had been working (*Munson Dep.,* Tr. 10-11). CSHO Munson observed thirteen openings in the upper level floor where formwork had been removed from the ceiling on the lower level. Nine of the openings had been covered with plywood attached to cleats to hold the plywood in position. The other four openings were not covered (*Munson Dep.,* Tr. 13-16).

CSHO Munson observed two safety harnesses on the upper floor. He stated, "One was lying on a stack of plywood. And the other was lying next to the stack of plywood. And then there was a strap that was attached to one of the machines that was on the second floor[.]"

(*Munson Dep.,* Tr. 16) Carpenter NM was not wearing a safety harness when he fell. CSHO Munson did not inspect the safety harnesses he saw on the upper level (*Munson Dep.,* Tr. 17).

CSHO Munson stated Harvestland's use of the strap anchored to the machine on the upper floor did not meet OSHA's requirements for fall protection. The strap was tied around a section of the machine "in a choker-type configuration" and was not equipped with a clevis to which an employee could attach a lanyard for fall protection (*Munson Dep.*, Tr. 60) CSHO identified "minimal damage to the strap" in the form of "some tears and some nicks" in the strap (*Munson Dep.*, Tr. 61).

CSHO Munson learned the Harvestland employees took an afternoon break from 3:00 to 3:15, and Carpenter NM fell from the upper level approximately 10 to 15 minutes after returning to work from the break (*Munson Dep.,* Tr. 24). Before the break, Carpenter NM "was working in what they call the pit area, building forms for what they call housekeeping pads, which machinery sits on which allows for easier clean-up. And that was located directly under the area where he fell from." (*Munson Dep.,* Tr. 24-25) Harvestland employees had heard Carpenter NM talking on his cell phone earlier that day, having what "seemed to be a heated argument with someone." (*Munson Dep.,* Tr. 25)

During his investigation, CSHO Munson found Harvestland had a site-specific safety plan and it held safety meetings every Monday ((*Munson Dep.,* Tr. 32-33). In one employee statement taken by CSHO Munson, the employee stated a supervisor came around three or four times a day to check on the work being performed and to make sure employees are using safety equipment (*Munson Dep.,* Tr. 37-38). If a supervisor saw an employee not working safely, the employee would be sent home (*Munson Dep.,* Tr. 39). Foreman FT told CSHO Munson that supervisors talked about the importance of using fall protection at the Monday safety meetings (*Munson Dep.,* Tr. 42).

CSHO Munson did not find an example of employees not using fall protections during his investigation (*Munson Dep.,* Tr. 27) Both management personnel and employees told him they had never seen Carpenter NM fail to use fall protection equipment when it was required (*Munson Dep.,* Tr. 29, 31). CSHO Munson held a closing conference with Harvestland personnel. He informed them he had observed "no violations" during his investigation, and he would not recommend the Secretary to issue a citation (*Munson Dep.,* Tr. 22-23).

Declaration of CSHO Matthew Munson

The Secretary attached a copy of CSHO Munson's declaration, signed February 19, 2021, (three months after his deposition date) to his *Response.* In his declaration, CSHO Munson states:

> I, Matthew Munson, state and declare as follows:
>
> 1. I am over 18 years of age, and have personal knowledge of the facts set forth herein.
>
> 2. I have been employed as a Compliance Safety and Health Officer ("CSHO") for the Occupational Safety and Health Administration ("OSHA") since September 2009.
>
> 3. On October 10, 2019, I initiated an inspection at Respondent Harvestland Constructors, Inc.'s facility at 843 Lexington Road, Crawfordville, GA 30631 ("the worksite").
>
> 4. I initiated the inspection because of a reported fatality at the worksite on October 9, 2019. The fatality report indicated that [Carpenter NM] was working at the worksite to cover floor openings when he fell 38 feet to his death.
>
> 5. I conducted an opening conference at the worksite with Respondent's Superintendent [AM]. I received permission to conduct a walk-around and to take photos and measurements.
>
> 6. During the inspection, I conducted interviews with [Superintendent AM], Site Superintendent [DR], foreman [FT], and non-management employees. Exhibit 1 is an accurate copy of the statements I took from [AM, DR, and FT], and non-management employees.
>
> 7. Exhibit 2 is an accurate copy of the photograph of the strap I found during the inspection. Through my inspection, I learned the following:
>
> 8. [Carpenter NM] was an employee with Harvestland Constructors, Inc. and was responsible for both identifying and covering holes that were uncovered. He was the only employee to perform this task.
>
> 9. [Carpenter NM] was not wearing fall protection when he fell.
>
> 10. Respondent's fall protection equipment consisted of a personal fall arrest system (PFAS) including a nylon strap anchored to the machinery that weighed approximately 20,000 lbs. and bolted in place adjacent to the floor holes on the second floor. To be used, a full body harness was connected to the nylon strap that is anchored to the equipment with a double/dual leg lanyard. When I arrived, the harness was not connected to the strap.
>
> 11. According to employees and managers, [Carpenter NM] had been observed wearing fall protection while working at heights days prior to the accident and typically wore his harness at heights; based on [Carpenter NM's] previous behavior, they claimed that they did not know why he was not wearing the harness or using the fall protection at the time of the incident.

12. Site Supervisor [AM] stated that the employer inspected fall protection prior to each use to ensure proper installation and issued new lanyards whenever workers' equipment became frayed.

13. The strap I found in plain view at the worksite and available for [Carpenter NM's] use was frayed, torn, and lacked a clevis. See Exhibit 2.

14. I learned from non-management employees that "there are some employees that won't wear fall protection." See Exhibit 1 at DOL 220.

15. According to Respondent's management, they performed frequent and regular inspections throughout the day to ensure that the unprotected floor holes were covered, secured, and labeled; however, inspections were not documented in any way.

16. Respondent's management did not divulge how many inspections they performed during the day or when they performed the last inspection on the day [Carpenter NM] died.

17. On the day of the incident, management stated that they had not observed [Carpenter NM] working at the level from where he fell.

18. The removal of the form work created the floor hole prior to an afternoon break, resulting in the floor hole remaining unprotected for an extended period.

19. The superintendent and foremen indicated that as part of their daily job while walking around the site, they would address any safety violation observed by the workers and look at hazards such as fall protection, floor holes, slipping and tripping hazards, housekeeping, and personal protective equipment.

20. The daily inspection the day of [Carpenter NM's] death did not include ensuring the decedent used fall protection while covering the unprotected holes.

21. No one would acknowledge that they were aware when the decedent was working on the upper level and if he used a personal fall arrest system.

22. There was no communication from the foreman overseeing the removal of the formwork and [Carpenter NM] informing him that there was a hole that needed covered.

23. Superintendent [DR] told me that foreman [FT] should have been supervising [Carpenter NM].

24. [Foreman FT] told me that he was up at the silo at the time of [Carpenter NM's] fall.

25. During the inspection, Respondent provided me with a copy of safety meeting notes. Exhibit 3 is an accurate copy of the October 19 meeting notes provided by Respondent. These notes state the use of a phone is prohibited except for a foreman or superintendent.[3]

[3] The date "October 19" appears to be a clerical error in CSHO Munson's *Declaration.* The date of Carpenter NM's death was October 9, 2019. The safety meeting notes state the meeting at issue occurred "Monday October 7, 2019." (*Declaration*, Exh. 3

(*Declaration*, pp. 1-4)

LEGAL STANDARDS

Summary Judgment Standard

Under Rule 56(a) of the Federal Rules of Civil Procedure "[a] party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought." [4] The Commission has held,

> The requirements for granting summary judgment are well established: there must be no genuine dispute as to any material fact, and a party must be entitled to a judgment as a matter of law. . . . In reviewing a motion for summary judgment, a judge is not to decide factual disputes. . . . Rather, the role of the judge is to determine whether any such disputes exist. . . . When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. . . . Thus, not only must there be no genuine dispute as to the evidentiary facts, but there must also be no controversy as to the inferences to be drawn from them.

Ford Motor Co. -Buffalo Stamping Plant, No. 10-1483, 2011 WL 3923734, at *1 (OSHRC Aug. 30, 2011) (internal citations omitted).

The Secretary's Burden of Proof Under § 5(a)(2)

> In order to prove a violation of section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.

Astra Pharm. Prod., Inc., No. 78-6247, 1981 WL 18810, at *4 (OSHRC July 30, 1981), *aff'd in pertinent part* 681 F.2d 69 (1st Cir. 1982).

Here, the only element of the Secretary's burden at issue is whether the Secretary can prove Harvestland either knew or could have known of the violative condition with the exercise of reasonable diligence.

The Cited Standard

Section 1926.501(b)(4)(i) provides:

> Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

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[4] Commission Rule 40(j) provides, "The provisions of Federal Rule of Civil Procedure 56 apply to motions for summary judgment." 29 C.F.R § 2200.40(j).

THE CITATION

Item 1 of the Citation alleges:

> 29 CFR 1926.501(b)(4)(i): Each employee on walking/working surfaces was not protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.
>
> On or about October 9, 2019, at the worksite located at 843 Lexington Road in Crawfordville, Georgia, workers working around unprotected floor holes were not protected from falling through them, exposing employees to a fall hazard of 38 feet to the floor below.

The Secretary proposes a penalty of $13,494 for Item 1.

ANALYSIS

As the moving party, Harvestland has the burden of identifying the parts of the record that show a genuine issue of material fact does not exist.

> The party moving for summary judgment bears the initial burden of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). An issue of fact is "material" if it is a legal element of the claim, as identified by the substantive law governing the case, such that its presence or absence might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998 (11th Cir. 1992).[5]

Harvestland Has Met Its Burden of Identifying the Parts of the Record Showing a Genuine Issue of Material Fact Does Not Exist

Harvestland argues it is entitled to summary judgment because it did not know Carpenter NM was exposed to the hazard of falling through one of the floor openings on the upper level of

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[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). "[I]n 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.'" *Dana Container, Inc.,* 25 BNA OSHC 1776, 1828 n.10 (No. 09-1184, 2015), *aff'd*, 847 F.3d 495 (7th Cir. 2017). This case arose in Georgia, located in the Eleventh Circuit. Harvestland's principal office is located in North Dakota, in the Eighth Circuit (*Complaint*, ¶ III; *Answer,* ¶ III).

the feed mill on October 9, 2019, while not using fall protection. Harvestland contends it had neither actual knowledge nor constructive knowledge of the violative condition.

> [T]here are two ways that the Secretary can show knowledge. First, if the Secretary establishes that a supervisor had either actual or constructive knowledge of the violation, such knowledge is (in the typical case) imputed to the employer. Or, the Secretary can prove constructive employer knowledge based on the employer's inadequate safety program.

ComTran Grp., Inc. v. U.S. Sec'y of Lab., 722 F.3d 1304, 1311 (11th Cir. 2013).

Actual knowledge of the violative conduct is not at issue in this proceeding. Harvestland argues the Secretary cannot show constructive knowledge of the violative condition because Harvestland had a good safety program that was effectively communicated to its employees and that required the use of fall protection for employees working at or above heights of 4 feet. Carpenter NM was a well-regarded veteran employee who, according to other Harvestland employees, always wore a safety harness and attached lanyard when working around fall hazards. Carpenter NM attended the weekly Monday morning safety meetings Harvestland held at its construction sites. Harvestland supervisors stressed the company's requirement to use fall protection at heights of 4 feet or more at the safety meetings.

Harvestland's argument is supported by the testimony of CSHO Munson in his deposition (*Munson Dep*., Tr. 19-20, 29, 31-33, 37-38, 42; Exh. 3). It is also supported by the following "facts not in dispute" from Harvestland's *Motion*, to which the Secretary agreed (*Response,* pp. 6-7):

> 9. [Carpenter NM] had been observed on a regular basis properly utilizing fall protection.
>
> . . .
>
> 12. Harvestland had records of disciplinary actions that were taken in the past for violating safety rules to include fall protection infractions; however, the most recent disciplinary action was dated in 2012 and there had been no documented disciplinary action for the current worksite. . . . However, the employees understood that if they violate a safety rule, they would be disciplined.
>
> 13. All Harvestland workers are required to use fall protection when working 4 feet or more above ground level.
>
> 14. [Carpenter NM] was current on his training and had never received any disciplinary actions against him in the course of his five years of employment with Harvestland.
>
> . . .
>
> 16. Harvestland hired an outside consultant to conduct monthly safety inspections.

(*Motion*, pp. 3-6).[6]

The Secretary Has Failed to Establish a Genuine Dispute of Material Fact Exists

The Secretary counters that a genuine dispute of material fact exists with regard to the adequacy of the fall protection equipment found unused on the upper level of the feed mill and with regard to the supervision of Carpenter NM.

Adequacy of the Strap Used as a Fall Protection Lifeline

CSHO Munson stated there were nicks and tears in the strap tied to the machine section for use as a vertical lifeline and that it was missing a clevis. The strap is visible in the photograph designated as Exhibit 2 of Munson's deposition. The Secretary argues the damage to the strap is a violation of § 1926.502(d)(21), which requires defective personal fall arrest equipment to be removed from service, and is, by extension, a violation of the cited standard because it was in plain view and Harvestland's supervisors had constructive knowledge of its condition.

The Secretary reached this conclusion based on the following logic:

Subpart M of the construction standards is titled *Fall Protection.* Section 1926.500(a)(1) (*Scope and application*) of Subpart M provides, "This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926."

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[6]The Commission has held the factors to be considered for evaluating constructive knowledge are the same as for evaluating the affirmative defense of unpreventable employee misconduct (UEM). *Burford's Trees*, No. 07-1899, 2010 WL 151385, at * 4 (OSHRC Jan. 8, 2010). To establish the defense, an employer must prove that it had: "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered." *Manganas Painting Co.*, No. 94-0588, 2007 WL 6113032, at *40 (OSHRC March 23, 2007).

Here, ¶¶ 9, 12, 13, 14, and 16 of the "facts not in dispute," which the Secretary agrees he does not dispute, establish Harvestland did not have constructive knowledge of Carpenter NM's failure to use fall protection on October 9, 2019. Harvestland had an established work rule designed to prevent the violative condition from occurring (¶ 13: "All Harvestland workers are required to use fall protection when working 4 feet or more above ground level."); it adequately communicated the rule to its employees (¶ 9: "[Carpenter NM] had been observed on a regular basis properly utilizing fall protection[,]" and ¶ 14: "[Carpenter NM] was current on his training[,]"); it took steps to discover violations of the rule (¶ 16: Harvestland hired an outside consultant to conduct monthly safety inspections."); and it effectively enforced the rule when violations were discovered (¶ 12: [T]he employees understood that if they violate a safety rule they would be disciplined.").

Section 1926.501(a)(1) (*Duty to have fall protection*) provides, "This section sets forth requirements for employers to provide fall protection systems. All fall protection required by this section shall conform to the criteria set forth in 1926.502 of this subpart."

Section 1926.502(a)(1) (*Fall protection systems criteria and practices*), "Fall protection systems required by this part shall comply with the applicable provisions of this section." Section 1926.502(d)(21) of the section provides, "Personal fall arrest systems shall be inspected prior to each use for wear, damage and other deterioration, and defective components shall be removed from service."

Based on the quoted standard sections, the Secretary argues the strap located on the upper level was defective and should have been removed from service. Because it was not, Harvestland was in violation of the cited standard, § 1926.501(b)(4)(i) ("Each employee on walking/working surfaces shall be protected from falling through holes . . . more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems[.]"), despite the fact Carpenter NM was not wearing a safety harness and was not tied off to the strap when he fell through the opening. "Regardless of [Carpenter NM's] usage of Respondent's existing fall protection, the parties dispute whether Respondent's onsite fall protection was in adequate condition to ensure worker safety." *(Response*, p. 10)

The Secretary's argument is that, because Harvestland violated § 1926.502(d)(21) (by failing to inspect and remove the defective strap from service), it was also in violation of § 1926.502(b)(4)(i). The material fact in dispute, the Secretary claims, is whether the strap was defective.

The Court disagrees. While it is true Harvestland disputes the Secretary's appraisal of the condition of the strap, the Secretary has failed to demonstrate the fact of the strap's condition is material to the cited standard. "An issue of fact is 'material' if it is a legal element of the claim, as identified by the substantive law governing the case, such that its presence or absence might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248. Here, the condition of the strap is immaterial to the knowledge element of the Secretary's burden of proof for the cited standard, which requires the Secretary to establish that Harvestland knew or could have known Carpenter NM was not protected from falling through floor openings on the upper level of the feed mill on October 9, 2019.

The evidence regarding the condition of the strap that the Secretary cites would be material to an alleged violation of § 1926.502(d)(21), which addresses the inspection and removal of defective fall protection equipment. The Secretary could have cited Harvestland for a violation of that standard, but chose not to.[7] Instead, the alleged violation description (AVD) of the Citation states, "On or about 9, 2019, at the worksite located at 843 Lexington Road in Crawfordville, Georgia, workers working around unprotected floor holes were not protected from falling through them, exposing employees to a fall hazard of 38 feet to the floor below." The AVD says nothing about a defective strap. It does not even specify that the fall protection measure at issue is a personal fall arrest system, rather than guardrails or covers.

The evidence required to establish a violation of § 1926.501(b)(4)(i) differs from the evidence required to establish a violation of § 1926.502(d)(21)—one addresses the failure to provide fall protection and, the other involves the failure to remove defective fall protection equipment. Under the Secretary's theory, any violation of § 1926.502, which mandates the extensive criteria for guardrail systems; safety nets; personal fall arrest systems; safety monitoring systems; covers; and protection from falling objects, would also violate § 1926.501(b)(4)(i).

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[7] It appears that § 1926.502(d)(21) would have been the more appropriate standard to cite, given the Secretary's allegation that the strap, used as part of a personal fall protection system, was defective. A claim that a more specific standard applies to the cited condition is, however, an affirmative defense which Harvestland has not raised.

> [R]egulatory preemption pursuant to § 1910.5(c)(1) is an affirmative defense that must be pleaded in the respondent's answer. *See, e.g., Spirit Aerosystems*, 25 BNA OSHC 1093, 1097 n.7 (No. 10-1697, 2014) ("[P]reemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer.") (citations omitted); *see also Safeway Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004) (explaining that specific standards function as an affirmative defense under the general duty clause); *Brand Energy Solutions LLC*, 25 BNA OSHC 1386, 1388 (No. 09-1048, 2015) (referring to preemption claim as an affirmative defense); *Vicon Corp.*, 10 BNA OSHC 1153, 1157 (No. 78- 2923, 1981) (describing a claim that a general standard was preempted by a more specific standard as an affirmative defense), *aff'd*, 691 F.2d 503 (8th Cir. 1982) (unpublished). The Commission's Rules of Procedure also require a respondent to raise any affirmative defense in the answer, or "as soon as practicable," or risk being prohibited from raising the defense at a later stage in the proceeding. 29 C.F.R. § 2200.34(b)(4). "As soon as practicable" means that the issue is raised with enough time for the opposing party to meaningfully respond. *See Field & Assocs., Inc.*, 19 BNA OSHC 1379, 1382 (No. 97-1585, 2001) (agreeing with judge that affirmative defense raised at hearing was not raised "as soon as practicable").

Mansfield Indus., Inc., No. 17-1214, 2020 WL 8871368, at *3 (OSHRC Dec. 31, 2020).

The fallacy of the Secretary's position is demonstrated by the case he cites in support of his argument, an unreviewed administrative law judge decision.[8] The Secretary states,

> Merely having fall protection is not sufficient to ensure worker safety if the fall protection itself is faulty. *Payton Roofing,* [Nos. 16-1161 & 16-1162, 2017 WL 8218884 (OSHRC Oct. 30, 2017)] (upholding citation against employer where workers wore personal fall arrest systems that were faulty because they were improperly attached).

(*Response*, p. 9)

The Secretary implies the affirmed item addressing improperly attached personal fall arrest system equipment cites the standard at issue here, § 1926.501(b)(4)(i). Although that standard is cited, it is one of three fall protection standards at issue in the case, and its affirmation has nothing to do with faulty fall arrest system equipment.

In *Payton Roofing*, the CSHO observed several employees exposed to fall hazards while working on top of a roof without fall protection.

> CO Rodgers testified that during his investigation seven employees were on the roof . . . working around the large hole without wearing any fall protection. The photograph at Ex. 33 shows five of the seven employees pictured on the roof *not wearing any personal fall arrest systems*. . . . Two other employees . . . were also observed near the "hole" at Ex. 28, at "A", using personal fall arrest systems. But the use of such systems was faulty because they had improperly attached their two lifelines to a single anchorage.

Id. at *8 (emphasis added).

The administrative law judge affirmed the citation for violation of § 1926.501(b)(4)(i) based on Payton Roofing's knowledge of the employees who were not wearing any fall protection.

> With regards to knowledge, CO Rodgers testified that Supervisor Brown had been on the roof while employees moved debris near the large hole. CO Rodgers testified that Mr. Brown admitted that the "workers worked around the holes" for the past two days, "*without any form of fall protection*." Mr. Brown also told CO Rodgers that both he (Mr. Brown) and Mr. Rodriguez had observed Respondent's employees on the roof working around and in close proximity to the holes *without any means of fall protection.* The larger hole was approximately 16 feet by 8 feet meaning it was large enough where Mr. Brown should have been aware of the hazard it presented. Knowledge has been established.

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[8] "*See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (unreviewed administrative law judge decision does not constitute binding precedent for the Commission)." *TNT Crane & Rigging, Inc.*, No. 16-1587, 2020 WL 1657789, at *7 (OSHRC March 27, 2020).

Id. at *9 (emphasis added).

The citation item for the violation of § 1926.501(b)(4)(i) was affirmed, based not on the two employees using faulty personal fall arrest systems, but on the employees who worked "without any form of fall protection." The two employees using the faulty equipment were the basis for the administrative law judge affirming a different citation item, for the violation of § 1926.502(d)(15) ("Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached[.]"). The administrative law judge affirmed a third citation item alleging a violation of the standard the Secretary considers the underlying violation in this proceeding, § 1926.502(d)(21), because Payton Roofing failed to inspect and remove a defective lifeline from the worksite.

Payton Roofing does not support the Secretary's argument that § 1926.501(b)(4)(i) is applicable to the use of faulty fall protection equipment. While it is not precedential, the decision provides persuasive support for the argument that proof of a violation of § 1926.502(d)(21) is separate and distinct from proof of a violation of § 1926.501(b)(4)(i). The Secretary has not provided the Court with any Commission or administrative law judge decision that supports his theory that failure to remove defective fall protection equipment supports finding a violation of the standard cited in this proceeding.

Under the legal standard for summary judgment, the Court must "resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party." *Ford Motor Co. -Buffalo Stamping Plant,* 2011 WL 3923734, at *1. Applying this standard, the Court finds it is a reasonable inference that the strap at issue was defective, based on the photographs and CSHO Munson's testimony that he observed nicks and tears on it. The Court concludes, however, that the condition of the strap is immaterial to the issue of whether Harvestland knew of Carpenter NM's failure to use any form of fall protection on the afternoon of October 9, 2019, while he was on the upper level of the feed mill.

Supervision of Carpenter NM

The Secretary also argues the lack of supervision of Carpenter NM on October 9, 2019, raises a genuine issue of material fact regarding reasonable diligence. He bases this argument on the following four contentions:

1. “In spite of Respondent’s claims that it inspected the worksite and fall protection regularly, Respondent did not document its inspections.” (*Response*, p. 11)

2. “[DR], the superintendent, stated that [Carpenter NM] typically wore a harness and should have had on a harness on the date of the incident. . . . DR stated, ‘Whenever employees work in elevated areas, they are supposed to go with another person . . . [but] I don’t know why [Carpenter NM] went up by himself or why he had to cover the holes by himself. The foreman was supposed to know who was working with him.” . . . Nonetheless, as Respondent admits, [Carpenter NM] was the only worker assigned to cover 13 open floor coverings and worked alone. . . Because [Carpenter NM] was alone, no one witnessed his fall.” (*Response*, pp. 12-13)

3. “[FT], the site foreman, recognized that it was his responsibility to check employees, watch them work, and ensure that work is performed safely and properly. . . . Site Superintendent [DR] stated that it was [FT’s] job to supervise [Carpenter NM]. . . . However, Foreman [FT] did not have knowledge of [Carpenter NM’s] whereabouts or duties on the date of the incident, stating that he believed the Superintendent directed [Carpenter NM’s] work instructions. . . . Both [DR] and [FT] failed to supervise their workers to ensure adequate adherence to Respondent’s fall protection measures.” (*Response*, pp. 12-13)

4. “Finally, on the day of the incident, at least one other worker observed [Carpenter NM] having a ‘heated argument’ on his cell phone while working on the second level to cover holes. . . . As part of its safety program, Respondent had a policy against workers using mobile devices while working. . . . Despite [Carpenter NM’s] heated phone conversation, and presumably loud speaking, Respondent made no attempts to prevent him from continuing work while on the phone.” (*Response*, p. 13)

The Secretary’s contentions in the first three statements do not establish facts material to Harvestland’s constructive knowledge of the violative condition. None of these contentions demonstrates Harvestland’s safety program was inadequate or its supervision was deficient. Nothing in OSHA’s fall protection standards requires the employer to document worksite inspections. Nor do the standards require constant supervision of employees. In his witness statement, Superintendent DR stated that Carpenter NM “was an experienced employee and knew that once the holes were opened, he had to cover them. No one had to tell him that, he would do it once he noticed the holes being opened.” (Exh. 1, Bates p. 215) Harvestland was not

obligated to supervise Carpenter NM continuously. The Commission has rejected such oversight in a case involving fall protection.

> The Secretary argues that Stahl should have provided more supervision, but [he] failed to specify how much would be necessary to assure compliance, what additional measures Stahl should have taken, or how Stahl's supervision was insufficient. *See Trinity Marine Nashville, Inc.*, 19 BNA OSHC 1015, 1017, 2000 CCH OSHD ¶ 32,158, p. 48,527 (No. 98-144, 2000), *rev'd on other grounds*, 275 F.3d 423 (5th Cir. 2002).
>
> The thrust of the Secretary's argument seems to be that the very fact the violations occurred proves Stahl's supervision was inadequate. However, an "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." *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶ 30653, p. 42,527 (No. 91-3467, 1995) (emphasis in original). "Where the evidence fails to show that the employer should have perceived a need for additional monitoring or that such an effort would have led to the discovery of instances of employee misconduct, increased supervisory efforts to monitor employee compliance are not required." *Dover Elevator Co.*, 16 BNA 1281, 1287, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993).

Stahl Roofing, Inc., Nos. 00-1268 & 00-1637, 2003 WL 440801, at *3 (OSHRC Feb. 21, 2003).

Here, there is no evidence Harvestland should have perceived a need for additional monitoring for an experienced employee performing a routine assignment. As in *Stahl*, the Secretary's argument appears to be that Carpenter NM's failure to use the available fall protection equipment proves Harvestland's supervision was inadequate. *Stahl* demonstrates reasonably diligent inspection measures are not inadequate merely because they failed to detect every instance of a fall hazard.

As for the Secretary's fourth contention, it misstates the testimony of the CSHO. The Secretary claims Carpenter NM was "on his cell phone while working on the second level to cover holes." (*Response*, p. 13). CSHO Munson did not testify, however, that an employee or employees heard Carpenter NM talking on his cell phone while he was working on the upper level. CSHO Munson does not say where Carpenter NM was at the time of his conversation, but he states Carpenter NM was working on the lower level before the afternoon break. This is the relevant testimony:

> Q.: [P]rior to the [afternoon] break, did you ascertain where [Carpenter NM] was working in relation to the construction site?

> CSHO Munson: He was working in what they call the pit area building forms for what they call housekeeping pads, which machinery sits on which allows for easier clean-up. And that was located directly under the area where he fell from.
>
> Q.: So, to the best of your ability, what you can determine is that the employees took an afternoon break -- a 15-minute break around the three o'clock hour. You don't know precisely. And then shortly after that, [Carpenter NM] fell from the floor hole; correct?
>
> CSHO Munson: Yes, sir.
>
> . . .
>
> Q.: Did anybody say anything about [Carpenter NM] having an argument with his wife during that day?
>
> CSHO Munson: There was a statement to such. Yes.
>
> Q.: Tell me what you ascertained about that, his argument with his wife.
>
> CSHO Munson: There was -- somebody stated that -- I can't recall who, that there was -- he is on the phone, which seemed to be a heated argument with somebody on the phone. The details could not be confirmed.

(*Munson Dep.*, Tr. 24-25)

There is no indication that Carpenter NM was on the upper level while talking on his cell phone or that a supervisor overheard the conversation. The Court is required to resolve ambiguities and draw reasonable inferences in favor of the nonmoving party when considering a summary judgment motion, but there must be some evidentiary basis for the resolutions and inferences.

> Although we draw justifiable inferences in the non-moving party's favor, "unsupported speculation does not meet a party's burden of producing some defense to a summary judgment motion" because it "does not create a genuine issue of fact." *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) (cleaned up). Speculation instead "creates a false issue, the demolition of which is a primary goal of summary judgment." *Id*. (quotation marks omitted).

Olbek v. City of Wildwood, FL, No. 20-13075, 2021 WL 1245276, at *5 (11th Cir. Apr. 5, 2021) (unpublished).

The Secretary's contention that Carpenter NM was working on the upper level while he talked on his cell phone is unsupported speculation. It does not create a genuine issue of disputed fact.

The Secretary's arguments regarding the purported inadequacy of Harvestland's safety program due to improper supervision are without merit. The Secretary has failed to establish a genuine dispute of a material fact exists with regard to constructive knowledge and reasonable diligence.

Disputed Facts

In his *Response,* the Secretary disputed seven of the twenty-two "undisputed facts" Harvestland set out in its *Motion.* The Court generally has addressed these issues in this decision. None of the disputed facts are material to this proceeding. The Court briefly addresses the Secretary's specific arguments here. Harvestland's initial statement is set out, followed by the Secretary's response.

> 8. Fall protection was available for [Carpenter NM's] use: in fact, two full-body harnesses with attachments were observed on the work level ready for use.
>
> > Response: Disputed. Although fall protection was available for use, the Secretary disputes whether the fall protection was adequate, given the lack of a clevis and the condition of the available fall protection.

(*Response*, p. 5)

As discussed previously, the purportedly damaged condition of the strap is not material to the legal element of constructive knowledge of the violation of § 1926.501(b)(4)(i).

> 10. Harvestland provides fall protection training for all employees along with other types of safety training in accordance with the work performed. When the employees worked at heights, every Monday, all the employees would have a meeting and go over safety issues including the use of fall protection. [Carpenter NM] signed the roster for those Monday meetings.
>
> > Response: Disputed. Foreman [FT] told CSHO Munson that he had not received fall protection training while working for this employer.

(*Response*, p. 6)

In his written statement, Foreman FT states, "At other places I have received training about fall protection but not here right now. Every Monday we have a meeting where they remind us that we need to check our tools, the areas we are going to work in and to wear protection if we are working over four feet." (Exh. 1, Bates p. 211)

Foreman FT was aware of Harvestland's requirement that employees working near fall hazards 4 feet or higher were required to use fall protection. He had received fall protection training in the past. Nothing in his statement demonstrates a material fact is in genuine dispute.

> 11. Harvestland had a fully adequate written fall protection program.
>
> > Response: Disputed. Foreman [FT] told CSHO Munson that he had not received fall protection training while working for this employer. . . . The Secretary disputes the adequacy of Harvetland's fall protection, including the condition of its equipment and the enforcement of its policies, as evidenced by [Carpenter NM's] working by himself while speaking on the telephone.

(*Response*, p. 6)

As previously noted, Foreman FT was aware of the requirement to use fall protection, and there is no evidence Carpenter NM was working while he was speaking on his cell phone.

> 15. Harvestland's superintendent and foremen inspected the worksite multiple times each day, reviewing the work of the employees to ensure they were working safely but did not document those inspections.
>
> > Response: Disputed. The Secretary disputes whether Harvestland's superintendent and foremen inspected the level on which [Carpenter NM] was assigned to work and whether their visits were adequate to ensure safety.

(*Response*, p. 7)

The Secretary's response does not refute Harvestland's statement, which describes its supervisors' regular inspection routine. This is borne out by the written statement of an employee who stated his supervisor "comes around three or four times a day." (*Munson dep.*, p. 37)

> 17. Employees understood they would be sent home if they did not work safely.
>
> > Response: Disputed. One non-management employee told OSHA that "there are some employees who won't wear fall protection."

(*Response*, p. 7)

In his *Declaration*, signed February 19, 2021, CSHO Munson avers, "I learned from non-management employees that 'there are some employees that won't wear fall protection.'" (*Declaration*, ¶ 14).[9]

This statement in his *Declaration* is at odds with CSHO Munson's deposition testimony, taken four months earlier. There, when asked, "[D]id you ever determine there was another example at this worksite where employees were not using their fall protection correctly?", CSHO responded, "No." (*Munson dep.*, p. 27)

[9] This sentence is taken from a longer statement made by the employee. For context, the employee stated,

> The supervisor comes around about three or four times a day. He [is] checking on if that work is going good, to make sure you have your safety on. If there is something wrong they will stop us, fix it, then let us go back to work after it is fixed. We have a safety meeting every Monday morning. They go over what not to do, talk about what will happen to you if you don't follow rules. I use fall protection. That said we are supposed to use fall protection. Listening and paying attention is the main key out here. *There are some that won't use the fall protection*. No I said that they tell you to wear fall protection I said the reason that accident happened was probably because he wasn't using the fall protection at that time. If they see you violating any safety stuff they will send you home.

(Exh. 1, Bates pp. 219-20) (emphasis added)

Generally, when considering a summary judgment motion, the Court is required to resolve all ambiguities and draw all reasonable references in favor of the nonmoving party. An exception exists in some circuits to this legal standard when a witness's subsequent affidavit contradicts his or her previous deposition testimony. The Eighth Circuit (where Harvestland's principal office is located) and the Eleventh Circuit (where the fatality occurred) observe this exception. The parties may seek review in either of those circuits, so the Court will apply the exception here.

The Court of Appeals for the Eighth Circuit explains the rationale for the exception.

> In *Camfield* [*Tires, Inc. v. Michelin Tire Corp.,* 719 F.2d 1361, 1363 (8th Cir. 1983)], we addressed "the troublesome issue of whether summary judgment may be granted when one of the parties after giving a deposition later files an affidavit with directly contrary statements." *Id.* In affirming the district court's grant of summary judgment for the defendant, this court held that an affidavit filed by the plaintiff in opposition to a motion for summary judgment that directly contradicted the plaintiff's previous deposition testimony was insufficient to create a genuine issue of material fact under Rule 56. *Id.* at 1365. We stated:
>
>> The very purpose of summary judgment under Rule 56 is to prevent "the assertion of unfounded claims or the interposition of specious denials or sham defenses ...." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2712 (1983). If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own earlier testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.
>
> *Id.* We emphasized that while summary judgment "is to be reserved for those cases in which there is no genuine material issue of fact for determination," if "testimony under oath ... can be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment." *Id.* No party should be allowed to create "issues of credibility" by contradicting his own previous testimony. *Id.* at 1366.

City of St. Joseph, Mo. v. Sw. Bell Tel., 439 F.3d 468, 475–76 (8th Cir. 2006).

The Court of Appeals for the Eleventh Circuit agrees: "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.,* 736 F.2d 656, 657 (11th Cir. 1984).

Based on the precedent of the Eighth and Eleventh Circuits, the Court credits CSHO Munson's testimony in his deposition that he knew of no instance, other than Carpenter NM's fall, where a Harvestland employee did not use proper fall protection at this worksite (*Munson's dep.*, Tr. 27). The Court does not credit his *Declaration* statement asserting an employee told him, "'There are some employees that won't wear fall protection." (*Declaration*, ¶ 14).

> 19. For reasons unknown, [Carpenter NM] chose not to put on or connect the harness despite having done so regularly at this worksite and countless times during the five years of his employment, in full compliance with the company's policies.
>
> > Response: The Secretary does not dispute that [Carpenter NM] was not wearing a harness at the time of his death. The Secretary objects to the remainder of this statement as speculative.

(*Response*, p. 7)

The Secretary is disputing a statement that is based on its CSHO's deposition testimony.

> Q.: Did you ascertain during the investigation whether [Carpenter NM] was observed when he was working at heights, normally wearing his harness and his lanyards attached properly?
>
> CSHO Munson: Yes, sir.
>
> Q.: So, no employee or no manager had observed [Carpenter NM] working at heights without properly wearing his fall protection before the incident; correct?
>
> CSHO Munson: That is correct.
>
> Q.: Did [Foreman FT] ever observe [Carpenter NM] not wearing his fall protection correctly?
>
> CSHO Munson: No.

(*Munson dep.*, p. 29)

> Q.· You also indicated, according to employees and managers, [Carpenter NM] had been observed wearing fall protection while working at heights days prior to the accident. True?
>
> CSHO Munson: That is correct.
>
> Q.: Also, according to the employees and managers, he always wore his harness at heights; is that correct?
>
> CSHO Munson: That is correct.

(*Munson dep.*, p. 31)

The statement that the Secretary characterizes as speculative is fully supported by CSHO Munson's testimony.

> 20. Not only did [Carpenter NM] apparently choose not to don and connect a harness; his hard hat was found carefully, and to all appearances intentionally, placed next to the floor opening through which he fell to his death.
>
> > Response: Disputed. The Secretary does not dispute that [Carpenter NM's] hat was found next to the floor opening where he fell. Respondent presents no facts supporting that the hat was "carefully" or "intentionally" next to the floor opening.

(*Response*, p. 8)

The Court agrees with the Secretary that nothing in the record supports Harvestland's contention that Carpenter NM's hard hat "was found carefully, and to all appearances intentionally, placed next to the floor opening through which he fell[.]"[10] One might assume an employee would better demonstrate care and intentionality if he placed the hard hat right side up and next to a wall. Instead, the hard hat is upside down in the middle of the floor between two openings. It is just as likely his hard hat fell off as Carpenter NM stumbled or stepped through the opening. Regardless, the disputed statement is not material to the issue of constructive knowledge.

CONCLUSION

Having reviewed the record and the parties' arguments, the Court finds there is no genuine dispute as to the evidentiary facts. Accordingly, Harvestland's *Motion for Summary Judgment* is **GRANTED.**

SO ORDERED.

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

Dated: May 13, 2021
Atlanta, GA

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[10] It is Harvestland's theory that Carpenter NM deliberately stepped through the opening, possibly because he was upset about the heated phone conversation he is reported to have had earlier that day.

> Q.: Do you have any evidence that shows that [Carpenter NM] did not commit suicide?
>
> CSHO Munson: Um . . . I—I do not.

(*Munson's dep.*, p. 58)

Nothing in the record indicates that Carpenter NM was talking to his wife on the phone (Harvestland's counsel assumes Carpenter NM was talking to his wife, but CSHO Munson states he was overheard talking to "somebody"), that he remained upset after the phone call, or that he felt suicidal.