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. ELMER W. DAVIS, INC., Respondent.	IN SIMPLIFIED PROCEEDINGS UNDER 29 C.F.R. § 2200.200 *et seq.* Docket No. 21-1021

DECISION AND ORDER

APPEARANCES:

For the Complainant:

Jordan Laris Cohen, Esquire
Trial Attorney
U.S. Department of Labor
New York, New York

For the Respondent:

Mr. Tim Crumb
Corporate Safety Director
Elmer W. Davis, Inc.
Rochester, New York

Michael Rubin, Esquire
Goldberg Segalla, LLP
Buffalo, New York
(Appearing Post-Hearing Only)

BEFORE: William S. Coleman
Administrative Law Judge

Elmer W. Davis, Inc. (EWD), the Respondent herein, is a construction company based in Rochester, New York, that concentrates on commercial roofing projects.

On April 30, 2021, EWD assigned two employees to repair the low-slope roof of a one-story commercial building in Rochester. The roof was about 15 feet above ground level, had

unprotected edges, and was less than 50 feet wide. Because of the roof's narrow width, the fall protection standard for roofing work on low-slope roofs [29 C.F.R. § 1926.501(b)(10)] permitted EWD to use a safety monitoring system alone for fall protection.

While driving to another destination, an on-duty Compliance Safety and Health Officer (CO) from the U.S. Occupational Safety and Health Administration (OSHA) noticed the two EWD employees on the roof. They appeared to him to be working without fall protection. The CO stopped driving and observed and photographed the employees for about ten minutes. (Joint Pre-Hr'g Statement at 5). The CO then alerted them to his presence, and at his request they descended from the roof. A formal OSHA inspection and investigation ensued.

About four months later, on September 1, 2021, OSHA issued to EWD a Citation and Notification of Penalty (Citation) that alleged one serious violation of 29 C.F.R. § 1926.501(b)(1), which provides that employees "on a walking/working surface … with an unprotected side or edge which is 6 feet … 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." The alleged violation description (AVD) set forth in the Citation stated:

> On or about 04/30/2021, at [worksite address], the employer did not enforce the use of fall protection, for employees engaged in roof work repairing and installing roof seams. Employees were exposed to falling 15 feet to lower levels, while working near the roof edge with no fall protection.

The Citation proposed a penalty of $4,566 for the sole alleged violation.

EWD timely contested the alleged violation and proposed penalty and thereby brought the matter before the independent Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act (Act). 29 U.S.C. § 659(c).

The matter was then assigned to the undersigned for hearing and decision under the Commission's rules for Simplified Proceedings. [1] *See* 29 C.F.R. §§ 2200.200–211.

Prior to the hearing, and with EWD's consent, the Secretary amended the alleged violation to change the cited standard from subparagraph (b)(1) to subparagraph (b)(10) of § 1926.501, which prescribes permissible fall protection systems and practices for "roofing work on low-slope roofs." The amendment did not alter the original AVD, quoted above. [2]

The evidentiary hearing was conducted via videoconferencing technology on March 30 to April 1, 2022. EWD was self-represented at the hearing (and also in all pre-hearing proceedings) through its Corporate Safety Director, Mr. Tim Crumb. Mr. Crumb also testified at the hearing in EWD's case-in-chief.

After the evidentiary record for the hearing had closed, Attorney Michael Rubin entered an appearance for EWD. Since entering that appearance, Attorney Rubin has served as EWD's lead representative, filing (1) a post-hearing motion for production of documents, (2) a post-hearing motion to dismiss the amended citation, and (3) a post-hearing brief.

Post-hearing briefing was completed on July 13, 2022. The principal issues for decision are as follows:

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[1] Even though heard and decided under the Commission's rules for "Simplified Proceedings," the undersigned would not characterize either the either the hearing or adjudication as having been "simple."

[2] Because this matter was designated for "simplified proceedings," no complaint or answer were filed. *See* 29 C.F.R. § 2200.205(a) (providing that "the complaint and answer requirements are suspended" in simplified proceedings). The original citation thus served as the functional equivalent of the Secretary's complaint, so the motion to amend operated to amend the original citation item. Pursuant to a scheduling order, EWD filed a statement of affirmative defenses on January 21, 2022, and later was permitted to file an amended statement of affirmative defenses. After the Secretary's amendment to the Citation was granted, EWD's affirmative defenses to the amended citation items were again expressly stated on the record at the outset of the hearing. (Tr. 10-11).

- Did the Secretary prove by a preponderance of the evidence that an EWD employee working on the low-slope roof was not protected by a compliant safety monitoring system because the designated safety monitor engaged in activities that could take his attention from the safety monitoring function?

  Decision: Yes. The Secretary proved the alleged violation of § 1926.501(b)(10).

- Did EWD prove by a preponderance of the evidence that the safety monitor's violative conduct constituted unforeseeable employee misconduct?

  Decision: Yes. EWD proved the affirmative defense of unforeseeable employee misconduct.

With the affirmative defense of unforeseeable employee misconduct having been proven, the sole alleged violation is vacated.

FINDINGS OF FACT

Except where the following findings indicate that the evidence was insufficient to establish a certain fact or indicates that there was no evidence bearing on a matter of fact, the following facts were established by at least a preponderance of the evidence:

1. Elmer W. Davis, Inc. (EWD), is a commercial roofing contractor based in Rochester, New York, that employs approximately 150 to 300 persons, with the precise number varying seasonally. (Ex. R-11 at 2; Ex. C-R-3 at 2; Tr. 12-15). EWD does roofing work in both New York and Pennsylvania. (Tr. 12). EWD uses materials that originate from outside the state of New York. (Tr. 12, 285-87).

2. EWD employs employees and is engaged in a business affecting interstate commerce. (Tr. 12-15).

EWD's Fall Protection Safety Program

Work Rules on Use of Safety Monitoring Systems

3. EWD has adopted work rules on the use of a safety monitoring system for fall

protection. One of those rules requires that safety monitors engage only in monitoring actions. (Tr. 159-60, 164-68, 220-21, 250-51, 273). A designated safety monitor who complies with this work rule would not engage in any action or activity that could take the monitor's attention from the monitoring function.

EWD Communication of Work Rules on Use of Safety Monitoring Systems

4. EWD has adopted a comprehensive written Corporate Safety Program that includes provisions that address the use of safety monitoring systems for fall protection. (Tr. 224-25; Ex. R-1 at 69). All employees receive training on the Corporate Safety Program during new-employee orientation. (Tr. 222-25; Ex. R-1 at 69).

5. EWD provides group safety training annually to all employees. One of the subjects covered in this training is the use of safety monitoring systems. (Tr. 222-23). In addition to this annual safety training event, employees who work at heights receive regular toolbox talks and other on-the-job training on fall protection. (Tr. 223).

6. The employees who have been trained and instructed on EWD's work rules for using a safety monitoring system understand those rules, and they know when and how to correctly implement those rules. (Tr. 139-50, 162-64, 167; Ex. C-R-3; Ex. R-12 at 5:26–5:31, 5:45–5:58, 41:05–41:11, 41:34–41:38).

7. EWD effectively communicates its work rules for use of safety monitoring systems to employees who may use that system of fall protection.

EWD Measures for Discovering Fall Protection Violations

8. EWD designates a foreman for every work crew. The designated foreman's responsibilities include enforcing safety rules. (Tr. 129-30, 134, 242).

9. Since at least 2013, EWD's corporate safety director has regularly visited EWD's worksites to inspect for compliance with safety rules. (Tr. 136, 225). In addition to the safety director's inspections, at least one other EWD safety professional regularly inspects EWD worksites for compliance with safety rules. (Tr. 131, 226; Ex. R-7; Ex. R-12 at 9:50–10:09). The EWD safety professionals can determine where any crew is located at any given time by utilizing Global Positioning System technology. (Ex. R-12, 19:00–19:35).

10. EWD sometimes hires outside safety consultants to conduct unannounced safety inspections. (Tr. 225-26). EWD's insurance carriers sometimes conduct unannounced inspections of its worksites. (Tr. 225-26).

11. EWD exercises reasonable diligence to discover violations of its fall protection rules.

EWD Enforcement of Fall Protection Rules

12. EWD has adopted and implemented a written policy for the imposition of progressive discipline for violations of its safety rules. Under that policy, the prescribed sanction for an employee's first-time violation of most safety rules is an oral warning. However, an employee's first-time violation for the failure to properly use fall protection carries the more severe sanction of either (a) a one-week suspension, or (b) at the option of the disciplined employee, completing an OSHA-approved training course on the employee's own time. (Tr. 230-31; Ex. R-1, at 33-34; Ex. R-7).

13. In the five years preceding the issuance of the Citation here, EWD regularly imposed progressive discipline against employees who had violated fall protection rules, including imposing prescribed disciplinary sanctions on supervisory and non-supervisory employees for violating rules on the use of safety monitoring systems. (Tr. 144-45, 157, 176, 231-35; Ex. R-6; Ex. R-7 at 1-3, 5, 12, 18, 28, 31, 32).

14. EWD effectively enforces its fall protection work rules by imposing progressive discipline on employees, both supervisory and non-supervisory, who are discovered to have violated those work rules, including violations of its rules respecting the use of safety monitoring systems.

Events Preceding the Issuance of the Citation

The Employees and the Worksite

15. On April 30, 2021, EWD sent two employees, Messrs. Ory Leach and Cody Pritt, to repair seams on the low-slope roof of a one-story commercial building in Rochester, New York.

16. Leach and Pritt are both longtime EWD employees with many years of experience utilizing fall protection measures. Leach has been employed by EWD since 2007 and has worked as a roofer for 25 years. (Tr. 123). Pritt has been doing roofing work for EWD since 2011. (Tr. 154).

17. EWD employs both Leach and Pritt in the position of "service foreman." Typically, EWD's service foremen have supervisory responsibility over the work crew to which the foreman is assigned. (Tr. 124, 305). Here, however, because Leach had seniority over Pritt, Leach was the designated foreman of the two-person crew. (Tr. 75, 124, 129, 134, 155, 194, 242-43; Ex. R-1 at 28).

18. The roof to be repaired was rectangular and not more than 50 feet wide, and its slope was less than 4 in 12 (vertical to horizontal). The roof's edges were unprotected, and three of its four sides were about 15 feet above the next lower level (which was ground level). (Tr. 12-13, 38-39, 123-24, 129, 154-55; Exs. C-1 to C-5; Ex. R-11 at 15).

The Workers' Activities at the Worksite

19. Upon arrival at the worksite, the employees inspected the roof and confirmed that the roof's configuration was such that EWD's work rules allowed them to use a safety monitoring

system alone for fall protection. They decided to implement a safety monitoring system alone for the roof repair. (Tr. 12-13, 167, 236-39; Ex. R-5).

20. The employees did not undertake to utilize any other form of fall protection during the roof repair other than a safety monitoring system. Specifically, the employees did not undertake to utilize a guardrail system, safety net system, personal fall arrest system, warning line system, or any permissible combination of fall protection systems, to provide fall protection during the roof repair. (Tr. 12-13, 167, 236-39; Ex. R-5).

21. In his role of crew foreman, Leach decided he would act as the safety monitor for Pritt while Pritt performed the repair. (Tr. 124, 155, 158-59).

22. The employees gathered the necessary materials to repair the roof seam, and they mounted the roof to perform the repair. (Tr. 123-24, 154). Pritt described the roof repair to entail "stripping in seams, applying cement fabric to the seams to make them watertight." That work involved "scooping cement from [a] pail onto the roof, spreading with a trowel, embedding the fabric, and recoating with another layer of cement." (Tr. 155). Pritt started repairing the roof by "roofing, flashing, and cementing some areas" while Leach monitored him doing this roofing work. (Tr. 124).

23. By the time the CO had made his presence known to the employees, Leach and Pritt had been on the roof for about 20 to 30 minutes. (Tr. 124, 143-44, 155, 178-79).

24. EWD's work rules for safety monitoring prohibited Leach from engaging in any roofing work while he was acting as safety monitor for Pritt. (Tr. 151, 165, 232, 251, 273; Ex. R-6). Leach knew that EWD's work rules prohibited him from engaging in any activity other than monitoring while he acted as a safety monitor. (Tr. 125-26, 138-39, 151, 192, 226-30; Ex. R-2; Ex. R-6; Ex. R-12 at 41:05–41:38).

25. At some point while Pritt did the roofing work, Leach began holding a hand trowel Pritt had been using. Leach's action of simply holding the trowel violated EWD's work rule that safety monitors engage in no activity other than monitoring. (Tr. 151, 165, 232, 251, 273; Ex. C-5; Ex. R-6).

26. While acting as safety monitor and holding the hand trowel while Pritt did the roof repair, Leach started to do some roofing work himself; he used the hand trowel multiple times to scoop cement from a five-gallon bucket and then deposit it onto the roof surface. This roofing work that Leach performed while he was also acting as safety monitor for Pritt reasonably could have taken Leach's attention from his monitoring function. (Ex. C-1 to C-5; Ex. C-R-3, Ex. R-6; Ex. R-12 at 5:45–5:58, 41:34–41:38). Pritt was aware that Leach was performing roofing work that could take Leach's attention from the monitoring function. (Ex. R-12, 4:35–6:25 & 10:58–11:07; Ex. R-6).

OSHA Inspection and Investigation

27. While the two EWD employees were on the roof, OSHA CO Wilson Soto drove by and noticed them. It appeared to the CO that both were working near the roof's unprotected edge without using any fall protection. (Tr. 32-33).

28. The CO stopped driving and he began to observe and photograph the employees. (Tr. 33-34, 420; Exs. C-1 through C-9). The photograph at Exhibit C-1 fairly and accurately depicts the following: Leach is standing near an unprotected edge that is fifteen feet above ground level with his back to the edge; Leach is facing away from Pritt and the hood of his sweatshirt is pulled fully over his head, limiting his peripheral vision; Leach is stooped over at the waist and facing down at the roof's surface while holding a hand trowel just a few inches above the opening of a five-gallon bucket that is immediately in front of him at his feet. The photographs show the employees in different positions and postures on the rooftop. The photographs depict a rooftop

worksite about which the CO reasonably assessed "there was no safety monitor." (Tr. 35, 397-98; Exs. C-1 thru C-9; Joint Pre-Hr'g Statement at 5).

29. After observing and photographing the EWD employees on the roof for about ten minutes, the CO identified himself to them as an OSHA official and asked them to come down from the roof, which they did. (Tr. 74, 116-17, 384; Exs. C-11 & C-12; Joint Pre-Hr'g Statement at 5). The CO briefly interviewed Leach and Pritt, and Leach told him that he was the foreman. (Tr. 78, 127-28; Ex. R-12 at 3:30–3:48). They informed the CO that the job involved repairing roof seams with roof cement. (Ex. R-12 at 1:19–1:33). Pritt made some mention to the CO about a safety monitor. (Tr. 87-88; Ex. R-12 at 1:19–2:01). Leach determined to contact EWD's safety director, Tim Crumb. Both Leach and Pritt chose not to speak further with the CO until after Crumb arrived. (Tr. 78, 128).

30. Crumb arrived at the worksite about 15 minutes after Leach contacted him. As Crumb exited his vehicle, he turned on his cell phone's video camera and slipped the phone into the chest pocket of his reflective vest with the camera lens facing forward. The camera recorded video in whatever direction the lens faced. The resulting video sometimes captured the facial expressions, gestures, and body language of Pritt, Leach, and the CO. The microphone captured everything that Crumb said, and most of what Pritt, Leach, and the CO said when they were near Crumb. The camera recorded for more than 42 minutes. The CO did not know that Crumb was recording the encounter. [3] (Ex. R-12; Tr. 200-01, 209-13).

[3] The Secretary first became aware of the existence of the video on the first day of the hearing, when Crumb, who represented EWD at the hearing, sought to use a segment of the video to impeach the CO's testimony in cross-examination. (Tr. 109-112). (This matter was designated for hearing and decision under the Commission's rules for Simplified Proceedings, and so pursuant to Commission Rules 200(b)(4) and 208, the parties did not engage in formal discovery that would otherwise have been allowed under Commission Rules 52 through 56.) The entire video, marked

31. Crumb is a former OSHA employee and was previously acquainted with the CO. (Ex. R-12, 33:30–34:40). At the start of the video, Crumb approaches the CO, and they began talking between only themselves. The CO told Crumb that he had observed both Leach and Pritt on the roof working on the roof repair and that: "I have photographs of them on the … northeast corner…. I've got photos of them right on the edge. Ah, Cody [Pritt] says they had a, they had a monitor, not today though. I don't know what he is talking about. Cody Pritt told me that." (Ex. R-12 at 1:19–2:01).

32. After some further discussion with the CO, Crumb summoned Leach and Pritt to come over to where he and the CO were gathered. Crumb then initiated the following dialogue with Leach and Pritt for the benefit of the CO (Ex. R-12, 4:35–6:25 & 10:58–11:07; Tr. 88, 198):

> CRUMB (addressing Leach and Pritt): So this is what's important. To understand the questions that he [the CO] is asking, I want you to explain to him is that in normal circumstances you would work separately with apprentices, right?
>
> PRITT: [Nodding] [Leach out of frame]
>
> CRUMB: So, when you each have your own apprentice, each of you would be in charge of that person.
>
> PRITT: [Nodding] [Leach out of frame]
>
> CRUMB: So today, you are both here, you [pointing at Leach] are calling yourself the foreman, and you [pointing at Pritt] are calling yourself the employee.
>
> PRITT: [Nodding] [Leach out of frame]
>
> CRUMB: But in reality, you are both at the same level.

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as Exhibit R-12, was eventually played at the hearing, and was admitted in evidence. (Tr. 206-220). However, pursuant to the undersigned's direction, the parties later prepared and filed a "Joint Statement Regarding Relevant Portions of Video Exhibit R-12," dated May 13, 2022. (Tr. 220, 423-24). As indicated at the hearing, only those segments of video that the parties have identified to be relevant in this joint filing are deemed formally received in evidence. Only those identified segments have been considered in arriving at the findings of fact and conclusions of law herein. (*See* Tr. 424).

PRITT: [Nodding] [Leach out of frame]

CRUMB: You both have the same accountability and responsibilities. You've received the same training.

PRITT: [Nodding] [Leach out of frame]

CRUMB: …. You remember what I did on Tuesday?

PRITT: [Nodding] [Leach out of frame]

CRUMB: What did we do on Tuesday?

PRITT: Safety meeting.

CRUMB: And what did we go over at the safety meeting?

PRITT: Fall protection.

CRUMB: And what did we say?

PRITT: Always have it.

CRUMB: Yeah. And what did we say about monitoring?

PRITT: Always have a monitor….

CRUMB: Right.

PRITT: … and then make sure it's okay…

LEACH: I was monitoring, you know.

CRUMB: At certain times.

LEACH: Yeah.

CRUMB: There is no point in lying. He's got videos, he's got a camera. He didn't stop because he's like 'Hey, guess what? I'm going to mess with Elmer Davis today.' He obviously saw both of you working.

PRITT: [Nodding] [Leach out of frame]

CRUMB: So, let's just tell him how long it went on for and why we did it.

PRITT: It didn't go on for long. We had a safety monitor when we first started, and we were working in the middle, so we, he [Leach] was just plopping for me, and then before we knew it, we were all the way to the edge, and …

LEACH: We were done. Damn near done.

CRUMB: And how long have you been here today?

PRITT: Only an hour, a little over an hour maybe….

CRUMB: So you were here for like an hour?

PRITT: [Nodding]. Yeah. We just had to strip a couple of seams up there that were popped open ….

* * * *

CRUMB (to CO): Well they [referring to Leach and Pritt] know what the deal is. That's why he [Leach] told you he was monitoring, because they know they are going to get in trouble.

LEACH: [Maintains impassive facial expression at Crumb's remark]

33. Crumb then dismissed Leach and Pritt and told them to wait in their truck. For about the next 29 minutes Crumb and the CO conversed (along with another EWD safety professional, who had arrived on the scene while the dialogue reflected above was in progress). After Crumb finished speaking with the CO, he walked to where Leach and Pritt were seated in their truck, which was outside the CO's earshot. The following dialogue ensued. (Ex. R-12 at 40:55–42:26 [end]; Tr. 199).

CRUMB: You are really pissing me off. Really pissing me off.

LEACH: What happened?

CRUMB: You know what happened. I literally told you on Tuesday to use a safety monitor at all times.

LEACH: But this was some quick [expletive].

CRUMB: Did I say you don't have to do it because it's quick?

LEACH: Ahh, but I wasn't really [unintelligible] ….

CRUMB: Like this literally gonna cost us like, probably, fifteen grand. And I am going to have to spend probably a hundred hours fighting with them. There is no value in not using a safety monitor. There is no savings.

PRITT: [Nodding] [Leach out of frame]

CRUMB: Like I don't know how else to get that across to everybody. There is literally no savings.

LEACH: I was monitoring for a while, and then I was like [unintelligible one-syllable word] …

CRUMB: I understand that….

LEACH: … and so I started plopping for him then.

CRUMB: … but it, we just, it has to be done. Because there's—one—I don't want anybody falling. And two—there is no savings. I mean, what money have we saved? I mean literally for your hourly rate alone, there is no savings. You guys would have been packed up, gone, long before this ever would have cost us money. You have to use a monitor.

PRITT: [Nodding] [Leach out of frame] …

34. The next day, May 1, 2021, Crumb sent the CO an email that stated in part: "While I haven't seen any of the photos … , if they represent what you described to me, I have no doubt that a violation occurred." (Ex. C-R-2). Crumb stated further that he believed that "this is a case of misconduct." (Ex. C-R-2).

35. Two days later, on May 3, 2021, EWD, through Crumb, formally disciplined both Leach and Pritt for their conduct on the roof. Crumb prepared separate but identical written disciplinary notices for each employee that imposed a one-week suspension on both in accordance with EWD's progressive discipline policy. Each employee read and signed their respective disciplinary notices. (Tr. 144-45, 157, 176, 231-33; Ex. R-6). Both notices described the violative conduct to have been as follows:

> [On] April 30, 2021, you were observed by an OSHA compliance officer on a roof engaged in work without fall protection. You were provided training just 3 days prior about proper fall protection and the use of a safety monitor. You stated that you were using a monitor but then started helping with the roofing work. You are ALWAYS required to have some form of fall protection while on a roof.

36. On May 6, 2021, Crumb sent the CO an email stating: "While I have not seen the photos … that you have, [Leach and Pritt] both indicated that at some point they were using a safety monitor and the monitor then decided to engage in work." (Ex. C-R-3 at 2). As he had indicated in his prior email of May 1, Crumb again stated that he believed the employees had engaged in "Employee Misconduct." (*Id.* at 1).

DISCUSSION

The Commission obtained jurisdiction under section 10(c) of the Act upon the Secretary's forwarding to the Commission the notice of contest that EWD had timely filed. (Tr. 15). 29 U.S.C. § 659(c); 29 C.F.R. § 1903.17(a).

EWD is an "employer" as defined in section 3(5) of the Act and is thus subject to the compliance provisions of section 5(a). 29 U.S.C. §§ 654(a), 652(5). (Findings of Fact ¶ 2; Tr. 15).

Section 5(a)(2) of the Act requires employers to "comply with occupational safety and health standards promulgated" under section 6 of the Act. 29 U.S.C. §§ 654(a)(2). The safety standard that EWD is alleged to have violated, § 1926.501(b)(10), was promulgated pursuant to section 6(b). 29 U.S.C. § 655(b). To prove a violation of such a standard, the Secretary must establish by a preponderance of the evidence that: (1) the cited standard applies; (2) there was noncompliance with its terms; (3) employees were exposed to, or had access to, the violative condition; and (4) the cited employer had actual or constructive knowledge of the violative condition. *Donahue Indus. Inc.,* 20 BNA OSHC 1346, 1348 (No. 99-0191, 2003); *D.A. Collins Constr. Co. v. Sec'y of Labor*, 117 F.3d 691, 694 (2d. Cir. 1997). [4]

[4] The employer and the Secretary may seek judicial review of a final order of the Commission in the federal court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, and the employer may seek judicial review

Alleged Violation of Fall Protection Standard for Roofing Work on Low-slope Roofs
[*29 C.F.R. § 1926.501(b)(10)*]

The standard that the Secretary alleges EWD violated, § 1926.501(b)(10), is contained in Subpart M of 29 C.F.R. Part 1926. 29 C.F.R. §§ 1926.500–503. Subpart M "sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926." § 1926.501(a)(1).

Section 1926.501(b)(10), provides:

> *Roofing work on Low-slope roofs.* Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25m) or less in width (see appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

The Secretary avers that EWD violated § 1926.501(b)(10) in the following manner: "[T]he employer did not enforce the use of fall protection, for employees engaged in roof work repairing and installing roof seams. Employees were exposed to falling 15 feet to lower levels, while working near the roof edge with no fall protection." (As noted previously, this AVD (alleged violation description) was alleged in the Citation as it was originally issued and was not changed

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also in the District of Columbia Circuit. 29 U.S.C. §§ 660(a) and (b). Here, the alleged violation occurred in New York, in the Second Circuit, where EWD's office is also located. *See* 29 U.S.C. § 660(b). If this decision becomes a final order of the Commission, EWD would be the prevailing party, and the Secretary could seek judicial review only in the Second Circuit. In deciding a case, the Commission generally regards precedent of the circuit court of appeals to which the Commission decision is most likely to be appealed to be controlling precedent. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

by the pre-hearing amendment of the Citation to allege a violation of a different subparagraph of § 1926.501(b).)

As discussed below, the Secretary has proven the four elements of the alleged violation.

1. *The Cited Standard Applies*

The term "roofing work" is defined in Subpart M as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work." § 1926.500(b). And the term "low-slope roof" is defined as "a roof having a slope less than or equal to 4 in 12 (vertical to horizontal)." § 1926.500(b).

The employees here were engaged in roofing work on a low-slope roof that had unprotected sides or edges 15 feet above the next lower level. (Findings of Fact ¶¶ 18 & 22). The cited standard applies to EWD's work on the roof here; EWD does not contend otherwise.

2. *EWD Did Not Comply with the Standard's Terms*

Section 1926.501(b)(10) provides seven alternative fall protection options for roofing work on any low slope roof, no matter the roof's width. In addition, for roofing work on low-slope roofs that are no more than 50 feet wide (as the roof here), the standard provides an eighth option—the use of a safety monitoring system alone. Leach and Pritt decided to implement this eighth option. There is no evidence or contention that the employees undertook to implement any of the other permissible options.

Section 1926.501(a)(1) provides that "[a]ll fall protection required by [§ 1926.501] shall conform to the criteria set forth in § 1926.502." The criteria specified in § 1926.502 for the use of a safety monitoring system are prescribed in paragraph (h) thereof, which provides:

> (h) *Safety-monitoring systems.* Safety monitoring systems [See §§ 1926.501(b)(10) and 1926.502(k)] and their use shall comply with the following provisions:

> (1) The employer shall designate a competent person[5] to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:
>
> (i) The safety monitor shall be competent to recognize fall hazards;
>
> (ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;
>
> (iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored;
>
> (iv) The safety monitor shall be close enough to communicate orally with the employee; and
>
> (v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.
>
> (2) Mechanical equipment shall not be used or stored in areas where safety monitoring systems are being used to monitor employees engaged in roofing operations on low-slope roofs.
>
> (3) No employee, other than an employee engaged in roofing work [on low-sloped roofs] or an employee covered by a fall protection plan, shall be allowed in an area where an employee is being protected by a safety monitoring system.
>
> (4) Each employee working in a controlled access zone shall be directed to comply promptly with fall hazard warnings from safety monitors.

EWD argues that the Commission should not even address the matter of whether its employees conformed with the requirements of § 1926.502(h) because the amended citation did not allege that EWD had violated that provision. EWD asserts that the Secretary's "[f]ailure to formally and properly allege a standard requires that the Court summarily dismiss any such 'violation.'" (Resp't Br. 24.) This argument is rejected.

[5] The term "competent person," as applicable to all of Part 1926, is defined in § 1926.32(f) as follows: "*Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

Contrary to EWD's assertion, an alleged violation of § 1926.501(b)(10) "formally and properly" alleges that the employer failed to provide fall protection that conformed with any of the eight options that the standard allows. The criteria for all those options are prescribed in § 1926.502. Section 1926.501(a)(1), by providing that "[a]ll fall protection required by [§ 1926.501] shall conform to the criteria set forth in § 1926.502," makes it clear that a violation for failure to utilize the fall protection system (or combined systems) prescribed under the various circumstances set forth in subparagraphs (1) through (15) of § 1926.501(b) necessarily involves a failure to comply with the relevant requirements prescribed by § 1926.502. *E.g., StormForce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530, at *8 n.12 (OSHRC, 2021) (addressing employer's conformance with § 1926.502(h) in connection with alleged violation § 1926.501(b)(13), which applies to fall protection in residential construction). [6]

[6] Even if the Secretary had been required to have expressly alleged that EWD had violated § 1926.502(h), the undersigned would amend the Citation *sua sponte* pursuant to Rule 15(b)(2) of the Federal Rules of Civil Procedure to include an alleged violation of that standard. *See Torry v. Northrup Grumman Corp.*, 399 F.3d 876, 878 (7th Cir. 2005) (upholding Commission judge's *sua sponte* amendment of complaint under Rule 15(b)(2)). Amendment under Rule 15(b)(2) "is proper only if two findings can be made—that the parties *tried* an unpleaded issue and that they *consented* to do so." *McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129 (No. 80-5868, 1984). "Trial by consent may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue." *Id.* at 2129-30.

Such a post-hearing *sua sponte* amendment would be appropriate here. Prior to the hearing, the parties prepared and submitted a Joint Prehearing Statement, in which EWD identified the following to be an issue of law to be litigated: "A safety monitor is not prohibited from having other job duties." (Joint Pre-Hr'g Statement at 7). The identification of this issue shows that EWD "squarely recognized" that its conformance with § 1926.502(h)(1)(v) was at issue. At the hearing EWD presented evidence to demonstrate conformance with § 1926.502(h). (*E.g.*, Tr. 97-98, 126, 156-57). This reflects EWD's consent to try that issue. *See also Avcon, Inc.*, 23 BNA OSHC 1440, 1451-52 (No. 98-0755, 2011) (consolidated) (on discretionary review of a Commission judge's decision, the Commission *sua sponte* amends multiple citation items after considering whether the respondent "had a fair opportunity to defend and … could have offered any additional evidence if the case was retried"); *LM Sanderson Constr., Inc.*, 26 BNA OSHC 2148, 2157-58 (No. 16-1321, 2017) (ALJ) (post-hearing *sua sponte* amendment of cited standard from subparagraph (1) to subparagraph (13) of § 1926.501(b)).

The Secretary may establish non-compliance with the "safety monitoring system alone" option of § 1926.501(b)(10) by proving that EWD failed to conform with just one of multiple requirements prescribed by § 1926.502(h). Here, the Secretary contends that the safety monitoring system failed to conform only to subparagraph (h)(1)(v), which provides: "The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function." Consistent with the text of that provision, OSHA commented in its 1994 preamble to Subpart M that a safety "monitor may have additional supervisory or non-supervisory responsibilities, provided that the monitor's other responsibilities do not interfere with the monitoring function."[7] Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672, 40714 (Aug. 9, 1994) (to be codified at 29 C.F.R. pt. 1926); *cf.* non-mandatory "Appendix E to Subpart M of Part 1926" (containing "sample fall protection plan" that includes the following as one of the "duties of the safety monitor": "Not allow other responsibilities to encumber monitoring").

EWD's work rule that prohibits a safety monitor from engaging in *any* activity other than monitoring is thus more stringent than the minimum standards prescribed by subparagraph (h)(1)(v). Compliance with EWD's work rule nearly assures that a safety monitor will meet the requirements subparagraph (h)(1)(v). This was among the reasons EWD established this more stringent rule. (*See* Tr. 251).

To establish non-conformance with subparagraph (h)(1)(v), the Secretary was *not* required to prove that a safety monitor's other responsibilities or activities had actually taken the monitor's attention from his monitoring function. Rather, the Secretary was required to prove only that a

[7] In the preamble to Subpart M, OSHA also commented that it considered a safety monitoring system "to be the least acceptable option for protecting employees from falls." 59 Fed. Reg. at 40715.

safety monitor's other responsibilities or activities "*could* take the monitor's attention from his monitoring function." *Cf. Beta Constr. Co.*, 16 BNA OSHC 1435, 1443 (No. 91-102, 1993) (noting that the former standard for safety monitoring systems [§ 1926.502(p)(7) (1990)], which had no provision that corresponds to current subparagraph (h)(1)(v), "does not expressly require that a monitor perform that duty exclusively," but "[r]ather, the standard sets forth performance criteria for determining the effectiveness of the safety monitoring"), *aff'd*, 52 F.3d 1122 (D.C. Cir. 1995) (unpublished). To the extent that subparagraph (h)(1)(v) establishes performance criteria, it is "interpreted in light of what is reasonable." *Thomas Indus. Coatings*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) ("performance standards … are interpreted in light of what is reasonable").

The word "could" as used in subparagraph (h)(1)(v) is not itself a defined term in the standard, and so it carries its ordinary meaning. *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term "carries its ordinary meaning"); *see also Fla. Gas Contractors, Inc.*, No. 14-0948, 2019 WL 995716, at *3 (OSHRC Feb. 21, 2019) (turning to dictionary to determine meaning of a word that is not defined in the standard). The first numbered definition of "could" identified in a prominent dictionary is that it is the past tense of "can." *Random House Unabridged Dictionary* 460 (2d ed. 1993). The second and third numbered definitions for the word in that dictionary are: (1) "used to express possibility," and (2) "used to express conditional possibility or ability." *Id.* The meaning of the word "could" as used in subparagraph (h)(1)(v) is consistent with both the second and third numbered definitions. *See also Beta Constr. Co.*, 16 BNA OSHC at 1443 (applying the former standard for safety monitoring systems [§1926.502(p)(7) (1990)], which had no provision that corresponds to current subparagraph (h)(1)(v), and deciding that the employer's "practice, under which one employee

moves backwards toward the edge of the roof while the other employee—his monitor—is engaged in smoothing out the roofing material, does not comply with the standard because it *allows* the monitor to be distracted" [emphasis added]).

Evidence described below establishes nonconformance with § 1926.502(h)(1)(v) by showing that it was reasonably possible Leach's activities while acting as safety monitor could take his attention from the essential "monitoring function" of "recogniz[ing] fall hazards" and "warn[ing] the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner." § 1926.502(h)(1)(i) & (ii); c*f. Beta Constr. Co.* 16 BNA OSHC at 1444 ("The facts here demonstrate that the monitor's ability to issue the required warning depends on a fortuity that he will be looking up at the other employee at the requisite times"); *S. Hens, Inc. v. OSHRC*, 930 F.3d 667, 677 (5th Cir. 2019) (noting that "occupational safety regulations exist because people are distractible," that "functioning with less than perfect focus and control is our ordinary condition," and that "OSHA standards serve to protect workers from common human errors such as neglect, distraction, inattention or inadvertence").

The CO observed and took photos of Leach and Pritt for about ten minutes before he alerted them to his presence. (Findings of Fact ¶ 29; Joint Pre-Hr'g Statement 5). Those photos depict Leach engaging in roofing work in such a manner as to make it reasonably possible that his attention could have been taken from his responsibilities to monitor Pritt and to recognize when Pritt needed to be warned. Photographs depict Leach standing near, and with his back to, the roof's edge, bent over at the waist and looking downward at the roof's surface and away from Pritt in order to scoop cement out of a bucket with a hand trowel and deposit the cement onto the roof. (Exs. C-1 to C-4). The photographs reflect that Leach was moving around on the rooftop while performing this roofing work. (Exs. C-1 to C-9). In addition to the reasonable possibility that the

roofing work that Leach was doing could have distracted him from his monitoring responsibilities, it is reasonably possible that he could have been distracted by having to "mind the edge" for his own safety while moving around the rooftop while depositing the cement and while working near, and with his back to, the unprotected edge. [8] (Tr. 95, 102, 139-41).

The photographic evidence of non-compliance is corroborated by the employees' contemporaneous recorded assertions that at the start of the repair work Leach monitored Pritt, but that Leach effectively stopped monitoring when he "started plopping" cement on the roof for Pritt. [9] (Findings of Fact ¶¶ 32 & 33). At the worksite, when Crumb said to Leach that he (Leach) had been monitoring only "at certain times," and Leach replied, "Yeah," Leach essentially admitted that there were other times when he had not been monitoring. [10] (Ex. R-12 at 5:26–5:31). Leach's contemporaneous remarks are consonant with the Employee Disciplinary Notices that

[8] To the extent the Secretary argues that Pritt's conduct on the roof violated the standard because his conduct resulted in the Leach doing roofing work without fall protection, that argument is rejected. (Sec'y Br. 15). The Secretary's theory of the violation at the hearing does not appear to have been grounded in any asserted failure of Pritt to properly act as a safety monitor for Leach. *Cf. Beta Constr. Co.*, 16 BNA OSHC at 1436 ("We … conclude that the [former safety monitor standard, § 1926.502(p)(7) (1990)], does not necessarily preclude a work practice by which each member of a 2–man work crew monitors the other").

[9] The whole of the evidence is insufficient to establish by a preponderance that Leach engaged in any roofing work other than to scoop cement from the bucket and deposit it on the roof for Pritt to then apply to the roof seams. In their contemporaneous statements at the worksite, this is essentially what the employees said they were doing. (Ex. R-12). The CO testified that it appeared to him that in one of the photographs Leach's "left arm appears to be applying sealant to a roof seam." (Tr. 52-53, 56; Ex. C-4). But from the ground-level vantage point from which the photo was taken, what Leach was doing with his hands near the roof's surface could not be seen. (Ex. C-4).

[10] Leach's hearing testimony that he was simply holding a trowel and had not been using it to deposit the cement onto the roof is given no weight. (Tr. 125-26). His recorded contemporaneous contrary assertions, as well as the recorded contrary assertions of Pritt, bear far greater indicia of reliability than Leach's contrary hearing testimony.

Crumb prepared and that both Leach and Pritt signed, both of which stated: "You stated that you were using a monitor but then started helping with the roofing work." (Ex. R-6).

Moreover, after Crumb had the opportunity to investigate internally, and two days before he imposed formal discipline on Leach and Pritt, he told the CO that he believed there had been a fall protection violation but that this was "a case of misconduct." (Ex. C-R-2). And then, after the safety director had disciplined the employees, he informed the CO that the employees "both indicated that at some point they were using a safety monitor and the monitor then decided to engage in work," and that the safety director believed their actions constituted "Employee Misconduct." (Ex. C-R-3, at 2).

Mr. Crumb is a knowledgeable and experienced safety professional, and he is well versed in the requirements of Subpart M. (E.g., Tr. 221-22; Ex. R-12 at 24:00–27:30, 33:30–34:40, 35:10–35:30, 35:45–37:20, 37:55–38:15, 39:10–40:30). It is unlikely that he would have made these inculpatory written representations to the CO unless he had been reasonably certain that Leach's activities as safety monitor for Pritt had failed to conform to the requirements of § 1926.502(h). *See, e.g.*, *SRS Roofing & Sheet Metal, Inc.*, 23 BNA OSHC 1141, 1145 (No. 09-0055, 2010) (ALJ) (finding a violation where safety monitor's activities put him in a position where he "could not see, or assess, whether [the monitored employee] was unaware of a hazard or was acting in an unsafe manner."); *Upstate Roofing, Inc.*, No. 00-0336, 2002 WL 31246069, at *3 (OSHRC ALJ, Oct. 3, 2002) (finding a violation where safety monitor's activities caused him to turn his attention away from the employee he was monitoring "on a regular basis").

The greater weight of the evidence establishes that EWD failed to comply with the cited standard because Leach, the designated safety monitor, engaged in activity that reasonably could

have taken his attention from his monitoring function, contrary to the requirement of § 1926.502(h)(1)(v). [11]

3. *Employee Exposure or Access to the Violative Condition*

Employee "[e]xposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Pritt worked near the unprotected edge of the roof without compliant fall protection because the designated safety monitor was not conforming to the requirements of § 1926.502(h)(1)(v). (Findings of Fact ¶ 32). This resulted in Pritt having actual exposure to a fall hazard. Moreover, EWD acknowledges that "[f]or a fall hazard presented by a roof with unprotected sides and edges, the zone of danger is the entire elevated surface." Resp't Br. 31, citing to 59 Fed. Reg. at 40683 ("In conclusion, after careful and complete consideration of the entire record, OSHA has determined that there is no 'safe' distance from an unprotected side or edge that would render fall protection unnecessary"). [12]

[11] The CO's testimony that he determined the employees had no fall protection was based essentially on his description of what the photographs that he took depicted. (Joint Pre-Hr'g Statement at 4–5). And so, the CO's testimony was largely cumulative of the photographs themselves. While EWD vigorously challenges the reliability and credibility of the CO's testimony (Resp't Br. 20-24), none of CO's testimony respecting alleged non-compliance with the standard was more probative than the photographs that the CO took or the contemporaneous assertions of Leach and Pritt that was corroborative of the CO's testimony. In other words, the finding of non-compliance with the cited standard does not turn on the reliability or credibility of the CO's testimony.

[12] The parties' briefs-in-chief address the issue of whether evidence of *Leach's* exposure to a fall hazard while he was acting as a safety monitor was sufficient to establish the "employee exposure" element of the Secretary's burden of proof. (Sec'y Brief 15; Resp't Br. 24-26, 30-32). However, in his reply brief, the Secretary withdrew that component of his argument on the exposure element. (Sec'y Reply Br. 7, n.7). Thus, the matter of whether the Secretary proved the alleged violation by showing that Leach had been exposed to a fall hazard is not in issue.

4. *Employer Knowledge*

"The fourth element, the knowledge requirement, may be satisfied by proof either that the employer actually knew, or with the exercise of reasonable diligence, could have known of the presence of the violative condition." *N.Y. State Elec. & Gas Corp v. Sec'y of Labor (NYSEG)*, 88 F.3d 98, 105 (2d Cir. 1996). "Knowledge or constructive knowledge may be imputed to an employer through a supervisory agent." *Id.*

Under Commission precedent, a supervisor's knowledge of their own violative conduct may be imputed to the employer without a showing that the supervisor's misconduct was foreseeable. *See Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012) (noting that under Commission precedent, a supervisor's knowledge of his own misconduct is imputed to the employer, but applying contrary applicable circuit court precedent that requires a showing of foreseeability), *aff'd*, 535 F. App'x 386 (5th Cir. 2013) (unpublished). The Sixth and Seventh Circuit courts of appeal have decided the same. *Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003) (ruling that because the employer's foreman "knew of his own failure to wear personal protective equipment, this failure may be imputed to" the employer); *Dana Container, Inc. v. Sec'y of Labor*, 847 F.3d 495, 499–500 (7th Cir. 2017) (concluding that "[w]e see no problem with the Commission's decision to impute" a supervisor's knowledge of his own violation to the employer).

Five other circuit courts of appeal have ruled that a supervisor's knowledge of their own violative conduct may be imputed to the employer only if the Secretary proves that the supervisor's violative conduct was foreseeable. *Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350 (3d Cir. 1984); *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396 (4th Cir. 1979); *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006); *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.3d 155 (10th Cir. 1980); *ComTran Grp., Inc. v. DOL*, 722 F.3d 1304 (11th Cir. 2013).

The D.C. Circuit has not directly addressed the issue, but it has stated it is "skeptical" of requiring the Secretary to prove foreseeability to impute a supervisor's knowledge of his own violative conduct to his employer. *Wayne J. Griffin Elec., Inc. v. Sec'y of Labor*, 928 F.3d 105, 109 (D.C. Cir. 2019).

Nor does the Second Circuit appear to have directly addressed the issue, but its decision in *NYSEG* suggests that it would follow the rule requiring the Secretary to prove foreseeability. *NYESG*, 88 F.3d at 106-07 (describing the decisions of the Third and Tenth Circuits in *Pa. Power* and *Mountain States* that require a showing of foreseeability).

The "Secretary can prove foreseeability in a variety of ways," *New River Elec. Corp. v. OSHRC*, 25 F.4th 213, 221 (4th Cir. 2022), but the determination typically turns on "the adequacy of a company's safety program, broadly construed." *Pa. Power*, 737 F.2d at 358; *see also NYSEG*, 88 F.3d at 106-07 ("constructive knowledge may be predicated on an employer's failure to establish an adequate program to promote compliance with safety standards"). The Commission assesses the adequacy of an employer's safety program by "consider[ing] 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." *S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016).

The adequacy of an employer's safety program is assessed in a similar manner in determining whether an employer has established the affirmative defense of unforeseeable employee misconduct. *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1306, n.4 (No. 06-1201, 2008) (noting "that the Secretary's burden of proving constructive knowledge and [the employer's] burden of showing unpreventable employee misconduct rest upon an overlapping issue—whether [the employer] had an adequate safety program"), citing *NYSEG*, 88 F.3d at 106.

Even though Leach, not Pritt, was the designated foreman for the two-person crew here, Pritt retained his position title and status of "service foreman." As EWD's safety director said during the inspection, "both [Pritt and Leach] have the same accountability and responsibilities," and have "received the same training." (Ex. R-12, 4:35–6:25). *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003) (supervisory status of an employee is based on a consideration of the "indicia of authority that the employer has empowered a foreman or other employee to exercise on its behalf"); *NYSEG*, 88 F.3d at 105.

The weight of the evidence establishes that Pritt knew that Leach had essentially quit monitoring him when Leach started engaging in roofing work, but that Pritt continued working anyway. Pritt's statement to the CO and Crumb supports this finding: "We had a safety monitor when we first started, and we were working in the middle, so we, he [Leach] was just plopping for me, and then before we knew it, we were all the way to the edge." (Ex. R-12, 4:35–6:25). Further, EWD's discipline of Pritt for having "engaged in work without fall protection" (Ex. R-6) supports the finding that Pritt knew that Leach had quit monitoring. (Ex. R-6). EWD's discipline of Pritt was justifiable only if Pritt knew that he was working without fall protection.

Pritt's knowledge of Leach's violative conduct is imputable to EWD and satisfies the Secretary's burden to prove the employer knowledge element. This conclusion is consistent with Commission precedent that does not require a showing foreseeability under any circumstances, because it is Pritt's knowledge of Leach's violative conduct that is imputed to EWD. *See TNT Crane & Rigging, Inc.*, No. 16-1587, 2022 WL 2102910, at *3-4 (OSHRC, June 2, 2022); *Angel Bros. Enters., Ltd. v. Walsh*, 18 F.4th 827, 830–32 (5th Cir. 2021) (showing of foreseeability not required where the supervisor whose knowledge is sought to be imputed did not commit the safety violation cited).

Considering separately the imputation of Leach's knowledge of his violative conduct to EWD, Commission precedent allows such imputation without proof of foreseeability. *Deep S. Crane & Rigging*, 23 BNA OSHC at 2102.

However, if contrary circuit court precedent that requires proof of foreseeability were the controlling precedent here, the Secretary would not have succeeded in imputing Leach's knowledge of his own violative conduct to EWD. To the contrary, EWD proved by a preponderance of the evidence that Leach's violative conduct was unforeseeable, and in doing so EWD established the affirmative defense of unforeseeable employee misconduct, as discussed next.

Unforeseeable Employee Misconduct

With the alleged violation having been proven, EWD argues alternatively that the Citation should be vacated because it has proven the affirmative defense of unforeseeable employee misconduct (UEM). To establish that affirmative defense, an employer must prove each of the following elements by a preponderance of the evidence: "(1) it established work rules to prevent the violation; (2) these rules were adequately communicated to the employees; (3) it took steps to discover violations; and (4) it effectively enforced the rules when infractions were discovered." [13] *D.A. Collins Constr. Co.*, 117 F.3d at 695.

[13] As indicated supra, adjudication of the UEM defense often involves evaluating the "same factors" that are assessed in determining whether the Secretary has proven that an employer's safety program was inadequate so that the employer is deemed to have constructive knowledge of a violative condition. *See Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010) (noting that the Commission has considered the "same factors in evaluating both an employer's constructive knowledge and the merits of an employer's unpreventable conduct affirmative defense"), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished); *S. Hens, Inc. v. OSHRC*, 930 F.3d at 678 (noting that "the UEM inquiry often overlaps considerably with the main violation inquiry"). Thus, Commission case law that assesses the adequacy of an employer's safety program for purposes of the "employer knowledge" element of the Secretary's burden of proof may inform analysis of an asserted unforeseeable employee misconduct defense.

"When the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee." *Archer-W. Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991), *aff'd*, 978 F.2d 744 (D.C. Cir. 1991) (unpublished). "Where … an employer defends against an alleged violation on the ground of unpreventable *supervisory* misconduct, the employer's burden of proof is more rigorous and the defense more difficult to establish because supervisory involvement in asserted misconduct is strong evidence that the employer's safety program is lax." *Fla. Gas Contractors, Inc.*, 2019 WL 995716, at *7.

1. *Established Work Rules to Prevent the Violation*

The first element of the defense—that the employer has established work rules to prevent the violation—may be satisfied where the work rule "effectively implemented the requirements of the standard." *TNT Crane & Rigging, Inc*, 2022 WL 2102910, at *4. This element may also be satisfied where the work rule is "designed to prevent the cited violation." *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1056 (No. 86-1087, 1991) (rejecting UEM defense in concluding that the employer did not have work rules "designed to prevent the cited violation"); *AJM Packaging Corp.*, 2022 WL 1102423, at *6 (OSHRC, Apr. 1, 2022) (determining, as part of "constructive knowledge" analysis for a lockout/tagout violation, that a work rule that would prevent the creation of hazardous energy was adequate).

EWD's work rule prohibited safety monitors from engaging in any activity other than monitoring employees. If Leach had complied with this work rule, his conduct would have conformed to the mandate that a safety monitor have no "other responsibilities which could take the monitor's attention from the monitoring function." § 1926.502(h)(1)(v). A safety monitor's compliance with EWD's more stringent work rule would make it nearly impossible to gainsay the monitor's conformance with § 1926.502(h)(1)(v). Indeed, this was among the reasons EWD

established that more stringent rule. (Tr. 220-21, 250-51, 273). EWD's work rule was adequate because is both "effectively implemented the requirements of the standard," *TNT Crane*, and was "designed to prevent the cited violation." [14] *Gary Concrete Prods.* 15 BNA OSHC at 1056.

2. *Work Rule Adequately Communicated to Employees*

Adequate communication of a work rule is established where employees are aware of a work rule and know when it is to be implemented. *See Texland Drilling Corp.*, 9 BNA OSHC 1023, 1026 (No. 76-5037, 1980) (finding adequate communication of a work rule where employees are trained, experienced, and know of the work rule). Adequate communication of a work rule may be accomplished through training. *Angel Bros. Enters., Ltd.*, 2020 WL 4514841, at *5–6 (finding orientation training, bi-annual training, toolbox talks, and an expressed instruction the day prior to the employee's misconduct to have been "more than sufficient to meet Angel's burden of proving adequate communication"), *aff'd* 18 F.4th 827 (5th Cir. 2021); *United Contractors Midwest, Inc.*, 26 BNA OSHC 1049, 1052 (No. 10-2096, 2016) (finding rules adequately communicated where they were explained in new employee orientation, toolbox talks, and annual training sessions, and an employee received express instruction to comply with the rule on the day of the violative conduct); *Thomas Indus. Coatings, Inc.*, 23 BNA OSHC at 2087 (finding Secretary had failed to prove the employer's safety program was inadequate for purposes of constructive knowledge analysis where the three employees that had been involved in violative conduct had attended training on the relevant work rule five months earlier, had attended weekly

[14] The Secretary argues that EWD's work rules were inadequate because EWD did not have a rule that required a safety monitor to utilize some form of fall protection. (Sec'y Br. 18-19). However, the Secretary effectively abandoned this argument in his reply brief by virtue of having withdrawn his contention the employee exposure element of the Secretary's burden of proof had been established by Leach's asserted exposure to a fall hazard while he was acting as the designated safety monitor. (Sec'y Reply Br. 7, n.7).

toolbox talks thereafter, and had received instruction to comply with the rule at the worksite days before the violation).

A preponderance of the evidence establishes that EWD adequately communicated its work rule. EWD's written "Corporate Safety Program" addresses the role of a safety monitor in fall protection and is covered during orientation for new employees. (Tr. 125-26, 224-25; Ex. R-1). EWD conducts annual group training that includes fall protection training for its construction employees. (Tr. 222-23). EWD's field employees also participate in regular toolbox talks and on-the-job training. (Tr. 223-25; Ex. R-1, at 69). Three days before the violation here, Leach and Pritt had both attended refresher training on the use of a safety monitoring system for fall protection. (Tr. 125-26, 138-42, 156, 192, 226-30; Ex. R-2; Ex. R-12).

With respect to the employees' understanding of the rule, the testimony of both employees evinced their thorough understanding of the proper use of a safety monitoring system, Pritt especially. (Tr. 139-40, 159-60, 164-68).

The Secretary argues that the whole of the evidence showed that work rule had not been adequately communicated because "Leach and Pritt both insisted at trial they did nothing wrong" and that "the failure of two foremen-level employees to understand the safety monitor requirement shows that [EWD] did not adequately communicate that requirement to its employees." (Sec'y Br. 19). It is true that in testifying about the discipline that they had received, both Leach and Pritt deflected personal responsibility. Leach claimed that when he received the discipline he was not told that he had done anything wrong. (Tr. 146). And while Pritt initially testified that, "[w]e knew what we had done [was] wrong," he then immediately backpedaled, testifying: "Honestly, I don't think we did anything wrong. I mean, it's just the way he has his pictures makes it look different, because we were -- the only time I was on the edge was right at the end, and Ory [Leach]

was watching me." (Tr. 176). This self-serving testimony of Leach and Pritt is given no weight because it is contrary to weightier and more reliable evidence, such as: (1) the employees' contemporaneous culpable statements as recorded in the video at Exhibit R-12; (2) the formal disciplinary notices that each employee signed and accepted; and (3) Crumb's email to the CO that both employees had indicated "that at some point they were using a safety monitor and the monitor then decided to engage in work." (Findings of Fact ¶¶32–36). The greater weight of the evidence establishes that EWD adequately communicated to its employees, including its supervisory employees, its work rules on the appropriate use of a safety monitoring system.

3. *Adequacy of Steps to Discover Violations*

"Establishing adequate procedures for monitoring employee conduct for compliance with applicable work rules is a critical part of any employer effort to eliminate hazards." *Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). "Effective implementation of a safety program requires a diligent effort to discover and discourage violations of safety rules by employees." *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999). "[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).

The preponderance of the evidence establishes that EWD established adequate procedures for monitoring employee compliance with safety rules and that it exercised reasonable diligence implementing those procedures. (Findings of Fact ¶¶ 8–11).

Every EWD work crew has a designated foreman who is responsible for worksite safety. (Tr. 129-30, 134, 242). EWD's safety director devotes much of his time visiting EWD jobsites and observing for compliance with work rules. (Tr. 225). In addition to the safety director's regular visits to worksites, at least one other member of EWD's safety department conducts regular

worksite inspections. (Tr. 226; Ex. R-12 at 9:50–10:09). EWD also hires outside safety consultants to conduct unannounced inspections and requests that its insurance carriers conduct unannounced inspections. (Tr. 225-26). Leach, an EWD service foreman, corroborated this uncontradicted evidence regarding the conduct of worksite inspections by EWD's safety department. (Tr. 126, 131, 135-36). EWD's records of disciplinary action also corroborate the occurrence of such safety inspections and their efficacy in identifying violations of safety rules, including fall protection violations by supervisory employees. (Ex. R-7, at 9, 18, 23, 26, 30, 33, 35, 37).

EWD has established that it exercised reasonable diligence in discovering employee violations of safety rules. *Cf. Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2182 (No. 00-1268, 2003) (finding employer provided adequate supervision of its worksites for purposes of constructive knowledge analysis where, in addition to having a supervisor on site, other safety personnel conducted scheduled and random inspections of worksites).

4. *Effective Enforcement When Infractions Discovered*

To establish the final element of the UEM defense—that the cited employer effectively enforced the rules when infractions were discovered—"requires a showing that the employer effectively disciplines employee misconduct." *L.E. Myers Co.*, 16 BNA OSHC at 1042; *see also Stahl Roofing, Inc.*, 19 BNA OSHC at 2182 (finding employer had adequately enforced its progressive disciplinary policy where evidence indicated that after violations had been identified the progression had been followed); *TNT Crane & Rigging, Inc.*, 2022 WL 33886, at *8 (concluding employer failed to establish that it had effectively enforced power line safety rules where no employee had been previously disciplined for violating those rules even though it was "highly unlikely" that there had been no previous violations); *Stark Excavating, Inc.*, 24 BNA OSHC 2218, 2220 (No. 09-0004, 2014) (effective enforcement not proven where supervisors

regularly failed to impose the employer's specified progressive disciplinary measures), *aff'd*, 811 F.3d 922 (7th Cir. 2016); *cf. D.A. Collins Constr. Co.*, 117 F.3d at 695 ("Evidence that a foreman or supervisor has violated a statutory standard permits the inference that the employer's safety program has not been adequately enforced"). Pre-inspection and post-inspection disciplinary measures may be considered in determining whether an employer has effectively enforced its work rules. *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1863-64, n.6 (No. 93-1122, 1996), *aff'd*, 149 F.3d 1183 (6th Cir. 1998); *Precast Serv., Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) ("Commission precedent does not rule out consideration of post-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline"), *aff'd*, 106 F.3d 401 (6th Cir. 1997).

EWD's progressive discipline policy prescribes an oral warning as the sanction for most first-time rules violations, but an employee's first-time failure to use required fall protection is an exception. (Ex. R-1 at 33). For such a violation of a fall protection rule, EWD's progressive discipline policy prescribes the substantially more severe sanction of a one-week suspension (or, at the option of the sanctioned employee and in lieu of suspension, completing an OSHA-authorized training course on their own time). (Findings of Fact ¶ 12; Tr. 230-31; Ex. R-1 at 33).

EWD employs between 150 and 300 workers depending on the season. (Findings of Fact ¶ 1). Since 2013, EWD has imposed formal progressive discipline measures about 83 times. (Tr. 234-35; Ex. R-7, at 1-3). The discipline imposed has included progressive discipline for violating rules on the use of a safety monitoring system for fall protection. (Ex. R-7 at 1-3). Uncontroverted evidence showed that at least since 2013, EWD has imposed formal progressive disciplinary measures on both supervisory and non-supervisory employees for fall protection

violations. (Tr. 230; Ex. R-1 at 33-34; Ex. R-7 at 5 [five-day suspension of apprentice roofer for first time misconduct while acting as safety monitor], *id.* at 12 [foreman terminated for multiple safety violations including improper use of safety monitor], *id.* at 18 [journeyman roofer disciplined for improper use of personal fall arrest system], *id.* at 28 [five-day suspension of journeyman roofer disciplined for working without a safety monitor], *id.* at 31 [five-day suspension of foreman of two-person crew for first time violation of working without a safety monitor], *id.* at 32 [five-day suspension of apprentice roofer for first time violation of working without safety monitor]). Consistent with its prior disciplinary practices, EWD imposed five-day suspensions on the two service foremen here. (Findings of Fact ¶ 35).

Notwithstanding that a supervisor's violative conduct constitutes "strong evidence that the employer's safety program is lax," *Stark Excavating, Inc.*, 24 BNA OSHC at 2220, the whole of the evidence overcomes that substantial evidentiary hurdle. The evidentiary record presented here establishes by a preponderance of the evidence each element of the UEM defense. EWD having established the affirmative defense, the sole alleged violation must be vacated. [15]

ORDER

The foregoing decision constitutes findings of fact and conclusions of law on all material issues of fact, law, or discretion in accordance with Commission Rules 90(a)(1) and 209(f)(2). 29 C.F.R. §§ 2200.90(a)(1), 2200.209(f)(2).

[15] The parties have stipulated that the Secretary's classification of the alleged violation as "serious" and the Secretary's proposed penalty are appropriate. (Joint Pre-Hr'g Statement at 6). Thus, if the determination herein that EWD had established the affirmative defense were to be reversed, remand to the undersigned would be unnecessary.

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that amended Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(10), is VACATED.

s/ *William S. Coleman*
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: February 21, 2023