Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MILLER INSULATION CO., INC., Respondent.	OSHRC Docket No. 19-1431

Appearances:

Bryan Kaufman, Esq., Department of Labor, Office of Solicitor, Denver, Colorado
For Complainant

Thomas R. Revnew, Esq., Peters, Revnew, Kappenman & Anderson, Minneapolis, Minnesota
For Respondent

Before: Judge Christopher D. Helms– U. S. Administrative Law Judge

DECISION AND ORDER

I. Procedural History

On April 19, 2019, Miller Insulation Co., Inc., ("Respondent") performed work at a jobsite located at 605 Fourth Avenue SE, Crosby, North Dakota ("worksite" or "site"). On that date, three of Respondent's employees, Francisco Andrade ("Andrade"), [redacted] ("victim"), and [redacted], entered a mezzanine on the site in order to perform warranty maintenance repair insulation work. (Ex. J-25). On April 19, 2019, Respondent's employee, the victim, fell from the edge of the mezzanine where its wooden floor met a drop ceiling made of thin tiles placed on a

thin metal grid. (Ex. J-17, J-25, J-26). The victim fell onto his head and neck area and later passed away at a hospital. (Ex. J-16, J-18, J-25). In response to the employee's worksite injury, the Occupational Safety and Health Administration ("OSHA") began an inspection of the Divide County High School site on April 23, 2019. As a result of OSHA's inspection, the Secretary of Labor ("Secretary") issued a one-item serious citation to Respondent. The citation, as amended,[1] alleged a serious violation of the general industry standard 29 C.F.R. § 1910.28(b)(1)(i), or in the alternative, the construction standard 1926.501(b)(1).[2] The citation proposed a penalty of $13,260.

Miller Insulation filed a timely notice of contest bringing the matter before the Occupational Safety and Health Review Commission (the "Commission").[3] The matter was designated for Simplified Proceedings by the Chief Administrative Law Judge and assigned to this Court on September 23, 2019. On or about October 2, 2019, the parties jointly moved to discontinue simplified proceedings in favor of conventional proceedings, which was granted on October 3, 2019. A trial was held on May 25-27, 2021, and June 2, 2021, via videoconference. The following individuals testified: (1) Glen Alexander, a superintendent for Respondent; (2)

[1] On July 29, 2020, the Secretary's Unopposed Motion to Amend the Citation and Complaint was granted. The amendment set forth the citation item be amended to allege a violation of the construction standard of 29 C.F.R. § 1926.501(b)(1) in the alternative.

[2] The Secretary originally cited Respondent for a violation of general industry standard 29 C.F.R. § 1910.28(b)(1)(i) of the Occupational Safety and Health Act of 1970, (the "Act"), 29 U.S.C. §§ 651-678. Prior to the hearing, Respondent filed a Motion for Summary Judgment contending that the Complaint should be dismissed. Among other arguments, Respondent argued that no material disputed facts existed as to whether the violations as alleged resulted from unpreventable employee misconduct by its supervisor at the time.

Following review and consideration of Respondent's Summary Judgment Motion, the undersigned denied the motion finding material facts existed which prevented summary judgment from being entered against the Secretary.

[3] The Commission is an independent adjudicatory agency and is not part of the Department of Labor or OSHA. 29 U.S.C. § 661. It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the OSH Act and has no regulatory functions. 29 U.S.C. § 659(c).

Francisco Andrade, a former employee for Respondent; (3) Jerome Ralph, a safety coordinator for Respondent; (4) Ernest Barnhard, a safety manager for Respondent; and (5) Compliance Safety and Health Officer ("CSHO") Kari Thorsteinson. Both parties submitted timely post-trial briefs. Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law.

For the reasons discussed, citation 1, item 1, as originally issued and as amended in the alternative, is VACATED.

II. Stipulations & Jurisdiction

The parties stipulated to various facts, including several jurisdictional details.[4] (Joint Stipulation Statement). Based on the Joint Stipulations, the Court finds the Commission has jurisdiction over this action pursuant to Section 10(c) of the Act, 29 U.S.C. § 659(c). Further, the Court obtained jurisdiction over this matter under section 10(c) of the Act upon Respondent's timely filing of a notice of contest. 29 U.S.C. § 659(c). The Court also finds Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3), (5).

[4] The Joint Stipulations were received and admitted as a Joint Stipulation Statement.

III. Factual Background[5]

A. The Company

Respondent provides insulation services to the industrial, commercial, oilfield, and residential markets. (Ex. J-14). It is an employee-owned construction company headquartered in Bismarck, North Dakota, with approximately 600 employees. (Tr. 818). In 2019, Respondent was engaged in insulation maintenance repair work at a worksite located in Crosby, North Dakota. (Tr. 48, 89, 599).

Respondent's worksite management consisted of foreman Francisco Andrade. (Tr. 94, 111, 171, 256; Ex. J-1). On March 14, 2019, Respondent's superintendent, Glen Alexander, conducted a pre-job walk-through of the worksite with Robert Boyer, a superintendent with the general contractor, FCI Constructors ("FCI"). (Tr. 180). Both individuals reviewed FCI's punch list of items to be completed at the worksite in order to determine the scope of work. (Tr. 180-183; Ex. J-8). The punch list referenced, *inter alia,* work that had previously been performed at the worksite and which areas required repair work. (Tr. 49-50, 52, 180-183; Ex. J-8). Respondent's main role was to repair insulation on piping and valves and replace stained ceiling tiles. (Tr. 186, 243-245; Ex. J-8). Mr. Alexander and Mr. Boyer examined stained ceiling tiles and then climbed a wall ladder to enter a mechanical room on a mezzanine above. (Tr. 55-56, 186-190, 245).

B. The Mezzanine

Upon entry from the ladder, from left to the right, the room was roughly 50-55 feet long, 12 feet wide, and 6-6.5 feet tall. (Tr. 188-191; Ex. J-17). From the entrance, the end of the right side of the room was about 15 feet away, leaving about 35-40 feet to the left side of the room. (Tr.

[5] The factual background is based on the credible record evidence, as discussed below, and consideration of the record as a whole. Contrary evidence is not credited.

190; Ex. C-6). Piping and an air handler immediately to the left of the room's entrance prevented walking directly to the left end and obscured the view from one end to the other. (Tr. 193, 202-203, 406-407; Exs. C-6, J-9). The wood flooring did not extend all the way to the walls at each end of the mezzanine. (Tr. 87, 220-221; Ex. J-17). Between the end of the wood floor and walls there were thin tiles placed on a metal grid, which served as the drop ceiling for the hallway below. (Tr. 45-49; Ex. J-17). In order to get to this area, an individual would have to walk straight ahead of the entrance, turn left for about 6-8 feet, and climb over the air handlers in the middle back of the room. (Tr. 202, 220-221).

Mr. Alexander spent about five minutes on the mezzanine and did not identify a clear hazard. (Tr. 62-63, 100). While on the mezzanine, Mr. Alexander used his cell phone's flashlight and took pictures of each area where work was to be performed. (Tr. 187-203, Ex. J-9 at 121, 127-129, 134-135). Given the relatively poor lighting, Mr. Alexander had asked Mr. Boyer to ensure the area was better illuminated before the work commenced. (Tr. 79).

C. The Incident

On April 19, 2019, Mr. Andrade, the victim, and [redacted] were scheduled to perform the insulation repairs at the worksite. (Tr. 94, 111, 171, 256, 273, 286; Ex. J-1). Mr. Alexander had planned on working at the worksite, but due to extenuating circumstances informed Mr. Andrade that he would need to go in his place. (Tr. 203-205). On the morning of April 19, 2019, Mr. Andrade, the victim, [redacted], and Mr. Alexander met to discuss the repairs to be made and load up supplies. (Tr. 205, 212-213). Mr. Alexander explained what work needed to be done at the worksite as he reviewed the item punch list and photographs he had taken with the employees. (Tr. 212-213; Exs. J-8, J-9). Mr. Alexander instructed Mr. Andrade to meet with Mr. Boyer to go over the work to be performed and to look after [redacted] and the victim. (Tr. 207, 215).

While on the way to the worksite, Mr. Alexander received a work emergency call, which required his attention. (Tr. 214-215). Mr. Alexander then got in contact with Mr. Andrade to inform him that he would need to continue to the worksite without him. (Tr. 203-205, 215). When Mr. Andrade arrived at the worksite, Mr. Boyer reviewed the item punch list with him and explained what worked needed to be completed. (Tr. 286-290).

When [redacted] and the victim arrived at the worksite, Mr. Andrade helped them bring work materials up to the mezzanine. (Tr. 293, 309-310). Mr. Andrade directed [redacted] and the victim on the repair work that needed to be completed based on pictures Mr. Alexander had provided. (Tr. 288; Ex. J-9). Mr. Andrade informed them they were only to complete the insulation repair work depicted in the pictures. (Tr. 288). They were not to look for work outside this original scope and were to call a supervisor for permission to conduct additional work outside their original assignment. (Tr. 236-237, 288).

Mr. Andrade testified that he had no difficulty with the lighting in the mezzanine and could see the floor and walls without the use of his hard hat headlamp. (Tr. 314-315, 320-321, 411-413). While working on the right side of the mezzanine, [redacted] yelled from downstairs that the victim had fallen and was injured. (Tr. 330, 391-394). Mr. Andrade immediately ran downstairs to find the victim on the ground with paramedics. (Tr. 330).

After receiving a call from [redacted] and learning of the accident, Mr. Alexander headed to the worksite to investigate the incident. (Tr. 215-216). He completed an accident report and took photographs of the scene. (Tr. 225-226; Exs. J-17, J-18). Mr. Alexander noted there was adequate lighting on the mezzanine, including in the area, where no work was scheduled to be performed and the victim had been working. (Tr. 84, 199-200, 220, 226).

After his fall, the victim was air lifted to Trinity Hospital in Minot, North Dakota where he later unfortunately passed away on April 22, 2019. (Ex. J-25). Mr. Barnhard reported the incident to OSHA and completed an accident report of his own. (Tr. 540, 782-783; Ex. J-25).

D. The Incident Inspection

Following the incident, Mr. Barnhard discovered through his investigation that Mr. Andrade had only partially completed a job hazard assessment ("JHA") before starting work. (Tr. 530, 540, 548; Exs. J-25, J-21). Mr. Andrade testified he failed to complete a JHA before starting work because he "spaced out on it." (Tr. 382-384, 400-401). A week after the incident, on April 26, 2019, Mr. Andrade was disciplined for failing to complete the JHA. (Tr. 408-410). He was suspended without pay for three days, demoted for thirty days, and placed on a six-month probation with any violation occurring during said time resulting in immediate termination. (Tr. 408-410; Ex. R-13).[6]

On April 22, 2019, CSHO Thorsteinson received a call from Mr. Barnhard reporting an employee had been hospitalized. (Tr. 620-621). After receiving the call, CSHO Thorsteinson traveled to the worksite and conducted an inspection the following day. (Tr. 622-623). Through the course of her investigation, she spoke with various representatives of Respondent and FCI. (Tr. 623-624). As a result of the CSHO's investigation, she determined the victim was exposed to a fall hazard next to an unprotected edge. (Tr. 640-643). CSHO Thorsteinson found, *inter alia*, that the height of the drop ceiling to the floor was approximately nine feet seven inches, employees were exposed to fall hazards for approximately forty-five minutes, and the probability of falling near an unprotected edge was greater because work was being performed near the unprotected edge. (Tr. 634, 640-644). Through her investigation, CSHO Thorsteinson determined that

[6] On July 9, 2019, Mr. Andrade's employment with Respondent was terminated for violating company policy while on his probationary period. (Tr. 410-411, 487-489; Ex. R-14).

Respondent had violated the requirements covered under 29 C.F.R Part 1910 and recommended OSHA issue a citation. (Tr. 635-636).

IV. Discussion

A. Law Applicable to Alleged Violations

In order to establish a violation of a safety standard under the Act, in this case 29 C.F.R. §1910.28(b)(1)(i) or in the alternative 29 C.F.R. § 1926.501(b)(1), Complainant must prove by a preponderance of the evidence: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994); *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-531, 1991) (citation omitted); *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609 (No. 87-2007, 1992) (citation omitted).

The Secretary has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

1. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1910.28(b)(1)(i): The employer did not ensure that each employee on a walking-working surface with an unprotected side or edge that is 4 feet (1.2 m) or more above a lower level was protected from falling:
>
> > On April 19, 2019, and at times prior for employees exposed to a 10 foot fall hazard through a drop ceiling while insulating pipes next to an unprotected edge at 605 Fourth Avenue SE in Crosby, North Dakota.
>
> *See* Citation.
>
> In the alternative, pursuant to this Court's Order granting leave to amend the complaint and citation, Complainant alleges a serious violation of 29 C.F.R. § 1926.501(b)(1):
>
> 29 CFR 1926.501(b)(1): The employer did not ensure that each employee on a walking/working surface with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

a. The Standard Applies

Under Commission precedent, "the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *KS Energy Servs., Inc.,* 22 BNA OSHC 1261, 1267 (No. 06-1416, 2008) (finding "the cited ... provision was applicable to the conditions in KS Energy's traffic control zone"), *aff'd*, 701 F.3d 367 (7th Cir. 2012); *Active Oil Serv., Inc.,* 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005) (finding "that the confined space standard applies to the cited conditions" because "the vault was a confined space"); *Arcon, Inc.,* 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004) ("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions.")

The amended citation alleges that Respondent violated a general industry standard, or in the alternative, a construction standard. Determining whether an activity is construction or maintenance requires consideration of whether a structure is altered, the project's scale and

complexity, and whether it is a routine activity. *See Brand Energy Sols. LLC*, 25 BNA OSHC 1386 (No. 09-1048, 2015). Pursuant to 29 C.F.R. § 1910.5(c)(1), if a more specific standard exists that is applicable to a "condition, practice, means, method, operation, or process," such as a construction standard, the more specific standard applies over the general.

Respondent is a construction company that was performing repair insulation work when the violation occurred. (Tr. 48, 89, 599, 818; Exs. J-14, J-25). Therefore, the repair work Respondent performed would fall under the purview of Part 1926, Subpart M, Section 501 – Duty to Have Fall Protection. Any hazards involving construction work repair and fall protection would fall within the scope of the aforementioned Subpart including its relevant sections.

Construction standards apply "to every employment and place of employment of every employee engaged in construction work." 29 C.F.R. § 1910.12(a). Construction work is defined as "work for construction, alteration, **and/or repair**, including painting and decorating." 29 C.F.R. § 1910.12(b). Because the work at the school was repair work, it fell under OSHA's definition of "construction work," which means the construction standards applied, not the general industry standards. The Court finds 29 C.F.R. § 1926.501(b)(1) applies and consequently 29 C.F.R. § 1910.28(b)(1)(i) does not.

b. <u>The Standard was Violated</u>.

Respondent does not dispute that the cited standard applies to this case and was violated. (*See* Resp't Br. at 13-14).

Here, the cited standard required Respondent to ensure that each of its employees on a walking/working surface with an unprotected side or edge, 6 feet or more above a lower level, was protected from falling by the use of a guardrail systems, safety net systems, or personal fall arrest systems. *See* 29 C.F.R. § 1926.501(b)(1). The record reveals that Respondent violated the

standard by failing to use any fall protection system to protect its employees from falling off the mezzanine's unprotected edge to the hallway floor which was at least nine feet below. (Tr. 634, 640-644; Ex. J-25).

Accordingly, in light of the abovementioned, this Court finds Respondent violated the terms of the standard.

c. Employees were Exposed to a Hazardous Condition.

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). The Commission's longstanding test for hazard exposure requires the Secretary to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing id.*). *See also Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980); *Gilles & Cotting*, 3 BNA OSHC 2002 (No. 504, 1976).[7]

The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr*. Co., LLC, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). The zone of danger is determined by the hazard presented by the violative condition and is normally the area surrounding the violative condition that presents the danger to employees which the standard is

[7] In *Gilles & Cotting, Inc*., the Commission rejected the "actual exposure" test, which required evidence that someone observed the violative conduct, in favor of the concept of "access", which focuses on the possibility of exposure under the conditions. *See Gilles & Cotting, Inc*., 3 BNA OSHC at 2002 (holding "that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure").

intended to prevent. *RGM Construction*, Co., 17 BNA OSHC at 1234; Gilles *& Cotting, Inc*., 3 BNA OSHC at 2003.

Respondent's employees were directly exposed to a hazardous condition when they worked in the mezzanine near an unprotected edge without any fall protection system to protect them from falling to the hallway floor nine feet below. (Tr. 634, 640-644; Ex. J-25). Courts have long held that exposure is met by an employee's mere access to a hazardous situation. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985); *S. Hens, Inc. v. Occupational Safety & Health Review Comm'n*, 930 F.3d 667, 681 (5th Cir. 2019). Here it is undisputed, Respondent's employees had access to and entered the mezzanine on April 19, 2019, to perform insulation repair work. (Tr. 634, 640-644; Ex. J-25).

Furthermore, it is undisputed the victim fell from the mezzanine's unprotected edge and died as a result. (Tr. 47-49, 71, 85-87; Exs. J-16, J-25). The victim's actual exposure, in falling from the mezzanine's unprotected edge and passing away from his fall, also establishes exposure. *See S & G Packaging, Co., LLC* (*S&G*), 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) (injuries establish actual exposure to the violative condition). As such, this Court finds that the victim was an exposed employee.

d. Knowledge

Respondent's knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known of the violative condition. 29 U.S.C. § 666(k); *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-531, 1991). When determining whether an employer has been reasonably diligent, the Commission considers "several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to

prevent the occurrence of violations." *Precision Concrete Constr.*, 19 BNA OSHC 1404 (No. 99-0707, 2001). An employer's awareness of the violation may be shown through actual or constructive knowledge of said violation. It is not necessary to show the employer knew or understood the condition was hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079-1080 (citations omitted). "[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." *Ragnar Benson, Inc.*, No. 97-1676, 1999 WL 770809, at *3 (OSHRC Sept. 27, 1999). An employer is not automatically aware of a hazard in plain view, especially if not observed by a supervisory employee. *Cranesville Block Co., Inc./Clark Division*, Nos. 08-0316 & 08-0317, 2012 WL 2365498, at *10 (OSHRC June 12, 2012).

The Secretary contends that Respondent failed to exercise reasonable diligence to discover and to prevent fall hazards and that Respondent therefore had constructive knowledge of the violative condition. According to the Secretary, Respondent did not have work rules designed to prevent the violation at issue, as its fall protection rules were insufficient with respect to preventing the cited violation. (Sec'y Br. at 12-15). The Secretary further argues that Respondent had failed to effectively communicate any works rules or effectively and consistently enforce said rules. (Sec'y Br. at 15-21). Additionally, the Secretary contends that Mr. Andrade's involvement and inactions at the worksite provide strong evidence of Respondent's ineffective safety program and lax disciplinary policies. (Sec'y Br. at 17-21). Further, the Secretary makes the argument that Mr. Alexander's and Mr. Andrade's knowledge of the hazard should be imputed to Respondent. (Tr. 638-639). The Secretary claims that Mr. Alexander had knowledge of the hazard because "it is his job to look for hazards on the job site" and that he "failed to make sure all edges of the

mezzanine were safe while knowing the mezzanine was elevated." (Tr. 638-639; Ex. J-27). The Secretary additionally argues that Mr. Andrade had knowledge of the hazard because "[h]e noticed the edge of the mezzanine on the right side posed a fall hazard," but did not stop to get fall protection, or see if the opposite side posed "the same hazard." (Tr. 638-639; Ex. J-27).

In support of Respondent's employee misconduct affirmative defense, Respondent claims that it met the reasonable diligence factors through Respondent's safety program, maintaining adequate work rules, adequately training employees on the work rules, effectively discovering violations of the work rules, and effectively enforcing those rules. (Resp't Br. at 19-30).

The credible record evidence reveals that Respondent did not have actual or constructive knowledge of the hazardous condition of the victim working from the mezzanine's unprotected edge without fall protection. (Tr. 47-49, 71, 85-87; Exs. J-16, J-25).

The Court first addresses whether Mr. Andrade is a supervisor whose knowledge can be imputed to Respondent. Although Mr. Andrade testified that he did not believe he was acting as a supervisor or foreman at the worksite, he was responsible for many typical foreman duties, including properly completing a JHA form and directing other employees to which work needed to be completed. (Tr. 280-284, 288, 383; Exs. C-6, J-9). Mr. Andrade testified that he became a foreman for Respondent in 2018 well before the date of the incident. (Tr. 256). Mr. Andrade further testified that he had been the victim's foreman on prior jobs to the job at the worksite. (Tr. 379-380). Further, Mr. Andrade was routinely given oversight of other employees and would conduct safety training and toolbox talks with them. (Tr. 379-386). A preponderance of the evidence establishes that Mr. Andrade was responsible for the work being completed at the worksite. An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer.

American Engineering & Development Corp., 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc*., 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992). Mr. Andrade as foreman had authority over [redacted] and the victim, and as such is a supervisor for purposes of imputing knowledge to Respondent.

According to the Commission, where a complainant shows that a supervisor[8] had actual knowledge of the violation, "such knowledge is generally imputed to the employer." *ComTran,* 722 F.3d at 1307–08. *See also Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) quoting *Access Equip. Sys.*, 21 BNA OSHC 1400, 1401 (No. 03-1351, 2006) and *Regina Constr. Co.*, 15 BNA OSHC 1044, 1046 (No. 87-1309, 1991).

However, neither Mr. Andrade nor Mr. Alexander had knowledge of the hazard which could be imputed to Respondent. The Secretary failed to provide evidence that the hazard existed when Mr. Alexander conducted his walkthrough before the incident. The record shows that Mr. Alexander spent about five minutes on the mezzanine and did not identify a clear hazard. (Tr. 62-63, 100). Similarly, Mr. Andrade did not identify a clear hazard while working at the worksite or when he observed where the victim was working. (Tr. 288, 314-315, 319-321, 331).

While the Secretary has alluded to the establishment of constructive knowledge through Mr. Andrade's failure to complete a JHA, this is mere speculation. (Resp't Br. at 16-17, 20). The

[8] It is well settled an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Access Equipment Systems. Inc*., 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) (employee who was "in charge of" or "the lead person for" one or two employees who erected scaffolds can be considered a supervisor). The Commission has long held it is the substance of the delegation of authority not the formal title of the employee having the authority. *Dover Elevator Co*., 16 BNA OSHC 1281 (No. 91-862, 1993). *See Diamond Installations*, 21 BNA OSHC 1688 (No. 02-2080, 2066 (permitting imputation of knowledge based on temporary delegation). A person not having the authority to hire or fire, such power is not "sine qua non" of supervisory status. *Rawson Contractors, Inc*., 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003).

record reveals that Mr. Andrade directed [redacted] and the victim on the repair work that needed to be completed based on pictures Mr. Alexander had provided. (Tr. 288; Ex. J-9). Only the insulation repair work depicted in the pictures was to be completed. (Tr. 288). However, the area that the victim fell from had no scheduled work to be performed and was 20 feet away, and partially barricaded by pipes, from the work he was instructed to complete. (Tr. 220-221, 226, 288; Exs. J-9, J-17). Mr. Andrade testified he did not direct the victim to work in the fall area because there was no work to be completed there. (Tr. 288). The Secretary has not proven that Respondent failed to take reasonably diligent measures to inspect the worksite and certainly has not established that Respondent would have discovered the fall hazard through reasonable diligence in an area that Respondent never intended or anticipated performing work in.

e. Unpreventable Supervisory Misconduct

Under the Act, Respondent raises the affirmative defense of unpreventable employee misconduct in its Answer and Post Hearing Brief. (Resp't Br. 19-30). The burden is on Respondent to prove the elements of this affirmative defense. To establish the affirmative defense of unpreventable employee misconduct, in cases that do not involve supervisor misconduct, the employer must prove that it "[(1)] has established work rules designed to prevent the violation [; (2)] has adequately communicated these rules to its employees [; (3)] has taken steps to discover violations and [; (4)] has effectively enforced the rules when violations have been discovered." *Western World, Inc. v. Sec'y of Labor,* 604 F. App'x 188, 191 (3d Cir. 2015) (unpublished), quoting *PP&L,* 737 F.2d at 358 (emphasis omitted) (quoting *Marson Corp*., 10 BNA OSHC 1660 (No. 78-3491, 1982). "When the alleged misconduct is that of a supervisory employee, the employer must ... establish that it took all feasible steps to prevent the accident, including adequate ... supervision of its [supervisory] employee." *See Archer- Western Contractors, Ltd.*, 15 BNA

OSHC 1013 (No. 87-1067, 1991), *aff'd Archer-W. Contractors, Ltd. v. Occupational Safety & Health Rev. Comm'n*, 978 F.2d 744 (D.C. Cir. 1992) (unpublished) (citations omitted). When an employer's unpreventable employee misconduct defense involves a supervisor, the "employer is excused from responsibility for acts of its supervisory employees only if it shows that the acts were contrary to a consistently enforced company policy, that the supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors." *W. Waterproofing Co. v. Marshall*, 576 F.2d 139, 144 (8th Cir. 1978) (citations omitted).

The factors illustrating Respondent's lack of constructive knowledge of the worksite hazardous condition also support Respondent's unpreventable employee misconduct defense. *Burford's Tree, Inc*., 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010) (the factors for evaluating constructive knowledge are the same factors for evaluating the unpreventable employee misconduct defense), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished).

The Secretary argues that Respondent cannot prove unpreventable supervisory misconduct because Mr. Andrade's failure to complete a JHA on the day of the accident, and the resulting violation and accident were foreseeable. (Sec'y Br. at 27). Further, the Secretary argues that Respondent did not adequately communicate or enforce its work rules and safety programs. (Sec'y Br. at 27-28).

Respondent argues that all of the elements of the defense are established, as it maintained adequate work rules, adequately trained employees on the work rules, had effective means of discovering violations of the work rules, and had effective enforcement of those rules. (Resp't Br. at 20-30).

i. Work Rules

The record reveals that Respondent had a good safety program that was effectively communicated to its employees that specifically required the use of fall protection for employees working at or above heights of six feet. (Ex. J-2). Work rules are included in various safety policies distributed and available to employees, such as Respondent's: (1) Safety Handbook; (2) Employee Handbook; (3) Workplace Accident and Injury Reduction Act ("AWAIR") Program; (4) Risk and Hazard Assessment Program; and (5) Safety Manual. (Exs. J-2, J-13, J-14, J-15, R-8). Many of Respondent's toolbox talks, employee orientation tests, and other handouts also provide the framework for Respondent's safety and policy objectives. (*See* Exs. R-1; R-17).

An employer's work rule must be clear enough to eliminate employee exposure to the hazard covered by the standard, and thus it "must be 'designed to prevent the cited violation.'" *Beta Construction*, 16 O.S.H. Cas. (BNA) 1435 (O.S.H.R.C.), 1993 O.S.H.D. (CCH) P 30239, 1993 WL 406468 at *10 (O.S.H.R.C. 1993). "Generally speaking, the work rule must be sufficiently precise to implement the requirements of the standard or be functionally equivalent to it." *Id*. Here, Respondent's Safety Handbook includes specific fall protection rules. (Ex. J-2). Respondent's Handbook instructs employees that fall protection is required "as a minimum… [w]hen working higher than six feet up on a platform or other support." (Ex. J-2 at 59). Respondent's employees are instructed on the need to wear fall protection "[w]hen working adjacent to an unguarded floor opening… Floor openings should be covered or barricaded and marked." (Ex. J-2 at 59). Additionally, Respondent's Safety Manual specifically includes fall protection guidance and safety concerns when working around unprotected sides and edges. (Ex. J-13 at 6362-6370). Further, the Safety Manual's Fall Protection Program requires employees to

use guardrails and barricade warning tape, along with fall protection, while working near unprotected sides and edges. *Id*.

This Court finds that Respondent had adequate work rules which specifically address and are intended to prevent the violation in this case.

ii. Communication

Respondent communicated its rules concerning fall protection to its employees in various ways. Respondent's orientation video, which is shown to all employees, discusses fall protection and Respondent's corresponding work rules. (Tr. 156-157, 715-716; Ex. J-3). Not only is fall protection gear explained to employees through video, but Respondent specifically provides employees with fall protection equipment and training itself. (Tr. 168-169, 716-720; Ex. J-3). Respondent's employees all receive a Safety Handbook, which includes fall protection guidance, and have access to the Safety Manual's fall protection program. (Tr. 147-148, 165-166, 742; Ex. J-13 at 6369-6370). Further, Respondent's employees regularly receive additional fall protection training through toolbox chats, OSHA 10, and OSHA 30 trainings. (Exs. J-12, R-7, R-8 at 6184). Respondent specifically conducted thirty toolbox chats, in the year prior to the incident, where they informed employees on fall protection alone. (Tr. 722-723; Ex. R-17).

Here, the record shows that Mr. Andrade and the victim were well aware of Respondent's work rules concerning fall protection and unprotected edges. When both employees were hired, they reviewed the safety manual, employee handbook, safety orientation class, and successfully passed the safety test. (Tr. 164-167, 333-338; Exs. J-2, J-3, J-11 J-13, J-14, R-1). Additionally, Mr. Andrade would not only attend many toolbox talks, but would lead them as well. (Tr. 385-387; Ex. R-7). Further, Mr. Alexander provided the victim with hands-on training, which included direction to tie off any time he would be working 6 feet above the ground or away from a leading

edge. (Tr. 164-170; Ex. J-10). Fall protection guidance had actually been communicated to the victim just a few days before the incident. (Tr. 176-178; Ex. J-12).

As a foreman, Mr. Andrade was also trained on Respondent's requirement to complete JHAs at the beginning of jobs, which included inspecting worksites for potential hazards. (Tr. 383-384). The JHA process specifically references identifying and abating potential fall hazards. (Tr. 720-721; Ex. J-15 at 86-87).

This Court finds Respondent's work rules were effectively communicated to employees.

iii. Reasonable Steps to Discover Violations

The record shows that Respondent took reasonable steps to discover violations. Respondent employs 6 safety coordinators who conducted jobsite audits, with each coordinator auditing 5 to 8 jobsites per week. (Tr. 464-465, 699-701). The coordinators' duties included reviewing JHAs weekly to ensure accuracy and completeness. (Tr. 129-134; Ex. R-5). Additionally, superintendents, like Mr. Alexander, would visit jobsites at least once per week for safety audits. (Tr. 150-151, 154-155). During these visits, Mr. Alexander would ensure supervisors completed their JHAs before starting work and would take remedial action if they were not complete. (Tr. 159-160, 459-460; Ex. J-14 at 6194-6195). Lastly, Respondent encouraged and incentivized employees to identify safety violations through its "good catch" program. (Tr. 707-708).

iv. Enforcement

Respondent took reasonable steps to enforce violations of its work rules. In the year before the accident, the company issued 23 disciplinary write-ups for violations of the fall protection rules and 11 disciplinary write-ups for failure to complete or turn in JHAs. (Tr. 755–777; Ex. J-28). Respondent also terminated two employees for repeated failure to practice proper

fall protection protocol. (Ex. J-28 at 253, 303). Between 2017 and the date of the accident, Respondent issued 77 disciplinary citations related to fall protection, 17 related to JHA failures, and over 800 disciplinary write-ups all together. (Tr. 756; Ex. J-28).

Respondent has met its proof burden regarding this affirmative defense. Mr. Andrade's actions and failure to complete a JHA before commencing work at the worksite were counter to the work rules Respondent consistently communicated and enforced to its employees. (Tr. 382-384, 400-401, 548; Ex. J-21 at 340-341). Respondent disciplined Mr. Andrade for his violation and ultimately let him go. (Tr. 409; Ex. R-13).

The Court finds the Secretary failed to establish his *prima facie* case and that Respondent has met its burden of proof regarding the affirmative defense of unpreventable employee misconduct.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1, and as amended in the alternative, is VACATED, and no penalty is assessed.

SO ORDERED.

/s/ Christopher D. Helms

Dated: January 24, 2022
Denver, Colorado

Christopher D. Helms
Judge, OSHRC