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. SOUTHERN PAN SERVICES CO., Respondent.	OSHRC Docket No. 08-0866

ON BRIEFS:

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For the Complainant

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For the Respondent

DECISION AND REMAND

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

Southern Pan Services Company, a concrete formwork contractor, installed the shoring and formwork for a six-story concrete parking structure, which was part of a project known as Berkman Plaza II, in Jacksonville, Florida. On December 6, 2007, part of the structure collapsed during a concrete pour, fatally injuring one Southern Pan employee and seriously injuring another Southern Pan employee along with more than twenty other workers involved in the project. After conducting an inspection of the worksite, the Occupational Safety and Health Administration issued Southern Pan two citations—a two-item serious citation and a two-item willful citation—alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. OSHA proposed a total penalty of $125,000. Following a hearing, former

Administrative Law Judge Ken S. Welsch issued a decision in which he vacated both of the serious citation items, and vacated one item and affirmed the other item of the willful citation, for which he assessed a penalty of $40,000.[1]

Only the two willful citation items are at issue on review. The Secretary challenges the judge's decision to vacate Willful Citation 2, Item 1, which alleges a violation of 29 C.F.R. § 1926.701(a) (placement of construction loads), and Southern Pan challenges his decision to affirm Willful Citation 2, Item 2, which alleges a violation of 29 C.F.R. § 1926.703(a)(2) (availability of formwork plans at jobsite). For the following reasons, we set aside the judge's decision in full as to Item 1 and in part as to Item 2, and remand the case to the Chief Judge for reassignment and further proceedings.

BACKGROUND

In January 2006, construction of a new six-story parking garage and adjacent condominium tower began at the Berkman worksite. The project owner, Berkman Plaza II, LLC, hired architecture firm Pucciano and English, Incorporated and general contractor Choate Construction Company to oversee the project. Pucciano and English employed the project's Engineer of Record, who prepared "signed and sealed" structural drawings for the project.[2] Choate hired various subcontractors, including A.A. Pittman and Sons, a concrete finishing company, and Southern Pan. Southern Pan was contractually responsible for: (1) obtaining shoring and reshoring[3] drawings for both the garage and tower; (2) building the formwork; and (3) placing concrete for some of the vertical pours, but not the horizontal pours. It is undisputed that placing the concrete for the horizontal pours—including the pour that resulted in the collapse—was Pittman's responsibility.

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[1] Judge Welsch has since retired from the Review Commission.

[2] Drawings are signed and sealed (or stamped) by an engineer after the engineer has reviewed them and determined they are adequate.

[3] A "shore" is defined by OSHA regulations as "a supporting member that resists a compressive force imposed by a load." 29 C.F.R. § 1926.700(b)(7). It is placed on the level immediately below that which is currently being built and is used to support the formwork before and during the concrete pour. "Reshoring" is defined as "the construction operation in which shoring equipment (also called reshores or reshoring equipment) is placed, as the original forms and shores are removed, in order to support partially cured concrete and construction loads." 29 C.F.R. § 1926.700(b)(6). It is placed on the completed levels below and does not support the structure, but carries the load of the wet concrete placed above.

Southern Pan hired Patent Engineering to provide the signed and sealed drawings for the shoring and reshoring that were available at the worksite. Patent's plans show that the formwork, which would hold the poured concrete for the garage, was to be supported by shoring and reshoring that extended all the way down to the ground. Once installed, the shoring and reshoring, as well as the formwork, were subject to two levels of scrutiny. Universal Engineering Sciences was hired by Southern Pan to inspect the shoring and reshoring to determine whether these components were correctly constructed according to Patent's drawings. Synergy Structural Engineering was hired by Berkman to serve as the project's threshold inspector and was required to provide periodic inspections at different stages of the construction process to ensure that: (1) the construction of all load-bearing components complied with the permit documents; and (2) the shoring and reshoring conformed to the shoring and reshoring plans.

Even though Patent's plans showed that shoring or reshoring was to extend down to the ground until the end of the construction phase, Southern Pan removed reshoring from the first, second, and third levels of the garage over three different days in October and November of 2007, well before the end of construction, but it neither made nor requested changes to Patent's drawings to reflect the removal. James Smith, Southern Pan's superintendent for the project, testified that the reshoring was removed because he believed that Timothy Postma, Southern Pan's senior project manager, wanted to switch the shoring method, which instead of shoring to the ground, would shore the top level and reshore only the two levels immediately below it (known as the "one-over-two method").[4] On November 7 and 20, 2007, Choate and Pittman placed two concrete pours in the garage without incident. However, during the next pour (known as 6A) on December 6, 2007, the garage collapsed.

DISCUSSION

Before turning to the two citation items at issue on review, we first address Southern Pan's claim that certain material redacted by the Secretary in a document provided to the

[4] Smith admitted at the hearing that it became apparent later that the switch to the one-over-two method was based on a misunderstanding between him and Postma. Postma had told Smith to rotate the "material," and Smith assumed that meant he should switch to what "we always did at one over two, one shoring over reshoring . . . ." Smith later learned that Postma had intended for him "to rotate his aluminum and plywood," but not to remove any reshoring. Postma testified that he had always intended the garage to be shored to the ground.

company during discovery was not, as alleged by the Secretary, protected by the deliberative process privilege and should have been produced in discovery.

I. Deliberative Process Privilege

In May 2008, a structural engineer in OSHA's National Directorate of Construction Office prepared a report ("Report") for OSHA regarding the garage collapse at the Berkman worksite. In response to Southern Pan's discovery request for OSHA's entire investigative file, the Secretary produced the Report with portions of the text redacted. The Secretary claimed that the redacted material was protected by the deliberative process privilege. Southern Pan filed a Motion to Compel seeking, among other things, the disclosure of portions of the redacted material. After conducting an *in camera* review of the Report, the judge issued an order denying Southern Pan's motion. He upheld the claim of privilege as asserted in a Declaration submitted by OSHA's Deputy Assistant Secretary and found that Southern Pan had not established a need for the redacted material sufficient to overcome the privilege. The judge also stated that "there is nothing in this [R]eport or in these conclusions . . . that I would use to form any basis for my decision." Therefore, he admitted the unredacted portions of the Report into evidence but sealed the redacted portions as confidential.

On review, Southern Pan contests the judge's ruling, raising various challenges to the Secretary's assertion of the deliberative process privilege. However, we agree with the judge that the Secretary properly invoked the privilege in withholding the redacted information in the Report. It is well-settled that the deliberative process privilege "allows the government to withhold documents and other materials that would reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' " *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citation omitted). The purpose of the privilege " 'is to prevent injury to the quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private." *Id.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)). In deciding whether material is protected under the deliberative process privilege, courts consider whether the material is "predecisional" and whether it is "deliberative." *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998). We find that the report is both predecisional and deliberative.

The material here is predecisional as it preceded the Secretary's decision to cite Southern Pan. In addition, the material is deliberative, because it does not consist of mere factual

conclusions, as Southern Pan contends, but rather contains communications that are "part of the agency give-and-take by which the decision itself [was] made." *Id.* It contains the OSHA engineer's personal opinions of how certain employers performed their contractual duties, as well as his conclusions about what caused the garage collapse. *Fed. Trade Comm'n v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (finding district court erred in ordering disclosure of agency memoranda that was predecisional and contained analyses and recommendations at "the heart of the deliberative and policymaking process"). The OSHA engineer provided the information at the request of OSHA's Region IV Administrator to assist its Jacksonville Area Office in determining whether to issue citations in this case. *See Stone & Webster Constr. Inc.*, 23 BNA OSHC 1939, 1942, 2009-12 CCH OSHD ¶ 33,222, p. 55,980 (No. 10-0130, 2012) (consolidated) ("predecisional materials pertaining to the government's decision to cite, *or not to cite*, an employer for a particular alleged violation are within the scope of the [deliberative process] privilege"). Accordingly, the Secretary had a substantial legal basis for applying the privilege. *See Donald Braasch Constr., Inc.*, 17 BNA OSHC 2082, 2086, 1995-97 CCH OSHD ¶ 31,259, p. 43,868 (No. 94-2615, 1997) (finding dismissal unwarranted where Secretary had a substantial legal basis for failing to disclose and there was no evidence of contumacy).

Contary to Southern Pan's argument, the Secretary did not waive the privilege. The Secretary timely filed a Declaration, objecting to production of the redacted material, just a few weeks after receiving Southern Pan's Motion to Compel, which was the first time Southern Pan requested production of the redacted portions of the Report. *See In re Sealed Case*, 121 F.3d at 741 (stating that a party has no obligation "to formally invoke its privileges in advance of the motion to compel"). In addition, the judge correctly found that the information had no bearing on whether the company was in compliance with the cited standards.[5] *Cf. Frazee Constr. Co.*, 1

[5] Given this finding, we note that even if the judge had erred in allowing the Secretary to redact this information under the deliberative process privilege any such error would have been harmless. *See Woolston Constr. Co.*, 15 BNA OSHC 1114, 1122, 1991-93 CCH OSHD ¶ 29,394, p. 39,573 (No. 88-1877, 1991) (finding harmless any error the judge may have made in not granting stay because willful character of violation largely established by undisputed facts), *aff'd without published opinion*, No. 91-1413, 1992 WL 117669 (D.C. Cir. May 22, 1992); *Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1658, 1981 CCH OSHD ¶ 25,359, p. 31,505 (No. 13401, 1981) ("The judge's error in not allowing P & W to examine withheld material was . . .

BNA OSHC 1270, 1274, 1973-74 CCH OSHD ¶ 16,408, pp. 21,301-02 (No. 1343, 1973) (agency's exculpatory information must be disclosed absent proof of privilege).

For all of these reasons, we affirm the judge's conclusion that the redacted material was protected under the deliberative process privilege. We turn now to the individual citation items.

II. Willful Citation 2, Item 1 – 29 C.F.R. § 1926.701(a) (construction loads)

Under this item, the Secretary alleges that Southern Pan failed to determine "based on information received from a person qualified in structural design" that the garage at the Berkman worksite was capable of supporting the load imposed by pour 6A. The cited standard states that "[n]o construction loads shall be placed on a concrete structure or portion of a concrete structure unless the employer determines, based on information received from a person who is qualified in structural design, that the structure or portion of the structure is capable of supporting the loads." 29 C.F.R. § 1926.701(a).

The judge vacated this item, finding that based on the plain language of the cited standard and the preamble to the final rule, the requirements of the standard apply only to "the employers directly responsible for the concrete operation"—in this case Choate, the general contractor, and Pittman, the concrete finishing subcontractor. He rejected the Secretary's claim that a clause in the subcontract between Choate and Southern Pan made Southern Pan contractually responsible for placing the concrete load on the structure because he found that nothing in the clause shifted "responsibility for the concrete operations to the formwork subcontractor." Thus, he concluded that the cited standard did not apply.

Under Commission precedent, however, the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer. *See, e.g. Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064, 2014 CCH OSHD ¶ 33,412, p. 57,383 (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, 2004-08 CCH OSHD ¶ 32,958, p. 53,924 (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, 2004-09 CCH OSHD ¶ 32,802, pp. 52,486-7 (No. 00-0482, 2005) (finding "that the confined

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harmless, because P & W could not have made any meaningful use out of the withheld material.").

space standard applies to the cited conditions" because "the vault was a confined space"); *Arcon, Inc.*, 20 BNA OSHC 1760, 1763, 2002-04 CCH OSHD ¶ 32,728, p. 51,896 (No. 99-1707, 2004) ("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions."). Since the Berkman project involved the placement of a load on the garage's concrete structure, § 1926.701(a) clearly applies to the cited conditions. Thus, contrary to our dissenting colleague's contention, the issue before us has nothing to do with whether the cited standard is applicable. That element of the Secretary's burden has been established. What remains at issue is determining the nature of Southern Pan's *compliance* obligations under the cited provision given the circumstances of this case.

We agree with the Secretary's contention on review that this question is answered by long-standing Commission precedent holding that an employer whose own employees are exposed to a hazard or violative condition—an "exposing employer"—has a statutory duty to comply with a particular standard even where it did not create or control the hazard. *See Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198-99, 1975-76 CCH OSHD ¶ 20,690, p. 24,784 (No. 3694, 1976) (consolidated) (holding that the exposure of a subcontractor's "employees to a condition that the employer knows or should have known to be hazardous, in light of the authority or 'control' it retains over *its own* employees, gives rise to a duty under section 5(a)(2) of the Act . . . ."). Here, the evidence unequivocally establishes that Southern Pan was an exposing employer. Two Southern Pan employees were on the fifth floor of the garage during the 6A pour observing the formwork to ensure it was compliant and stable. *See Jackson Constr. Co.*, 5 BNA OSHC 1608, 1610, 1977-78 CCH OSHD ¶ 21,981, p. 26,491 (No. 13843, 1977) (finding that carpenters working on the floor below the pour "had access to the zone of danger created by the violation") (citation omitted). Therefore, both employees, one of whom died as a result of injuries sustained in the garage collapse, were exposed to the violative condition. And as an exposing employer, Southern Pan was required to "do what [was] 'realistic' under the circumstances to protect its employees from the hazard to which a particular standard is addressed, even though literal compliance with the standard may [have been] unrealistic." *Anning-Johnson Co.*, 4 BNA OSHC at 1199, 1975-76 CCH OSHD at p. 24,784 (footnote omitted); *see also Capform, Inc.*, 16 BNA OSHC 2040, 2042, 1993-95 CCH OSHD ¶ 30,589, p. 42,356 (No. 91-1613, 1994) (addressing "multi-employer worksite defense" and finding exposing employer responsible for violation it did not create or control because it failed to take

"reasonable alternative steps to protect its employees"); *Capform Inc*., 13 BNA OSHC 2219, 2222, 1987-90 CCH OSHD ¶ 28,503, p. 37,776 (No. 84-0556, 1989) (rejecting employer's asserted multi-employer worksite defense and noting that "[t]he . . . defense does not alter the general rule that each employer is responsible for the safety of its own employees.") (citation omitted), *aff'd per curiam*, 901 F.2d 1112 (5th Cir. 1990) (unpublished); Mark A. Rothstein, Occupational Safety and Health Law (2014 ed., § 7:7) ("Although still maintaining that a noncontrolling employer is in violation when its employees are exposed to hazards," the Commission created the multi-employer worksite defense, holding that an exposing "employer is not in violation if it did not and could not with the exercise of reasonable diligence know of the hazard" and permitting "an employer to escape liability by taking realistic abatement measures, even though [they] may fall short of literal compliance with applicable standards.").

This has been Commission precedent for nearly forty years, but our dissenting colleague chooses to ignore these fundamental principles and, instead, poses what she apparently believes is something of a conundrum—asking how Southern Pan could violate the cited standard when, as even the Secretary concedes, only Choate and Pittman were obligated to make the determination the standard requires. The Commission clearly answered this long ago:

> [E]ach employer has primary responsibility for the safety of its own employees. Simply because a subcontractor cannot himself abate a violative condition does not mean it is powerless to protect its employees. It can, for example, attempt to have the general contractor correct the condition, attempt to persuade the employer responsible for the condition to correct it, instruct its employees to avoid the area where the hazard exists if this alternative is practical, or in some instances provide an alternative means of protection against the hazard . . . . In the absence of such actions, we will still hold each employer responsible for all violative conditions to which its employees have access.

Grossman Steel & Alum. Corp., 4 BNA OSHC 1185, 1189, 1975-76 CCH OSHD ¶ 20,691, p. 24,791 (No. 12775, 1975) (footnote omitted); *see Associated Underwater Servs.*, 24 BNA OSHC 1248, 1251, 2012 CCH OSHD ¶ 33,198, p. 55,750 (No. 07-1851, 2012) ("Commission precedent require[s] an employer to detect and assess the hazards to which its employees may be exposed, even those it did not create.") (citation omitted); *D. Harris Masonry Contracting, Inc. v. Dole*, 876 F.2d 343 (3d Cir. 1989); *DeTrae Enters., Inc. v. Sec'y of Labor and OSHRC*, 645 F.2d 103 (2d Cir. 1981); *Bratton v. OSHRC*, 590 F.2d 273 (8th Cir. 1979); *Cent. of Ga. R. Co. v.*

OSHRC, 576 F.2d 620 (5th Cir. 1978).[6] In short, an employer's compliance duty under the Act is undeniable when its own employees are exposed. OSH Act § 5(a)(2), 29 U.S.C. § 654(a)(2) ("Each employer . . . shall comply with occupational safety and health standards promulgated under this Act."). The only question is what measures the employer can reasonably take to protect its employees, and such measures must be identified by the Secretary to satisfy his burden of proving noncompliance.

Our dissenting colleague makes a number of seemingly plausible arguments but they are all variations of her flawed premise—that this case is about applicability rather than compliance. Her position further suggests a fundamental disagreement with our multi-employer precedent, but that precedent is well-settled and firmly grounded in the statute.[7] Because Southern Pan exposed its employees to a hazard, it is of no moment that Southern Pan was unable to abate the violation itself or, as was the case here, that another employer might be charged with abating the

[6] Accordingly, as these cases make clear, our dissenting colleague's claim that Southern Pan lacked notice of its compliance obligation to its own employees is without merit. Moreover, one of the measures the Secretary claims Southern Pan should have taken to protect its employees—"obtain the necessary information from a shoring engineer and provide it to Choate and Pittman"—is an obligation that was expressly set forth in Southern Pan's contract with Choate. Thus, Southern Pan clearly had notice of its obligation.

[7] Our colleague points to a dissent to the Commission's decision in *Southeast Contractors, Inc.*, 1 BNA OSHC 1713, 1716, 1973-74 CCH OSHD ¶ 17,787, p. 22,149 (No. 1445, 1974), *rev'd*, 512 F.2d 675 (5th Cir. 1975), and the per curiam decision by the Fifth Circuit adopting the dissent's reasoning, claiming that we have chosen to ignore this forty-year precedent. We disagree. First, *Southeast Contractors* is inapposite, as its focus was the existence of an employer-employee relationship not, as is the case here, exposing employer liability under the multi-employer worksite doctrine. Moreover, whatever view the dissenting commissioner expressed in that case, it is by no means precedent. Commission precedent is not found in any commissioner's dissenting opinion, nor does it reside in a per curiam decision by a Court of Appeals that found favor with it. Our precedent is found in Commission decisions in which a majority of commissioners have adopted a rule of law. *See e.g. Summit Contractors, Inc.*, 23 BNA OSHC 1196, 2009-12 CCH OSHD ¶ 33,079 (No. 05-0839, 2010), *aff'd per curiam* 442 Fed App'x 570 (D.C. Cir. 2011) (unpublished); *Grossman Steel & Alum. Corp.*, 4 BNA OSHC at 1189, 1975-76 CCH OSHD at p. 24,791. And although this case arises in the Eleventh Circuit, as the Berkman worksite was located in Florida and Southern Pan's corporate headquarters are in Georgia, the Commission has specifically held that the Fifth Circuit case relied on by our colleague does not "preclude us from following Commission precedent" regarding the multi-employer worksite doctrine in cases arising in the Eleventh Circuit. *See McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1110-12 & nn.9-12, 2000 CCH OSHD ¶ 32,204, p. 48,780-81 & nn.9-12 (No. 97-1918, 2000).

condition. Gregory N. Dale & P. Matthew Shudtz, eds., Occupational Safety and Health Law (3d ed. 2013, Ch. 3.III) ("OSHA must show that a condition that violates a standard existed. This element does not require proof that the cited employer *itself* violated the standard, i.e., that the cited employer created the violative condition; OSHA need prove only that a violative condition existed, regardless of who or what caused it."). An employer in Southern Pan's position still has an obligation to make reasonable efforts to protect its employees from a hazard. And contrary to our dissenting colleague's claim, the Secretary has done nothing to upset an exposing employer's responsibility to its own employees when, in the preamble to the cited provision, he explained that the concrete operator rather than an engineer-architect is responsible for the standard's construction-load placement determination. Indeed, the concrete operator places the load and bears responsibility for employee safety; it is unquestionably a "creating employer." The Secretary, however, did not state that the concrete operator's responsibility for employee safety belonged to it alone, nor did the Secretary relieve an exposing employer of its obligation to protect its own employees.

Thus, the issue for consideration is whether, under applicable precedent, Southern Pan made reasonable efforts to protect the two employees exposed to the violative condition. *E.g.*, *Associated Underwater*, 24 BNA OSHC at 1251, 2012 CCH OSHD at p. 55,750. Because the judge never addressed the Secretary's contention that Southern Pan violated the cited provision as an exposing employer, he did not resolve the issue of Southern Pan's compliance obligations under the standard.[8] Accordingly, we remand this case for a determination of whether the

[8] The Secretary contends on review that compliance with the cited provision required Southern Pan to take the following measures:

> (1) obtain the necessary information from a shoring engineer and provide it to Choate and Pittman, and (2) verify before the pour that Pittman or Choate had determined that the structure could support the wet concrete load, on the basis of information from Southern Pan's shoring engineer or from another qualified source if Southern Pan was unable or unwilling to meet its contractual obligation to provide these contractors with the necessary information from its shoring engineer.

Cf. David Weekley Homes, 19 BNA OSHC 1116, 1119, 2000 CCH OSHD ¶ 32,203, p. 48,775 (No. 96-0898, 2000) (vacating citation issued to general contractor on multi-employer worksite where Secretary "failed to define what would have constituted compliance for [cited employer] under the circumstances and how [its] conduct was deficient").

Secretary has established that Southern Pan failed to take reasonable measures to comply with the standard as an exposing employer.

On remand, if it is determined that Southern Pan failed to comply with § 1926.701(a), the judge should also determine whether the Secretary has established that Southern Pan knew or should have known of the conditions giving rise to the violation. *Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC 1072, 1073, 2004-09 CCH OSHD ¶ 32,943, p. 53,787 (No. 06-0792, 2007) (stating that the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation). In the event the Secretary bases his case for knowledge on the imputation of superintendent Smith's knowledge of his own misconduct, i.e. his failure to take steps to obtain and provide the required information, we direct the judge to determine on remand whether this case falls within the scope of the Eleventh Circuit's recent decision in *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304 (11th Cir. 2013). In *ComTran*, the court held that "the Secretary does not carry [his] burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct." 722 F.3d at 1316. "Rather, 'employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor.' " *Id.* (quoting *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604, 609 n.8 (5th Cir. 2006)). Depending on the resolution of this issue, the judge may allow both parties to "further develop[]" the record with evidence related to the foreseeability of Smith's unsafe conduct. *See ComTran Grp., Inc.*, 722 F.3d at 1318. If knowledge is established and the violation affirmed, the judge must then address whether the violation was properly characterized as willful by the Secretary and determine an appropriate penalty.

III. Willful Citation 2, Item 2 – 29 C.F.R. § 1926.703(a)(2) (formwork drawings)

Under this item, the Secretary alleges that Southern Pan failed to "obtain a reshoring drawing, including all revisions, for the reshoring design method of using two levels of reshores, exposing employees to a structural collapse hazard." Section 1926.703(a)(2) provides that "[d]rawings or plans, including all revisions, for the jack layout, formwork (including shoring equipment), working decks, and scaffolds, shall be available at the jobsite." The judge affirmed the violation, finding that Southern Pan removed shoring and reshoring from the garage without

having a revised plan available on site that allowed for such removal. We find that the Secretary established Southern Pan's noncompliance with the cited provision, but direct the judge on remand to determine if the issue of knowledge as presented by this item is affected by the court's decision in *ComTran*. First, however, we address Southern Pan's threshold arguments relating to preemption.

Preemption

Southern Pan contends that the Secretary cannot cite it under § 1926.703(a)(2) for its alleged failure to have on-site plans allowing for shoring *removal* because, it claims, that provision governs shoring *installation*; § 1926.703(e), by contrast, specifically governs shoring removal and does not require an employer to obtain drawings before removing formwork.[9] In response, the Secretary maintains that there is nothing in the cited provision that limits its requirements to installation and, therefore, "the two provisions impose different, concurrent requirements to address different conditions."[10]

[9] Section 1926.703(e) provides:

> (1) Forms and shores (except those used for slabs on grade and slip forms) shall not be removed until the employer determines that the concrete has gained sufficient strength to support its weight and superimposed loads. Such determination shall be based on compliance with one of the following:
>
> (i) The plans and specifications stipulate conditions for removal of forms and shores, and such conditions have been followed, or
>
> (ii) The concrete has been properly tested with an appropriate ASTM standard test method designed to indicate the concrete compressive strength, and the test results indicate that the concrete has gained sufficient strength to support its weight and superimposed loads.
>
> (2) Reshoring shall not be removed until the concrete being supported has attained adequate strength to support its weight and all loads in place upon it.

29 C.F.R. § 1926.703(e).

[10] The Secretary urges the Commission to decline consideration of Southern Pan's preemption argument because it was not raised before the judge or in Southern Pan's petition for review. We disagree and find that the preemption argument is properly before us, as the Commission has jurisdiction over all issues in a pending case and both parties have briefed the issue on review. *See Westvaco Corp.*, 16 BNA OSHC 1374, 1380 n.14, 1993 CCH OSHD ¶ 30,201, p. 41,570-71 n.14 (No. 90-1341, 1993) (addressing infeasibility because both parties briefed the issue, even though employer did not initially raise it in its answer). However, as discussed below, we also conclude that Southern Pan's preemption argument fails on its merits.

We find that the text and structure of § 1926.703 support the Secretary's position. Subsection (a) provides general requirements for formwork—including a requirement that all drawings for all formwork "shall be available at the jobsite"—and subsections (b), (c), (d), and (e) impose other specific obligations concerning the formwork. *See Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502, 1993-95 CCH OSHD ¶ 30,294, p. 41,732 (89-1555, 1993) ("[T]he test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability is questioned."). The specific obligation imposed by subsection (e) addresses the removal of formwork based either on compliance with plans or specifications that stipulate the conditions for the removal of forms and shores, or measurement of the concrete's compressive strength.

In this respect, the obligation under subsection (a) to have drawings available on the jobsite clearly extends to any drawings or plans an employer might develop to comply with subsection (e). As such, subsection (e) complements, but does not preempt, subsection (a). Indeed, the requirement under § 1926.703(a)(2) to have "[d]rawings or plans, including all revisions for the jack layout formwork . . . available at the jobsite" complements the requirement under § 1926.703(e)(1)(i) that one method of removing formwork is to follow those onsite "plans and specifications stipulat[ing] conditions for removal of forms and shores." *Cf. McNally Constr. & Tunneling Co.*, 16 BNA OSHC 1879, 1883, 1994 CCH OSHD ¶ 30,506, p. 42,170 (No. 90-2237, 1994) (basing its finding of preemption, in part, on a determination that "the two standards are not additive and complementary, but instead directly conflicting"), *aff'd*, 71 F.3d 208 (6th Cir. 1995). *See generally Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98-99 (1992) (instructing that "the provisions of the whole law" guide the determination as to whether the Act preempts a state regulation) (citations omitted). Further, subsection (b)(1)'s requirement that employers inspect all shoring equipment before installation to ensure the equipment meets the specifications in the formwork drawings is facilitated by subsection (a)(2)'s requirement to have all drawings and revisions on site. Accordingly, we conclude that the duties imposed by § 1926.703(a) are not preempted by those imposed by § 1926.703(e).

Compliance

Southern Pan next claims that it had all "available" plans on site and, in any event, it "fulfilled its responsibilities [under the standard] when . . . Synergy secured the approval of the [E]ngineer of [R]ecord . . . by e-mail" for the shoring and reshoring removal. We disagree with

both of these contentions. An employer's obligation to create a drawing or plan that accurately represents the existing formwork is clear from the language of § 1926.703(a)(2), which requires that the "[d]rawings or plans, includ[e] all revisions." Indeed, OSHA has recognized that this provision is intended to prevent accidents that could result from improperly erected formwork, and written plans enable this protective purpose to be met. Concrete and Masonry Construction Safety Standards, 53 Fed. Reg. 22,612, 22,624-26 (June 16, 1988) ("Without the drawings or plans immediately accessible at the job site, questions regarding the design and integrity of the forms or shoring layout cannot be properly addressed."). As the judge here correctly stated in his decision: "The requirement that all plans, including revisions, be present on site is not a mere technicality. Formwork is designed to transfer weight from the structure. Prematurely removing formwork without an engineer's revisions exposes employees to structural collapse. Without the correct plans on site, crucial information is missing." *See Major Constr. Corp*., 20 BNA OSHC 2109, 2110-11, 2004-09 CCH OSHD ¶ 32,860, p. 53,041 (No. 99-0943, 2005) (affirming violation of § 1926.703(a)(2) based on judge's finding that employer lacked formwork plans, which exposed employees to hazard of possible collapse), *aff'g in relevant part*, 2001 WL 392470, at *36 (OSHRC ALJ, Apr. 19, 2001) (judge's decision addressing § 1926.703(a)(2)).

Other subsections in § 1926.703 are written such that the duty to have drawings or plans "available at the worksite" contemplates that such plans—including any revisions—will be reduced to writing. As the Secretary points out, this duty to have revised plans that "exist" is clarified by § 1926.703(b)(1)'s requirement that an employer inspect the shoring equipment "to determine that the equipment meets the requirements specified in the formwork drawings." *See Custom Built Marine Constr. Co.*, 23 BNA OSHC 2237, 2239, 2013 CCH OSHD ¶ 33,258, p. 56,310-11 (No. 11-0977, 2012) (different provisions in a regulation should be read in context of regulation as a whole). While § 1926.703(e) creates certain exceptions to this requirement, there is no indication that any exception applies to the facts here.

To read the cited provision as Southern Pan urges would allow an employer to dispense with any revisions and simply rely on outdated drawings that do not reflect actual conditions at the jobsite. *See Unarco Commercial Prods.*, 16 BNA OSHC at 1502, 1993-95 CCH OSHD at p. 41,732 ("It is well established that . . . a standard must be construed so as to avoid an absurd result.") (citing *Griffith v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982)); *see also Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("[R]egulations are to

be read as a whole, with each part or section . . . construed in connection with every other part or section.") (internal quotation marks and citation omitted); *E. Smalis Painting Co*., 22 BNA OSHC 1553, 1580-81, 2009-12 CCH OSHD ¶ 33,303, p. 54,370-71 (No. 94-1979, 2009) (interpreting cited provision in context of entire standard and its overall purpose). Such a position is unreasonable and would render the standard meaningless.

Contrary to Southern Pan's claim, we do not find a lack of notice of the requirement to have revised plans on site. *See S. G. Loewendick & Sons Inc. v. Sec'y of Labor*, 70 F.3d 1291, 1297 (D.C. Cir. 1995) ("Congress and the courts require that agency action reflect clear, rational decisionmaking that gives regulated members of the public adequate notice of their obligations.") (citations omitted). Smith and Postma both testified that they recognized the obligation to have accurate plans available on site inasmuch as they knew not to deviate from the original plan before a revision was received. According to Postma, he told his superintendents all the time "that the plans had to be on site" and emphasized that the work always needed to be done "according to the drawings [because t]he drawings that are on site [are] the Bible of what you're going by." Smith testified that Southern Pan had contracted with Universal for one specific reason—to inspect Southern Pan's shoring and reshoring and make sure it complied with the drawings. Without written, accurate drawings on site, it would have been impossible for Universal to assess whether or not the formwork complied with the drawings. Both by the plain terms of the standard and Southern Pan's admission regarding its obligation, we find that Southern Pan had prior notice of what was required for compliance with the standard. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) (noting well-settled principle that a regulation should be construed to give effect to the natural and plain meaning of its words).

Equally unavailing is Southern Pan's argument that it complied with the standard. The parties stipulated that Patent provided the sole signed and sealed shoring and reshoring drawings for the garage that were available on site and that these drawings included a "typical reshore diagram that shows the garage to have shoring and/or reshoring to the ground." Contrary to the on site plans, Southern Pan removed the reshoring on October 22 and 26, several days before the Engineer of Record sent his e-mail to Synergy, so it is impossible that the e-mail could have led Southern Pan to believe it was in compliance with § 1926.703(a)(2) at that time. In fact, there is

no evidence that Southern Pan even knew of the e-mail's existence before the garage collapsed.[11] When Southern Pan removed reshoring from the garage, changing to the one-over-two method, the formwork was no longer consistent with Patent's on-site drawings; thus, it was not in compliance with § 1926.703(a)(2).[12]

Exposure and Knowledge

We turn now to the remaining elements of the Secretary's burden of proving a violation—that its employees had access or exposure to the violative condition and that Southern Pan either knew or could have known of the condition with the exercise of reasonable diligence. *See Astra Pharm Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p. 31,900 (No. 78-6247, 1981) *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Exposure has been established because Southern Pan's employees were removing reshoring without having revised drawings on site; therefore, they were exposed to the hazard of a possible structural collapse. Regarding knowledge, however, the Eleventh Circuit's decision in *ComTran* could affect the judge's finding of actual knowledge, which he based on superintendent Smith's admission that Southern Pan "did not have a revised plan on site" and acknowledgment that "OSHA required it [to] have one." In this regard, the judge appears to have imputed Smith's knowledge of his own failure to obtain the required revised plan. Thus, on remand, the judge should consider whether the knowledge issue as presented by this citation item is affected by *ComTran*, and depending on the judge's resolution of this issue, may allow both parties to "further develop[]" the record with evidence related to Southern Pan's foreseeability of Smith's misconduct. *See ComTran*, 722 F.3d at 1318. Accordingly, we conclude that Southern Pan failed to comply with 29 C.F.R. § 1926.703(a)(2), but we direct the judge on remand to reconsider whether the Secretary has established knowledge. If knowledge is established, the judge should reconsider whether the violation was properly characterized as willful and determine an appropriate penalty.

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[11] We also question whether the e-mail itself would be sufficient to satisfy the requirements of the cited provision. Synergy's inquiry seeking reassurance about the removal of shoring should have been directed to Patent, which was specifically responsible for the sealed drawings and, in any event, elicited only a vague single-word reply from the Engineer of Record – "[c]orrect" – that did not result in a revision of Patent's on-site drawings.

[12] Unlike the other willful citation item, Southern Pan's duty under this standard—to ensure that drawings "be available at the jobsite"—does not arise under a theory of multi-employer liability. Rather, the compliance obligation imposed by § 1926.703(a)(2) falls primarily on Southern Pan, because it was contractually responsible for obtaining those drawings.

ORDER

We vacate the judge's decision as to Item 1, and vacate his decision in part as to Item 2, and remand this case to the Chief Judge for reassignment and further proceedings consistent with this decision.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: December 18, 2014

MACDOUGALL, Commissioner, concurring in part and dissenting in part:

I join the majority's opinion with regard to its discussion of the deliberative process privilege and Citation 2, Item 2, which alleges a violation of 29 C.F.R. § 1926.703(a)(2) (availability of formwork plans at jobsite). However, it is clear to me that the judge's well-reasoned approach to Citation 2, Item 1 was correct on the merits, and he properly vacated this item, which alleges a violation of 29 C.F.R. § 1926.701(a) (placement of construction loads), because the standard is inapplicable to Southern Pan.[1] Accordingly, I dissent from the majority's opinion regarding this citation item.

As a preliminary determination, the Secretary's burden of proving a violation of a cited standard, *as always*, is whether *the standard applies to the cited condition*.[2] In other words, it must be possible for the cited employer, in this case Southern Pan, to violate the standard. Here, as the judge properly concluded, the plain language of the standard indicates that the only employers subject to the standard are those placing the construction loads. The preamble to the final rule clarifies that § 1926.701(a) applies to an employer "directly responsible for the concrete operations."[3] That employer is not Southern Pan.[4]

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[1] The judge found that, based on the plain language of the standard and the preamble to the final rule, the requirements of the standard apply only to "the employers directly responsible for the concrete operation"—in this case, the general contractor and the concrete finishing subcontractor.

[2] The Secretary has the burden of proving: (1) the applicability of the cited standard; (2) the employer's noncompliance with the standard's terms; (3) employee access or exposure to the violative conditions; and (4) the employer's actual or constructive knowledge of the violation (in other words, that the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions). *Ormet Corp.*, 14 BNA OSHC 2134, 2135, 1991-93 CCH OSHD ¶ 29,254, p. 39,199 (No. 85-0531, 1991). The Commission has found "no reason to alter the Secretary's burden of proof because the [alleged] violation arises at a common construction site." *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198, 1975-76 CCH OSHD ¶ 20,690, p.24,783 (No. 3694, 1976) (consolidated) (a case oft-cited in my colleagues' majority opinion).

[3] In 1988, OSHA revised its regulations concerning concrete formwork. The preamble to the final rule states:

> After carefully considering all the comments and testimony received, OSHA has decided to delete the requirement for the specified engineer-architect services. This decision is based on the comments and testimony received which indicates that engineer-architects frequently do not consider construction loads in the design, nor do they approve their placement on partially completed structures.

My colleagues do not disagree with my conclusion that Southern Pan is not directly responsible for concrete operations. Rather, the majority remands this case for a determination as to whether Southern Pan violated § 1926.701(a) as an "exposing employer" under the multi-employer worksite doctrine. However, the Secretary's multi-employer citation policy rests upon section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), which provides that an employer "shall comply with occupational safety and health standards promulgated under this [Act]." As Chairman Rogers noted in her concurring and dissenting opinion in *C.T. Taylor Co., Inc. and Espirit Constructors Inc.*, 20 BNA OSHC 1083, 1094, 2002-04 CCH OSHD ¶ 32,659, p. 51,347 (No. 94-3241, 2003) (consolidated), the multi-employer worksite doctrine "serves to allocate responsibility and liability among multiple corporate actors." What the majority opinion fails to acknowledge here is that in promulgating § 1926.701(a), the Secretary has already determined that in the multi-employer construction worksite the allocation of responsibility and liability under this specific standard is limited to those placing the construction load; specifically, "the person directly responsible for the concrete operations." Concrete and Masonry Construction Safety Standards, 53 Fed. Reg. 22,612, 22,617 (June 16, 1988) (preamble to final rule); *see Martin v. Am. Cyanamid Co.*, 5 F.3d 140, 145 (6th Cir. 1993) (holding preamble to regulation

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> However, OSHA believes that it is still important that someone be responsible for performing this service. Therefore, OSHA is requiring that the employer make the determination that the structure or portion of the structure is capable of supporting the construction loads. The employer must make this determination on the basis of information received from a person qualified in structural design. *This revision also places responsibility for employee safety with the person directly responsible for the concrete operations.*

Concrete and Masonry Construction Safety Standards, Final Rule, 53 Fed. Reg. 22,612, 22,617 (June 16, 1988) (preamble to final rule) (emphasis added). It is this emphasized language that is the focus of Southern Pan's argument that the Secretary has not proven that the cited standard applies.

[4] I would adopt the findings and conclusions of the judge in this regard. Even under an argument that Southern Pan has the burden to show that the cited standard did not apply to it as the concrete formwork contractor, *e.g.*, *C.J. Hughes Constr. Inc.*, 17 BNA OSHC 1753, 1756, 1995-97 CCH OSHD ¶ 31129, p. 43,476 (No. 93-3177, 1996) ("A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception."), I would find that Southern Pan has shown that it is excepted from the scope of the cited regulation. *See also United States v. First City Nat'l Bank of Houston*, 386 U.S. 361 (1967); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) (the party who claims the benefit of an exception has the burden of proving its entitlement thereto).

may be consulted in determining administrative construction and meaning of regulation); *Phelps Dodge Corp.*, 11 BNA OSHC 1441, 1444, 1983-84 CCH OSHD ¶ 26,552, p. 33,920 (No. 80-3203, 1983) (stating standard's "preamble is the best and most authoritative statement of the Secretary's . . . intent"), *aff'd*, 725 F.2d 1237 (9th Cir. 1984). Extending liability to additional employers is thus contrary to the language of the standard. Additionally, as I discussed in my concurring opinion in *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064, 2014 CCH OSHD ¶ 33,412, p. 57,383 (No. 10-0551 2014), I do not believe that the Secretary's Multi-Employer Citation Policy[5] can be used as a tool to reach an employer otherwise excluded from the application of a standard. In viewing the facts, the plain language of the standard and its preamble, and the required elements of proof, I conclude that the Secretary cannot meet his burden of proving that the cited standard applies to Southern Pan.

My colleagues assert that my analysis expressed herein ignores forty years of Commission precedent and the "fundamental principle" that an employer always has an obligation to protect its own employees from a known hazard. The majority's reasoning misses the mark. This case is not about the indisputable proposition that an employer has a duty to protect employees under all applicable standards; rather, it is about the question of whether a specific standard applies in the first place. Further, in claiming there is forty years of Commission precedent in support of the majority's opinion, my colleagues fail to cite a single Commission case that holds an employer responsible, even as an "exposing employer," for violating a specific-duty standard that charges only certain, specifically identified employers with responsibility for the working conditions addressed by it. My colleagues depart from long-standing Commission precedent that it is the Secretary's burden to prove the standard applies to the cited condition (*see* footnote 2, *supra*); further, "there can be no violation of the Act by a respondent for failure to comply with a standard which charges some other employer with the duty of implementing the standard." *Se. Contractors, Inc.*, 1 BNA OSHC 1713, 1716, 1973-74 CCH OSHD ¶ 17,787, p. 22,149 (No. 1445, 1974) (dissent by Chairman Moran adopted on

[5] The multi-employer citation policy states that more than one employer can be cited on a multi-employer worksite: "On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition *that violates an OSHA standard*." OSHA Instruction CPL: CPL 2-0.124, *Multi-Employer Citation Policy* (Dec. 10, 1999) *reprinted in* 1999 Transfer Binder, CCH OSHD ¶ 13,924 at p. 25,031 (emphasis added). Again, even pursuant to its own terms, more than one employer may be cited but only if the standard applies.

appeal, 512 F.2d 675 (5th Cir. 1975) (per curiam)).[6] *See also Unarco Commercial Prods.*, 16 BNA OSHC at 1499, 1993-95 CCH OSHD at p. 41,729 (vacating citation based on the plain language of the standard, and stating that "the test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability is questioned") (citations omitted). Thus, I conclude that the judge correctly found that the cited standard is inapplicable to Southern Pan.

Given the plain language of the cited standard and the preamble to the final rule, which clearly contemplated *but then rejected* a broader application of the standard, I would find it fundamentally unfair to apply the cited standard to Southern Pan.[7] An employer lacking fair notice of a standard cannot be found in violation of the Act for failure to comply with that standard.[8] *E.g., S.G. Loewendick & Sons Inc. v. Sec'y of Labor*, 70 F.3d 1291, 1297 (D.C. Cir.

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[6] The Eleventh Circuit has held that Fifth Circuit decisions like *Southeast Contractors*, which were issued prior to October 1, 1981, are considered binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1209 (11th Cir. 1981). Consequently, the holding in *Southeast Contractors* should be applied here. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.") (*citing* 29 U.S.C. §§ 660(a) and (b)). While in *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1111, 2002-04 CCH OSHD ¶ 32,204, p. 48,781 (No. 97-1918, 2000), the Commission determined that there is no Eleventh Circuit precedent on the multi-employer citation policy, I do not believe that *McDevitt Street Bovis* and the Commission's recognition of the multi-employer doctrine undermine *Southeast Contractors'* holding that an employer cannot violate a standard that is inapplicable to it because its duty has been specifically charged to a different employer. Moreover, even if *Southeast Contractors* is not binding precedent, I find it persuasive authority. *See generally* Rule 36-2 of the Eleventh Circuit Rules of Procedure (though not binding precedent, an unpublished opinion is of persuasive authority); *see also Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (summary affirmances are of some precedential value).

[7] The majority opinion cites several cases for the proposition that the element of *applicability* requires the Secretary to show that the standard applies to the cited *conditions*, rather than the cited *employer*. Upon closer scrutiny, none of the majority's cited cases support such a ruling, and none involve a standard like the one here, which, by its plain terms, is limited to a specifically identified employer *other than* the respondent employer.

[8] My colleagues' analysis suggests that Southern Pan had notice of the standard's applicability because it had notice of its general compliance obligation to its own employees. Certainly there is no dispute that Southern Pan had obligations to its own employees under the OSH Act and *applicable* standards. However, this has no reasonable relationship to § 1926.701(a)'s plain words, which limit application of this particular standard to a different employer—the employer

1995) ("Congress and the courts require that agency action reflect clear, rational decision making that gives regulated members of the public adequate notice of their obligations."); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335-1339 (6th Cir. 1978); *Cardinal Indus.*, 14 BNA OSHC 1008, 1011, 1987-89 CCH OSHD ¶ 28,510, p. 37,801 (No. 82-427, 1989). To the extent that the Secretary's choice of language does not effectuate what the Secretary may have intended, the remedy lies in further rulemaking by the Secretary rather than the adoption by this Commission of an interpretation that is not supported by the standard and its preamble as promulgated. *See Diamond Roofing v. OSHRC*, 528 F.2d 645, 650 (5th Cir. 1976) (regulations cannot be construed to mean what an agency intended but did not adequately express).

For these reasons, I conclude that Citation 2, Item 1 was properly vacated.

/s/
Heather L. MacDougall
Commissioner

Dated: December 18, 2014

directly responsible for concrete operations. The majority's contrary construction cannot be expected to guide employers in their conduct. *Lisbon Contractors, Inc.*, 11 BNA OSHC 1971, 1974, 1984-85 CCH OSHD ¶ 26,924, p. 34,500 (No. 80-97, 1984) ("A construction of a standard that bears no reasonable relationship to the standard's plain words cannot be expected to guide employers in their conduct."). I fear that my colleagues' opinion today, which imposes a new requirement upon employers to comply with every OSHA standard, whether it is applicable to them or not, may in effect prove to be counterproductive to the purposes of the Act.

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

Secretary of Labor, Complainant, v. Southern Pan Services Co., Respondent.	OSHRC Docket No. **08-0866**

Appearances:

Dane Steffenson, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

J. Larry Stine, Esq., and Mark Waschak, Esq., Wimberly, Lawson, Steckel, Schneider & Stine, P. C., Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Southern Pan Company (SP) is a concrete formwork contractor. General contractor Choate Construction Company subcontracted SP to install the shoring and formwork for a new six-story garage and adjacent condominium tower, known as the Berkman Plaza II project, in Jacksonville, Florida. On December 6, 2007, the garage collapsed as subcontractor A. A. Pittman and Sons poured the concrete for the sixth level roof. More than 20 workers were seriously injured, and SP employee Willie Edwards was killed.

Occupational Safety and Health Administration (OSHA) compliance officer Henry Miller conducted an inspection of the worksite after the collapse. As a result of the inspection, the Secretary issued serious and willful citations to SP on June 2, 2008. SP timely contested the citations.

Item 1 of citation no. 1 alleges a serious violation of 29 C. F. R. § 1926.21(b)(2), for failing to instruct each employee in the recognition and avoidance of unsafe conditions. Item 2 of citation

no. 1 alleges a serious violation of 29 C. F. R. § 1926.703(b)(7), for subjecting shore heads and similar members to eccentric loading for which they had not been designed. The Secretary proposed a penalty of $ 2,500.00 for item 1 and $ 5,000.00 for item 2.

Item 1 of citation no. 2 alleges a willful violation of § 1926.701(a), for failing to determine, based on information received from a person who was qualified in structural design, that the structure or portion of the structure was capable of supporting the loads. Item 2 of citation no. 2 alleges a willful violation of 29 C. F. R. § 1926.703(a)(2) for failing to have drawings or plans available at the worksite. The Secretary proposed a penalty of $55,000.00 for item 1 and $ 70,000.00 for item 2.

The court held an eight day hearing in this matter, from May 18 to May 22, and from July 7 to July 9, 2009, in Jacksonville, Florida. The parties stipulated jurisdiction and coverage (Exh. J-A). Each party has filed a post-hearing brief.

SP denies the violations and contends the Secretary failed to present a *prima facie* case for each of the alleged violations. In its answer, SP asserted the affirmative defense of unpreventable employee misconduct. SP no longer asserts that defense (Exh. J-A, ¶ 23).

For the reasons discussed in this decision, the court vacates both items of citation no. 1, and item 1 of citation no. 2. The court affirms item 2 of citation no. 2, as willful, and assesses a penalty of $ 40,000.00.

Facts

The parties stipulated to a number of facts which are the primary source of the following facts, rearranged for narrative purposes (Exh. J-A):

SP's corporate headquarters are located in Lithonia, Georgia. Choate hired SP to install the shoring and formwork on the Berkman Plaza II project. The Berkman Plaza II project, located at 500 E. Bay Street in Jacksonville, Florida, consists of a 23-story condominium tower and a six-story parking garage. Both structures are constructed with poured-in-place (also referred to as "cast-in-place") concrete. Construction on the project began in January 2006.

SP began work on the project in March 2006. SP was responsible for obtaining shoring and reshoring drawings for both the garage and the tower, building the formwork, and placing the concrete for some of the vertical pours. SP was not responsible for placing the concrete for the

horizontal pours, which included Pour 6A (6th level, A section), the pour being made at the time of the collapse.

Various participants were involved in the development and construction of the Berkman Plaza II project. They include the following:

1. Berkman Plaza II, LLC

Berkman Plaza II, LLC (BPII), is the owner of the project. BPII hired the architect, Pucciano and English, and the general contractor, Choate. Under the Florida Building Code, BPII is responsible, as owner, for ensuring that structures pass threshold inspection before proceeding with safety-critical operations, as determined by state law (Exh. J-18).

2. Choate Construction Company

Choate is the general contractor on the project. Choate's project manage for the Berkman Plaza II project was Lawrence Gilbert. Choate hired the subcontractors, including SP, and the threshold inspector (Tr. 29).

3. Synergy Structural Engineering

Choate hired Synergy Structural Engineering to meet Florida's threshold inspection law. Synergy employed the threshold inspectors Eric Cannon and Tim Frazier (Tr. 94-95).

4. Pucciano and English

Pucciano and English is the architecture firm hired by BPII to create the design of the parking garage. Pucciano and English is responsible for the project manual and specifications, and for the general construction drawings. The firm hired the project's engineer, Soheil Rouhi (Tr. 35-36).

5. Soheil Rouhi

Soheil Rouhi is the engineer of record for the project. Rouhi prepared the structural drawings, and signed and sealed them. He drafted and/or approved the threshold inspection plan. Rouhi expected the threshold inspector to verify the inspected structure to comply with the approved plans and drawings, including the shoring and reshoring plans provided by Patent Engineering.

6. Patent Engineering

As the formwork contractor, SP hired Patent Engineering to provide its plans and drawings for shoring and reshoring on the project. Patent provided the only signed and sealed drawings for the shoring and/or reshoring. The drawings consisted of ten pages, eight of which were full-size and

the last two (pertaining to approval of replacing the aluminum beams with 4x4 wood beams) were on 8.5-inch by 11.5-inch sheets of paper. These drawings were available at the worksite. There were no other written plans or drawings pertaining to the shoring and/or reshoring for the garage. Patent's drawings included a typical reshore diagram that shows the garage to have shoring and/or reshoring to the ground.

7. Universal Engineering Sciences

SP hired Universal Engineering Sciences, a professional engineering firm, to inspect the shoring and reshoring to determine whether components were correctly constructed according to the plans prepared by Patent (Tr. 83).

8. A. A. Pittman and Sons

Choate hired A. A. Pittman and Sons, a concrete finishing company. Pittman and Choate were responsible for placing the horizontal pours, including Pour 6A. Pittman poured the concrete slabs in the garage at depths of 8 inches, 16 inches, and 20 inches (Exh. J-11). It poured slabs in the tower at depths of 8 or 9 inches (Tr. 371).

On October 22, 2007, SP, when placing shoring under the fifth level of the garage, began to remove some of the shoring and reshoring from the first level in the section where there were no 20-inch slabs. On October 26, 2007, SP removed some shoring and reshoring from the second level in the section where there were no 20-inch slabs. On November 19, 2007, SP started removing some of the shoring and reshoring between the ground and the third level (referred to as the "high bay area").

Pittman performed Pour 5A on November 7, 2007; Pour 5B on November 20; and Pour 6A on December 6. Pour 6A was for the sixth level roof of the garage. On December 6, at approximately 6:15 a.m., the parking garage from column line GA to column line GG (approximately 70% of the garage), collapsed to the ground ("pancaked") as the concrete was poured. SP employees Willie Edwards and Roland Hawkins were on the fifth level, below the pour, ready to clean off any excess concrete. The collapse killed Edwards[1] and seriously injured Hawkins and other contractor employees.

[1] By all accounts, Willie Edwards was a dependable, hard-working employee and a man devoted to his family. SP had recently given him a raise. SP superintendent James Smith stated, "Willie was the one man that would go with somebody else to make sure it got done, and we could rely on him to do that. He had become a very reliable employee" (Tr. 213). Hawkins testified Edwards was working the day of the collapse "so he could have a good Christmas for his children" (Tr. 625).

OSHA's assistant area director Jeff Romeo and a compliance officer arrived at the site the day of the collapse. At that time, and for the next several days (the body of Edwards was not recovered for three days), only rescue personnel were allowed in the garage area. Compliance officer Henry Miller arrived at the site the following Monday or Tuesday. He was accompanied by Mohamed Ayub, OSHA's director of engineering. Miller and Ayub observed the collapsed area from a manlift on the north side of the garage. They took photographs of the collapsed area. Miller also conducted interviews and obtained documents from SP (Tr. 772).

As a result of the OSHA inspection, the serious and willful citations were issued to SP on June 2, 2008.

Citation No. 1

The Secretary has the burden of proving the violation by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.,* the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of § 1926.21(b)(2)

The citation alleges SP "did not instruct the laborers on how to read the plans and drawings to recognize hazards when removing reshores from a concrete structure." Section 1926.21(b)(2) provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

SP stipulated that § 1926.21(b)(2) applies to the work SP was performing at the worksite (Exh. J-A, ¶ 13). SP also stipulated it "did not instruct the laborers on how to read the plans and drawings" (Exh. J-A, ¶ 26). SP contends that the concrete formwork industry does not recognize the duty to instruct laborers in how to read plans and drawings. SP also contends any violation for

failing to train Roland Hawkins is barred by the six-month statute of limitations for OSHA violations.

Section 1926.21(b)(2) requires an employer to "instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Pressure Concrete Constr. Co.,* 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992). "An employer's instructions are adequate under § 1926.21(b)(2) if they are specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *Model Continental Construction Co.,* 19 BNA OSHC 1760 (No. 00-1629, 2001).

Compliance officer Henry Miller testified he recommended the Secretary issue the citation based on his questioning of SP president Ken Dickey. Dickey told Miller he did not train SP laborers how to read plans and drawings. Miller did not research whether other formwork contractors train their employees in reading plans and drawings, and he did not know what the industry standard for training laborers in reading plans and drawings is (Tr. 953).

In determining the duty of a "reasonably prudent" employer,

> Reasonableness is an objective test which must be determined on the basis of evidence in the record. Industry standards and customs are not entirely determinative of reasonableness because there may be instances where a whole industry has been negligent . . . . However, such negligence on the part of a whole industry cannot be lightly presumed. *Diebold Inc. v. Marshall,* 585 F.2d 1327, 1336 (6th Cir. 1978). It must be proven.

Ray Evers Welding v. OSHRC, 625 F.2d 726, 732 (6th Cir. 1980).

Patrick Marchman, SP's safety director, testified it is not the construction industry's standard to teach laborers how to read plans and drawings (Tr. 1058). SP president Ken Dickey also stated it is not the industry standard (Tr. 1124).

Dr. Stanley Lindsey is a professor of environmental and civil engineering at Georgia Tech Savannah. He has a Ph.D. in Structural Engineering from Vanderbilt University (Exh. R-8). The court qualified Dr. Lindsey as an expert in structural engineering and cast-in-place concrete (Tr. 1222). Dr. Lindsey addressed the issue of training people in how to read plans and drawings:

> You know, at Tech, in order to familiarize a student to be able to really use Auto CAD, to read drawings and to do that sort of thing, we take them for two semesters and teach them the basis of

> engineering drawings and engineering calculations. And, to think that you're going to take a laborer out in the field and within ten hours or a week teach him how to read drawings, that's not going to happen. If you could, we certainly wouldn't be spending two semesters at Tech doing that. I'll tell you that right now. We have more important things to do (Tr. 1187).

The Secretary adduced no evidence establishing it is the formwork industry's standard to train laborers to read plans and drawings. Research on this issue failed to turn up a single case where the Secretary cited an employer for failing to train its laborers to read plans and drawings. Such training usually requires a certain degree of education and technical training that is beyond what an employer can reasonably be expected to provide to laborers. The Secretary has failed to establish § 1926.21(b)(2) requires employers to train their laborers to read plans and drawings.

Although the citation specifies SP's alleged violation is not instructing its laborers "on how to read the plans and drawings," the Secretary attempts to broaden the alleged violative conduct. In her post-hearing brief, she states, "SP violated this standard by not training its laborers *on all formwork standards and hazards applicable to their work"* (Secretary's brief, p. 14, emphasis added).

James Borders is OSHA's area director of the Jacksonville office (Tr. 843). When asked if OSHA was contending there is a recognized hazard for failing to train laborers to read plans and drawings, Borders replied:

> No, sir, not so much plans and drawings, but I think the intent here was that they should be familiar that they do exist and what is the purpose of those things. The employer does have an obligation, as the standard says, to educate their employees about what standards apply to their work. As you know, plans and drawings are very important to this type of work. I think the intention here was that the employer had an obligation to make sure that their laborers were aware that plans existed, that they had to be followed, they had to be approved and things of that nature (Tr. 866).

Later, Borders was asked if the Secretary cited SP for failing to train its laborers to read plans and drawings. Borders stated, "I believe the intent was more broader than that. But, yes, that's what the alleged violation description said, and it could have been written better than that" (Tr. 889).

In her post-hearing brief, the Secretary argues SP knew "that the basis of this training citation was that SP employees were not 'trained about the standards that apply to their work'" (Secretary's brief, p.15, footnote 10). The Secretary declined to amend the citation to allege SP failed to train its laborers on all formwork standards and hazards applicable to their work.

SP did not impliedly consent to try the broader issue of training laborers in all formwork standards and hazards. Indeed, SP expressly and repeatedly objected to broadening the scope of the citation (Tr. 279, 384, 627). Counsel for SP stated, "We've stipulated to the language in the citation that we had not trained our hourly employees on any of the blueprints and drawings. We want to preserve our objections that we're not trying this by consent, any other issue as to the training" (Tr. 277). An amendment under Rule 15(b)(2) of the Federal Rules of Civil Procedure "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.*, 11 BNA OSHC 2128, 2129 (No. 80-5868,1984). The Secretary did not move to amend the citation to allege SP failed to train its laborers on all formwork standards, and the court declines to do so now *sua sponte.*

The Secretary has failed to establish a violation of § 1926.21(b)(2). Item 1 is vacated.[2]

Item 2: Alleged Serious Violation of § 1926.703(b)(7)

The citation alleges the wood blocks SP placed on top of the scaffold jack screw plates "were not plumb, exposing employees to a structural collapse hazard." Section 1926.703(b)(7) provides:

> Eccentric loads on shore heads and similar members shall be prohibited unless these members have been designed for such loading.

SP stipulates § 1926.703(b)(7) applies to the work it was doing at the Berkman Plaza II site (Exh. J-A, ¶ 13). SP argues the Secretary offered no evidence establishing the wood blocks were not plumb prior to the garage collapse.

Shoring is placed on the level that currently is being built. It is used to hold the formwork prior to pouring the concrete (Tr. 467). Reshoring is placed on the completed levels below the

[2] Because the court finds the violative conduct alleged in item 1 is limited to training laborers in reading plans and drawings, SP's argument that its alleged failure to train Roland Hawkins is barred by OSHA's six-month statute of limitations is moot.

current level being built. Reshoring does not support the structure itself; its purpose is to carry the load of the wet concrete placed on the upper level (Tr. 1452).

SP's shoring consisted of frame scaffolds of different heights (3 feet, 6inches; 5 feet; and 6 feet) with screw jacks on top of each of the frame's four corners. Employees could adust the height of the screw jacks. On top of the screw jacks were shore heads, and on top of the shore heads were aluminum I-beams that supported 4"x4" laminates placed perpendicular to the I-beams. SP employees placed plywood on top of the laminates, onto which the concrete was poured (Tr. 238-239).

For SP's reshoring, employees would remove the plywood, the 4"x4" laminates, and the aluminum I-beams. They would replace these materials with "post-shore heads" (PSHs) or "post header extensions." These are 12- inch long 4"x4" wood blocks that employees placed either upright or lying flat on top of the shore heads. The employees would then adjust the screw jack so that the PSHs were snug up beneath the previously poured concrete levels (Tr. 270-272).

SP received most of its 4"x4" blocks from SP's yard in Atlanta, where they were cut with a table saw. The table saw made a single cut all the way through the wood, so that the cut surface was smooth and flat. SP superintendent James Smith testified his employees had to cut some 4"x4"s in the field, using a Skil saw. Smith explained the method for cutting with a Skil saw: "You take a speed square, mark it all the way around so you have a line, a pencil line, all the way around on square, cut it through, flip it over and cut it through following the line" (Tr. 274). Sometime this method left the cut surface uneven. Smith testified he discarded those blocks:

> There were a few of them like that on the job, but I would have those taken away. We wouldn't use them. [Labor foreman] Drew [Linderman] knew that we couldn't use those and would discard them to the side. If some of his laborers had used them, they would be swapped out and replaced with the correct ones
> . . . .
> If it was a sixteenth of an inch, I would let it go. If it's three-sixteenths of an inch, it got discarded (Tr. 275).

SP's employees would set aside the rejected 4"x4" blocks. The clean-up crew routinely ran late on this project, so the rejected blocks were not removed immediately: "Probably not at that particular moment, no. When the cleanup crew came through, then, yes. Anything lying down,

4"x4"s or any trash or material that had been cut, laying on a slab, then they would be discarded by the clean-up crew" (Tr. 275). Smith stated that not all of the wood blocks were used as PSHs. Some were used as "kickers" to keep the forms in place, some were used for bracing, and some were used for dunnage (Tr. 342-342).

The Secretary contends SP used some of these double-cut blocks as PSHs. Because the surfaces of these PSHs were uneven, the Secretary argues, they did not fit plumb on the shore heads, causing them to carry an eccentric load. The Secretary relies primarily on the testimony of three witnesses, John Czerepka, Roland Hawkins, and Mohamed Ayub, to establish SP violated the terms of § 1926.703(b)(7).

John Czerepka is a project engineer with Bracken Engineering (Tr. 462). After the garage collapse, Bracken was hired to "come up with a demolition protocol on how to take apart the collapsed debris and also the standing portion, and how to save evidence and documentation of that evidence. . . "(Tr. 463). Czerepka worked with other Bracken employees to remove reshoring from the structure on the east side of the garage (Tr. 466-467).

Bracken's employees removed the reshoring assemblies, marked them, and attached them to the scaffold frames with zip ties. Bracken then placed the units in a storage container (Tr. 468). Czerepka testified he uncovered hundreds, perhaps thousands, of 4"x4" wooden blocks in the rubble (Tr. 470). He retained approximately 20 of these blocks, chosen at random, as a representative sample of blocks on the site (Tr. 473).

Exhibit C-6 is a copy of a photograph showing eleven of the blocks, standing on their ends (Tr. 476). Czerepka brought two of the blocks to the hearing on May 20, 2009. Using a tape measure, Czerepka demonstrated a difference of ¼ inch on the surface of one block, and of ⅛ inch on the other (Tr. 485). Czerepka could not say that these two blocks, or the blocks shown in Exhibit C-6, were used as PSHs. He conceded the two blocks he brought in appeared to be waterlogged, indicating they were stored on the ground (Tr. 496).

Roland Hawkins was the SP's lead carpenter on the vertical crew for the garage. He began working for SP approximately four months before the collapse (Tr. 616). At the time of the collapse, Hawkins was standing next to Willie Edwards on the fifth level of the garage, "watching the forms for leakage or blowouts" (Tr. 617). Hawkins was seriously injured in the collapse.

Hawkins testified he observed some of the double cut 4"x4" blocks used by SP employees (Tr. 630-631): "I would say that there were uneven cut boards used as reshoring; not the majority of them, but maybe a small percentage, you know. It's just grab what you can and stick it in there and go." Hawkins worked on the leading edge at the top level of the structure most of the time, but he did occasionally help erect or dismantle reshoring. He also observed the reshoring on the lower levels as he walked up and down the ramps (Tr. 631, 635). He stated that, as he went up and down the ramps, he sometimes observed reshoring that was not plumb, "but not to the point where I was afraid to go to work" (Tr. 632). Hawkins was not questioned as to the date or dates he observed the PSHs that he thought were out of plumb.

Hawkins testimony regarding to the condition of the wooden blocks is not given weight because he did not identify the dates of his observations and his memory apparently has been affected by his injuries and treatment. He candidly discussed his personal problems and when asked if his memory had been affected since the collapse, Hawkins responded, "Absolutely, yes. . . . It doesn't have anything to do with my recollection" (Tr. 636-637, 664).

Superintendent Smith, carpenter foreman James Ferrell, and Synergy threshold inspector Eric Cannon all testified that the reshoring was constantly checked for plumbness. If any reshoring was found out of plumb, it would be corrected immediately (Tr. 340, 740, 1242).

Smith gave detailed testimony regarding the loads placed on the PSHs. He testified that the PSHs would on occasion come loose:

> If the slab above is being poured and they're vibrating from the concrete, hitting the deck from the pump, the vibrators themselves, and they were only snug tightening them by hand anyway, and there's no gauge saying how tight you had to have these or have them torqued down to a certain strength, there were occasions where there would be one or two here or there that would work themselves loose and you had to go back.
>
> You know, that was part of the inspection. You checked these things. This is part of why they had to go through and inspect these, to make sure. There were things like that that happened. It happens on every job (Tr. 338-339).

To ensure the PSHs were put back in plumb, Smith stated:

> I had one particular–I usually had one man and I would instruct Drew to send one man through, "Check all your reshore posts. Make sure they're plumb and make sure they're snug and tight." (Tr. 340).

Smith testified that as of December 5, 2007, the PSHs had been checked by Univesal and found to be plumb. To ensure the PSH's remain plumb, Smith testified:

> You go by and you grab it and if it don't move, it's good. If it moves, it's going to come out of plumb. I mean, it's real simple (Tr. 340).
> . . . .
> We used levels, torpedo levels, two-foot levels, check out our plumbness. Drew would tote–like I said, when he was with Universal walking through, he kept a torpedo in his pocket. If he had a question about something not being plumb, the torpedo level goes on it to find out (Tr. 341).

Ferrell corroborated Smith's account. He testified that he, Smith, and Linderman all participated in the walk-around inspection for Pour 6a. At that time, immediately before the December 6 pour, all the PSHs "were plumb and straight" (Tr. 1244).

The testimony of Smith and Ferrell specifically addresses the condition of the site "on or about December 6, 2007," as alleged in the citation. It is given more weight regarding the condition of the PSHs than Hawkins's testimony, because there is no indication of the date or dates Hawkins observed the PSHs out of plumb.

The Secretary adduced evidence it obtained after the collapse in an attempt to show the PSHs were eccentrically loaded before the collapse. Miller took photographs from the manlift of various PSHs that appeared to him to be out of plumb (Exh. C-10).[3] The Secretary rejects any suggestion the garage collapse may have shaken the PSHs out of plumb. Ayub stated:

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[3] The Secretary also introduced a copy of a photograph taken "a few weeks" before the collapse by Tim Marlow, SP's superintendent for the tower (Exh. C-4), which the Secretary claims "unintentionally documented a PSH that was substantially off-center" (Secretary's brief, p. 27). Although the PSH does appear to be off-center, the distance and the angle from which the photograph was taken diminish the accuracy of a conclusive finding. In addition, the citation alleges PSHs were eccentrically loaded "on or about December 6, 2007." An out-of-plumb PSH observed "a few weeks" before that date falls outside the scope of the alleged violation.

> This is not a seismic event. This is not a ground motion which relates to the whole event of acceleration, and vertical acceleration and the rotation of the building.
>
> Here, we are dealing with a collapse. A collapse has taken place, essentially five bays on the north, and there is damage done to three bays with the main collapse upward.
>
> That line of shoring which is very close to the fractured slab surface . . .there could be some distortion and some movement on the line of the shoring which is closest to where the fracture took place on the unfailed part.
>
> I was at the site, I observed the unfailed base. There was not rotation, there was no tilting. It was all standing plumb (Tr. 1570-1571).

Dr. Lindsey disagreed with Ayub's analysis. He testified, "[W]hen the structure collapsed, . . .what I would consider to be a large amount of force, and very difficult to calculate the exact quantity of, was exerted on the garage, and it caused the garage to move. And, in moving, it had the potential and probably the result of that movement, was to displace some of those 4"x4"s that were in place" (Tr. 1321-1322). He stated there is no scientific basis to say the PSHs were not plumb prior to the collapse (Tr. 1323). He also stated an engineer could not observe the conditions of the PSHs post-collapse "and make any viable conclusions about the status of those blocks prior to the collapse" (Tr. 1434).

Upon consideration of the evidence, the court concludes the Secretary has fallen short of proving it was more likely than not that PSHs were eccentrically loaded on or about December 6. The only eyewitness who stated he observed PSHs out of plumb (that were not corrected immediately) did not give a specific date for his observation. The record establishes SP checked the PSHs constantly and immediately corrected any that were out of plumb. The threshold inspector inspected the reshoring before the December 6 pour and found the PSHs to be plumb. Smith, Ferrell, and Linderman also inspected the reshoring prior to Pour 6A, and observed the PSHs were straight and plumb.

The evidence gathered post-collapse also fails to establish the PSHs were eccentrically loaded pre-collapse. There is no evidence the double cut 4"x4" blocks recovered by Czerepka were used as PSHs. Smith's testimony establishes the blocks could have been used as kickers, or bracing, or dunnage, or were discarded blocks set aside for the clean-up crew to collect. The photographs

admitted as Exhibit C-10 are insufficient to establish the violation on two counts: first, it is not possible, based on the photographs, to prove the plumbness or out-of-plumbness of any of the PSHs. Second, even if the PSHs were conclusively established as being out-of-plumb, the Secretary cannot establish this condition did not result from the collapse itself. The court does not give weight to Ayub's opinion that the collapse could not have generated forces that would cause the PSHs to shift. Smith testified the PSHs would shift during concrete pours, due to vibrations from the pump and the vibrators (Tr. 338). Vibrations created by pouring concrete do not exert the force of vibrations created by the collapse of 70% of the parking garage. In the report Ayub submitted following his investigation, he states, "The collapse was massive . . ." (Exh. C-15). The enormity of the collapse, as amply demonstrated in the photographs, supports the expert opinion of Dr. Lindsey, who stated the collapse most likely caused the PSHs to move. Hawkins, the only witness who was actually in the garage at the time of the collapse, stated the collapse "was like being in a tornado of steel and concrete. It was like being in a hurricane of steel and concrete" (Tr. 666).

The Secretary has not established SP failed to comply with the terms of § 1926.703(b)(7). Item 2 is vacated.

Citation No. 2
Item 1: Alleged Willful Violation of § 1926.701(a)

The original citation alleged SP "did not have a qualified person determine if the formwork with the additional height added, would be capable of supporting the additional load of the wet concrete, exposing the employees to a structural collapse hazard." Upon the Secretary's motion (and over SP's objection), the court amended the citation to allege SP "did not determine, based on information received from a person who was qualified in structural design, the concrete garage structure or portion of the concrete garage structure was capable of supporting the weight of the wet concrete for pour 6A, exposing employees to a structural collapse hazard." Section 1926.701(a) provides:

> No construction loads shall be placed on a concrete structure or portion of a concrete structure unless the employer determines, based on information received from a person who is qualified in structural design, that the structure is capable of supporting the load.

The parties stipulate the Secretary has not issued any interpretations of § 1926.701(a), other than the preamble to the final rule (Exh. J-A, ¶ 25). SP argues § 1926.701(a) does not apply to it because SP did not place the load of concrete on the structure.

In 1988, OSHA revised its regulations concerning concrete formwork in order to eliminate redundancies, ambiguities, and gaps resulting from prior regulations and the incorporation of ANSI standards, and to establish a clear set of operating principles for employers in the concrete construction industry. In the preamble to the final rule, the Secretary states:

> After carefully considering all the comments and testimony received, OSHA has decided to delete the requirement for the specified engineer-architect services. This decision is based on the comments and testimony received which indicates that engineer-architects frequently do not consider construction loads in the design, nor do they approve their placement on partially completed structures. However, OSHA believes that it is still important that someone be responsible for performing this service. Therefore, OSHA is requiring that the employer make the determination that the structure or portion of the structure is capable of supporting the construction loads. The employer must make this determination on the basis of information received from a person qualified in structural design. *This revision also places responsibility for employee safety with the person directly responsible for the concrete operations.*

Concrete and Masonry Construction Safety Standards, Final Rule, 53 FR 22612, 22617 (emphasis added) (Exh. J-20).

In this instance, the employers directly responsible for the concrete operation are Choate, the general contractor, and Pittman, the concrete finishing subcontractor. The Secretary concedes that Choate "would typically be responsible for making sure that a person qualified in structural design provided information upon which contractors could determine that it was safe to place construction loads on the structure being built" (Secretary's brief, p. 30). The Secretary argues, however, that "SP agreed and was contractually obligated to perform this responsibility for Choate by being the contractor responsible for hiring the shoring engineer, who would provided the information upon which this determination could be made via the signed and sealed shoring and reshoring plans" (Id.).

The Secretary relies on paragraph 12 of Exhibit B of SP's subcontract with Choate to support her argument that the contract shifts the obligation of compliance with § 1926.701(a) from Choate to SP. Paragraph 12 states:

> Furnish, install, and maintains all necessary shoring and reshoring. Furnish all necessary shore and reshore inspections. Furnish shoring and reshoring drawings, sealed by engineer.

SP argues that the obligation to comply with § 1926.701(a) remained with Choate and Pittman, and further argues that the employers fulfilled that obligation when Choate hired Synergy as its threshold inspector.

The court agrees that SP was not responsible for the placement of the concrete load on the structure. The contents of paragraph 12 of the subcontract do not shift responsibility for the concrete operations to the formwork subcontractor. Paragraph 12 of the subcontract essentially paraphrases the requirements of § 1926.703(a)(1), with which SP is obligated to comply.[4]

The Secretary stipulated, "A. A. Pittman was the concrete finisher and along with Choate was responsible for placing the horizontal pours, including Pour 6A" (Exh. J-20 ¶ 9). With this stipulation, the Secretary has undercut her case that § 1926.701(a) applies to SP. The plain language of the standard indicates the employer placing the construction load is the employer to whom the standard applies. The preamble to the final rule further clarifies that the § 1926.701(a) applies to the employer "directly responsible for concrete operations." In the present case, that employer was not SP.

Item 1 of citation no. 2 is vacated.

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[4] Section 1926.703(a)(1) provides:

> Formwork shall be designed, fabricated, erected, supported, braced and maintained so that it will be capable of supporting without failure all vertical and lateral loads that may reasonably be anticipated to be applied to the formwork. Formwork which is designed, fabricated, erected, supported, braced and maintained in conformance with the Appendix to this section will be deemed to meet the requirements of this paragraph.

Item 2: Alleged Willful Violation of § 1926.703(a)(2)

The citation alleges SP "did not obtain a reshoring drawing, including all revisions, for the reshoring design method of using two levels of reshores, exposing employees to a structural collapse hazard."

Section 1926.703(a)(2) provides:

> Drawings or plans, including all revisions, for the jack layout, formwork (including shoring equipment), working decks, and scaffolds, shall be available at the jobsite.

SP stipulates § 1926.703(a)(2) applies to the work it was doing at the Berkman Plaza II site (Exh. J-A, ¶ 13). SP argues it had all existing plans and drawings available at the site. The dispute is whether SP was required to have a revised plan on site once it removed reshoring from the lower levels, which was contrary to the plans on site.

The stipulations pertinent to this issue are (Exh. J-A):

1. Southern Pan was responsible for obtaining shoring and reshoring drawings for both the garage and tower, building the formwork and placing the concrete for some of the vertical pours. (¶ 7)

2. Southern Pan hired Patent to provide it plans and drawings for shoring and reshoring. (¶ 14)

3. Patent provided the only signed and sealed drawings pertaining to the shoring and/or reshoring for the garage. These drawings consisted of 10 pages, eight of which were full-size and the last two (2) pertaining to approval of replacing the aluminum beams with 4x4 wood beams were on 8.5" by 11.5" sheets of paper. These drawings were available at the worksite. There were no other written plans or drawings pertaining to the shoring and/or reshoring for the garage. (¶ 15)

4. The Patent drawings included a typical reshore diagram that shows the garage to have shoring and/or reshoring to the ground. (¶ 16)

5. Southern Pan removed some of the shoring and reshoring from the first level in the non-20" section of the garage beginning on or about October 22, 2007. (¶ 17)

6. Southern Pan was removing some shoring and reshoring from the second level of the non-20" section of the garage on or about October 26, 2007. (¶ 18)

7. Southern Pan started removing some of the shoring and reshoring between the ground and the third floor, which is referred to as the high bay area, on or about November 19, 2007. (¶ 19)

8. Subsequent to the start of construction of garage, Southern Pan provided Choate multiple copies of the shoring plan described above, but Choate misplaced at least some of the copies. (¶ 22) (Exh. J-A)

Doug Rose is the Patent shoring engineer who designed the shoring and reshoring plans for SP (Tr. 110-112). He testified that for all of Patent's designs, all levels of a structure are shored and reshored ("to the ground") (Tr. 118). If SP decides not to shore to the ground, then a separate engineering firm (SP used Dansco when it requested revised plans for the tower) must calculate and create an new reshore plan to be signed and sealed. Patent does not create reshore plans that do not go to the ground (Tr. 122).[5]

Rose stated that reshoring could not be removed from the structure and still be in compliance with Patent's plans because "of Patent's policy, and that's the way it was designed" (Tr. 134). Rose testified Patent's plans called for the reshoring to be kept in place to the ground until "the end of the construction phase" (Tr. 142).

Tim Postma, SP's project manager, testified the Patent drawings that showed reshoring going to the ground were "what was intended to be used" (Tr. 546). Superintendent Smith recognized SP was required to follow Patent's plans (Tr. 242): "You don't deviate from the drawing sets that you have unless another engineer provides adequate, I guess, paperwork or plans to change things. You never deviate from the plans, the original things you got, until something else, a revision comes in."

Despite this recognition, Smith ordered his employees to remove reshoring from the lower levels of the garage, beginning on October 26, 2007. Smith testified he assumed Postma had requested Dansco to create a revised reshoring plan, in which, instead of reshoring to the ground, SP would shore the top level and only the two lower levels ("1-over-2" shoring) (Tr. 243).

Smith explained how his misunderstanding arose:

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[5] When a structure is shored and reshored to the ground, it creates "a load path that would take the wet concrete to the ground" (Tr. 123). That way, the reshoring is carrying the weight of the wet concrete, rather than the structure itself. If reshoring is removed, the weight of the wet concrete is transferred to the structure (Tr. 124-125).

> There was a discussion among Tim Postma and Tim Marlow, the superintendent of the tower, and myself. His drawings, original drawings from Dansco, had got misplaced through the mail. There was a reordering process going on with Tim Postma.
>
> In discussing the drawings, I assumed he was doing mine at the same time because when he was speaking to us, I felt like he was speaking to both of us at the time and that my drawings were going to be with that second set of drawings for the tower as well when they came in.
>
> . . . .
>
> [T]hat's typical on every job. I mean, every job that we've done since I've been with Southern Pan, that was the typical procedure (Tr. 244).
>
> . . . .
>
> Patent's drawings always showed shoring or scaffolding to the ground, the ground all the way up, whether it's three stories or fifteen stories.
>
> And, it was typical procedure to have it recalibrated where you could use one floor of shoring and two floors reshoring, one over two. I had worked with high-rises. That was the typical standard thing that was done (Tr. 245).

Postma testified Smith should have checked Patent's plans that were available at the site before he removed the reshoring on the lower floors:

> Jim Smith should have looked at the drawings and, yes, if Jim Smith made a mistake and took something out he shouldn't have taken out, that was a mistake. And, that's the reason the other layer of Universal is there to catch those mistakes, and at that point, if the mistake was caught, the shoring would have been put back in place and we would have been back in accordance with the drawings that were on the site (Tr. 552).

Postma agreed that Smith was qualified to understand the need for shoring plans on site. He said "No, he's a qualified superintendent. I have every faith in him to have done exactly as he should have. It was a mistake."

SP contends it did not violate the terms of § 1926.703(a)(2) because Synergy, the threshold inspector, "by e-mail, secured the approval of Rouhi, the engineer of record, for the removal of reshoring from lower levels except for one area where Rouhi stated that the reshoring should be retained" (SP' brief, p. 35). This argument is rejected. Synergy emailed Rouhi *after* SP began removing the reshoring because Synergy wanted to clarify whether SP should be doing so

(Exh. J-7).[6] Furthermore, there is no evidence SP knew of the existence of this email prior to the collapse (Tr. 759-760).

SP also argues it was not required to have any plans in addition to the Patent plans already available on site. SP contends, somewhat confusingly, it was not required to provide "mental plans," (Tr. 942). It is perhaps best to quote SP verbatim on this point (SP's brief, p. 36, emphasis in original):

> Complainant's position appears to be that Southern Pan violated 29 C.F.R. § 1926.703(a)(2) not because all plans and drawings *in existence* were not available at the site, but rather because plans and drawings *that did not exist*–had not been created, but in OSHA's opinion should have been–were not available. Specifically, Complainant appears to be arguing that: (1) Patent's reshoring plans showed reshoring going all the way to the ground; that (2) Jim Smith was using the "1-over-2"standard industry practice method, so Jim Smith must have had a "mental plan" which would, in the Secretary's view, require him to stay on site at all times in order to have the "plan in his head" on site; that (3) Jim Smith had an obligation to revise the written plans to show removal of reshoring in order to allow him to leave the site as he did; and that (5) [sic] Smith's alleged failure to either remain on site, or in the alternative, create a drawing constitutes a willful violation of the standard. Such an interpretation impermissibly contorts the natural meaning of the words in the cited standard.

SP's argument is rejected. The Secretary is only arguing point (1) listed above, which is a fact stipulated to by both parties. The Secretary is not arguing Smith was required to stay on site at all times so that his "mental plan" was available, nor is she arguing Smith should have drawn up some plans himself. What she is arguing (and what Smith and Postma both understood at the

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[6] Rouhi's email was ambiguous. On August 31, 2007, Choate project manager Kirk Gilbert emailed Rouhi, seeking permission to proceed with construction despite two structural problems in two different bays in the garage. SP had installed extra reshoring to repair the problems. Rouhi responded, "As long as the shores stay in place I will not have any problem continuing the project." On October 30, 2007, Tim Frazier of Synergy emailed Rouhi after learning SP was removing reshoring: "They are beginning to remove shoring at the garage. Per your email below I just wanted to clarify that the areas you are requesting to stay shored all the way to the ground are only the bays where the repair is required, not the entire garage, correct?" Rouhi responded with one word, "Correct" (Exh. J-7). Rouhi testified he was not approving the removal of all of the reshoring on the lower levels, but rather advising Synergy that the additional reshoring should be kept in place in the two bays where there were structural problems (Exh. C-5a, pp.31-32)

hearing) is that SP needed to have revised shoring and reshoring plans on site before it began removing the reshoring. Section 1926.703(a)(2) plainly states, "Drawings or plans, including *all revisions*" for shoring equipment must be available on site. Patent created a set of plans for SP, showing reshoring going all the way to the ground. SP decided to alter the way the reshoring was installed, which required a revised plan to be on site. Both Smith and Postma understood this. Smith stated, "You never deviate from the plans, the original things you got, until something else, a revision comes in" (Tr. 242). Postma conceded Smith made a mistake in removing the reshoring without a revised plan (Tr. 565): "We discuss [plans required to be on site] all the time. It's an ongoing discussion. It's an ongoing discussion even on my job sites with my superintendents when I'm on the job site. Always according to the drawings. The drawings that are on the site is the Bible of what you're going to go by."

The Secretary has established SP violated the terms of § 1926.703(a)(2). The requirement that all plans, including revisions, be present on site is not a mere technicality. Formwork is designed to transfer weight from the structure. Prematurely removing formwork without an engineer's revisions exposes employees to structural collapse. Without the correct plans on site, crucial information is missing.

SP had actual knowledge of the violation. Smith was the SP's superintendent for the garage. Smith admitted SP did not have a revised plan on site, and that he knew OSHA required it have one. Item 2 of citation no. 2 is affirmed.

Willful Classification

The Secretary classifies this violation as willful. A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.,* 16 BNA OSHC 1179, 1181 (No. 89-2883, 1993). A showing of evil or malicious intent is not necessary to establish willfulness. A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.,* conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.,* 14 BNA OSHC 2064, 2068 (No. 82-630, 1991).

The court finds the Secretary has established SP's violation of § 1926.703(a)(2) was willful. Superintendent James Smith was responsible for removing the reshoring without having a revised plan on site. Smith admitted he knew he was not permitted to continue work if he did not have the revised plans on site. Smith admitted he never saw any revised plans, yet he ordered the reshoring removed anyway (Tr. 247). "The hallmark of a willful violation is the employer's state of mind at the time of the violation- - an intentional, knowing, or voluntary disregard for the requirements of the Act or ... plain indifference to employee safety." *Kaspar Wine Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) *aff'd* 268 F.2d 1123 (D.C. Cir. 2001). Smith's testimony demonstrates his state of mind at the time he ordered his employees to remove the reshoring . He knew he did not possess revised plans on site, he knew he was not supposed to deviate from the existing plans, and yet he did so. Smith knowingly disregarded the requirements of the standard.

Smith's claim he mistakenly assumed the revised plans were in the mail from Dansco, along with the replacement drawings for the tower is, rejected. Even if the plans were in the mail, Smith should not have removed the reshoring until the revised plans were on site. No one specifically told Smith that revised reshoring plans had been ordered or were in the mail. Smith's mistaken assumption does not show good faith.

A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. *L.R. Willson and Sons, Inc.,* 17 BNA OSHC 2059, 2063 (No. 94-1546, 1997), *rev'd on other grounds,* 134 F.3d 1235 (4th Cir. 1998).

SP's contract with Universal Engineering Service to inspect the shoring/reshoring does not show good faith. The test of good faith for these purposes is an objective one; whether the employer's efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *Williams Enterp., Inc.,* 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). SP cannot contract away its responsibility under the standard. Universal was never given the Patent plans and was only shown the shoring plans SP asked it to inspect. Greg Holtz was the project engineer for Universal (Tr. 398). He inspected the garage on December 4, 2007, in preparation for Pour 6A. Holtz testified he never saw reshoring plans, only the shoring plans (Tr. 408). Smith would verbally tell Holtz what he wanted Holtz to look at. Smith carried what

were purported to be shoring plans. Holtz states, "[T]here was no need to bring out the plans. He had them rolled up and said, 'These are the plans' and he quickly rolled them back up" (Tr. 409). The inspections by Universal were not in accordance with the plans on site.

The violation is properly classified as willful.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

The record does not disclose the size of the employer. The Secretary has previously cited SP for OSHA violations and therefore SP is not entitled to credit for history (Exh. C-11). The Secretary adduced no evidence of bad faith.

The gravity of the violation is high. The parties stipulated, "The Secretary does not allege that any of the alleged violative conditions in this case caused the collapse of the garage," (Exh. J-A, ¶ 24). However, had the reshoring been in place in accordance with the only reshoring plan on site, it may have lessened the damage caused by the collapse. A penalty of $ 40,000.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of citation no. 1, alleging a serious violation of § 1926.21(b)(2), is vacated, and no penalty is assessed;

2. Item 2 of citation no. 1, alleging a serious violation of § 1926.703(b)(7), is vacated, and no penalty is assessed;

3. Item 1 of citation no. 2, alleging a willful violation of § 1926.701(a), is vacated, and no penalty is assessed; and

4. Item 2 of citation no. 2, alleging a willful violation of § 1926.703(a)(2), is affirmed as willful, and a penalty of $40,000.00 is assessed.

\s\ Ken S. Welsch
KEN S. WELSCH
Administrative Law Judge

Date: March 8, 2010