**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

MEADOWS CONSTRUCTION COMPANY LLC,

Respondent.

OSHRC DOCKET No. 14-1636

Appearances: Dustin Saldarriaga, Esquire
U.S. Department of Labor, Office of the Solicitor, Boston, Massachusetts
For the Secretary

Stephen P. Kolberg, Esquire
Kolberg Law, P.C., Boston, Massachusetts
For the Respondent

Before: William S. Coleman
Administrative Law Judge

## DECISION AND ORDER

The Respondent, Meadows Construction Company LLC (Meadows or Respondent) is a general contractor located in Newburyport, Massachusetts. Meadows obtained a construction contract to replace the asphalt shingles, gutters, and downspouts on two-story public building used as a police station located in Haverhill, Massachusetts.

On August 21, 2014, the Area Office of the Occupational Safety and Health Administration (OSHA) located in Andover, Massachusetts, received an anonymous complaint regarding safety at the worksite, and as a result, a compliance safety and health officer (CO) from the Area Office went to the worksite that same day to investigate. As a

result of that investigation, OSHA issued a two-item serious citation (Citation) to Meadows on September 9, 2014, proposing a penalty of $5,390 for each item.

Item 1 of the Citation alleged a violation of the construction industry standard for fall protection at 29 C.F.R. § 1926.502(d)(15), which requires in pertinent part that "Anchorages used for attachment of personal fall arrest equipment shall be … capable of supporting at least 5,000 pounds (22.2 kN) per employee attached." The Citation item alleged that Meadows had violated this standard in that its "fall protection anchors were not properly secured to the peak of the roof."

Item 2 alleged a violation of the construction industry standard for "material handling equipment" at 29 C.F.R. § 1926.602(c)(1)(vi), which provides as follows: "All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined in American National Standards Institute B56.1-1969, Safety Standards for Powered Industrial Trucks." The Citation item alleged that Meadows had violated this standard in that "a Caterpillar rough terrain forklift was left unattended with the hoisting boom fully extended over the roof of a two story commercial building with a pallet of roof shingles on the forks."

Meadows timely contested the Citation and proposed penalty, and the Executive Secretary of the Occupational Safety and Health Review Commission (Commission) docketed the matter on November 3, 2014. The Commission's Chief Judge thereafter designated the matter for disposition under the Commission's rule for Simplified Proceedings, 29 C.F.R. pt. 2200, subpt. M, and assigned the matter to the undersigned

Commission Judge for hearing and decision.[1]

The undersigned conducted an evidentiary hearing in Boston, Massachusetts on February 4, 2015. The parties thereafter simultaneously filed post-hearing principal briefs. The Secretary exercised the option to file a reply brief, and briefing was complete on April 2, 2015.

The salient issues for decision are:

- Did the Secretary prove by a preponderance of the evidence that a roof anchor in use was not "capable of supporting at least 5,000 pounds per employee attached" because it had been improperly installed?
- Did the Secretary prove by a preponderance of the evidence that Meadows' rough terrain forklift truck had been left "unattended" with its load-engaging means elevated?

As described below, the Secretary has met his burden of proof on both. The two Citation items are affirmed, and a penalty of $4,750 is assessed for each, for a total penalty of $9,500.

## Findings of Fact

A preponderance of the evidence established the following:

1. The Respondent, Meadows Construction Company LLC, is a general contractor based in Newburyport, Massachusetts. Most of Meadows' work involves

[1] Because this matter is in Simplified Proceedings, no complaint or answer was filed. *See* 29 C.F.R. § 2200.205(a) (providing that "the complaint and answer requirements are suspended" in Simplified Proceedings). The original Citation served as the functional equivalent of the Secretary's complaint. Pursuant to a scheduling order, Meadows filed an Amended Statement of Affirmative Defenses on December 23, 2014.

exterior work on public construction projects. (T. 126-27). Meadows' business affects interstate commerce.

2. Meadows employs about 25 employees during the spring, summer, and fall, and somewhat fewer during winter. (T. 151, 157).

3. In 2014, the City of Haverhill, Massachusetts, contracted with Meadows to perform roofing and gutter work on a two-story police station building at 40 Bailey Boulevard, Haverhill, Massachusetts. The work entailed removing the existing asphalt shingles, installing new shingles, and replacing the building's gutters and downspouts. (Ex. 1; T. 28-30).

4. Meadows commenced work sometime after July 24, 2014. Meadows did not engage any subcontractors for the project, so Meadows employees were the only persons working on the project. (T. 81-82, 127).

5. On August 21, 2014, the OSHA Area Office in Andover, Massachusetts, received an anonymous complaint reporting inadequate fall protection at the worksite. (T. 12). As a result of that anonymous complaint, CO Thomas Braile was dispatched to investigate. (T. 27).

6. CO Braile arrived at the worksite shortly before 4:00 p.m. on August 21, 2014. (T. 29).

*Roof Anchor Model A210400*

7. The following conditions pertinent to the use of a particular brand and model roof anchor (Werner Company model A210400) existed when CO Braile entered the worksite.

8. Six Meadows employees were on the south face of the roof installing new shingles. (T. 64, 82; Exs. C-2, C-3, C- 5). The slope of the roof was 8 in 12 (vertical to horizontal). (T. 149). The eave of the roof was about 25 feet above ground level.

9. Each employee working on the roof was using a personal fall arrest system to protect against fall hazards.

10. One type of roof anchor being used as part of the personal fall arrest systems was Werner Company model A210400. Model A210400 is depicted and described in the manufacturer's "User Instructions" at Exhibit C-14. (T. 75-76). Model A210400 is a reusable roof anchor with two flanges that are hinged together. The design of model A210400 allows the anchor to be used over a roof's peak, with the separate flanges being attached to opposite sides of the peak. However, model A210400 may also be properly installed at locations other than over a roof peak. (T. 65-67, 146-47, 167).

11. The manufacturer of anchor model A210400 rates it to support at least 5,000 pounds when properly installed. (Ex. C-14, pp. 3-4). To properly install model A210400, both flanges must be secured to the roof, with six screws securing each flange, for a total of 12 screws. (Ex. C-14, pp. 3-4; T. 66, 74-76, 93). According to the manufacturer, roof anchor model A210400 will not hold its rated capacity of at least 5,000 pounds if only one of its two flanges is secured to the roof. (Ex. C-14, pp. 2-3; T. 77-79).

12. The roof anchor that is depicted in use on the peak of the roof on the left side of the photograph in Exhibit C-2 is Werner Company model A210400. This roof anchor had only one of its two flanges secured to the roof. (T. 67, 183; Ex. C-2). The Meadows

employee depicted in Exhibit C-2 sitting on the peak of the roof to the immediate right of this roof anchor had connected the lanyard of his personal fall arrest system to that roof anchor. (Ex. C-2; T. 67).

13. It was common practice for Meadows' employees to secure only one flange of the two-flanged anchor model A210400. (T. 170).

*Rough Terrain Forklift Truck (Telehandler)*

14. The following conditions pertinent to Meadows' rough terrain forklift truck existed when the CO entered the worksite.

15. Meadows was using a rough terrain forklift truck, Caterpillar model TH360B, to deliver a pallet of new shingles to the workers on the roof. (T. 17, 19-20, 34). This rough terrain forklift truck is known as a "telehandler." A rough terrain forklift truck like the telehandler is a type of powered industrial truck. (T. 63). The telehandler has a three-stage extensible boom with a fork attached at its end. (T. 130).

16. The telehandler's extensible boom was raised and extended so that the fork hung directly over the lower part of the roof's surface. (Ex. C-2, T. 30-31, 35, 40 42). The elevated fork held a pallet of new asphalt shingles, which had weighed about 2,100 pounds when full. (C-2; T. 64, 166, 176). The fork hovered over the roof's surface at a level that permitted the workers on the roof to readily grasp and carry new shingles from the pallet. (Ex. C-2).

17. The telehandler was equipped with two stabilizers (also referred to as "outriggers") that are located forward of the front wheels. The stabilizers were deployed,

which caused the telehandler's front wheels to be elevated off the ground. (T. 33, Ex. C-4).

18. Meadows' foreman at the worksite was Ramiro Texeira (R.T.). (T. 44-45, 156). R.T. was the only person at the worksite that Meadows had certified to operate the telehandler. (T. 44). R.T. had put the telehandler into the position that existed when the CO entered the worksite. (T. 60). When the CO entered the worksite, R.T. was about 194 feet away from the telehandler in the building's parking lot. (T. 55). R.T. told the CO that he could better observe the employees on the roof from that location. (T. 44-47, 58-59, 64; Exs. C-8, C-13).

19. The operator's position of the telehandler (the "cab") was unoccupied. (Ex. C-4). No person certified to operate the telehandler was within 25 feet of the telehandler while its fork holding the pallet of shingles was elevated over the roof. (T. 44).

20. The employee nearest the telehandler was Leonardo Bonacenha[2] (L.B.). L.B. was standing near the telehandler's right rear wheel, within 25 feet of the telehandler. (T. 59, 88-89, 139). L.B. was not certified to operate the telehandler. (T. 44).

21. An aerial boom lift, Genie model S-60, was also in use when the CO arrived at the worksite. Two Meadows employees were in the lift-basket working at eave-level. (T. 41-42). The aerial lift's boom crossed underneath the telehandler's extended boom. The two booms were about one foot apart at the closest point. (T. 38-39; Exs. C-5 & C-6).

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[2] This person's surname is spelled "Bonacida" in the transcript (T. 88, 159), but counsel for the Secretary states that this is a misspelling and that the correct spelling is "Bonicenha." (Sec'y Reply Brief, p. 1; Joint Prehearing Statement, p. 6).

22. If the telehandler's boom had lowered to a shallower angle while the aerial lift's boom remained stationary, the telehandler's boom would have contacted aerial lift's boom. (Exs. C-4, C-5, C-6; T. 40).

23. If the telehandler's three-stage extended boom had retracted while the aerial lift's boom remained stationary, the telehandler's fork would have eventually contacted the aerial lift's boom. (Ex. C-5, C-7; T. 40).

## Discussion

The Commission obtained jurisdiction of this matter under section 10(c) of the Occupational Safety and Health Act (Act) upon Meadows' timely contest of the Citation and proposed penalty. 29 U.S.C. § 659(c). At all relevant times, Meadows was an employer covered by the Act because it met the Act's definition of "employer." 29 U.S.C. § 652(5).

To prove a violation of an OSHA standard, the Secretary must establish that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980).

*Citation Item 1 -- Roof Anchor Installation, § 1926.502(d)(15)*

The cited standard, § 1926.502(d)(15), requires in pertinent part that "[a]nchorages used for attachment of personal fall arrest equipment shall be … capable of supporting at least 5,000 pounds … per employee attached."

*Applicability of § 1926.502(d)(15)*

The cited standard applies. Subpart M of 29 C.F.R. Part 1926 "sets forth requirements and criteria for fall protection in construction workplaces." 29 C.F.R. § 1926.500(a)(1). Section 1926.501(b)(1) requires employers to protect employees on a walking/working surface with an unprotected side or edge which is six feet or more above a lower level "from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." The unprotected side or edge here was about 25 feet above the ground level. Meadows elected to provide fall protection by using a personal fall arrest system for each employee. (T. 148-50). Section 1926.502(d) sets forth the requirements that a personal fall arrest system must meet, and includes the cited standard pertaining to anchorages. "Anchorage" is a defined term that "means a secure point of attachment for lifelines, lanyards or deceleration devices." 29 C.F.R. § 1926.500(b). Meadows was using the Werner model A210400 roof anchor as such an "anchorage," so the cited standard pertaining to anchorages applies.

*Compliance with § 1926.502(d)(15)*

Section 1926.502(d)(15) requires that "[a]nchorages used for attachment of personal fall arrest equipment … be … capable of supporting at least 5,000 pounds … per employee attached."[3]

The Citation item alleges that Meadows violated this standard in that "fall

[3] Section 1926.502(d)(15) provides an alternative means of compliance that is not at issue here. That alternative requires that anchorages used for attachment of personal fall arrest equipment be "designed, installed, and used … (i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and (ii) under the supervision of a qualified person." 29 C.F.R. § 1926.502(d)(15).

protection anchors were not properly secured to the peak of the roof." The Secretary's theory of this alleged violation was that both flanges of the two-flanged Wenger model A210400 anchor had to be secured to the roof in order for the anchor to support at least 5,000 pounds. (T. 14-15; Sec'y Br. 2-3). The Secretary argues that the evidence shows multiple instances of only one flange being secured.[4]

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[4] Meadows filed a motion *in limine* to preclude the admission of evidence that more than one worker had been tethered to a single anchor, arguing that such a theory of the alleged violation would be beyond the scope of the Citation's description of the alleged violation that the "anchors were not properly secured to the peak of the roof." A ruling on the motion was reserved, and the Secretary was allowed to present evidence that more than one worker had been secured to a single roof anchor. (T. 13-16, 69-70).

Meadows is correct in its contention that this theory of the violation is outside the scope of the Citation's description of the alleged violation. As the CO testified, his concern during the inspection "was the installation of the anchor" (T. 66), and this is consistent with the Citation's description of the alleged violation that roof anchors "were not properly secured." An improperly secured anchor is distinctly different from an anchor that may be properly secured, but improperly utilized. The Secretary never moved to amend the Citation to allege either in the alternative or as an additional alleged violation that the standard had been violated because more than two employees were tethered to a single anchor. Moreover, post-hearing *sua sponte* amendment would be improper because the Respondent very plainly did not consent to trying the issue. *Cf. McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129 (No. 80-5868, 1984) (finding post-hearing amendment of pleadings pursuant to Fed. R. Civ. P. Rule 15(b) "is proper only if two findings can be made – that the parties *tried* an unpleaded issue and that they *consented* to do so"); *Brand Energy Solutions, LLC*, 25 BNA OSHC 1386, 1390, n. 6 (No. 09-1048, 2015) (declining to amend citation *sua sponte* on discretionary review of judge's decision). Accordingly, this additional theory of the violation of § 1926.501(d)(15) is not properly considered.

Even if this additional theory of responsibility were within the scope of the Citation's description of the alleged violation, the Secretary would have failed to prove by a preponderance of the evidence that more than one worker had been tethered to a single anchor. There is no indication that the CO discerned this alleged violative condition while inspecting the worksite. (T. 99). Rather, it appears likely that the CO concluded that more than one worker had been tethered to a single anchor only after he had studied photographs that he had taken from ground level during the inspection. (*See*

A preponderance of the evidence establishes that the roof anchor depicted in Exhibit C-2 at the peak of the roof (about an arm's length away from the worker sitting with his right elbow resting on his right knee) was a Werner model A210400 two-flanged hinged roof anchor.[5]

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T. 15). The CO testified that he believed certain photographs that he took depict more than one worker being tethered to a single anchor. (T. 69-70). However, these photographs are far from definitive and by themselves are insufficient to establish by a preponderance of the evidence that more than one worker was tethered to any single roof anchor. (Ex. C-3; T. 69-70, 148-49, 167).

[5] Pursuant to a pretrial scheduling order, Meadows was required to provide the following information to the Secretary about four weeks before the hearing: "Identify the manufacturer of any fall protection anchors that Respondent was utilizing on August 21, 2014 on the peak of the roof at 40 Bradley Boulevard, Haverhill, MA, and provide copies of manufacturer's manual and instructions for the use of such anchors." *See* Commission Rule 208, 29 C.F.R. § 2200.208 (providing that in Simplified Proceedings, discovery "will only be allowed under the conditions and time limits set by the Judge.")

Pursuant to that directive, Meadows informed the Secretary that the manufacturer of the roof anchors was the Werner Company. (T. 107, 177). Meadows, however, did not have the manufacturer's manual for the roof anchor in its possession, and thus did not provide the Secretary with any manufacturer's manuals or instructions. (T. 107, 170-71).

Because Meadows did not provide the Secretary with any manual or instructions, an official from OSHA's regional office in Boston contacted the manufacturer and obtained directly from the manufacturer three separate user instructions for various Werner Company roof anchors, one of which was for model A210400. Before the hearing, the Secretary's attorney provided Meadows' attorney with complete copies of all three of these user instructions. (T. 113). A part of the user instructions for model A210400 was received in evidence as Exhibit C-14. (T. 110-13).

CO Braile testified that the only Werner Company anchor that resembled the anchor depicted in the photograph in Exhibit C-2 was model A210400. (T. 72-77). Even though Meadows' owner, Mr. Michael Meadows, testified to having "checked the specs on the anchors," Meadows did not introduce any evidence that the hinged anchor depicted in Exhibit C-2 was something other than Werner model A210400. (T. 145). If there were any such evidence to present, it was peculiarly within Meadows' power to produce. *Cf. CCI, Inc.*, 9 BNA OSHC 1169, 1174 (No. 76-1228, 1980) (noting that when a party has evidence but does not present it, it may be reasonably inferred that the

The manufacturer's "User Instructions" for model A210400 describe the roof anchor's "Rated Capacity" as follows:

> **Rated Capacity**
>
> 1. Capacity: 310 lbs. For one person with a combined weight (person, clothing, tools, etc.) of not more than 310 lbs. Only one personal protective system may be connected to the roof anchor at any time.
> 2. Minimum Breaking Strength: 5000 lbs. when loaded within the loading direction limitations. This anchor satisfies OSHA and ANSI strength requirements when used in accordance with OSHA, ANSI local regulations and the manufacturer's instructions.

(Ex. C-14, p. 4).

The User Instructions direct users to install six screws per flange, meaning that 12 screws must be used to secure the two flanges. (Ex. C-14, p. 2). The User Instructions contain the following warning, set off in distinctive bold face type: "All 12 screws must be installed. If the roof anchor is not installed properly, it will not hold the rated loads and serious injury or death could occur." (Ex. C-14, p. 3).

One employee had attached his lanyard to the Werner model A210400 roof anchor depicted on the left side of Exhibit C-2 that had only one of its two flanges secured. (Ex. C-2, T. 67, 78, 170). Because only one of the anchor's two flanges was secured, that anchor would not hold its rated capacity of 5,000 pounds (Ex. C-14), and

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evidence would not help that party's case), *aff'd* 688 F.2d 88 (10th Cir. 1982).

For these reasons, the Secretary has proven by a preponderance of the evidence that the roof anchor depicted on the left side of the photograph at Exhibit C-2 was Werner Company model A210400.

thus was violative of the cited standard.[6]

*Employee Access and Employer Knowledge*

The Meadows employee whose lanyard was attached to the improperly secured anchor, as depicted in the photograph at Exhibit C-2, was exposed to the violative condition.

"Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). "It need not … be shown that the employer understood or acknowledged that the physical conditions were actually hazardous." *Id.*

Meadows had knowledge of the violative condition. The owner of Meadows, Mr. Michael Meadows, indicated that it was common practice for Meadows employees to secure only one flange of the two-flanged anchor, testifying, "We've been doing it for years." (T. 170). Moreover, when the CO arrived at the worksite, the foreman (R.T.) had positioned himself at a location on the ground so that he could observe the workers on the

[6] The Secretary argues that the roof anchor on the roof peak depicted in Exhibit C-3 is also a Werner model A210400 and that this anchor has only one of its two flanges secured. (Sec'y Br. 3; T. 68-69). It is apparent from a comparison of the anchor depicted in the photograph at Exhibit C-3 and the depiction of Werner model A210400 shown in the manufacturer's user instructions at Exhibit C-14, that the anchor depicted in the Exhibit C-3 looks different from the anchor depicted in the User Instructions at Exhibit C-14. According to the Respondent's owner, Mr. Michael Meadows, more than one type of roof anchor was being used at the worksite. (T. 177). Scrutiny of the photograph at Exhibit C-3 makes it apparent that the anchor depicted there is probably some model other than A210400 as depicted in Exhibit C-14. The evidence is therefore insufficient to establish that the anchor depicted in Exhibit C-3 is Werner model A210400, and thus there is no evidence that the anchor depicted in Exhibit C-3 was not capable of supporting at least 5,000 pounds as required by the cited standard.

roof "for production and quality purposes." (T. 59, 64). The foreman had ample opportunity to observe that only one flange of the Werner anchor model A210400 depicted in Exhibit C-2 was secured. *See Rawson Contractors Inc.*, 20 BNA OSHC 1078, 1080-81 (No. 99-0018, 2003) (imputing a foreman's knowledge to the employer).

The Secretary has met his burden to establish by a preponderance of the evidence that Meadows violated § 1926.502(d)(15) in the manner alleged in item 1 of the Citation.

*Classification of Violation of § 1926.502(d)(15)*

The Act provides that a violation is "serious" if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). "[Section 666(k)] does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Pete Miller, Inc.,* 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000).

If the roof anchor had failed and the worker had fallen 25 feet to the ground, serious injury or death could have resulted. (T. 42). The violation is correctly classified as "serious."

*Affirmative Defenses to Violation of § 1926.502(d)(15)*

Meadows timely interposed the affirmative defense of infeasibility to this Citation item.[7] An employer who raises the affirmative defense of infeasibility has the burden to

[7] Meadows also raised the affirmative defense of unpreventable employee misconduct but has not argued this affirmative defense in its post-hearing brief. The parties were informed by order dated February 6, 2015, that claims and defenses not argued in their respective principal briefs would be deemed abandoned. *See Ga.-Pac. Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991). The other matters that Meadows raised in its amended statement of affirmative defenses to this Citation item are matters that merely negate an element of the Secretary's case, and thus are not truly in the nature

prove that "(1) literal compliance with the requirements of the standard was infeasible under the circumstances and (2) *either* an alternative method of protection was used *or* no alternative means of protection was feasible." *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160 (No. 90-1620, 1993) (consolidated) (emphasis in original).

Meadows argues that the evidence showed that it was infeasible for both flanges of the two-flanged roof anchor to be secured for the duration of the roof installation, because as new shingles were installed up to the roof peak, "Meadows was required to lift that flange to shingle the area where the flange was previously affixed." (Resp. Br. 5). The Respondent's owner, Mr. Michael Meadows, testified that during an earlier phase of the roof installation, both flanges of the two-flanged anchor shown in Exhibit C-2 had been secured, but as the shingle installation approached the peak of the roof, one of the two flanges had to be unsecured. He testified:

> Q So Meadows had both flanges on these roof anchors installed throughout the first public -- the first street side of the roofing project?
>
> A Yes. We didn't have to take them down after we did the front.
>
> Q Do you know why one flange may have been lifted up on any of these anchors?
>
> A Because as the picture shows, they're bringing the shingle up, so they left the other side screwed down. They bring the shingle up, and then we have to cut that, and then we'll put it back down till after we do the ridge. The shingles were going on right then, not the ridge. The vent was not happening, at that point. The shingle has to go all the way up to the very top.

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of affirmative defenses. *See United States Postal Serv.*, 24 BNA OSHC 2066, 2068 (No. 08-1547, 2014).

Q Is it feasible to have both flanges screwed down?
A You can't.
Q Why is that?
A Because you'll never get the shingle underneath it.

(T. 147).

Meadows has not carried its burden to establish the affirmative defense for at least three reasons. First, Meadows presented no evidence that it was infeasible to comply with § 1926.502(d)(15) by the alternative method of compliance that is described in footnote 3, *supra*.

Second, Mr. Meadows testified that there are single-flange anchors rated to support at least 5,000 pounds that Meadows had actually used during this project. (T. 169, 177; Ex. R-4). Meadows presented no evidence that it would have been infeasible to use such a single-flanged anchor instead of the double-flanged model A210400 to overcome the technical problem that Mr. Meadows described in his testimony.

Third, the Citation item states that the alleged violation was "corrected during inspection." This is inherently contradictory to the assertion that it was infeasible to correct the violative condition that existed when the CO arrived. (No evidence was presented that the Citation erroneously stated that the alleged violative condition had been corrected during the inspection.)

Meadows has failed to present sufficient evidence to establish the affirmative defense of infeasibility.

*Citation Item 2 – Unattended Industrial Truck, § 1926.602(c)(1)(vi)*

Item 2 of the Citation alleges that Meadows violated § 1926.602(c)(1)(vi) because Meadows' telehandler "was left unattended with the hoisting boom fully extended over the roof of a two story commercial building with a pallet of roof shingles on the forks."

The cited standard, § 1926.602(c)(1)(vi), provides:

> (c) *Lifting and hauling equipment (other than equipment covered under subpart N of this part).* (1) Industrial trucks shall meet the requirements of § 1926.600 and the following:
>
> ….
>
> (vi) All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined in American National Standards Institute B56.1-1969, Safety Standards for Powered Industrial Trucks.

Subparagraph (c)(1)(vi) expressly makes the "operation" requirements of American National Standards Institute (ANSI) consensus standard B56.1-1969, "Safety Standards for Powered Industrial Trucks," applicable to "[a]ll industrial trucks in use" in construction.

One of the operation requirements of ANSI standard B56.1-1969 pertinent here is subsection E of section 603, which provides as follows: "When leaving a powered industrial truck unattended, load engaging means shall be fully lowered, controls shall be neutralized, power shut off, brakes set, keys or connector plug removed. Block wheels if truck is parked on an incline." (Ex. C-18, p. 2).

Another of the ANSI standard's operation requirements pertinent here is section 602, which provides in part as follows: "Only trained and authorized operators shall be

permitted to operate a powered industrial truck." (Ex. C-18, p. 2).

Section 1926.602(d), "Powered industrial truck operator training," incorporates by reference general industry standard 29 C.F.R. § 1910.178(l). Powered Industrial Truck Operator Training (Final Rule), 63 Fed. Reg. 66238, 66274 (Dec. 1, 1998) (to be codified at 29 C.F.R. part 1926). Section 1926.602(d) thus makes the training requirements set forth in § 1910.178(l) applicable to operators of powered industrial trucks in construction.

Section 1910.178(l) requires that employers "ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l)." This required training must "consist of a combination of formal instruction …, practical training …, and evaluation of the operator's performance in the workplace." § 1910.178(l)(2)(ii). The content of the required training is prescribed by § 1910.178(l)(3). Employers are required to "certify that each operator has been trained and evaluated as required by this paragraph (l)." § 1910.178(l)(6). This certification must "include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation." *Id.*

*Applicability of § 1926.602(c)(1)(vi)*

Meadows makes two separate arguments that § 1926.602(c)(1)(vi) does not apply. Meadows' first argument is that the cited standard applies only to "earthmoving equipment" (and thus not to the telehandler, which is not earth moving equipment). Meadows bases this argument on paragraph (a) of § 1926.602, which is captioned

"Earthmoving equipment," and subparagraph (a)(1), which states, "These rules apply to the following types of earthmoving equipment," and then lists such equipment. Industrial trucks are not included in that list.

This first argument is rejected. The descriptive heading for the whole of § 1926.602 is "Material handling equipment."[8] "Earthmoving equipment" is the caption for paragraph (a) of § 1926.602. The limiting introductory clause in subparagraph (a)(1) ("[t]hese rules apply to the following types of earthmoving equipment") relates only to the rules contained in paragraph (a). In contrast, paragraph (c) bears the caption "Lifting and hauling equipment," and subparagraph (c)(1) expressly establishes requirements for industrial trucks.

It is undisputed that the telehandler is a "rough terrain forklift." (T. 17). A "rough terrain forklift" is a type of "industrial truck." (T. 63). Section 1926.602(c)(1)(vi) applies to all industrial trucks in use in construction, including rough terrain forklift trucks like the telehandler. *See* OSHA Standard Interpretation letter dated November 27, 2001 (interpreting § 1926.602(c)(1)(vi) to be applicable to rough terrain forklifts);[9] *see also* Powered Industrial Truck Operator Training (Final Rule), 63 Fed.

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[8] Each section in the Code of Federal Regulations has "a brief descriptive heading, preceding the text, on a separate line." 1 C.F.R. § 21.16(b). These descriptive headings are useful for identifying the purpose of a standard. Nonetheless, in determining the scope of a standard, the Commission looks "primarily to the standard itself rather than its caption." *Chesapeake Operating Co.*, 10 BNA OSHC 1790, 1793 (No. 78-1353, 1982).

[9] The Secretary appended to his post-hearing brief a copy of this OSHA interpretation letter in the form in which it has been published on OSHA's public web site.

Reg. at 66241 (to be codified at 29 C.F.R. parts 1910, 1915, 1917, 1918 and 1926) (describing "rough terrain forklift trucks" as a type of industrial truck to which training requirements of § 1910.178(l) apply). Meadows' first argument that the cited standard is applicable only to "earthmoving equipment," and thus is not applicable to the telehandler, has no merit.

Meadows' second argument that the cited standard does not apply relates to ANSI consensus standard B56.6-2005, "Safety Standard for Rough Terrain Forklift Trucks." That ANSI standard applies only to rough terrain forklift trucks, such as Meadows' telehandler. (Ex. R-1). Meadows argues that this more recently published ANSI standard is the only consensus standard applicable to the telehandler.[10] Meadows seems to argue that the cited OSHA standard does not apply because it does not expressly adopt the requirements of the 2005 ANSI standard applicable to rough terrain forklift trucks. (Resp. Br. 14-16). This argument is rejected.

The requirements of ANSI standard B56.6-2005 appear not to have been expressly adopted by any OSHA standard. In contrast, § 1926.602(c)(1)(vi) expressly makes the requirements of ANSI standard B56.1-1969 applicable to all types of powered industrial trucks in use in construction, including a rough terrain forklift truck like the telehandler involved here. *See* Powered Industrial Truck Operator Training (Final Rule), 63 Fed. Reg. at 66255 (stating that the coverage of § 1910.178 is the equivalent of the

[10] In contrast, ANSI standard B56.1-1969 was first adopted by the OSHA general industry standards in 1971 (36 Fed. Reg. 10466, 10613) (to be codified at 29 C.F.R. part 1910), and was adopted by the OSHA construction standards in 1979 (44 Fed. Reg. 8577, 8647) (to be codified at 29 C.F.R part 1926).

coverage of ANSI standard B56.1-1969, and that § 1910.178 applies to industrial trucks that are covered by more specific consensus standards, including standard B56.6 for rough terrain forklift trucks); Powered Industrial Truck Operator Training (Final Rule), 63 Fed. Reg. at 66241 (describing standard B56.6 applicable to rough terrain forklift trucks as a "supplementary" standard to the broader standard B56.1-1969). This second argument that the cited standard is not applicable has no merit.

Because the telehandler is an industrial truck that was being used in construction, § 1926.602(c)(1)(vi) applies.

*Compliance with § 1926.602(c)(1)(vi)*

The Citation item alleges that Meadows failed to comply with § 1926.602(c)(1)(vi) because the telehandler "was left unattended with the hoisting boom fully extended over the roof of a two story commercial building with a pallet of roof shingles on the forks." As discussed below, the Secretary has proven the facts alleged and has thereby established that Meadows failed to comply with the cited standard.

Subsection E of section 603 of ANSI standard B56.1-1969 specifies that "[w]hen leaving a powered industrial truck unattended, load engaging means shall be fully lowered." When the CO arrived at the worksite, the telehandler's load-engaging means was not fully lowered. Rather, the telehandler's extensible boom and attached fork was supporting a pallet of shingles more than 25 feet in the air. Compliance with ANSI standard B56.1-1969 required that the telehandler not be left "unattended" in that position.

Commission precedent holds that an industrial truck is deemed "unattended"

within the meaning of section 602, subsection E, of ANSI standard B56.1-1969 when its operator is "25 feet or more away from the vehicle which remains in his view," as is specified by the general industry standard for "powered industrial trucks" at 29 C.F.R. § 1910.178(m)(ii). *A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 2001 (No. 92-1022, 1994) (relying on 29 C.F.R. § 1910.178(m)(ii) to define the word "unattended" as used in ANSI standard 56.1-1969).

The Secretary argues that the telehandler was left unattended because the foreman (R.T.) was the only trained and authorized operator of the telehandler present, and that he was about 194 feet away from it when the CO entered the worksite. Meadows argues that the telehandler was not left unattended because L.B. was standing within 25 feet of it. (Resp. Br. 17).

The foreman, R.T., told the CO that he was the only person at the worksite who was "qualified and authorized to operate" the telehandler. (T. 44). The foreman also told the CO that another Meadows employee authorized to operate the telehandler had been present, but that he had departed the worksite about two hours before the CO arrived. (T. 44).

Meadows' owner, Mr. Michael Meadows, testified that Meadows provides training on heavy equipment such as telehandlers, excavators, bulldozers, and backhoes, and that "each guy is expected to know how to operate every piece." (T. 135). He testified further that "most" of his employees "get operational experience on heavy equipment … including the telehandler." (T. 135). Mr. Meadows testified that he believed all of the employees present at the worksite when the CO arrived "had enough

training to step in" if an emergency occurred. (T. 135).

When Mr. Meadows was asked whether he had any documents pertaining to the training of the employee who was standing next to the telehandler (L.B.), he testified, "I have sign-in sheets for United Safety that they sign in on." (T. 170). According to Mr. Meadows, United Safety is a company that Meadows uses to provide training and twice yearly gives "a four-hour safety talk of how to – what's the industry standards, what's happening as far as the problems out there, law changes, and so forth." (T. 129). There was no evidence that L.B. received the training required by § 1910.178(l) on the operation of the telehandler either from United Safety or from Meadows. There was thus no evidence that any employees who were present during the CO's inspection (except for R.T.) had received the operator training prescribed by § 1910.178(l) on the telehandler. Nor was there any evidence presented that Meadows had issued a certification of operator training and evaluation as required by § 1910.178(l)(6) for any employee at the worksite other than R.T.

The finding of fact that the foreman (R.T.) was the only employee present who was trained and authorized to operate the telehandler is based on the CO's testimony regarding what the foreman (R.T.) told the CO. (T. 44).

The CO's testimony about what R.T. said to the CO was credible and reliable. Although English was a second language for R.T. (his native language was Portuguese), the CO perceived R.T. to be fluent in English and he did not perceive R.T.'s English language skills to impede their effective communication. (T. 102, 151).

R.T. was not called to testify. No evidence was presented that controverted the

CO's testimony about what R.T. had said to him. If any evidence existed that the CO had somehow misunderstood or misremembered what R.T. said, it was incumbent upon Meadows to present it.[11]

The CO's testimony of what the foreman (R.T.) said to him is not hearsay evidence pursuant to Fed. Rule Evid. Rule 801(d)(2)(D), which provides that a statement is not hearsay if it is offered against a party opponent and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." The evaluation of the reliability of an employee's statement that is admissible under Rule 801(d)(2)(D) was addressed in *Regina Constr. Co.*, 15 BNA OSHC 1044, 1048 (No. 87-1309, 1991):

> Although admissions under Rule 801(d)(2)(D) are not inherently reliable, there are several factors that make them likely to be trustworthy, including: (1) the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted. 4 D. Louisell & C. Mueller, *Federal*

[11] At the outset of the hearing, the attorney for Meadows indicated that two Meadows employees who had been onsite during the CO's inspection had traveled to Brazil to work there during the winter, but the attorney did not specifically identify who those two employees were. (T. 6). Meadows did not request a continuance of the hearing due to the unavailability of an essential witness. It is also worth noting that since this matter was heard in Simplified Proceedings, the Federal Rules of Evidence were not applicable, and thus a written statement from R.T. addressing what he said to the CO during the inspection could have been offered and received in evidence. Commission Rule 209(c), 29 C.F.R. § 2200.209(c).

*Evidence* § 426 (1980 & Supp.1990). [12]

All three enumerated factors described above in *Regina Constr. Co.* weigh heavily in support of the conclusion that R.T.'s statement to the CO is likely to be trustworthy, and proves that R.T. was the only person onsite trained and authorized to operate the telehandler.

R.T. was about 194 feet away from the telehandler when the CO arrived at the worksite. Because the only person on the worksite who was certified to operate the telehandler was more than 25 feet away from the telehandler while its load-engaging means were elevated, Meadows failed to comply with the cited standard in the manner alleged by the Citation item.

*Employee Access to Violative Condition*

The Secretary argues that the two workers in the lift basket of the aerial boom lift and the workers on the roof were exposed to the violative condition. (Sec'y Br. 7-8).

To establish employee access to a hazard, "the Secretary must show either that Respondent's employees were actually exposed to the violative condition or that it is 'reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.'" *S&G Packaging Co.,*

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[12] In 2011, Fed. R. Evid. 801(d)(2) was amended so that it no longer calls an out of court statement of a party opponent an "Admission by party-opponent," but instead calls it "An Opposing Party's Statement." The advisory committee recommended this change on the rationale that "[t]he term 'admissions' is confusing because not all statements covered by the exclusion are admissions in the colloquial sense – a statement can be within the exclusion even if it 'admitted' nothing and was not against a party's interest when made." 2011 Advisory Committee note on technical changes to Fed. R. Evid. 801(d)(2).

19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) (quoting *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)). "The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Construction Co.*, 17 BNA OSHC 1229, 1233 (No. 91-2107, 1995).

The two workers in the aerial lift were exposed to the violative condition. If the telehandler's boom and its attached fork had unexpectedly fully lowered or retracted, the boom or fork would have struck the extended boom of the aerial lift, which was supporting two employees who were working at eave-level. This could have resulted in those workers falling to the ground and suffering serious injury or death. (T. 42).

The workers on the roof who were retrieving new shingles from the fork of the telehandler were also exposed to the violative condition. Any unexpected lowering of the boom could have resulted in the fork striking and injuring the employee. (*See* Ex. C-2).

Meadows argues that no employees were exposed to the violative condition. Meadows asserts that the unattended telehandler did not present any hazard because (1) the vehicle itself was immobilized because its stabilizers were deployed, and (2) the boom would not move even if there was an equipment failure because the boom had "an automatic, metal lock which prevents the boom from lowering or moving forward due to a hydraulic failure." (Resp. Br. 19).

Meadows' argument is rejected. The evidence is insufficient to support a finding of fact that it was impossible for the telehandler's boom to move in the event of a hydraulic failure or other failure. Although Mr. Michael Meadows testified to this effect

(T. 132-34), his testimony was uncorroborated by any information from the manufacturer or from any other authoritative source regarding the design and engineering of the telehandler's boom and the effect of a failure on the boom's functioning. While Mr. Meadows seems to have held the sincere belief that the boom could not move in the event of an equipment failure, his uncorroborated testimony alone on that subject is not weighty enough to establish by a preponderance of the evidence that his sincerely held belief is accurate.

Second, even if Mr. Meadows was correct that the telehandler's boom could not move in the event of a hydraulic failure, the cited standard is a specification standard that presumes a hazard to exist if the terms of the standard are violated. *A.L. Baumgartner*, 16 BNA OSHC at 2001 (observing that § 1926.602(c)(1)(vi) "does not require separate proof of a hazard," but rather "gives notice of the proscribed conduct and contemplates the existence of a hazard when its terms are not met"); *see also Joseph J. Stolar Constr. Co.*, 9 BNA OSHC 2020, 2024 n.9 (No. 78-2528, 1981) (noting that "when a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated"). Even the newer consensus standard B56.6-2005 (which Meadows has argued is the only consensus standard that is applicable to the telehandler) requires that a rough terrain forklift truck's load-engaging means be fully lowered when the equipment is left unattended. ANSI B56.6-2005, section 6.2.12(g). (Ex. R-1).

The preponderance of the evidence establishes that employees had access to the presumed hazard presented by the violative condition of the telehandler being left

unattended with its load-engaging means elevated.

*Employer Knowledge of Violative Condition*

Meadows' foreman onsite knew that he was the only person present who was certified to operate the telehandler, and he knew that he was more than 25 feet away from the telehandler when its load-engaging means were elevated over the roof. The foreman's knowledge is imputed to the employer, and establishes the "employer knowledge" element of the Secretary's burden of proof.

The Secretary has met his burden to establish by a preponderance of the evidence that Meadows violated § 1926.602(c)(1)(vi) in the manner alleged in item 2 of the Citation.[13]

*Classification of Violation of § 1926.602(c)(1)(vi)*

If the telehandler's boom had unexpectedly lowered or retracted, it would have come into contact with the extended boom of the aerial lift, which was supporting two employees who were working at eave-level. This could have resulted in those two workers falling to the ground and suffering serious injury or death. (T. 42). The boom and fork could also have struck and injured employees working on the roof's surface. The violation is correctly classified as "serious."

*Penalty Assessment*

The permissible range of penalties for a serious violation is from no penalty to $7,000. 29 U.S.C. § 666(b). The Commission and its judges conduct *de novo* penalty

[13] Meadows raised the affirmative defense of unpreventable employee misconduct to Citation item 2, but has not argued this affirmative defense in its brief, so that affirmative defense is deemed abandoned. (Resp. Br. 19-20). *See* footnote 7, *supra*.

determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) *aff'd*, 73 F.3d 1466 (8th Cir. 1996); *Allied Structural Steel*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975).

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the S.*, *Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990). Gravity is the primary consideration among these four statutory criteria, and is determined by "such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary seeks a penalty of $5,390.00 for each of the violations, for a total proposed penalty of $10,780.00. The Secretary determined that a resulting injury from each of the violative conditions would have been of "higher" severity, and that the probability of an injury resulting from each of the violations was "greater"[14] (as opposed to "lesser"). (T. 119-20). The proposed penalty was the product of an automated process that generates a proposed penalty based upon data input on certain parameters. (T. 119, 123-24). The proposed penalties were increased for "history" because Meadows had been cited for a "higher severity/greater probability" violation within the previous five

[14] The transcript erroneously reflects the word "grader" being spoken, when in actuality the word being spoken was "greater." (T. 119, lines 1, 12, 22 & 25).

years, although the record does not reflect the percentage of the increase. (T. 119). The proposed penalties were reduced due to Meadows' smaller size, although again the record does not reflect the percentage of that reduction. (T. 119).

Meadows notes that in its 37 years of operations it has had only one accident, and that this record has earned it a very favorable insurance rating. (Resp. Br. 2). "The absence of a history of accidents ..., while irrelevant to whether a violation exists, may be considered in determining gravity." *Monitor Constr. Co.,* 16 BNA OSHC 1589, 1595 n.8 (No. 91-1807, 1994) *citing Brennan v. Smoke-Craft, Inc.,* 532 F.2d 843 (9th Cir. 1976).

As discussed above in connection with the "serious" classifications, in the event of an accident both violations could result in serious injury or death. This supports the characterization of "higher" severity of resulting injury.

As to the "greater probability" classification for the improperly secured roof anchor, it was apparently a common practice for Meadows' employees to secure only one of the two flanges of anchor model A210400 to the roof. This practice was contrary to the manufacturer's user instructions and warning that both flanges had to be secured for the anchor to support the minimum weight required by § 1926.502(d)(15). In view of this common practice, it is reasonable to conclude that the probability that an accident could occur was "greater."

With regard to the "greater probability" classification as to the telehandler, as is discussed above, Mr. Meadows' testimony was insufficiently weighty by itself to establish that the boom would not lower or retract even in the event of some kind of equipment failure. Given that both of the consensus standards presented in evidence

require that the telehandler's boom be lowered when unattended, it is reasonable to conclude that the probability that an accident could occur for failing to do so was "greater."

The evidence supports a reduction of the penalty to account for Meadows' relatively small size.

The evidence is insufficient to support an increased penalty based upon Meadows' compliance history. No documentary evidence was presented to establish that any citation previously issued to Meadows had become a final order. The undersigned takes notice of the Commission's records in *Meadows Constr. Co., LLC*, No. 12-2142, which involves alleged violations by Meadows in July 2012, but upon which there has been no final order of the Commission because the judge's decision in that matter is presently pending before the Commission on discretionary review. 29 U.S.C. § 661(j); 29 C.F.R. § 2200.91; *cf. Hamilton Die Cast, Inc.*, 12 BNA OSHC 1797, 1799 (No. 83-308, 1986) (holding the "failure to direct a particular citation item for review does not make the judge's disposition of that item a final order of the Commission"), *overruled on other grounds by R & R Builders, Inc.*, 14 BNA OSHC 1844 (No. 88-282, 1990).

No adjustment for good faith is appropriate in view of Meadows' apparent disregard (1) of the manufacturer's installation instructions for the roof anchor, and (2) the requirement set forth in both the controlling OSHA standard (B56.1-1969) and the newer supplemental consensus standard (B56.6-2005, which Meadows has asserted is the only applicable standard) that the telehandler's boom be fully lowered when left unattended.

Considering these factors, a penalty of $4,750.00 for each violation for a total penalty of $9,500.00 is appropriate.

**ORDER**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a). If any finding is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the contrary notwithstanding. Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, Item 1 for a serious violation of 29 C.F.R. § 1926.502(d)(15) is AFFIRMED and a penalty of $4,750 is ASSESSED; and

2. Citation 1, Item 2, for a serious violation of 29 C.F.R. § 1926.602(c)(1)(vi) is AFFIRMED and a penalty of $4,750 is ASSESSED.

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: September 15, 2015