



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.

CECO CONCRETE CONSTRUCTION, LLC,

Respondent.

OSHRC Docket No. 17-0483

ON BRIEFS:

Amy S. Tryon, Senior Attorney; Charles F. James, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Angelo M. Filippi, Esq., Kelley Kronenberg, Fort Lauderdale, FL
For the Respondent

DECISION

Before: ATTWOOD, Chairman; SULLIVAN and LAIHOW, Commissioners.

BY THE COMMISSION:

Ceco Concrete Construction, LLC, is a nationwide structural concrete construction company. On September 1, 2016, a Ceco employee died after falling from the 16th floor of a building under construction in West Palm Beach, Florida. Following the accident, the Occupational Safety and Health Administration conducted an inspection and issued Ceco a four-item, serious citation, of which only two items—Items 3 and 4—are at issue on review. Item 3 alleges a violation of 29 C.F.R. § 1926.703(a)(1) for failing to design formwork to withstand vertical and lateral loads from wind gusts. Item 4 alleges a violation of 29 C.F.R. § 1926.703(b)(6) for failing to properly secure a formwork table's legs and anchor plates to the building's concrete floor.

Following a hearing, Administrative Law Judge John B. Gatto affirmed both citation items and assessed the proposed \$12,675 penalty for each violation. For the following reasons, we also affirm both violations, but on different grounds than the judge, and assess a single grouped penalty of \$12,675.

BACKGROUND

Ceco was subcontracted to build the concrete structure for a 20-story condominium building in West Palm Beach, Florida. This work required installing and removing formwork—the molds used to hold wet concrete—on each floor of the building, including the installation of pre-built formwork tables around the floor’s perimeter. Ceco placed each table individually and then tied them together, at which point workers poured the layer of concrete that would form the new floor. Once the poured concrete had cured sufficiently, Ceco released each perimeter table by first lowering its legs several inches and then detaching it from the concrete floor. A crane with a special attachment called a “C-picker” was then used to remove and lift the table into the same position on the floor above. Each floor, including the interior formwork that is not at issue here, took approximately a week to construct.

Ceco’s written procedures for installing perimeter tables are set forth in a manual titled “CEFCO E-Z Panel System: Basic Installation and Stripping Using the CH3850 C-Picker,” commonly referred to by the company as its “best practices manual.” According to those procedures, as well as testimony from Ceco officials, the formwork tables are secured in several steps. When a table is first placed into position with the C-picker, workers drill a hole at each of the table’s two interior legs and drive form spikes into the holes. These form spikes are designed to prevent the table from being knocked off the building as the C-picker is withdrawn. Before detaching the C-picker, workers perform a rough grading of the table, extending its legs until they are approximately the correct height.

Once the C-picker is detached, workers secure the table against potential wind by attaching nylon ratchet straps to baseplates anchored to the concrete floor. The best practices manual directs workers to attach the ratchet straps’ base plates to the concrete using half-inch drop-in or cast-in anchors. The manual allows for the substitution of bolts of equivalent strength for drop-in anchors in some instances, but it specifies that workers should not deviate from using half-inch drop-in anchors when securing corner tables. Once set, anchored, and leveled, the tables remain in place

for some variable period of time before they are ultimately tied together and connected to the interior formwork.

On the day of the accident, Ceco was in the process of moving the perimeter formwork tables from the 15th to the 16th floor. On the 16th floor, a three-person crew consisting of two Ceco employees and a foreman was setting and securing the formwork tables as they were placed. Just prior to the accident, the crew set in place a corner table with an atypical design where one side of the 12-foot-long table had a six-foot cantilever, three times larger than the opposite side's two-foot cantilever. The crew installed form spikes into the legs of the corner table, known as Table 27, then graded the table by adjusting its height. To secure the table, the crew attached two ratchet straps and anchored each strap's base plate with two half-inch wedge bolts. After the C-pickup was detached, a worker was attempting to adjust one of Table 27's legs when the table fell off the building, dragging him with it and breaking his personal fall protection device. The worker died from the fall.

DISCUSSION

To prove a violation, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) its terms were violated, (3) an employee was exposed to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982); *see also ComTran Grp. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1308 (11th Cir. 2013). The cited standards for both items at issue on review are performance standards. *See Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, 1419 (No. 89-1206, 1993) (discussing section 1926.703(a)(1)). Performance standards "require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them." *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) (citing *Lowe Constr. Co.*, 13 BNA OSHC 2182, 2185 (No. 85-1388, 1989)). In other words, when faced with complying with a performance standard, employers are required to address the hazards that a "reasonably prudent employer" would recognize. *See Associated Underwater Servs.*, 24 BNA OSHC 1248, 1250 (No. 07-1851, 2012) (citing *W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1235 (No. 09-0344, 2000), *aff'd*, 285 F.3d 499 (6th Cir. 2002); *Thomas Indus. Coatings*, 21 BNA OSHC at 2287 ("[P]erformance standards . . . are interpreted in light of what is reasonable.") (citation omitted)).

Item 3

Section 1926.703(a)(1) states that “[f]ormwork 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.” 29 C.F.R. § 1926.703(a)(1). The Secretary alleges in the citation that Ceco violated this provision because the formwork at the worksite “was not *designed* to withstand vertical and lateral loads due to wind gusts.” (emphasis added). On review, Ceco challenges only the judge’s findings regarding noncompliance and knowledge.

Noncompliance

The judge found noncompliance on the basis that Ceco failed to design the individual formwork tables for lateral loads, including wind loads, for the period of time before the tables were tied together. Ceco asserts this was error, pointing to the Commission’s decision in *Worcester Steel*—the only Commission precedent addressing the cited provision—and arguing the Secretary was required to prove the formwork as erected was not strong enough to support reasonably anticipated wind loads.

We disagree. In *Worcester Steel*, the employer was cited for failing to *erect* metal decking to support all reasonably anticipated loads, not for failing to *design* the decking to do the same. 16 BNA OSHC at 1409; see 29 C.F.R. § 1926.703(a)(1) (“Formwork shall be *designed*, fabricated, *erected*, supported, braced and maintained . . .” (emphasis added).) “[E]rected” and “designed” are two different elements of the standard and we cannot interpret them to have interchangeable meanings.¹ The Secretary did not contest the adequacy of the company’s design plans in *Worcester Steel* but instead pointed to the company’s deviation from those plans in erecting the decking and argued that the deviation established a violation. *Id.* at 1417-18. In vacating the citation, the Commission rejected this argument, holding that the company’s deviation from its design plan did not establish a violation—rather, “the Secretary has the burden to show that, more

¹ In this regard, Ceco’s proffered reading of *Worcester Steel* also runs afoul of § 1926.703(a)(1)’s plain language. Requiring the Secretary to always demonstrate the insufficiency of *erected* formwork would effectively eliminate any meaningful distinction between the provision’s separate requirements that employers design formwork to withstand reasonably anticipated loads, and then erect and maintain the formwork to do the same. See *Jesco, Inc.*, 24 BNA OSHC 1076, 1078 (No. 10-0265, 2013) (citing *Am. Fed’n of Gov’t Emps.*, 803 F.2d 737, 740 (D.C. Cir. 1986)) (explaining that a “standard must be read as a coherent whole and, if possible, construed so that every word has some operative effect”).

likely than not, the erected formwork was not strong enough to support the reasonably anticipated load.” *Id.* at 1419.

In contrast to *Worcester Steel*, the citation here alleges that Ceco failed to *design* the formwork to withstand reasonably anticipated wind loads. Thus, the Commission’s analysis in *Worcester Steel* is only relevant in the sense that it requires the Secretary to prove that Ceco either lacked a design or its design was inadequate. But it does not, as Ceco claims, require the Secretary to prove that the formwork as *erected* was not capable of withstanding all reasonably anticipated loads. Rather, the Secretary can prove a violation of § 1926.703(a)(1) by demonstrating that an employer failed to adequately account for reasonably anticipated wind loads when designing its formwork, even if the formwork as ultimately erected was sufficient to withstand such loads.

Turning to Ceco’s design plans, the company points to the procedures laid out in its best practices manual and argues that the Secretary failed to prove they were insufficient. At the hearing, however, OSHA’s expert witness, structural engineer Gopal Menon, testified that the procedures addressing the formwork’s design were at a minimum plainly inadequate for Table 27, which was the corner table being placed at the time of the accident. This was because it had “asymmetrical cantilevers—six feet on one end of the table and just two feet on the other,” and therefore even “the slightest wind” could topple it over. Menon testified that Ceco’s design was flawed based on wind estimates from the American Society of Civil Engineering. He used those estimates to calculate that formwork at an elevation of 150 feet in West Palm Beach reasonably could be subjected to winds of 150 to 170 miles per hour. Menon explained that in calculating these wind speeds he accounted for the relatively brief amount of time that each formwork table would stand separate from and unattached to the surrounding formwork.

Ceco introduced no evidence, expert or otherwise, to rebut Menon’s testimony regarding the reasonably anticipated lateral wind loads at the worksite. And the company’s director of engineering, Eric Eder, testified that just prior to the hearing, a former Ceco engineer informed him the manual’s procedure for securing individual formwork tables during the installation process was designed to withstand sustained winds of 90 miles per hour and gusts of up to 115 miles per hour.² Eder was the only witness for Ceco to testify about what lateral wind speeds individual

² Counsel for Ceco attempted to question Eder about Menon’s wind speed estimates, but the judge correctly ended the line of questioning following an objection from the Secretary that Ceco had not offered Eder as an expert witness.

formwork tables could withstand.³ Thus, Menon’s unrebutted expert testimony regarding the anticipated wind speeds, together with Eder’s testimony regarding the best practices manual’s actual design capacity, establishes that Ceco’s design for the perimeter tables was inadequate.

Finally, although Ceco provides no evidence to rebut Menon’s expert testimony, the company nonetheless asserts his testimony should not be credited, pointing to statements Menon made at the hearing—specifically that he “did not look into the [manual’s] design” and did not “know whether what is provided in [it was] sufficient.” But taken in context, it is clear that both of Menon’s statements were predicated on the fact that Ceco had failed to respond to the Secretary’s discovery request for the engineering calculations that went into developing the manual. See *N. Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1473 (No. 96-0721, 2001) (“[D]eficiencies in [the employer’s] response should be taken as establishing that there was no such evidence, not that the Secretary failed to carry her burden.”) (citing *Ocean Elec. Corp. v. Sec’y of Labor*, 594 F.2d 396, 403 n. 4 (4th Cir. 1979)). Thus, in stating he “did not look into the design,” Menon was simply acknowledging that there was nothing for him to “look into.” The same is true with respect to Menon’s testimony regarding the manual’s sufficiency—with no engineering calculations on which to base an opinion, it is hardly surprising that Menon was unable to draw firm conclusions in this regard.

Although the record does not establish what wind speeds were present on the day of the accident or even that wind actually caused Table 27 to topple over, the testimony of Menon and Eder establishes that adequate wind speeds were not accounted for in the design of the formwork. This is sufficient to demonstrate a violation of the standard.⁴ For all these reasons, we find the

³ We note that Ceco’s design engineer for the project, Carolina Kumanchik, was not called to testify at the hearing but asserted generally during a deposition that the procedures in the company’s best practices manual were sufficient for the individual formwork tables. In making this assertion, however, she conceded that she did not recall making any load calculations for specific tables at the project. Likewise, Kevin Peterson, Ceco’s regional safety director responsible for this project, testified that he did not know what calculations were made in developing the table anchoring system. During discovery, the Secretary requested that Ceco provide documentation of the engineering calculations that went into designing the manual’s best practices, but received no response.

⁴ The Commission has long held that “[d]etermining whether the standard was violated is not dependent on the cause of the accident.” *Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated), *aff’d in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003). It is

Secretary established that Ceko failed to comply with the cited provision because the company did not design the formwork tables to withstand the reasonably anticipated wind speeds at the worksite.

Knowledge

To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation. *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015). Here, the judge found that Ceko had actual knowledge because the foreman at the worksite knew the individual formwork tables were not designed to withstand lateral wind loads and nevertheless exposed himself and his crew to the hazard of a table falling. On review, Ceko reasserts essentially the same argument it made with respect to noncompliance—that the judge erred in finding knowledge because the Secretary failed to demonstrate the employer’s installation process was actually insufficient. We reject that argument for the same reasons set forth above.

We do, however, agree with Ceko that the judge erred in finding actual knowledge based on the foreman’s awareness of the conditions at the worksite. As discussed above, the violative condition here was Ceko’s failure to adequately *design* the formwork, not a failure by the foreman or his crew to erect or install it in accordance with the company’s design. Because there is nothing in the record showing that the foreman was involved in the company’s design process, or otherwise had knowledge that the company’s design was inadequate, there is no knowledge to impute.

The Secretary, however, has proven constructive knowledge. The record establishes that Ceko, with the exercise of reasonable diligence, could have determined both the reasonably anticipated wind speeds at the worksite, as well as its best practices manual’s design capacity. *See Wiley Organics, Inc. d/b/a Organic Tech.*, 17 BNA OSHC 1586, 1597 (No. 91-3275, 1996), *aff’d*, 124 F.3d 201 (6th Cir. 1997) (“An employer has a general obligation to inform itself of the hazards present at the worksite and cannot claim lack of knowledge resulting from its own failure to make use of the sources of information readily available to it.”) (citations omitted). Ceko engineer Carolina Kumanchik designed the formwork tables for the project and conceded she had not performed any lateral load calculations for individual formwork tables. As for Eder, he considered lateral load calculations for individual tables unnecessary for any regular-sized table that could stand on its own. Moreover, Eder explained that he only learned of the tables’ lateral wind load

therefore not necessary for the Secretary to demonstrate that wind was the actual cause of the accident to prove the violation of §1926.703(a)(1).

design capacity just days before the hearing. This evidence demonstrates that Ceco failed to reasonably assess its method of securing formwork tables against reasonably anticipated lateral wind loads. Indeed, a reasonable review or inquiry by Ceco into the design of its best practices manual would have revealed—as Eder himself learned days before the hearing—that the manual did not account for lateral winds of over 150 miles per hour. Likewise, Ceco’s engineers could have calculated, as OSHA’s expert did, the reasonably anticipated wind speeds. Accordingly, we find the Secretary has demonstrated that Ceco should have known of the violative condition.

For these reasons, we affirm the violation of § 1926.703(a)(1) alleged in Item 3.

Item 4

Section 1926.703(b)(6) states that “[a]ll base plates, shore heads, extension devices, and adjustment screws shall be in firm contact, and secured when necessary, with the foundation and the form.” 29 C.F.R. § 1926.703(b)(6). The Secretary alleges in the citation that Ceco violated the provision because “the anchorage of the table form legs to the concrete floor was not properly secured with the required bolts.” On review, Ceco challenges only the judge’s findings with regard to noncompliance. Specifically, the judge contrasted Ceco’s actual efforts to secure the tables with the procedures set forth in its best practices manual:

According to Ceco’s Best Practices Manual, the company considered securing the base plates to the foundation to be necessary and provided specific instructions to its employees to do so. Any deviation from the Best Practices Manual required approval from a Ceco engineer. Ceco’s employees deviated from the Best Practices Manual without consultation with an engineer. The [c]ourt concludes Ceco violated the cited standard.

Ceco claims that the judge erred in concluding the company’s failure to follow the bolting procedures in its best practices manual or consult an engineer about deviating from the best practices violated the standard.⁵ Ceco further asserts that the Secretary failed to demonstrate its deviation resulted in a hazard because the half-inch wedge bolts the company used to secure the formwork tables’ ratchet straps were at least as strong as the half-inch drop-in anchors required by the best practices manual.

⁵ According to Ceco, the Commission’s holding in *Worcester Steel* similarly applies to § 1926.703(b)(6), and therefore the Secretary must demonstrate that any deviations in Ceco’s method of anchoring formwork tables actually created a hazard. As discussed above, the measure of compliance for this standard is reasonableness, not whether Ceco followed its own internal design plans.

We agree with the company that the judge failed to apply the correct legal test in analyzing this element of the Secretary’s case but find that noncompliance is nonetheless established here. As a performance standard, § 1926.703(b)(6) states the objective to be achieved—ensure that “[a]ll base plates, shore heads, extension devices, and adjustment screws shall be in firm contact, and secured when necessary, with the foundation and the form”—not the means for achieving it. 29 C.F.R. § 1926.703(b)(6); *see, e.g., Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2152 (No. 08-1656, 2016) (identifying 29 C.F.R. § 1926.602(a)(3)(i) as a performance standard). Thus, the appropriate inquiry here is not whether Ceco complied with its own best practices manual, but whether the company made reasonable efforts to secure the base plates and other equipment against reasonably expected loads. *See Thomas Indus. Coatings*, 21 BNA OSHC at 2287 (“Because performance standards . . . do not identify specific obligations, they are interpreted in light of what is reasonable.”).

Reframing the inquiry under the correct legal test, the record demonstrates that Ceco’s efforts to secure its formwork tables, and Table 27 in particular, were not reasonable. As explained above, Eder testified that the manual’s procedures were only sufficient to secure tables against lateral wind loads of up to 115 miles per hour, well shy of the 150-170 mile-per-hour winds that Menon testified could reasonably be expected at the West Palm Beach worksite. On cross examination, Menon conceded that substituting two wedge bolts in place of a single drop-in anchor could have increased the base plates’ compressive strength from 9,000 to 9,560 pounds per square inch. But even accepting Ceco’s contention that substituting two wedge bolts in place of a drop-in anchor could have increased the total compressive strength of the ratchet straps’ base plates, that substitution does not appear sufficient to bridge the shortfall of the underlying design of the formwork. Furthermore, Menon asserted that Ceco’s undisputed practice of reusing the wedge bolts could have reduced the bolts’ strength. He noted that the wedge bolts here appeared to pull out of the concrete holes smoothly without cracking or damaging the surrounding concrete, suggesting the bolts were not properly gripping the concrete at the outset.⁶ Finally, although the occurrence of the accident alone is not dispositive, lacking any evidence of some other

⁶ We note that while Menon testified that reusing the bolts would theoretically weaken them, there is no conclusive evidence that was the case for Table 27’s bolts. In any event, Ceco’s use of the bolts instead of drop-in anchors does not automatically establish a violation. Rather, the basis of the violation is that Ceco’s design, including its drop-in anchor requirement, did not account for the reasonably anticipated wind speeds.

extraordinary intervening event, the fact that Table 27 pulled free of the concrete slab and fell off the 16th floor of the building is strong evidence that Ceco's efforts to secure the table to the concrete slab were not reasonable.

For all these reasons, we find that Ceco failed to make reasonable efforts to secure the formwork tables' baseplates against reasonably expected loads. Accordingly, we affirm the violation of § 1926.703(b)(6) alleged in Item 4.⁷

PENALTY

Ceco has not challenged on review the penalty assessed by the judge for each violation. However, both violations involve essentially the same hazard—a formwork table detaching and falling during the construction process—and stem from effectively the same violative conduct—Ceco's failure to design the formwork to withstand reasonably anticipated wind gusts.

⁷ Ceco did not contest the judge's finding of knowledge with respect to Item 4 in its petition for discretionary review. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n.4 (No. 86-0360, 1992) (consolidated) ("Ordinarily the Commission does not decide issues that are not directed for review.")

Under these circumstances, we find it appropriate to group the violations for penalty purposes and assess a single \$12,675 penalty. *See* 29 U.S.C. § 666(j); *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1394 (No. 97-0755, 2003) (citing *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981) (assessing a single penalty for distinct but overlapping violations)).

SO ORDERED.

/s/ _____
Cynthia L. Attwood
Chairman

/s/ _____
James J. Sullivan, Jr.
Commissioner

/s/ _____
Amanda Wood Laihow
Commissioner

Dated: February 26, 2021



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SECRETARY OF LABOR,
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v.

CECO CONCRETE CONSTRUCTION, LLC,
Respondent.

OSHRC Docket No. **17-0483**

DECISION AND ORDER

COUNSEL:

Dane L. Steffenson, Attorney, Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for Complainant.

Angelo Filippi, Attorney, Kelley Kronenberg, Fort Lauderdale, FL, for Respondent.

JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

In September 2016, the Department of Labor's Occupational Safety and Health Administration (OSHA) conducted a fatality investigation involving an employee of Ceco Concrete Construction, LLC (Ceco) at an apartment building under construction in West Palm Beach, Florida (worksite), and subsequently issued a four-item citation to Ceco for alleged violations of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 651–678, with proposed penalties of \$50,700.00.¹ After Ceco timely contested the citation, the Secretary of

¹ The Secretary of Labor has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA, and has delegated exclusively to the Solicitor of Labor the responsibility for bringing legal proceedings under the Act and the determination of whether such proceedings are appropriate in a given case. *See* Order No. 1–2012 (77 FR 3912). The terms “Secretary” and “OSHA” are used interchangeably herein. The Assistant Secretary has authorized OSHA’s Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

Labor (Secretary) filed a formal complaint² with the Commission charging Ceco with violating the Act and seeking an order affirming the citation and proposed penalties. The Secretary subsequently withdrew Item 2 prior to trial, which reduced the Secretary's total proposed penalty to \$38,025.00 (Pretrial Order, ¶ 11). A bench trial was held in Miami, Florida.³

There is no dispute that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c), or that Ceco is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (Compl. ¶¶ I-II; Answer ¶¶ I-II). After hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings.⁴ For the reasons indicated *infra*, the Court **VACATES** Item 1 and **AFFIRMS** Items 3 and 4.

II. BACKGROUND

Ceco was the formwork⁵ contractor for an apartment building under construction at the worksite where its scope of work included installing and removing formwork, installing rebar, and placing concrete for decks and columns. The formwork consisted of aluminum legs connected by "windows" to form a table that would fit between columns. Concrete was poured on the formwork to create the decks. Interior forms were assembled on the deck. Perimeter forms, or tables, were assembled on the ground and reused on each floor (Tr. 278-280).

The perimeter tables had four legs; each leg had a screw jack that allowed crews to raise or lower it to level the table. After the poured concrete hardened sufficiently, stripping crews removed the formwork by lowering the table several inches to remove tie-down straps. When the crew was ready on the level above, the crane operator lifted the table an inch or two, using a "C-picker" attached to the crane. The crane operator then raised the table to the level above and set it down in the spot located above where it was set below (Tr. 61-62, 281-282).

² The citation at issue was attached to the complaint as an exhibit. Commission Rule 30(d) provides that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R. § 2200.30(d).

³ In addition to the trial testimony, the record includes the November 15, 2017, deposition of Aubrey Dunham, a Senior Project Engineer for Ceco, and the November 17, 2017, deposition of Carolina Kumanchik, Ceco's Design Engineer for the worksite (*Pretrial Order*, ¶ 14; *see also* Tr. 19-20).

⁴ If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

⁵ "Formwork" means "the total system of support for freshly placed or partially cured concrete, including the mold or sheeting (form) that is in contact with the concrete as well as all supporting members including shores, reshores, hardware, braces, and related hardware." 29 C.F.R. § 1926.700(b)(2).

On September 1, 2016, three Ceco employees were working on the 16th level (the 15th story since the number 13 was omitted in numbering the floors) of the planned 20 story building. Ceco Foreman Luis Gutierrez and two of Ceco's carpenters (the Decedent and Martin Perez Mendez) were in the process of installing a large piece of formwork designated as Table 27.⁶ At approximately 1:30 p.m., after being released by the C-picker of the crane that had hoisted it into place, Table 27 fell from the 16th level to the street below, dragging with it the Decedent (Tr. 41-42, 64-65).

OSHA's West Palm Beach area office received notification of the accident and assigned Compliance Safety and Health Officer Luis San Miguel to conduct a fatality investigation of the incident. San Miguel arrived at the construction site at approximately 4:30 p.m. the day of the accident and held an opening conference with representatives of Kast, the general contractor, and Ceco (Tr. 41-42). San Miguel interviewed employees (including the foreman and laborer who had been working with the Decedent), the Decedent's next of kin who had arrived at the site, responding police officers, and the medical examiner. San Miguel also reviewed Ceco's formwork plans, its Best Practices Manual, its safety plan, and its safety manual (Tr. 49-51; *see also* Ex. J-1, Ex. J-2, Ex. J-4, J-6, Ex. C-2). At approximately 5:15 p.m., San Miguel went to the 16th level of the building, accompanied by representatives of Kast and Ceco and took photographs (Tr. 53).

San Miguel returned the next day and went back to the 16th level, again accompanied by Kast and Ceco representatives, as well as Gutierrez and Mendez, who had been present the day before when Table 27 swept the Decedent off the building. San Miguel conducted further interviews with the two employees while examining the worksite at that level (Tr. 103-105). Based on his investigation, San Miguel recommended the Secretary cite Ceco for violating four construction standards. The Secretary did so on March 1, 2017. As noted *supra*, only Items 1, 3, and 4 of the citation remain at issue.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Commission serves as a "neutral arbiter" between the Secretary and cited employers. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985). Thus, Congress vested the Commission with the "adjudicatory powers

⁶ The parties stipulated that Luis Gutierrez, Martin Perez Mendez, and the Decedent were Ceco's employees on or about September 1, 2016, and Gutierrez was Ceco's foreman. (*See Pretrial Order*, Attach. C.)

typically exercised by a court in the agency-review context.” *Martin v. Occupational Safety and Health Review Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 151, 154 (1991).

The Court of Appeals for the Eleventh Circuit where the action arose⁷ has held, “the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer ‘knowingly disregarded’ the Act’s requirements.” *ComTran Grp., Inc. v. U.S. Dep’t of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013).

A. Item 1

The cited standard in Item 1, 1926.502(d)(15), provides in relevant part that “[a]nchorage used for attachment of personal fall arrest equipment shall be ... capable of supporting at least 5,000 pounds (22.2 kN) per employee attached[.]” 29 C.F.R. § 1926.502(d)(15). The Secretary alleges that Ceco violated the cited standard because on the day of the fatality, Ceco’s employees allegedly “anchored their fall protection arrest system to the bracings of the nearby formwork tables without ascertaining the capacity of the bracings to withstand a force of 5,000 pounds.” (Compl. Ex. A at 6 of 11).

(1) Whether Cited Regulation Applies to Cited Conditions

Section 1926.502(d)(15) is found under Subpart M—Fall Protection of the Construction Standards, which sets forth the requirements for fall protection in construction workplaces. As indicated *supra*, at the time of the fatality, Ceco was engaged in construction work activities involving the placement of formwork at the worksite. Therefore, the cited standard applies to the cited conditions.

(2) Whether Requirements of Cited Regulation Were Violated

The Secretary contends Gutierrez and Mendez anchored their self-retracting lifelines to the frames of formwork tables adjacent to Table 27, which, according to the Secretary’s expert, were not capable of supporting 5,000 pounds. Ceco disputes the Secretary’s claim, arguing Gutierrez

⁷ Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer’s principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). The citation was issued in West Palm Beach, Florida, and Ceco’s principal place of business is in Tampa, Florida (Compl. ¶ III; Answer ¶ III), both in the Eleventh Circuit. “[I]n general, ‘[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has ... applied the precedent of that circuit in deciding the case—even though it may differ from the Commission’s precedent.’” *Dana Container, Inc.*, 25 BNA OSHC 1776, 1792 n.10 (No. 09- 1184, 2015), *aff’d*, 847 F.3d 495 (7th Cir. 2017) (citation omitted). Therefore, the Court applies the precedent of the Eleventh Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

and Mendez were tied off to columns, which the Secretary does not argue was inadequate to support 5,000 pounds. Thus, whether the requirements of the cited standard were violated hinges on which of the parties' contradictory scenarios the Court credits.

Ceco had stretched red barricade tape some distance from the perimeter of the 16th level. Only the three Ceco employees setting the tables were permitted past the tape. Ceco had also erected a wooden guardrail between the red barricade tape and the edge of the 16th level. Anyone going past the guardrail was required to use a personal fall arrest system (Tr. 55-56; *see also* Ex. J-6, Ex. C-8, p. 23).

Ceco's safety rules also require its employees working on perimeter tables to tie off to approved anchorage points using self-retracting lifelines. Ceco installed over 100 embedded adapter straps on each level and at the bases of columns at the worksite. Ceco's employees could tie off directly to the columns or to the embedded adapter straps (Tr. 282-83, 301-02). Attached to the frame of a table adjacent to Table 27 were red straps. Gutierrez told San Miguel the straps were already attached to the table when it was raised from the 15th level (Tr. 124).

San Miguel interviewed Gutierrez and Mendez on September 1, 2016, the day of the accident, wrote down their answers to his questions, and gave them the statements to read and sign. Both told him they were tied off to columns while working earlier that day on the 16th level, in compliance with Ceco's safety plan and the cited standard. The length of the self-retracting lifelines they were using was 30 feet, and the self-retracting lifelines were hooked to straps attached to the bottom of the columns. Both employees identified the columns on either side of Table 27 at the edge of level 16 as the ones they attached their self-retracting lifelines (Tr. 98-99, 128-30, 135-37; *see also* Ex. J-4, Ex. J-6).

San Miguel returned to the site the next day at approximately 9:30 a.m., and went back up to the 16th level, accompanied by Gutierrez and Mendez, among other Ceco representatives. San Miguel testified he asked Gutierrez and Mendez again what anchorage points they used. They repeated to San Miguel they had been tied off to columns the day before (Tr. 106). San Miguel again wrote down the statements of the employees and had them sign the statements. Nothing in the statements reflects that San Miguel had any questions about their stated anchorage points (Tr. 107).

San Miguel admitted that Gutierrez and Mendez told him that after the accident occurred, each of them removed his self-retracting lifeline "and left it up there at the scene." (Tr. 123.) This

is consistent with evidence gathered by Frederick Fischer, a crime scene investigator for the City of West Palm Beach Police Department, that arrived at the worksite on September 1, 2016, at approximately 2:10 p.m. “to document the scene as it appeared after the accident” (Tr. 72-73). He took photographs on the 16th level at approximately 3:00 p.m., more than two hours before San Miguel arrived on that level (Tr. 74). Police Photograph 14 shows two self-retracting lifeline devices lying on the floor. One of them is attached to a strap that appears to be embedded in a column (this is not the column the employees identified as one they were using at the time of the accident) (Ex. C-7, p. 14). San Miguel admitted at trial Photograph 14 shows physical evidence that employees were properly tied off to columns, rather than improperly to the formwork frames. (Tr. 141-45.) However, he testified he did not observe the two self-retracting lifelines lying on floor when he arrived on the 16th level.

San Miguel testified he observed red straps on the formwork frame that he thought Gutierrez and Mendez had used to tie off. Kevin Peterson is the regional safety director for Heico Construction Group, and he is responsible for the safety programs of Ceco, a “sister company” of Heico (Tr. 260-61). Peterson was asked if thought it was unusual that a strap attached to a self-retracting lifeline was hanging from a frame, which is not an approved anchorage point. He stated,

I don't find it unusual. These straps are laying all over the job site. And as an example, somebody walking through a stripping floor, that strap is no longer needed on those elevations, they're already installed. They might hang it up. They might hang it up somewhere. And we tell them repeatedly that – with [self-retracting lifelines], don't throw them on the floor. I mean treat it -- I mean this is your protection for your life and don't throw it on the floor, don't leave it out in the rain. Take care of it. And so, you know, I see retractables, I see straps, I see a lot of things hung from tables, windows, boxes, including lunch boxes.

(Tr. 289.)

Mendez never wavered in his statements to OSHA that he had tied off to a column the day of the accident. Gutierrez was also consistent in his two signed statements to OSHA and in his OSHA interview that he had tied off to a column. The only evidence indicating Gutierrez was improperly tied to the formwork frame is San Miguel’s testimony that Gutierrez responded “Yes” when he said to him, “[Y]ou guys were anchored to those red straps on the brace of the tables.” (Tr. 106-07.) According to San Miguel, as they were preparing to exit the 16th level, San Miguel and an emotional Gutierrez had another conversation. San Miguel stated Gutierrez and Mendez “were still crying. I stood behind because, you know, I -- honestly, I felt for them. . . . And as soon

as we started walking towards the stairs Gutierrez walked with me. And at that point I asked [Gutierrez], you know, that you guys were anchored to those red straps on the brace of the tables and he told that, yes.” (Tr. 106-107.) San Miguel testified this conversation took place in Spanish and no one overheard it (Tr. 107). San Miguel testified that he made a note to himself of this conversation when he got to his car. (Tr. 108-109.) However, the record does not reflect San Miguel ever asked Gutierrez to amend his written statement to include this alleged admission. Significantly, in February of 2017, Gutierrez again stated at a second OSHA interview⁸ that his self-retracting lifeline was anchored to a concrete column and the other two employees were also anchored to concrete columns. San Miguel did not challenge Gutierrez on this point and San Miguel never brought this purported contradictory statement to the attention of the other OSHA personnel in attendance at the interview (Tr. 110-11).

Gutierrez did not testify at trial; thus the Court was not given an opportunity to make a credibility determination based on his live testimony. However, it is the Secretary’s burden to prove by a preponderance of the evidence that Ceco failed to comply with the requirements of the cited standard. There are significant gaps in the evidence. San Miguel did not go to the 16th level until approximately 5:15 p.m. on September 1, about 3 hours and 15 minutes after the 1:30 accident. Officer Fischer arrived at the site at approximately 2:10 p.m. but did not start taking photographs on the 16th level until around 3:00 p.m. (Tr. 74). It is unknown what workers, if any, were on the 16th level approximately 40 minutes after the accident occurred, or what they were doing. Gutierrez and Mendez told San Miguel they were told to leave their equipment and go down to the street level after the accident. Officer Fischer was uncertain whether anyone moved the workers’ equipment between the time of the accident and his arrival on the 16th level. (Tr. 77-78.)

The Secretary’s claim that the red straps on the table framework next to Table 27 constitute “the only physical evidence” of where the employees were tied off is not supported by the evidence. As indicated *supra*, Gutierrez told San Miguel the straps were already attached to the frame when it was lifted to the 16th floor. Peterson, the regional safety director, provided a

⁸ Ceco’s Counsel referred to it as a deposition. San Miguel referred to it as an interview. It took place in Ceco’s Counsel’s office. San Miguel testified most of the questions were from Gopal Menon, an OSHA structural engineer, and a Mr. Mohamad, both employees in OSHA’s engineering department in its national office (Tr. 109, 196). Since only the parties’ representatives are authorized to appear and represent the parties in Commission proceedings, including depositions taken as part of such proceedings, the Court assumes, without deciding, that it was an interview, not a deposition.

plausible explanation for their presence, stating Ceco’s employees were instructed to hang up the straps after using them. Police Photograph 14 shows two self-retracting lifeline devices on the 16th level, one of which is attached to a strap embedded in a column. None of the witnesses at trial were present on the 16th floor between the time of the accident and the arrival of Officer Fischer. Officer Fischer testified people were still on level 16 when he arrived at the site and it appeared some of the equipment may have been moved.

Gutierrez and Mendez signed statements in which they stated they were tied off to columns on either side of Table 27 the day of the accident. Although San Miguel claims Gutierrez admitted to him the next day that he and Mendez were tied off to the table framework, Gutierrez sat for an interview attended by San Miguel and stated he was tied off to a column. This statement was not refuted or challenged at the interview. The Court concludes the Secretary failed to establish a violation of the cited standard by a preponderance of evidence and Item 1 must be therefore vacated.

B. Item 3

The cited standard, 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.

29 C.F.R. § 1926.703(a)(1). The Secretary alleges in Item 3 that Ceco violated this standard because “the formwork was not designed to withstand vertical and lateral loads due to wind gust.” (Compl. Ex. A at 8 of 11). For the reasons indicated *infra*, the Court concludes the Secretary has met his burden of establishing a prima facie case for the violation.

(1) Whether Cited Regulation Applies to Cited Conditions

The cited standard is found under *Subpart Q—Concrete and Masonry Construction of the Construction Standards*, which “sets forth requirements to protect all construction employees from the hazards associated with concrete and masonry operations” on construction sites. 29 C.F.R. § 1926.700(a). There is no dispute Ceco was engaged in construction work activities involving installing and removing formwork, installing rebar, and placing concrete for decks and columns. The cited standard applies to the cited conditions.

(2) *Whether Requirements of Cited Regulation Were Violated*

The Secretary argues that even though Ceco properly included in its formwork design a method that would support lateral loads *once the individual tables were tied together*, the company “failed to comply with this standard by failing to design for lateral loads, including wind loads, while the individual formwork tables were sitting prior to being tied in to the other tables.” (Sec’y’s Br., p. 12) (emphasis added). The Secretary further contends the shape of Table 27 was “sufficiently different than many tables and [was made] in such a way that its center of gravity was substantially different than most of the other tables, which required an engineer to run a calculation to determine how different lateral loads would affect the table and then design the table to withstand those loads.” (*Id.*)

The Commission has held that in any case brought against an employer under the cited standard,

the Secretary has the burden to show that, more likely than not, the erected formwork was not strong enough to support the reasonably anticipated load. The cited employer can rebut by showing that, more likely than not, the erected formwork was strong enough to support such a load. If deviations from manufacturer's specifications are relied on, there must be evidence that they affected the decking's actual performance or its load-bearing capacity, thereby making it unable to support the reasonably anticipated load. Under the plain language of the standard, it is not enough for the Secretary simply to presume a violation because the deviations would add an element of uncertainty as to the strength of the decking

Worcester Steel Erectors, Inc., 16 BNA 1409, 1419 (No. 89-1206, 1993).

Gopal Menon has worked as a structural engineer with Engineering Services in OSHA’s Directorate of Construction and was qualified as an expert in structural engineering (*Pretrial Order* ¶ 12, Attach. D). He holds a Master of Science degree with specialization in solid mechanics and structures. Prior to this case, Menon had investigated at least 25 structural collapses. OSHA assigned him to investigate the collapse of Table 27. Menon visited the accident site and viewed the wreckage of Table 27 on the street and the existing tables in place on the 16th level. He reviewed Ceco’s engineering plans and spoke with Carolina Kumanchik, the Design Engineer (Tr. 194-196).

Menon explained the differences between Table 27 and the other tables. Other tables were balanced with smaller, equally-sized cantilevers that were typically about 2 feet (Tr. 201-206). However, the top of Table 27 extended 6 feet beyond the legs in one direction and only 2 feet

beyond the legs in the other direction, causing it to be eccentrically loaded. Menon opined Table 27 could “topple because of [the excessive weight], if there is a lateral load. When there is a lateral load or if there is some load on—an existing load, the load transferred. It would be more always on these posts,” nearest the cantilever (Tr. 207).

Although Menon testified Ceco’s design specifications were adequate to withstand concrete pours, he also opined there “was no design . . . for the individual tables” to withstand any lateral load *before* they were tied together (Tr. 214). In her deposition testimony, Kumanchik agreed Table 27 was designed for lateral loads *once it was tied in with the other tables*. Table 27 “was designed to hold any concrete vertical and some wind loads. And that also goes into seeing that everything is in place, including the straps, and everything is tied down. So getting everything as a whole, it’s that the table was designed with taking everything into consideration, *including the tie downs and everything*.” (*Kumanchik Deposition*, p. 7) (emphasis added). However, Kumanchik admitted she did not analyze or make any calculations related to lateral loads for Table 27, believing straps would be enough to resist any lateral load (*Id.* at 13-14).

Aubrey Dunham, Ceco’s Senior Project Executive for the worksite, also acknowledged Ceco had no design for Table 27 with respect to lateral loads before it was tied in with the other tables. (Dunham Dep., pp. 4, 40-41). Ceco’s counsel also conceded “there was no drawing [of a formwork design for Table 27] by the engineers that did that. Because there was the Best Practices. . . . The Best Practices constitute a design for the anchorage of the table.” (Tr. 185-86.)⁹ Nonetheless, Ceco argues the Secretary failed to establish it was not in compliance with the cited standard because he presented no evidence “the procedures in the Best Practices Manual were insufficient to anchor the table against anticipated wind loads.” (Resp’t’s Br., p. 18.)

Eric Eder, Ceco’s Director of Engineering, testified Table 27 was a typical table with respect to its “size, the depth that it was, the height, total height, the stability of it, the location,” and that cantilevered corner tables were not unusual (Tr. 321, 325). He testified the tables with the strapping were designed to withstand sustained winds of 90 miles per hour and gusts of 115 miles per hour (Tr. 330). Likewise, Ceco Safety Director Peterson agreed that Table 27 was not “out of the ordinary.” (Tr. 294).

⁹ According to Ceco’s Best Practices Manual, it “covers the Basic Installation and Stripping procedures for the CEFCO E-Z Panel System which can be used with any number of different forming systems.” (Ex. J-1, p. 2).

Instructions for setting corner panels (such as Table 27) appear in a yellow box on page 27 of Ceco's Best Practices Manual (Ex. J-1). The note in the yellow box states:

Setting corner panels: use form spike method or you **must** use the deck filler option to secure panel before removing CH-3850 C-Picker. After C-Picker is removed you **MUST** use ratchet straps with ½” drop-in anchors and a shoulder eye bolt to secure all corner panels. Form spike: Ultimate is 1180# tension, 2425# shear. ½” Drop-in: Ultimate is 9000# tension, 6640# shear.

(Ex. J-1, p. 27) (emphasis in original.) Menon opined why these instructions were inadequate:

The table 27 needs to be looked at because it has a six-foot cantilever. I don't know what design -- we asked for the design for this --for the best practice document and this is something they have for -- that CECO has for all the tables. So we cannot have something which can be used for all tables apply to table 27. Unless, unless CECO practice says that this can be used for tables with certain cantilevers, certain geometry. So I did not see any design associated with this best practice document. And I requested CECO and we never received it.

(Tr. 218-19.)

The Court agrees with the Secretary that although Ceco properly included in its formwork design a method that would support lateral loads once the individual tables were tied together, the company “failed to comply with this standard by failing to design for lateral loads, including wind loads, while the individual formwork tables were sitting *prior to being tied in to the other tables.*” (Sec’y’s Br., p. 12.) (emphasis added). Therefore, the Secretary has established a violation of the cited standard.

(3) Whether Employees Were Exposed to Hazard Created

Ceco does not dispute this element of the Secretary’s case. (Pretrial Order, Attach. C, Stip. 2) It is also evident the three Ceco employees working on the 16th level of Fern Street building were exposed to the hazard created by the collapse of Table 27. Therefore, the Secretary has established employees were exposed to the hazard created.

(4) Whether Ceco Knowingly Disregarded Act’s Requirements

As indicated *supra*, part of the Secretary’s prima facie case for the violation of an OSHA standard requires proof “that the employer ‘knowingly disregarded’ the Act’s requirements.” *ComTran*, 722 F.3d at 1307. As for the knowledge element, “[t]he Secretary may prove that an employer had knowledge of a violation in one of two ways—(1) by imputing the actual or constructive knowledge of a supervisor or (2) by demonstrating constructive knowledge based on the employer’s failure to implement an adequate safety program.” *Samsson Constr., Incorp. v.*

Sec'y, U.S. Dep't of Labor, 723 F. App'x 695, 697 (11th Cir. 2018) (citing *ComTran*, 722 F.3d at 1311). San Miguel conceded he found no deficiencies in Ceco's training in fall protection or its enforcement of its work rules (Tr. 160-61). Therefore, to establish the knowledge element, the Secretary must prove Ceco had knowledge of the violation by imputing the actual or constructive knowledge of a supervisor.

Even though Ceco's employees were setting the formwork in conformance with its Best Practices Manual, which Ceco considers its design document, Ceco knew its Best Practices Manual did not have a drawing of a formwork design for Table 27 with respect to lateral loads *before it was tied in* with the other tables. Foreman Gutierrez and his two subordinate two carpenters (Mendez and the Decedent) were in the process of installing formwork designated as Table 27 when the accident occurred. He directly observed the violative conduct of the subordinate carpenters. His actual knowledge is imputed to Ceco. *ComTran*, 722 F.3d at 1316. Further, even if Foreman Gutierrez was an "actual malfeasant," his "rogue" conduct is imputed to Ceco since, by his roguish malfeasance, he exposed not only himself but also his subordinates to the hazard. *Samsson*, 723 F. App'x at 698 (citing *Quinlan v. Sec'y of Labor*, 812 F.3d 832, 841 (11th Cir. 2016)). Therefore, the Secretary has established Ceco's knowledge of the violation.¹⁰

Characterization of Violation

The Secretary characterized the violation of the cited standard as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). Here, an employee died because of the collapse of Table 27. The violation is a serious one.

C. Item 4

The cited standard in Item 4, section 1926.703(b)(6), provides that "[a]ll base plates, shore heads, extension devices, and adjustment screws shall be in firm contact, and secured when necessary, with the foundation and the form." 29 C.F.R. §1926.703(b)(6). The Secretary alleges that Ceco violated this standard because "[b]ase plates, shore heads, extension devices, and

¹⁰ In its brief, Ceco asserts the "defense of unpreventable employee misconduct should apply to the fall protection issue," which is the alleged violation in Item 1 (Resp't's Br., pp. 20, 21). Thus, Ceco argues "[a]ssuming that the Secretary is able to establish a prima facie case, Respondent contends that the defense of unpreventable employee misconduct applies to the violation of Citation 1, Item 1." (Resp't's Br., p. 2). Since Ceco only preserved this defense as to Item 1, it has waived it as to the remaining Items. Therefore, the Court declines to address this defense.

adjustment screws were not in firm contact, and secured when necessary, with the foundation and the form.” (Compl. Ex. A at 9 of 11). More specifically, the Secretary asserts “the anchorage of the table form legs to the concrete floor was not properly secured with the required bolts.” (*Id.*) For the reasons indicated *infra*, the Court concludes the Secretary has met his burden of establishing a prima facie case for a violation.

(1) Whether the Cited Regulation Applies to the Cited Conditions

Section 1926.703(b)(6) is found under *Subpart Q—Concrete and Masonry Construction* of the construction standards, which “sets forth requirements to protect all construction employees from the hazards associated with concrete and masonry operations” on construction sites. 29 C.F.R. § 1926.700(a). Section 1926.703 is captioned *Requirements for cast-in-place concrete*. At the time of the fatality, Ceco was engaged in construction work activities involving the placement of formwork at the worksite. The cited standard applies to the cited conditions.

(2) Whether the Requirements of the Cited Regulation Were Violated

Ceco’s Best Practices Manual requires its employees to secure the formwork tables to the foundation:

Before the C-Picker is removed, the panel **must** be “fastened” to the floor using 3/16” form spikes and a washer pin **or** you **must** use the deck filler option (described on page 10). This will reduce the potential for accidental displacement as the C-Picker is removed. (i.e., catching on the panel and dragging closer to the edge).

(Ex. J-1, p. 27) (emphasis in original.) The Best Practices Manual does not indicate how many form spikes per base plate should be used or how many base plates should be secured with form spikes. The Best Practices Manual also requires formwork to be secured to the foundation to prevent movement from wind with a ratchet strap¹¹ over the top of the formwork and connected to base plates “with ½” drop-in or cast-in anchors and a shoulder eye bolt,” and it instructs employees to “[c]onsult with engineering for approval to use other methods for securing perimeter panels.” (Ex. J-1, p. 27.) The strap is held on each side of the table by connecting it to a base plate screwed into the slab with two wedge bolts on diagonal corners of the base plate (Tr. 287, 295).

On September 1, 2016, Ceco’s three-man crew used ½-inch diameter bolts that were embedded 2 inches deep into the concrete. The substituted bolts had no anchors and went directly

¹¹ The ratchet strap was also referred to as “wind strap” at trial, which is a three-inch-wide yellow nylon strap (Tr. 67, 287).

into the concrete. The bolts were reused from floor to floor. In some cases, Ceco used spike nails or regular nails. The employees drove the spike nails only part way into foundation to avoid hitting the post-tensioning cable in the slab (Ex. C-8, pp. 30-34, 38; Tr. 85-86, 93-94).

As the Secretary notes, Ceco “used nails instead of form spikes, only put spike nails partially into the slab, substituted wedge screws that could be used from floor to floor with half the holding capacity of drop-in anchors with bolts, and in some places substituted nails or form spikes for the drop-in anchors with a tiny fraction of the holding capacity.” (Sec’y’s Br., pp. 16-17) (*citing* Tr. 85-6, 93-4; Ex. C-8 at 29-38). Ceco’s senior project executive, Aubrey Dunham, conceded the use of spike nails was improper. “No, we should be using bolts.” (Dunham Dep., p. 46.) San Miguel also testified Kumanchik told him the use of spike nails was improper (Tr. 71).

Ceco argues there is “no dispute that the base plates at issue were in firm contact with the deck.” (Resp’t’s Br., p. 20.) However, as indicated *supra*, the cited standard requires that base plates “shall be in firm contact, *and secured when necessary*, with the foundation and the form.” 29 C.F.R. §1926.703(b)(6) (emphasis added). According to Ceco’s Best Practices Manual, the company considered securing the base plates to the foundation to be necessary and provided specific instructions to its employees to do so. Any deviation from the Best Practices Manual required approval from a Ceco engineer. Ceco’s employees deviated from the Best Practices Manual without consultation with an engineer. The Court concludes Ceco violated the cited standard.

(3) Whether Employees Were Exposed to the Hazard Created

The three Ceco employees were working next to the edge of the 16th level. Failure to properly secure the base plates created a hazard of Table 27 moving and striking employees or dragging them off the edge of the building. Here, the nails used in two of the four legs and the bolts used to anchor the ratchet straps all pulled out of the slab when Table 27 fell off the building. The employees were exposed to the hazard.

(4) Whether the Employer Knowingly Disregarded the Act’s Requirements

Foreman Gutierrez was working with the two carpenters as they placed the tables and drove in the spike nails and bolts. He directly observed the violative conduct. His actual knowledge is imputed to Ceco. *ComTran*, 722 F.3d at 1316. Further, as indicated *supra*, even if Foreman Gutierrez was an “actual malfasant,” his “rogue” conduct is imputed to Ceco since he exposed

not only himself but also his subordinates to the hazard. *Samsson*, 723 F. App'x at 698. Therefore, the Secretary has established Ceco's knowledge of the violation.

Characterization of Violation

The Secretary characterized the violation as serious. As indicated *supra*, a serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). Here, an employee died because of the collapse of Table 27. The violation is also a serious one.

IV. PENALTY DETERMINATION

"In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *N. E. Precast, LLC; & Masonry Servs., Inc.*, 26 BNA OSHC 2275, 2282 (Nos. 13-1169 and 13-1170, 2018) (*citation omitted*). "Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Id.* (*citations omitted*).

The Secretary and Ceco stipulated that on the day of the accident, Ceco employed approximately 1,800 people (Pretrial Order, Attach. C, Stip. 3). Therefore, Ceco is not entitled to any penalty reduction based upon size. The Secretary cited Ceco for OSHA violations within the previous five years (Tr. 90-91). Therefore, Ceco is also not entitled to any penalty reduction based upon history. Ceco had a written safety program and the Court credits Ceco with good faith.

However, the gravity of the violations are high, and their severity outweighs the other factors. An employee was killed, and two other employees were exposed to the hazards created by the collapse of Table 27. The likelihood of injury was high. "Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors." *Natkin & Co. Mech. Contractors*, 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973) (*quoting N. E. Precast*, 26 BNA OSHC at 2282). Giving due consideration to the gravity of the violation and Ceco's size, history of violation, and good faith, the Court finds the Secretary's proposed penalty of \$12, 675.00 for Items 3 and \$12, 675.00 for Item 4 is appropriate. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Item 1 of the citation is **VACATED** and no penalty is assessed.

IT IS FURTHER ORDERED THAT Item 3 of the citation is **AFFIRMED** and a penalty of \$12,675.00 is assessed.

IT IS FURTHER ORDERED THAT Item 4 of the citation is **AFFIRMED** and a penalty of \$12,675.00 is assessed.

SO ORDERED.

/s/ John B. Gatto

John B. Gatto, First Judge

Dated: October 26, 2018
Atlanta, GA