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

Secretary of Labor, Complainant, v. Quandel Construction Group, Inc., Respondent.	OSHRC Docket No. **14-1434** Simplified Proceedings

Appearances:

Wayne P. Marta, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Secretary

Douglas J. Suter, Esquire, Hahn, Loeser & Parks, LLP, Columbus, Ohio
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Quandel Construction, Inc. (Quandel) performs construction work as a general contractor. On July 24, 2014, Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) Michael Stowell conducted an inspection of Quandel's worksite at the hhgregg appliances & electronics[1] store (hhgregg) located at 6440 Sawmill Road, Worthington, Ohio. As a result of OSHA's inspection, the Secretary issued a Citation and Notification of Penalty (Citation)[2] to Quandel on September 3, 2011, alleging Quandel violated an OSHA construction standard.

The Citation alleges Quandel committed a serious violation of 29 C. F. R. § 1926.453(b)(2)(v), by permitting an employee to work in an elevated aerial lift without connecting the fall protection harness to prevent falling. The Secretary proposed a penalty of $3,825.00 for the alleged violation. Quandel timely contested the Citation. Thereafter, this case

[1] The hhgregg appliances & electronics logo is a trademark of Gregg Appliances, Inc. The store is commonly referred to as "hhgregg," and will be referred to as such with the trademark lower case spelling in this decision.

[2] Exhibit C-1.

was designated for Simplified Proceedings under Subpart M, § 2200.203(a), of the Commission Rules. The undersigned held a hearing on January 8, 2015, in Columbus, Ohio. Both parties filed post-hearing briefs on February 2, 2015. For the reasons that follow, Citation 1, Item 1 is vacated and no penalty is assessed.

Jurisdiction

The parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act (Tr. 5). Quandel also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 5; Prehearing Conference Order issued Dec. 8, 2014).

Background

Quandel is a construction company with approximately 250 employees (Tr. 68-69, 92; Exh. A, p. 1). It is a large company comprised of separate divisions (Tr. 142, 166). Its management structure includes superintendents, project managers, field managers and foremen (Tr. 140, 164, 206, 208, 232). At the time of the OSHA inspection at issue here, it was general contractor on a project[3] at an hhgregg store which involved converting half of the building space for occupancy by a Recreational Equipment Inc. (REI) store on the right side of the building (Tr. 61, 69, 145). In addition to modifications inside the building, the project included constructing a new storefront (Tr. 153). Quandel had been onsite on the project for approximately one to two months (Tr. 100).

Quandel's management on the hhgregg project included Patrick Collins, project superintendent, James Peck, field manager, and Craig Jolly, foreman (Tr. 140, 164, 206, 208, 232). Several subcontractors for Quandel also were working on the hhgregg project (Tr. 159; Exh., R-C, p. 5). One of the subcontractors was the Self Perform Group (SPS) [4] which provides carpenters on Quandel's large jobs (Tr. 157, 207-208). SPS utilizes Quandel employees to perform construction work on the job sites (Tr. 207).

[3] This project was referred to at the hearing as the hhgregg project.

[4] SPS was also referred to in the hearing as a Division of Quandel and is a part of that company (Tr. 158, 160, 163, 206-207).

On July 24, 2014, Quandel was in the process of constructing the new storefront to include a façade for the REI store (Tr. 128, 133). On that day, while at the drive-through of a fast food restaurant, OSHA CSHO Stowell observed two employees in an elevated Skyjack aerial lift at the hhgregg project construction site which was adjacent to the restaurant (Tr. 34). One of the employees observed by the CSHO turned around in the aerial lift, indicating to the CSHO that the employee was not connected while in the aerial lift. The CSHO took a photograph of what he observed (Tr. 34; Exh. C-4). After exiting the drive-through, the CSHO parked his vehicle and observed the employee go up and down in the aerial lift three times while unconnected (Tr. 34). CSHO Stowell took more photographs of what he was observing (Tr. 44; Exhs. C-5, C-6).

While parked, CSHO Stowell looked at the photographs he had taken to confirm whether the employee he had observed turn around in the aerial lift was unconnected (Tr. 43). The CSHO was located approximately several hundred feet away from where the employees were working when he took the photographs; however his camera had a zoom lens and he was able to enlarge the photographs on his camera to see the conditions more clearly (Tr. 43). The first photograph he took showed two employees wearing fall protection harnesses and a retractable lanyard attached to the anchor point on the basket; however only one employee was connected (Tr. 37-38, 43; Exh. C-4). The CSHO was able to see more clearly from the second photograph he had taken that the employee was not connected because the snap link which should go through the D-ring was hanging (Tr. 44-45; Exh. C-5). From the photographs, he also observed a Quandel sign in the front of the jobsite (Tr. 34).

As a result of what he had observed for approximately 10 to 15 minutes, the CSHO went to the jobsite to open an inspection (Tr. 34, 44). Once onsite, he identified himself and asked to speak to the person in charge (Tr. 34, 76). He was directed to Chad Havens who was the employee he observed unconnected in the aerial lift (Tr. 34). According to the CSHO, at that time Havens identified himself as foreman (Tr. 35). Havens then escorted the CSHO inside the hhgregg store to an area in the back of the store which was being used as an office, where he met with the project superintendent and other managers on the site (Tr. 61). The CSHO was introduced and he then explained what he had observed and that the inspection would be limited to the fall protection violation he observed (Tr. 61, 77-78, 155).

The CSHO was onsite approximately two hours conducting his inspection. The inspection revealed that two Quandel employees, Havens and a temporary employee working as a helper, were installing metal studs and braces on the façade on the southwest side of the building (Tr. 63, 115; Exhs. C-8, C-9). They were working on the metal façade from an aerial lift at an elevation of approximately 38 to 40 feet at its high point (Tr. 115). The façade under construction was higher than the roof line of the building upon which it was attached. Architectural plans show the roof was 24 feet high in the area where the employees were working from the aerial lift (Tr. 39).

The work on the façade required the employees to go up in the aerial lift to attach metal stud framing to the front façade of the building (Tr. 46). Because the bracing had to be cut to size, they had to go down to the ground in the aerial lift to retrieve the bracing which had been cut to measurement (Tr. 46). The employees in the aerial lift would determine the measurements and relay them to an employee on the ground, who cut the appropriate size bracing, and the employees in the aerial lift would go down to ground level to retrieve them and then back up to attach the bracing (Tr. 46-47, 56). Havens testified that most of the bracing on the façade was the same length, so the employee on the ground would cut all the bracing needed for a specific measurement provided to him. While the bracing was being cut, Havens and the helper attached the bracing which already had been put in place. When they were out of bracing, they would go back down to get more from the employee on the ground (Tr. 119 – 120). The CSHO observed this process occurring three times in the 10 to 15 minutes before he entered the jobsite (Tr. 47).

During the inspection CSHO Stowell conducted employee interviews and obtained interview statements. According to the CSHO, Havens stated during his interview that his position was carpenter and he worked for James Peck, field manager, who tells him what to do. Havens stated he was responsible for making sure all work is done on a day to day basis (Exh. C-9). He admitted he was not connected in the aerial lift because he just forgot (Tr. 56; Exh. C-9). As a result of the inspection the Secretary, on September 3, 2014, issued the Citation at issue in this proceeding.

The Citation

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). The only element regarding the Secretary's burden of proof in dispute is the knowledge element, as discussed below.

Item 1: Alleged Serious Violation of 29 C. F. R. § 1926.453(b)(2)(v)

Item 1 of the Citation alleges that an employee was working from the elevated aerial lift without his fall protection harness being connected, thereby exposing the employee to a 24 foot fall hazard (Exh. C-1).

Section 1926.453(b)(2)(v) provides:

> A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.
>
> Note to Paragraph (b(2)(v): As of January 1, 1988, subpart M of this part (§ 1926.502(d)) provides that body belts are not acceptable as part of a personal fall arrest system. The use of a body belt in a tethering system or in a restraint system is acceptable and is regulated under § 1926.502(e),

At the time of the inspection, two Quandel employees were working from an aerial lift at least 24 feet above ground while constructing a façade on the storefront on the jobsite. Each employee wore a fall protection harness; however one employee was not connected to the anchor point on the aerial lift (Exhs. C-4, C-5, C-9).

(1) Applicability of the Cited Standard

Quandel does not dispute that the cited standard applies to the work being performed on the jobsite at the time of the inspection. The evidence shows construction activity was occurring on the jobsite which involved the use of an aerial lift from which Quandel employees worked to construct a new façade on the storefront of the building. The Secretary has established § 1926.453(b)(2)(v) applies to the work being performed by Quandel on the jobsite on July 24, 2014.

(2) Compliance with the Terms of the Cited Standard

Quandel also does not dispute an employee was not connected to the anchor point while

working from the aerial lift elevated at least 24 feet from the ground (Tr. 54; Exh. C-9). Violation of the terms of § 1926.453(b)(2)(v) is established.

(3) Access to the Violative Condition

The evidence adduced at the hearing establishes Havens and his helper used the aerial lift to construct the façade on the storefront. The work activity required them to go up and down in the aerial lift to retrieve pieces of bracing being cut to size for placement on the façade of the storefront. Havens testified that at the time of the depiction in Exhibit C-6 they were 22 to 23 feet above ground in the aerial lift (Tr. 132). The architectural plans show the roof elevation at 24 feet; however, the façade of the building was higher than the roof of the building (Tr. 39). Havens testified he worked at the upper portion of the façade which was 38 - 40 feet at its highest point (Tr. 115, 133). Havens admits and the photographs show he was not connected while working from the aerial lift. "I was not connected because I just forgot." (Exh. C-9). The Secretary has established access to the violative conditions.

(4) Knowledge of the Violative Conditions

The issue in dispute in this matter is whether Quandel knew or could have known of the violative condition. Quandel contends the Secretary cannot establish its management knew or with the exercise of reasonable diligence could have known of the violative condition. Quandel asserts it did not know Havens was unconnected and it had no reason to believe employees would work in an aerial lift without connecting the fall protection harness to an anchor. Quandel also asserts Havens was not a supervisor. (Quandel's brief, pp. 3, 10-11, 12 foonote 1; Tr. 18). As an affirmative defense, it alleges unforeseeable employee misconduct.

The Secretary's investigation file and evidence adduced at the hearing substantiates the Secretary issued this Citation on the theory that knowledge of the violative condition was based on the contention Havens was a supervisor for Quandel (Tr. 35, 55-56, 79-80, 111-113; Exhs. C-2, R-A). This theory was not briefed by the Secretary. Instead the Secretary only argues in his brief that with reasonable diligence Quandel could have known of the violative condition if it had conducted inspections of the jobsite (Secretary's brief, p. 5).[5]

To prove knowledge, the Secretary can show a supervisor had either actual or

[5] Rule 2200.200(b)(6) of the Commission's rules for Simplified Proceedings does not require the filing of briefs. Therefore the Court does not deem issues not raised in the briefs to be waived.

constructive knowledge of the violation and such knowledge is generally imputed to the employer. Actual knowledge is established when a supervisor directly sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co*., 5 BNA OSHC 1202, at *3 (No. 11015, 1977)(holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent"). On the other hand, constructive knowledge is established where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have. *See, e.g., Hamilton Fixture*, 16 BNA OSHC 1073 *17-19 (No. 88-1720, 1993)(holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). In the alternative, the Secretary can show constructive knowledge based upon the employer's failure to implement an adequate safety program. *See, New York State Elec. & Gas Corp*., 88 F.3d 103, 105-06 (2d Cir. 1996) (citations omitted) with the rationale being that ---in the absence of such a program ---the misconduct was reasonably foreseeable.

The Court first addresses whether Havens is a supervisor whose knowledge can be imputed to Quandel. Havens stated in his interview statement he was responsible for making sure all work onsite was done on a day to day basis and that Peck, field manager, told him what to do (Exh. C-9). According to Havens, he was responsible for the exterior work being performed at the time of the inspection (Tr. 101-102). Havens testified his formal job title is carpenter and he does not recall telling the compliance officer he was a foreman (Tr. 99). He testified on direct examination:

> A. He [CSHO] had asked me who was in charge of the job. Asked me my responsibility on the job.
>
> Q. And what did you tell him?
>
> A. I told him that I was - - to my best recollection I told him that I was running the outside part of that job.
>
> Q. What does that mean?
>
> A. That I was - - basically that I was helping put the work in place. That I was - - we had I think six - - five, six guys on the job and I was dictated what they did in putting work in place. To make sure that that part of the job continued to move per the schedule that we needed.

(Tr. 101-102).

Havens further testified he was not given authority to discipline anyone on the jobsite and if he had a concern about an employee he would have to take it to Jolly, the foreman (Tr. 126). Field Manager Peck confirmed that Havens would come to him or the foreman for discipline (Tr. 216-217). According to Peck, Havens was lead carpenter on the jobsite, he was not a foreman (Tr. 216-217). "He just - - his title was carpenter but he was the leadman on the exterior of the project. So he was just overseeing details and make sure the job got done properly and safely." (Tr. 216). In addition, the helper working with Havens at the time of the inspection stated in his statement, "We have had safety talks every morning. Chad [Havens] usually holds the safety meetings and we have discussed fall protection." (Tr. 51, Exh. C-8).

A preponderance of the evidence establishes Havens was responsible for the project's exterior work to ensure the work being performed was done so "properly and safely." It is not disputed he was leadman for the exterior work, only that he was not a foreman. That he did not possess the title of foreman is not determinative. An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *American Engineering & Development Corp*., 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc*., 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992). The employee's job function rather than title is determinative. Therefore, the Commission has imputed the knowledge of a "working leader," because although not a full-time supervisor he was a supervisor at the time of the alleged violation. Havens as leadman had authority over the helper in the aerial lift and the employee cutting the pieces on the ground, and as such is a supervisor for purposes of imputing knowledge to Quandel. The Court therefore must determine whether as supervisor Havens's knowledge of his own misconduct may be imputed to Quandel.

The instant case arises in the Sixth Circuit which has held in a case involving supervisory misconduct "knowledge of a supervisor may be imputed to the employer. Because Wagner was a foreman and knew of his own failure to wear personal protective equipment, this failure may be imputed to Danis-Shook." *Danis-Shook Joint Venture XXV*, 319 F.3d 805 (6th Cir. 2003).

Although the knowledge of a supervisor is generally imputable, the Commission has held that an employer may avoid imputation by proving: (1) the establishment of work rules that

effectively implement the requirements of the standard; (2) the effective communication of the work rules to employees; and (3) the effective enforcement of the work rules through adequate supervision and discipline. *Superior Electric Co*., 17 BNA OSHC 1635, 1995-1997 (No. 91-1597, 1996); *See, Par Electrical Contractors, Inc.,* 20 BNA OSHC 1624 (No. 99-1520, 2004) (knowledge of supervisor imputed to employer); *Revoli Construction Co., Inc*., 19 BNA OSHC 1682 (No. 00-0315, 2001) (actual or constructive knowledge of foreman or supervisor imputed to employer); *North Landing Line Construction Co*., 19 BNA OSHC 1465 (No. 96-0721, 2001) (knowledge of supervisor imputed to company).

The courts and Commission are divided on the issue of whether a supervisor's knowledge of his or her own malfeasance is imputable to the employer.[6] As shown in *Danis-Shook, supra*, the Sixth Circuit agrees with the Secretary that this knowledge is imputable. Since the courts and the Commission are divided on this issue, in ruling on the issue, the Commission has deferred to the holding of the applicable circuit.[7] Because this case arose in the Sixth Circuit, deferring to the holding in that Circuit, Havens's misconduct is imputed to Quandel. The Secretary has established a prima facie case regarding the Citation issued to Quandel.

The Secretary's contention that had Quandel conducted inspections it could have known Havens was not connected is addressed below. Evidence on this issue is intertwined with evidence relating to Quandel's unforeseeable employee misconduct defense. For the reasons set forth below in the section on *Foreseeability and Preventability,* the Court finds that Quandel

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[6] The clear majority of circuits have held a supervisor's knowledge of his own misconduct is not imputable to the employer (i.e., the Second, Third, Fourth, Fifth, Tenth and Eleventh Circuits). This issue was most recently addressed by the Eleventh Circuit in *ComTran Group Inc*., 722 F.3d 1304 (11th Cir. 2013). In *Comtran*, the court held that "if the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the conduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct." *Id*. at 1318. The court further held "[T]he Secretary does not carry [his] burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct. A supervisor's 'rogue conduct' cannot be imputed to the employer in that situation." *Id*. at 1316. [A] "different situation is presented" when the misconduct is the supervisor's own. [*Mountain States Telephone & Telegraph Co*., 623 F.2d. 155, 158 (10th Cir. 1980)]. In that situation, the employer has no "eyes and ears." It is, figuratively speaking, blind and deaf. To impute knowledge in this situation would be fundamentally unfair. *Id*. at 1317 (footnote omitted).

[7] "Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied that circuit's precedent in deciding a case, even though it may differ from the Commission's precedent. *E.g., Kerns Brothers*, 18 BNA OSHC [2064,] 2067 [No. 96-1719, 2000)]." *North Landing Line Constr. Co.,* 19 BNA OSHC 1465,1473 n.8 (No. 96-721, 2001).

utilized reasonable diligence in conducting inspections; therefore the Secretary's argument as to constructive knowledge on the basis of failing to conduct inspections fails. Constructive knowledge also is not established because as set forth in the discussion below, Quandel had an effective safety program.

The remaining issue to be determined is whether Quandel has established the alleged affirmative defense of unforeseeable employee misconduct.

Employee Misconduct (Isolated Incident)

Quandel contends the cited violation was the result of an isolated incident of unpreventable employee misconduct. To prove this defense, "an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule." *Schuler-Haas Elec. Corp*., 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006) (citations omitted). An employer may rebut the Secretary's prima facie showing with evidence that it took reasonable measures to prevent the occurrence of the violation. In addition, the employer has the burden of showing "that the violative conduct of the employee was idiosyncratic and unforeseeable." *L. E. Myers Co*., 16 BNA OSHC 1037, 1040 (No. 90-945, 1993).

Work Rule

At the hearing the Secretary admitted that Quandel had a safety rule (Tr. 85, 248). The CSHO testified Quandel had an applicable work rule addressing fall protection for employees while working in an aerial lift (Tr. 85). The evidence adduced shows Quandel has a safety program and safety rules specifically regarding fall protection (Exh. R-B). Its safety rule when working from aerial lifts provides:

> Employees working above 6' on any raised platform must wear a full-body harness attached to a lanyard- which is attached to the work platform on an anchor point provided by the manufacturer. (Note-wrapping (choking) the lanyard around the cage railing is not acceptable).

(Exh. R-B, p. 93). Merely having a work rule, however, is not enough. A work rule is defined as "an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J.K. Butler Builders, Inc*., 5 BNA OSHC 1075, 1076 (No. 12354, 1977). An

employer's work rule must be clear enough to eliminate the employees' exposure to the hazard covered by the standard and must be designed to prevent the cited violation. *Beta Constr. Co.*, 16 BNA OSHC 1434, 1444 (No. 91-102, 1993). The undersigned finds Quandel's work rule is clear and was designed to prevent the cited violation.

Adequately Communicated

The employer must show that it communicated the specific rule or rules that are in issue. *Hamilton*, 16 BNA OSHC at 1090; *N.Y. State Elec. & Gas Corp*., 17 BNA OSHC 1129, 1134 (No. 91-2897, 1995). The communication element of the misconduct defense is met when the employees are well-trained, experienced and know the work rules. *Texland Drilling Corp*., 9 BNA OSHC 1023, 1026 (No. 76-5037, 1980). Although Havens had been employed by Quandel only since December 2013, he had previous experience in operating aerial lifts (Tr. 92-94). Havens testified since his employment with Quandel he had received site specific safety training on the use of the lifts on the jobsite, and less than a month prior to the inspection he had taken the week long fall safety course through OSHA (Tr. 102-103). Just prior to that, he finished two toolbox talks addressing fall restraints and operating lifts. Also during his employment he had received safety training which included fall protection by Quandel consisting of an hour and a half long safety video, weekly toolbox talks, safety manuals on jobs and weekly training meetings at the shop (Tr. 94-95). Havens further testified he recalled having toolbox safety discussions about using fall harnesses in the aerial lifts, and it was Quandel's safety policy for employees to tie off the body harness to an aerial lift when working in it (Tr. 95, 127). Further evidence of Havens's experience was testimony from field manager Peck that he observed Havens operating the aerial lift on many occasions - "he was in a lift every day" (Tr. 217).

Project Superintendent Collins is responsible for communicating Quandel's safety policy to its employees (Tr. 141). This is done by orientations before starting on the jobsite (Tr. 141). Division leaders and field superintendents also communicate the safety policies to employees (Tr. 142). They have a safety orientation, toolbox talks once a week, and Collins has a checklist and walks through it every day and walks the job every day to make sure the program is being followed (Tr. 143). The toolbox talks adduced at the hearing reflect several safety topics including those on various types of fall hazards. A Toolbox Audio Topic on falls dated June 2, specifically addressed falling from a lift or scaffold (Exh. R-A, pp.55-56). As project

superintendent, Collins communicated his notations of fall hazards to the subcontractors' safety person (Tr. 193-194). Field Manager Peck and foreman Jolly utilized tool box talks to communicate safety rules on the hhgregg jobsite (Tr. 213-214). The Court finds Quandel's work rule was adequately communicated.

Enforcement

Commission precedent allows consideration of both pre- and post-inspection discipline. *See American Engineering & Development Corp*., 23 BNA OSHC 2093, 2097 (No. 10-0359, 2012) (finding that one instance of delayed discipline two months after the inspection did not undermine its otherwise strong enforcement policy). However, post-inspection discipline is not a substitute for an effective enforcement program prior to the inspection. *See Jersey Steel Erectors*, 16 BNA OSHC 1162, 1165 n.3 (No. 90-1307, 1993), *aff'd in unpublished opinion*, 19 F.3d 643 (3d Cir 1994) (finding termination of foreman following OSHA inspection did not make up for ineffective enforcement policy prior to inspection).

Collins testified that Quandel safety policies are enforced by use of the three strike rule which involves a verbal warning, written warning and then the third time you are taken off the job (Tr. 147; Exh. R-B, p. 19). As project superintendent he was responsible for implementing and enforcing the safety rules and regulations (Exh. R-B, p. 14). Havens testified when Quandel employees were found violating a company safety rule they were disciplined and warned. "Your first time would be a written warning—it's kind of like a three strikes and you're are out rule." (Tr. 96). Havens received a written warning for his violation of the work rule the day after the OSHA inspection, and was provided refresher training by field manager Peck (Tr. 86, 97, 221; Exh. R-C, p. 3). Later, on or about August 12, 2014, an employee of SPS was observed not wearing a harness or was not connected in a boom lift, and as a result was removed from the lift immediately, as were employees observed not being tied off on May 20, 2014 (Tr. 150-151; Exh. R-C, pp. 16, 42). This is evidence of good enforcement before the violation at issue here.

The Secretary asserts Quandel's enforcement was lax because it did not follow its Discipline Plan when employees committed fall protection and other types of violations. The Secretary focuses significantly on Quandel's use of verbal warnings rather than written warnings. However, the plan provides for verbal warnings as the first step, and also provides that the "Company reserves the right to administer discipline in any manner it believes to be appropriate"

including disregarding progressive discipline and instead imposing immediate termination in its discretion (Exh. R-B, p. 19). The evidence adduced at the hearing reveals employees and/or subcontractors received at least a verbal warning for fall protection violations (Tr. 180-190).[8] The Court finds Quandel effectively enforced its work rules.

Foreseeability and Preventability

The defense of unforeseeable employee misconduct requires "that the violative conduct of the employee was idiosyncratic and unforeseeable." *L. E. Myers,* 16 BNA OSHC at 1040. By the time of the OSHA inspection Havens had been employed with Quandel for six months (Tr. 92-93). Havens testified that other than the instant situation, he does not recall another incident on the jobsite where he had been in and out of the aerial lift without attaching his fall harness (Tr. 128). Havens's uncontroverted testimony was he had never committed a safety infraction before or since this one (Tr. 136). Field Manager Peck confirmed they had never had another problem or issue on the hhgregg jobsite with Havens afterwards (Tr. 222). Project Superintendent Collins testified he never observed Havens operating an aerial lift without his fall harness attached to the anchorage point on the lift and he had no reason to believe that on the morning of July 24, 2014, Havens and the other carpenters were going to work out of the aerial lift without utilizing their fall protection (Tr. 152, 202-203). Field Manager Peck also testified he never saw Havens operating one of the aerial lifts without his fall harness and lanyard attached (Tr. 217). Collins and Peck testified confidently and with certainty and their testimony is highly credited. The Court finds this uncontroverted evidence compelling and supportive of finding that it was not foreseeable Havens would work in an aerial lift without his fall harness being connected to an anchorage point.

The Court further finds Quandel exercised reasonable diligence in inspecting the worksite and taking measures to prevent hazards to its employees. "Reasonable diligence" includes the employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co*., 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). Although it was normally Jolly's responsibility as

[8] The Secretary points out that a violation on August 12, 2014, did not result in even a verbal warning. When questioned about this on Cross Examination, although Peck testified he did not give the warning, he testified "I'm not sure who - - whether it was the foreman was notified. I'm not sure. I can't answer." (Tr. 227). The Court finds the record is inconclusive as to whether the August 12 infraction resulted in discipline.

foreman to inspect the jobsite, the evidence shows he worked inside the day of the inspection and the responsibility was left to Haven. The record is replete with evidence that Quandel conducted inspections of the jobsite, had a detailed safety program addressing fall protection and other issues, trained its employees, had a progressive discipline program to address violations, and Havens received a written warning consistent with the policy (Exh. R-B). Project Superintendent Collins testified he required the foremen to check the surroundings all of the time (Tr. 172). The evidence shows Jolly, as foreman, walks around making sure everybody is working safely (Tr. 232). Superintendent Collins and field manager Peck walked the jobsite looking for safety issues (Tr. 104-105, 215). Collins walked the exterior approximately four hours per day (Tr. 105). The undersigned finds these steps to discover safety violations reasonable.

The Commission has held that "[r]easonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell Tel. Co.,* 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000)(citations omitted), *aff'd without published opinion*, 277 F.3d 1374 (5th Cir. 2001). The record shows Quandel had an effective safety program and has established the defense of unforeseeable employee misconduct, thereby rebutting the Secretary's prima facie case.

Item 1 of the Citation is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of the Citation, alleging a serious violation of § 1926.453(b)(2)(v), is vacated, and no penalty is assessed.

SO ORDERED.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Date: February 23, 2015
Atlanta, Georgia