United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. GATE PRECAST COMPANY, Respondent.	OSHRC Docket No. 15-1347

DECISION AND ORDER

COUNSEL: Dolores G. Wolfe, Attorney, U.S. Department of Labor, Office of the Solicitor, Dallas, TX, for Complainant.

J. Larry Stine, Mark A. Waschak, Attorneys, Wimberly Lawson Steckel Schneider & Stine, PC, Atlanta, GA, for Respondent.

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

I. INTRODUCTION

Gate Precast Company (Gate Precast) manufactures and installs precast concrete structures. On May 4, 2015, Derek Rusin, a compliance safety and health officer for the Occupational Safety and Health Administration (OSHA), observed workers at a Gate Precast worksite in Shenandoah, Texas, working on the second floor of a planned six-story Holiday Inn under construction (Stipulations, ¶ ¶ 4, 5, 8). Rusin believed the workers he observed were not tied off and were working at the edge of the second floor. Rusin stopped and conducted an inspection of the worksite. As a result of the inspection, OSHA issued two citations to Gate Precast on July 16, 2015, for serious and repeated violations of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. §§ 651-678.[1]

[1] The Secretary of Labor (the Secretary) delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads OSHA, and assigned responsibility for enforcement of the Act to OSHA. *See* 65 Fed.Reg. 50017 (2000). The Assistant Secretary has promulgated occupational safety and health

Gate Precast timely contested the citations and thereafter, the Secretary filed a formal complaint with the Commission charging Gate Precast with violating the Act and seeking an order affirming the citations and proposed penalties. Gate Precast filed an answer on October 27, 2015. The Commission has jurisdiction of this action under section 10(c) of the Act, § 659(c). (Compl. ¶ I; Answer ¶ 1; Stipulations, ¶ 1). Prior to the trial, the parties reached a partial settlement agreement regarding Citation 1 (Tr.8).[2] Remaining at issue is Citation 2, alleging a repeat violation of 29 C.F.R. § 1926.501(b)(1), for failing to ensure employees were protected from falling while on walking/working surface with an unprotected edge 6 feet or more above a lower level.[3] The Secretary proposes a penalty of $38,500.00 for this Citation 2.

The parties stipulated and the Court finds Gate Precast is engaged in a business affecting interstate commerce and is an employer covered under section 3(5) of the Act, § 652(5). (Compl. ¶ II; Answer ¶ 2; Stipulations, ¶ 2). A one-day bench trial was held in Houston, Texas, on June 29, 2016. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. For the reasons indicated *infra*, the Court concludes the Secretary established a violation of 29 C.F.R. § 1926.501(b)(1) with regard to two of the three workers he alleged were exposed to a fall hazard. Accordingly, the citation is **AFFIRMED** and a civil penalty of $26,000.00 is assessed.

II. BACKGROUND

Gate Precast is "in the business of manufacturing and installing precast concrete structures." (Stipulations, ¶ 4.) On May 4, 2015, Gate Precast was "working on a project at 19333 David Memorial Drive, Shenandoah, Texas," and Gate Precast's foreman on the site was Albert Godinez (Stipulations, ¶5). Gate Precast employee Anthony Fay also was working on the site (Stipulations, ¶ 6). The project was a "six-story hotel with a CMU block and steel framing construction with Gate-Core (hollow core) planking floor and roof deck." (Stipulations, ¶ 8.) For this project, Gate Precast "used the services of Labor Ready to provide general helpers to work

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standards, *see e.g.*, 29 C.F.R. Parts 1910 and 1926, and has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[2] In a *Final Consent Order* dated June 27, 2016, the Court approved the partial settlement agreement and adopted and incorporated the agreement as part of the order.

[3] In the alternative, the Secretary charged Gate Precast with a violation of subsection (b)(12), relating to precast concrete erection. However, although the workers observed by Rusin were preparing to engage in precast concrete erection later in the day, at the time he observed them they were engaged in landing a load of material hoisted by a forklift. Therefore, the Court concludes subsection (b)(1) is more specific to the cited conditions.

under the supervision, direction and control of" Gate Precast. "Labor Ready provided Bobby Pitts and Bradley Blaine to work at the job site." (Stipulations, ¶ 7.) Gate Precast foreman Godinez went up on the second floor the morning of May 4, 2015, and verified red tape was placed 6 feet from the edge of the building as a marker (Tr. 88). The red tape "was secured to some sticks in between some cracks." (Tr. 14.) The red tape was not intended as a barrier that would physically prevent employees from accessing the area within 6 feet of the edge. "The warning line used here was only intended to reinforce the instructions not to go into the zone of danger." (*Gate Precast's Br.* p. 12.) The second story was approximately 24 feet high (Tr. 19).

As Rusin[4] was driving to another construction site on May 4, 2015, he observed a worker on the second floor of the Holiday Inn project. Rusin explained OSHA has "a construction emphasis program. When we see somebody on a roof, we need to ensure that they're properly protected from falling." (Tr. 29.) To that end, Rusin parked, exited his vehicle, and met with the general contractor's superintendent for the project. The superintendent informed Rusin the workers he had observed on the second floor were employees of Gate Precast (Tr. 30).

When Rusin arrived at the site, Gate Precast foreman Godinez was operating a rough-terrain forklift located on the ground and was attempting to lift a load of precast panels to the second floor (Tr. 32-35). Rusin observed three workers on the second floor who were attempting to guide the load as it moved toward them (Tr. 37-38). He stated he "did not go on the roof. . . There was no way for me to get up there and I can't do that anyway." (Tr. 39.)[5] From his vantage point on the ground, Rusin concluded Gate Precast's employees "were wearing harnesses but they were not attached to anything." (Tr. 41.) Rusin took photographs and interviewed Gate Precast employee Anthony Fay and Labor Ready temp Bradley Blaine, who had been assigned by Gate Precast to help lay grout on the second floor of the project on May 4, 2015 (Tr. 12, 23, 70). Based on CSHO's inspection, on July 16, 2015, OSHA issued the Citation at issue.

[4] Rusin works for OSHA's Houston North Area Office. He had worked for OSHA for seven years and seven months at the time of the trial (Tr. 29).

[5]At the time of the inspection, the planned six-story structure was only two stories high. At times during the hearing, witnesses referred to the second floor as the "roof." It is understood that references in the record to the "roof" indicate the unfinished second story of the building.

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). To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority the Secretary promulgated the standard at issue in this case.

A. Factors Required to Establish Violation of Cited Standard

Under both Commission precedent and the law of the Fifth Circuit, the jurisdiction in which this case arises,[6] in order to prove a violation of a cited standard, the Secretary "must show by a preponderance of the evidence: (1) that the cited standard applies; (2) noncompliance with the cited standard; (3) access or exposure to the violative conditions; and (4) that the employer had actual or constructive knowledge of the conditions through the exercise of reasonable due diligence." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016) (*citing Jesse Remodeling, LLC*, 22 BNA OSHC 1340 (No. 08–0348, 2006); *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90–1747, 1994)). Further, "hazard is generally presumed in safety standards unless the regulation requires the Secretary to prove it." *Id.*, 811 F.3d at 735. Therefore, where a standard presumes a hazard, "the Secretary need only show the employer violated the terms of the standard." *Id.* (*citing Kaspar Electroplating Corp.*, 16 BNA OSHC 1517 (No. 90–2866, 1993)).

1. Alleged Violation

Citation 2 Item 1, as amended,[7] alleges a repeated violation of the Secretary's fall protection standard, 29 CFR § 1926.501, for failing to provide a fall protection system at the

[6] 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). This case arose in Texas, which is in the Fifth Circuit. In general, where 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." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

[7] The Court granted the Secretary's unopposed *Second Motion to Amend Citation and Complaint* on June 21, 2016.

worksite. More specifically, the Secretary charged Gate Precast with a violation of subsection (b)(1), relating to unprotected sides and edges, which mandates that each employee "on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." The amended citation asserts Gate Precast "does not ensure that employees are protected from falling while on working services at heights greater than 6 feet."

2. Applicability of the Cited Standard

A "walking/working surface" is "any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties." 29 C.F.R § 1926.500(b). The standard defines "unprotected side or edge" as "any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or guardrail system at least 39 inches (1.0 m) high. *Id.* The second floor of the worksite at issue was a walking/working surface with an unprotected edge within the meaning of the cited and alternative standards. Further, Gate Precast concedes "the fall protection standard applies." (*Gate Precast's Br.* p. 8.) Therefore, the Court concludes section 1926.501(b)(1) applies to the cited conditions.

3. Non Compliance with the Cited Standard

The cited standard lists three methods of fall protection for use at an unprotected edge: "guardrail systems, safety net systems, or personal fall arrest systems." The parties agree that Gate Precast erected neither a guardrail nor a safety net system, and that the red tape Gate Precast placed around the unprotected edge did not serve as a method of fall protection. In his brief the Secretary contends, "[t]hree workers were exposed to the hazard of falling as they were not tied off for at least ten to thirty minutes." (*Secretary's Br.* p. 7). A person normally "ties off" by securing a rope lanyard, which is attached to the safety harness worn by the worker, to a cable or some structure capable of supporting the person's weight. *N & N Contractors, Inc. v. Occupational Safety & Health Review Comm'n*, 255 F.3d 122, 125 (4th Cir. 2001).

The three workers the Secretary identifies are Anthony Fay, a permanent employee of Gate Precast, and Bradley Blaine and Bobby Pitts, temporary laborers supplied by Labor Ready.[8] Gate Precast admits it "agreed to provide adequate supervision, direction and control over workers that Labor Ready provided to" it and "no Labor Ready supervisor was present at the project at 19333 David Memorial Drive." (*Responses of Gate Precast to Requests for Admission,* ¶¶13, 21.) Gate Precast does not dispute that, under the test for employment set out in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 316 (1992), and adopted by the Commission in *Don Davis*, 19 BNA OSHC 1477 (No. 96-1378, 2001), it was the employer of Blaine and Pitts at the time of the OSHA inspection. *See Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated)). ("While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers."). The Court determines the temporary workers at the worksite were employees of Gate Precast, as defined by *Darden*.

Temporary employee Blaine testified Labor Ready assigned him to work for Gate Precast on May 4, 2015, at the worksite at issue. It was his first day on the site (Tr. 14). He stated, "When I showed up, I was told that I was going to be helping lay grout and the pieces that were already up on the flooring. . . . And then help with clean-up." (Tr. 12.) While waiting to start his assigned work, foreman Godinez used a rough-terrain forklift to lift a load of precast panels (the crane that Gate Precast normally would use to perform this task was not available). Blaine testified none of the employees on the second floor "were tied off because there was nothing to tie off to" (Tr. 17) and he "didn't see anybody tied off." (Tr. 25.)

Rusin singled out Anthony Fay as a Gate Precast employee who was not tied off. When asked how he determined Fay was not tied off, Rusin stated, "He was moving around. So every time he turned or moved around, I can see that his D-ring was empty." (Tr. 39.) Rusin stated he was standing on the ground, looking up two stories, and "could see the upper portion of the two gentlemen that were trying to help land this load on the roof." (Tr. 33). From this position, he stated, he "could see that they had harnesses on but they didn't have anything attached to their D-rings on the back." (Tr. 33.) On cross-examination, Rusin testified he interviewed Fay and stated Fay "did not tell me he was tied off." (Tr. 70.) According to Rusin,

[8] The record indicates there was a second Gate Precast employee named Adams on the second floor at the time of the inspection. The Secretary has not identified this employee as one of the workers in noncompliance with the cited standard.

> Fay told me that him and another employee had [gone] up on the second floor and they had brought two yo-yo lanyards with them, and the one that he had was froze up. It wouldn't move. . . And I asked him why if they still have one working, why didn't one person try to land the load or at least one tie off, and he said he didn't know why.

(Tr. 74.) However, Gate Precast foreman Godinez testified the permanent employees who were on the second floor of the structure on May 4, 2015, were wearing harnesses with attached yo-yo lanyards. Gate Precast had installed anchor bolts on the floor of the structure to which the employees could attach their lanyards (Tr. 87). Once the employees were on the second floor, Godinez asked them for verbal confirmation that they were tied off (Tr. 89).

There is a discrepancy in the record: Blaine, the only witness who was present on the second floor, testified he did not observe anyone on the second floor tied off and Rusin testified Fay informed him he was not tied off. On the other hand, foreman Godinez stated he observed the permanent employees on May 4, 2015, before they went up to the second floor. They were wearing harnesses with attached lanyards. Once on the second floor, they informed Godinez they had attached the lanyards to the anchors installed on the floor. However, this evidentiary impasse can be resolved by reviewing the photographic exhibits.

Looking at the Government's Exhibit 5, Godinez identified Fay and stated he could "see the lanyard hooked to the harness." (Tr. 91.) James Stini, vice-president of Gate Precast, also testified he could see the lanyard. "[H]e is absolutely tied off. You can see the lanyard is pulling from his back away from –away from the edge of the deck. So he's actually tied off. And that man right there is Anthony Fay." (Tr. 145.) Fay can be seen at the right of the photograph as he attempts to dislodge a broom that had become wedged against the structure. Fay is three-quarters facing the camera as he reaches up. He is clearly wearing a harness. Also clearly visible is a yellow lanyard stretched from the floor of the second story towards the back of Fay's harness. Although its connection to the D-ring is not visible, because Fay's back is not turned to the camera, there is no other plausible explanation for the presence of the lanyard in the photograph. The Secretary did not question Godinez or Stini regarding the visible lanyard in this exhibit and does not mention the photograph or the testimony in his post-trial brief. The photographic evidence challenges the reliability of the testimony of Blaine and Rusin. The photograph, taken by Rusin and adduced by the Secretary, is inconsistent with the testimony that Fay was not tied off. Based on the clear evidence established by the Government's Exhibit 5, the

Court concludes the Secretary has failed to establish that Gate Precast did not provide a fall protection system to employee Fay in violation of the cited standard.

The Secretary also contends temporary employees Blaine and Pitts were not tied off as required by the cited standard. Gate Precast did not present a safety briefing for the temporary employees or provide them with harnesses and lanyards (Tr. 15). Blaine testified the "only thing I was told about it is not to go over from the red tape" that was placed 6 feet from the open edge of the second floor (Tr. 15). Gate Precast concedes as much, stating neither of the temporary employees were "fitted with a harness and a lanyard, but [their] job was only clean-up and [they were] explicitly instructed never to go past the red tape that Gate [Precast] had installed at the site to remind unauthorized workers not to stray within 6 feet of the edge." (*Gate Precast's Br.* p. 7.) Foreman Godinez himself instructed Blaine and Pitts to go to the second floor and stay inside the red tape. "These workers were not issued harnesses and lanyards because they just did clean-up and had no reason to go outside the tape and into the 6-foot danger zone: only the Gate [Precast] employees had assignments that took them outside of the tape." (*Id.*)

Based on this admission by Gate Precast, the Court concludes temporary employees Blaine and Pitts were on a walking/working surface with an unprotected edge approximately 24 feet above the lower level and were not protected from falling by the use of personal fall arrest systems. The cited standard commands that an employee on an unprotected surface that is six feet or more above a lower level must be protected by the use of guardrails, safety nets, or safety harnesses. Therefore, the plain language of the regulation identifies both the hazard to be guarded against and the specific safety precautions to be taken. Here, the temporary employees were working on an unprotected surface that was six feet or more above a lower level; therefore the cited standard applies, and they were required to be protected by the use of guardrails, safety nets, or safety harnesses.

Nothing in the standard requires the Secretary to demonstrate a hazard is present before the employer is required to comply with the standard's terms. If an employee is on a walking/working surface 6 feet or more above the lower level, the employee must have some form of fall protection. Such is the case here. The Secretary has established Gate Precast failed to comply with the requirements of the cited standard with regard to temporary employees Blaine and Pitts.

4. Access or Exposure to the Violative Condition

The Secretary establishes employee access to a violative condition "either by showing actual exposure or that access to the hazard was reasonably predictable." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1037, 2012) (*citing Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (*per curiam*)). In determining whether the Secretary has proven access to the hazard, the "inquiry is not simply into whether exposure is theoretically possible," but whether it is reasonably predictable "either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Id.* (*citing Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). Here, there is evidence that the temporary employees were exposed to the unprotected edge.

Blaine stated that he was "[r]oughly three to five foot" away from the open edge of the second story as he assisted with the incoming load (Tr. 17). He conceded, however, that he did not measure the distance between the red warning tape and the open edge. Blaine testified he never crossed the red tape (Tr. 23). CSHO Rusin did not go up on the second floor and so did not take measurements relevant to the red tape. The Court accepts Gate Precast's assertion the red tape was placed 6 feet from the open edge of the second story.

Gate Precast argues the Secretary failed to establish employee exposure to the risk of injury, claiming, "[t]here is no evidence that it was reasonably predictable that the temporary workers from Labor Ready would be in the zone of danger. The evidence in the record overwhelmingly shows that they were not exposed to the hazard, because they were instructed never to go within 6 feet of any unprotected side or edge." (*Gate Precast's Br.* p. 11.) Gate Precast appears to have taken the "6-foot rule," requiring employees to tie off when they are working vertically 6 feet above a lower level, and applied it horizontally.

However, as the Secretary point out in his brief, OSHA considered and rejected this approach in the Preamble to the Final Rule for fall protection. "In conclusion, after careful and complete consideration of the entire record, OSHA has determined that there is no 'safe' distance from an unprotected side or edge that would render fall protection unnecessary." *Safety Standards for Fall Protection in the Construction Industry*, 59 Fed. Reg. 40672-01 (August 9, 1994). The preamble to a standard is the most authoritative evidence of the meaning of the standard. *Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC 1396, 1398 (No. 08-1292, 2015);

Superior Rigging & Erecting Co., 18 BNA OSHC 2089, 2092 (No. 96-0126, 2000); *Tops Markets*, 17 BNA OSHC at 1936. "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context. Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152-55 (1991). The Court finds the Secretary's interpretation in his preamble to be both consistent with the regulatory language and reasonable.

The Commission has also rejected Gate Precast's contention the red tape provided adequate warning to employees of a "safe" distance from the edge, for which they did not require fall protection in *Nuprecon LP*, 23 BNA OSHC 1817 (No. 08-1307, 2012). In that case, Nuprecon employees were engaged in demolishing hangars and other structures, and were working on the third floor of a hangar, one side of which was "an unprotected twenty-one-foot-long, floor-to-ceiling opening." *Id.* at 1818. Similar to the present case, Nuprecon had "'hung red plastic ... tape several feet above the floor from the walls near the open edge to and between stanchions' to create 'a rectangular area in front of the open edge.' Nuprecon trained its employees that red tape signified 'danger' and that they were to 'stay out' of such taped-off areas." *Id.* "[T]he red tape strung parallel to the unprotected edge was positioned at a 15-foot distance from that edge." *Id.* Nuprecon's field safety officer testified that (similar to the red tape Gate Precast placed), at one point "the distance between the tape at the wall on the right side of the edge and the edge itself was six feet." *Id.* at 1818. The Nuprecon employee at issue was looking up, removing overhead ceiling pipes while standing in a mobile lift located to one side of the unprotected opening. In the present case, the temporary employees were reaching up to help guide the load of precast panels to the second floor.

The Commission nonetheless found it "reasonably predictable that such an employee actively engaged in this type of work would need to move about his entire work area. Nothing prevented him from dismounting the lift in that area and—given the distance between the edge and the red tape on that side—coming within six feet of the edge." *Id.* at 1820. "In fact, based on the employer's own instructions that the red tape signified 'danger' and employees were to 'stay out' of such areas, this employee may have had the mistaken impression that as long as he remained outside of the taped-off area, he would not be exposed to a fall hazard." *Id.* "Under these circumstances, we find it reasonable predictable that this employee would dismount the lift

in his work area and come within the zone of danger." *Id.* The Court therefore concludes the temporary employees had access to the hazard since it "was reasonably predictable either by operational necessity or otherwise (including inadvertence)," that the temporary "employees have been, are, or will be in the zone of danger."[9] Thus, the Secretary has established employee exposure to the cited conditions.

5. Actual or Constructive Knowledge of the Conditions

"To prove knowledge, 'the Secretary must show that the employer knew of, or with exercise of reasonable diligence could have known of the non-complying condition.' *Trinity Industries v. OSHRC,* 206 F.3d 539, 542 (5th Cir.2000)." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 736 (5th Cir. 2016). Gate Precast foreman Godinez was aware the temporary employees were not tied off. Gate Precast states in its brief that it intentionally declined to provide the employees with fall protection because the company did not believe the employees were exposed to a fall hazard. This knowledge is imputed to the company. *W.G. Yates & Sons Construction Co., Inc. v. OSHRC,* 459 F.3d 604, 607 (5th Cir.2006) ("[W]hen a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge[,] actual or constructive [,] of non-complying conduct of a subordinate.") (quoting *Mountain States Telephone & Telegraph Co. v. OSHRC,* 623 F.2d 155, 158 (10th Cir.1980)). There is substantial evidence on the record to establish that Gate Precast possessed knowledge of the violative conditions. The Secretary has established Gate Precast had actual knowledge of the violative conduct. Therefore, employer knowledge is established.

B. AFFIRMATIVE DEFENSE

Gate Precast contends any violation of the cited standard is the result of unpreventable employee misconduct. "To establish this affirmative defense, an employer must show that it (1)

[9] *Cf. Dic-Underhill*, 8 BNA OSHC 2223 (No. 10798, 1980) (finding access to a fall hazard where two employees grinding ceiling seams 25 or more feet from unguarded edge had to move closer to edge to sand seams extending to that side of building); *Gallo Mech. Contractors, Inc.*, 9 BNA OSHC 1178, 1180 (No. 76-4371, 1980) ("Hazards of tripping and falling ... can occur if matter is scattered about working and walking areas."); *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2122 (No. 96-0606, 2000) (stumbling near unprotected edge resulted in non-tied-off employee falling to his death), *aff'd*, 255 F.3d 122 (4th Cir. 2001). *See also Lancaster Enters*., 19 BNA OSHC 1033, 1037 (No. 97-0771, 2000) (finding exposure where employees used a hatchway and ladder "closely adjacent" to a fall hazard); *Phoenix Roofing*, 17 BNA OSHC at 1079 ("about 12 feet" from unguarded skylights); *Dic-Underhill*, 8 BNA OSHC at 2229-30 (25 or more feet from an unguarded edge, working towards that edge); *Cornell & Co.*, 5 BNA OSHC 1736, 1738 (No. 8721, 1977) (ten feet from an elevator shaft).

established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered. *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). Gate Precast predicates this misconduct, however, on the actions of its permanent employee, Fay. The employees who were in noncompliance with the cited standard were the temporary employees. Gate Precast concedes it did not have a work rule requiring temporary employees to tie off. Therefore, it could not communicate this nonexistent rule to the temporary employees or takes steps to discover violations or enforce the rule when its violation was discovered. For this reason, Gate Precast's unpreventable employee misconduct defense fails.

C. REPEAT VIOLATION

Under Fifth Circuit and Commission precedent, a violation is repeated if, at the time it occurred, "there was a Commission final order against the same employer for a substantially similar violation." *Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x 386, 390 (5th Cir. 2013) (*citing Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 837 (5th Cir.1981)) (quotation marks and citation omitted); *Potlatch Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary establishes a prima facie case of substantial similarity by showing that the prior and present violations are for failure to comply with the same standard. *Monitor Constr. Co*., 16 BNA OSHC 1589, 1594, 1993-1995 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994)." *Deep S. Crane & Rigging Co*., 23 BNA OSHC 2099, (No. 09-040, 2012).

Gate Precast does not dispute OSHA previously cited it for a substantially similar violation. OSHA previously cited Gate Precast for a violation of § 1926.501(b)(1) as a result of a May 14-15, 2014, inspection at a Gate Precast worksite in Amarillo, Texas. The Court agrees with the Secretary that the serious violation of 29 C.F.R. § 1926.501(b)(1) found through OSHA Inspection No. 977474 at Amarillo, Texas, set forth in Item 1 of Citation No. 1, issued August 28, 2014, became a final order of the Commission on September 23, 2014 (Gov. Ex. 15-18). Gate Precast's subsequent violation of § 1926.501(b)(1) occurred on May 4, 2015, at the Shenandoah, Texas, worksite. Because Gate Precast failed to comply with the same standard in both instances, the Secretary has established OSHA cited Gate Precast for a substantially similar violation that became a final order before the occurrence of the May 4, 2015, violation. Thus, Gate Precast was properly cited for repeat violations.

IV. PENALTY DETERMINATION

Under the Act, any employer who "repeatedly" violates the requirements of section 5(a) of the Act may be assessed a civil penalty of not more than $70,000 for each violation. 29 U.S.C. § 666(a). The Commission is empowered to "assess all civil penalties" provided in this section, "giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00- 1052, 2005). "Moreover, while gravity is normally the primary factor in assessing appropriate penalties, an employer's substantial history of prior violations may skew the importance of gravity in the final penalty determination." *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994).

Given the repeated violation, and the awareness of the supervisor that the temporary employees were working without fall protection, the Court concludes Gate Precast is not entitled to a reduction for lack of history of previous violations or for good faith. *Gen. Motors Corp., CPCG Okla. City Plant*, 22 BNA OSHC 1019, 1048 (No. 91-2834E & 91-2950, 2007) (consolidated) (giving no credit for good faith when management tolerated and encouraged hazardous work practices). The record does not indicate the size of Gate Precast's business.

As to the gravity of the violation, it was high. The three employees were standing near the edge of the roof and were not tied off, receiving the lift for a duration of at least ten to thirty minutes. (Tr. 46.) The workers were about 24 feet up from the ground with nothing to break their fall, other than the dirt below. (Tr. 19.) The probability of injury was greater because all three employees were receiving the lift with their eyes over their head trying to reach the out of control lift while moving, making the probability of injury extremely likely. The severity was high since the employees were moving back and forth near and edge exposing them to a fall of 24 feet could result in serious injury or death. (Tr. 57 – 60.)

The Secretary proposed a penalty of $38,500.00 for the repeated violation, which the Court concludes was justified due to the gravity of the facts, but should be reduced to reflect two exposed employees, rather than three, as the Secretary alleged.[10] Giving due consideration to the size

[10] The Secretary identified three employees exposed. Since the Court found the permanent employee was tied off, there were only two exposed employees. Therefore, the Court assesses 2/3 of the proposed penalty.

of the business, the gravity of the violation, good faith, and history, the Court finds the appropriate civil penalty is $25,667.00. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Item 1 of Citation 2 is **AFFIRMED** and a penalty of $25,667.00 is assessed.

SO ORDERED.

/s/ John B. Gatto
John B. Gatto
Administrative Law Judge

Dated: September 23, 2016
Atlanta, GA