

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
100 Alabama St. S.W.  
Building 1924 Room 2R90  
Atlanta, GA 30303-3104

SECRETARY OF LABOR,  
Complainant,

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.<sup>1</sup> After Ceco timely contested the citation, the Secretary of

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<sup>1</sup> 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.

Labor (Secretary) filed a formal complaint<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> For the reasons indicated *infra*, the Court **VACATES** Item 1 and **AFFIRMS** Items 3 and 4.

## II. BACKGROUND

Ceco was the formwork<sup>5</sup> 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).

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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).

<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> 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.

<sup>5</sup> "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 16<sup>th</sup> level (the 15<sup>th</sup> 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.<sup>6</sup> 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 16<sup>th</sup> 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 16<sup>th</sup> 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 16<sup>th</sup> 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*,

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<sup>6</sup> 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.)

474 U.S. 3, 7 (1985). Thus, Congress vested the Commission with the “adjudicatory powers 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 arose<sup>7</sup> 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]nchorages 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

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<sup>7</sup> 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.

not capable of supporting 5,000 pounds. Ceco disputes the Secretary's claim, arguing Gutierrez 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 16<sup>th</sup> 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 16<sup>th</sup> 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 15<sup>th</sup> 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 16<sup>th</sup> 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 16<sup>th</sup> 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 16<sup>th</sup> 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 16<sup>th</sup> 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 16<sup>th</sup> 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 interview<sup>8</sup> 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 16<sup>th</sup> 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 16<sup>th</sup> level until around 3:00 p.m. (Tr. 74). It is unknown what workers, if any, were on the 16<sup>th</sup> 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 16<sup>th</sup> 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

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<sup>8</sup> 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.

evidence. As indicated *supra*, Gutierrez told San Miguel the straps were already attached to the frame when it was lifted to the 16<sup>th</sup> floor. Peterson, the regional safety director, provided a 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 16<sup>th</sup> level, one of which is attached to a strap embedded in a column. None of the witnesses at trial were present on the 16<sup>th</sup> 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 16<sup>th</sup> 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.)<sup>9</sup> 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

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<sup>9</sup> 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).

miles per hour (Tr. 330). Likewise, Ceco Safety Director Peterson agreed that Table 27 was not “out of the ordinary.” (Tr. 294).

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  $\frac{1}{2}$ ” drop-in anchors and a shoulder eye bolt to secure all corner panels. Form spike: Ultimate is 1180# tension, 2425# shear.  $\frac{1}{2}$ ” 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 16<sup>th</sup> 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.<sup>10</sup>

#### *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

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<sup>10</sup> 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.

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 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 strap<sup>11</sup> 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).

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

On September 1, 2016, Ceco's three-man crew used  $\frac{1}{2}$ -inch diameter bolts that were embedded 2 inches deep into the concrete. The substituted bolts had no anchors and went directly 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 16<sup>th</sup> 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 malfeasant,” 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*

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John B. Gatto, First Judge

Dated: October 26, 2018  
Atlanta, GA