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

Secretary of Labor, Complainant, v. Empire Roofing Company of Georgia, Inc., Respondent.	OSHRC Docket No. 16-1984

Appearances:

Jaslyn W. Johnson, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

McCord Wilson, Esquire, Rader & Campbell, P.C.
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

While returning to their office from an inspection, two Compliance Safety and Health Officers (CSHO) from the Atlanta West OSHA area office observed a group of men working on the roof of a Comfort Suites in Columbus, Georgia. The men did not appear to be using any type of fall protection. The CSHOs stopped and initiated an inspection, calling the men down off the roof. As they descended in an aerial lift, the men did not have on harnesses and were not tied off to the lift. The CSHOs later discovered the men worked for Empire Roofing Company of Georgia, Inc., (Empire) and had been applying a sealing material to the roof. During the course of their inspection, the CSHOs learned at least one Empire employee on site had not been trained on the hazards associated with the chemicals the men were using to repair the roof.

Based on the inspection, the Secretary issued Empire a serious citation alleging two violations and an other than serious citation alleging one violation. Item 1, Citation 1, alleges a serious violation of 29 C.F.R. § 1926.453(b)(2)(v) for failing to ensure employees wore a personal fall arrest system while riding in the aerial lift. Item 2, Citation 1, alleges a serious violation of 29 C.F.R. § 1926.501(b)(1) for not ensuring employees were protected from falls

while working on the roof of the building. The Secretary proposed penalties for the violations in the amount of $2,272.00 and $3,741.00, respectively, for a total proposed penalty of $6,013.00. Item 1, Citation 2, alleges an other than serious violation of 29 C.F.R. § 1910.1200(h)(1) for failing to train at least one employee on the chemicals used onsite. The Secretary proposed no penalty for the other than serious citation. Empire timely contested the citations bringing the matter before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (the Act).

I held a hearing in this matter on March 16, 2017, in Atlanta, Georgia. The proceedings were conducted pursuant to the Commission's Simplified Proceedings. 29 C.F.R. §§2200.200-211. The parties filed post-hearing briefs in this matter on May 8, 2017.

For the reasons that follow, Items 1 and 2 of Citation 1 are affirmed and a total penalty of $6,013.00 is assessed. Citation 2 is affirmed with no penalty assessed.

JURISDICTION

At the hearing, the parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 10). Empire 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 § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 10). Based upon the parties' stipulations and the record, I find the Commission has jurisdiction over this matter and Empire is an employer covered under the Act.

BACKGROUND

Empire is a roofing company located in the Atlanta, Georgia, metropolitan area. It has a small workforce of approximately 20 employees (Tr. 295). It is organized into two divisions. The production division performs larger jobs involving installation of roofs. The service division performs smaller jobs including repairs (Tr. 247). The jobsite that was the subject of the inspection involved a roof repair and was being handled by the service division.

The job was being performed by a four-man crew. The crew consisted of two employees who held the title of foreman and two laborers. Foreman 1 had the most experience with the company and had been designated as the person in charge of the job. None of the workers had long tenures with Empire. Foreman 2 and Laborer 1 (both of whom testified at the hearing) had been with the company less than one year at the time of the inspection (Tr. 106, 156).

The inspection occurred on Monday, June 20, 2016. In the morning of that day, the crew had attended a tool box talk meeting in which the use of a personal fall arrest system had been the topic (Tr. 138, 170; Exh. R-6). The men then drove to the worksite to begin their work. Empire had rented an aerial lift to access the roof. Empire had issued each man a bucket that contained their personal protective equipment, including a harness and lanyard, and one roof anchor (Tr. 190). Once at the worksite, the men donned their harnesses and rode the aerial lift to the roof. They worked on the roof, using their personal fall arrest systems, until lunch. At lunch, they descended from the roof.

The job required the men to apply a coating material around pipes and the "coping laps" on the roof (Tr. 135). Coping laps are the overlapping pieces that form the seam of a metal roof (Tr. 47-48). The materials used for the process were Solargard 6083 Base Coat, Solargard 6083 Finish Coat, and Solargard Fluoro-Prime (Exhs. C-8, C-9, C-10; Tr. 29-30, 135, 148). These materials were in 5-gallon buckets in the truck. The buckets were labeled to indicate their contents.

As the men were descending for lunch, Jumper Collins, Empire's service manager, arrived at the site. Collins's duties include oversight of the crews working on service division jobs. He observed the men descend from the roof on the aerial lift (Tr. 191). According to Collins, the men were tied off (Tr. 191). The record is unclear as to when Collins left the worksite, particularly as to whether the men had returned to the roof before or after he had left.

Around 5:00 p.m., CSHO Kelly Young and CSHO Dion Baker were driving past the worksite when they observed the men on the roof appearing not to be tied off (Tr. 19). They drove to the next exit and pulled off the highway. They proceeded to a location some distance from the worksite and took photographs. They then proceeded to the worksite where CSHO Young went to meet the hotel manager and CSHO Baker called for the men to come down from the roof (Tr. 20). As they descended in the aerial lift, CSHO Baker took photographs of the men. None were tied off while in the lift (Tr. 22; Exhs. C-2 and C-3). CSHO Young then spoke with the two foremen while CSHO Baker spoke with the two laborers (Tr. 71).[1] Both laborers told

[1] I find Laborer 1's testimony that CSHO Young required he sign a blank sheet of paper which she later filled in lacks credibility. It is clear from the record the only documents related to Laborer 1 are unsigned notes, taken by CSHO Baker (Tr. 84). I found Laborer 1's demeanor on the stand to suggest a lack of credibility on this. He appeared uncomfortable and evasive. To the extent Empire relies on this testimony to suggest CSHO Young used "heavy handed" or inappropriate tactics, such allegation is rejected.

CSHO Baker they had been tied off all day, except for when they were "finishing up." (Tr. 31-32). According to CSHO Young, the foremen told her they had been wearing fall protection all day, but had become tired of wearing it so they took it off (Tr. 72). Laborer 1 testified at the time the inspectors arrived they "had already taken off our harnesses and taken everything off the roof…" (Tr. 163). They chose to untie at the end of the day because, according to Laborer 1, "we're finished. And we're thinking, hey, with the little stuff we've got, take five minutes and we're off the roof. So we was just tired, it was hot. We were just ready to get off the roof." (Tr. 175). Foreman 2 testified they had been working without fall protection about 10 to 15 minutes when the CSHOs arrived (Tr. 109).[2]

Based on the inspection, CSHO Young recommended Empire be issued citations for violations of the standards at 29 C.F.R. §§ 1926.453(b)(2)(v) and 1926.501(b)(1) for failure to tie off while working on the aerial lift and the roof, respectively. Based upon Laborer 1's statements to CSHO Baker, CSHO Young also recommended an other than serious citation be issued to Empire for failure to train Laborer 1 on the hazards associated with the chemicals the men were using on the roof, in violation of 29 C.F.R. § 1910.1200(h)(1) (Tr. 32). Empire timely contested the citations. Empire contends the employees' failure to tie off was the result of unpreventable employee misconduct. In response to the other than serious violation of the hazard communication standard, Empire argues all employees were appropriately trained.

DISCUSSION

The Secretary has the burden of establishing the employer violated the cited standards. 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).

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

Section 1926.453(b)(2)(v) requires the use of a fall restraint system "attached to the

[2] Empire dedicates a significant portion of its post-hearing brief to a discussion of the credibility of CSHO Baker and CSHO Young, particularly where their testimony differs from that of Foreman 2 and Laborer 1. Much of that discussion addresses immaterial factual disputes. With regard to disputes of material fact, I have relied on photographic evidence and the testimony of Foreman 2 and Laborer 1.

boom or basket when working from an aerial lift." Item 1, Citation 1, states Empire violated the standard when it "exposed two employees (roofers) to fall hazards while utilizing a JLG Industries, Inc., aerial lift (Model #450AJSII, Serial #0300108860) at a height of approximately 40 feet above the lower level without fall protection." The Secretary alleges the roofers' failure to don their personal fall arrest equipment while being lowered to the ground in the aerial lift violated the cited standard.

Applicability of 29 C.F.R. § 1926.453(b)(2)(v)

There is no factual dispute the four Empire employees were using the aerial lift to access the roof. Empire contends the standard does not apply because traveling in the lift to and from the work location is not "working from an aerial lift." The Commission has previously addressed this issue and held the standard applicable when an employee is being transported by an aerial lift to and from a work level. *Salah & Pecci Construction Company, Inc*., 6 BNA OSHC 1688, 1689 (No. 15769, 1978); *see also Empire Roofing*, No. 13-1034 (ALJ March 14, 2014) *aff'd on other grounds* 25 BNA OSHC 2221 (2016).

Empire urges I ignore the Commission's holding in *Salah*. It argues the Commission's failure to "critically analyze the statutory language" calls the decision into question and "vitiates its power as a precedent." (Respondent's Post-Hearing Brief at p. 28). Whether I agree with Commission precedent or not, I am bound by it. The Commission's holding in *Salah* is directly on point and the Commission has not overturned it, even when presented with the opportunity to do so. *Empire Roofing*, 25 BNA OSHC 2221 (No. 13-1034, 2016). The fact it is an older case does not negate or diminish its precedential value. "Judicial decisions, however, are not spoilable like milk. They do not have an expiration date and go bad merely with passage of time." *Comtran Group, Inc. v. DOL*, 722 F.3d 1304, 1314 (11th Cir. 2013). The standard applies.

Failure to Comply and Employee Exposure to the Hazard

There is also no factual dispute Empire's employees were in violation of the cited standard and were exposed to a fall hazard. CSHO Young and CSHO Baker observed the employees descending in the aerial lift without tying off (Exhs. C-2 and C-3). Foreman 2 and Laborer 1 admitted they had not worn their harnesses while descending in the lift (Tr. 108, 118, 130). The aerial lift was elevated approximately 40 feet in the air (Tr. 33). Empire's employees were exposed to a fall of that distance.

Empire argues no violation of the standard can be found because CSHO Baker and CSHO Young induced its employees to violate the standard by calling them down from the roof in a manner that suggested such urgency they did not have time to put their harnesses back on and tie off to the lift. Empire relies on the Commission holdings in *Inland Steel Co.*, 12 BNA OSHC 1968 (No. 79-3286, 1986) and *RGM Construction Co*., 17 BNA OSHC 1229 (No. 91-2107, 1995). *Inland Steel* involved a general duty clause violation alleging, in part, failure to have an adequate safety program ensuring employees were protected from working with unsafe railcars. As part of the Secretary's proof of the inadequacy of the company's safety program, the Secretary presented evidence certain employees were required or permitted to step between railcars to manually open couplers because the cars were either missing, or had defective, coupling devices. In support of this allegation, the CSHO testified he observed an employee step between railcars to manually lift a coupling pin. The Commission found this could not form the basis for a violation because the employee had done so only upon request of the CSHO to demonstrate how an accident had occurred. The Commission held "Exposure to hazards due to complying with an OSHA inspector's perceived request is not grounds for issuance of a citation." *Inland Steel*, 12 BNA OSHC at 1983 (citations omitted).

In *RGM*, the Commission reached a different conclusion. The employer in *RGM* was engaged in a bridge construction project. On the day of the inspection, a foreman was in the process of attaching cables that would later be used as lifelines when his attention was caught by the CSHO calling to him from a completed portion of the bridge. The foreman believed the CSHO to be a motorist in need of assistance. He unhooked his lanyard and walked across a beam to the CSHO without using fall protection. The Commission held *Inland Steel* was not applicable in that instance because no inspection had begun and the foreman was not acting in compliance with a directive of what he believed to be a government official. Because the foreman "elected, however, to walk along the beam without fall protection, voluntarily causing his exposure to the hazard" the Commission found it was compelled to find a violation. *RGM,* 17 BNA OSHC at 1233.

Similarly, here, the exposure to the violative conduct occurred before the inspection. When CSHO Baker and CSHO Young arrived, the crew was working 40 feet above the ground without any apparent form of fall protection. It was reasonable for CSHO Baker to call for the men he perceived to be exposed to a fall hazard to come down from the roof. The crew had no

idea why they were being summoned down from the roof. Laborer 1 testified he remained on the roof while the other three crew members descended in the lift. He testified, the crew was about to don their harnesses, but didn't because they were "rushed to the ground." (Tr. 160). He later, somewhat inconsistently, testified Laborer 2 had his harness on both when descending and when returning to retrieve him in the lift (Tr. 161). If Laborer 2 had time to don his harness and tie off, Foreman 1 or Foreman 2 did as well. Laborer 1 provided no explanation as to why he could not have donned his harness while waiting to be retrieved. In choosing not to do so, Laborer 1 voluntarily caused his own exposure. When asked why they did not have on their harnesses prior to being summoned down, Foreman 2 testified "Because we finish the job. It was the end of the day, so we take it off. We take it off and put it in the lift. We're ready to come down. So we ready to come down, so we take it off on that other roof." This testimony suggests the crew had taken off their harnesses in anticipation of riding down in the lift prior to the arrival of the inspectors. Under the circumstances, I am not persuaded Foreman 2, and Laborer 1 were induced to ride the aerial lift without fall protection.

Employer Knowledge

To establish employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving a supervisory employee knew of or was responsible for the violation. *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984); *see also Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman can be imputed to the employer). Actual knowledge refers to an awareness of the existence of the conditions allegedly in noncompliance. *Omaha Paper Stock Co.*, 19 OSHC 2039 (No. 01-3968, 2002). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). Both Foreman 1 and Foreman 2 were in violation of the requirement to tie off in an aerial lift and were in a position to observe Laborer 1 doing so as well. Foreman 2 testified foremen for Empire have the authority to direct the work on the job, correct employees, and issue safety violation

warnings. Collins testified Foreman 1 was in charge of the worksite (Tr. 207). Foreman 1's knowledge of his own violative conduct and that of his crew is imputed to Empire. *Quinlan d/b/a Quinlan Enterprises v. Secretary of Labor*, 812 F.3d 832 (11th Cir. 2016).

The Secretary has met her burden to establish a prima face case of a violation of 29 C.F.R. § 1926.453(b)(2)(v)

Item 2, Citation 1: Alleged Violation of 29 C.F.R. § 1926.501(b)(1)

Section 1926.501(b)(1) requires

> 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.

Item 2, Citation 1, states Empire violated the standard when it "exposed two employees (roofers) to fall hazards while sealing coping laps on the roof of the building at a height of approximately 40 feet above the lower level without fall protection." The Secretary alleges Empire employees were observed working on the roof of the Comfort Suites without any type of fall protection.

As with Item 1, Citation 1, there are few facts in dispute with regard to the alleged violation of 29 C.F.R. § 1926.501(b)(1). Empire employees were working on a working surface more than 6 feet from the ground (Tr. 33). There were no guardrails or other protection along the edge of the roof (Exhs C-4, C-6, and C-7). All four employees were working without any type of personal fall arrest system (Tr. 108 - 113). All were exposed to a fall of approximately 40 feet. As shown in the photographs taken by CSHO Baker, the employees are working in proximity to the unprotected edge of the roof (Exhs. C- 4, C-6, and C-7). Foreman 1's knowledge of his own violative conduct, as well as his three crew members is imputed to Empire. *Id*.

The Secretary has established a prima facie case of a violation of 29 C.F.R. § 1926.501(b)(1).

Unpreventable Employee Misconduct Defense

Empire contends Items 1 and 2, Citation 1, are the result of unpreventable employee misconduct. The Commission has recognized the affirmative defense of unpreventable employee misconduct when "the actions of the employee were a departure from a uniformly and effectively communicated and enforced work rule." *Archer-Western Contractors, Ltd.*, 15 BNA

OSHC 1013, 1017 (No. 87-1067, 1991); *see also Daniel Int'l Co. v. OSHRC*, 683 F.2d 361, 364 (11th Cir. 1982). To prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See, e.g., Stark Excavating, Inc.*, 24 BNA OSHC 2218 (Nos. 09-0004 and 09-0005, 2014), *citing Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). Where, as here, "a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Archer-Western*, 15 BNA OSHC at 1017. Based upon the record as a whole, I find Empire has not met its burden.

Empire established it had a rule addressing both the need for fall protection while working at heights above 6 feet, including when working in an aerial lift (Tr. 275-76; Exhs. R-1 and R-6 p. 5). Empire's written fall protection program requires a fall arrest system be used whenever "fall hazards cannot be eliminated through other means." (Exh. R-1 p. 3). According to Laborer 1, Empire's rule was to tie off in an aerial lift (Tr. 165). Empire provided employees with the equipment necessary to tie off.

Empire took steps to ensure their rules were communicated to its employees. Upon hire, employees attend an initial 3 -5 hour training covering a variety of topics (Tr. 165, 207). This training is provided by Engineering Safety Consultants (ESC) (Tr. 277). ESC is an independent consulting company that provides services such as safety training and worksite inspections (Tr. 271). Empire hired ESC to perform the work of a fulltime safety manager because it was less costly (Tr. 296). ESC conducts the new hire or initial training in both English and Spanish (Tr. 145, 219, 274). The training includes a live instructor, a written presentation (or slides), and a demonstration using a mock-up of a roof (Tr. 184-85, 207, 273-74). ESC conducts annual training sessions for all Empire employees (Tr. 187-88, 277). It also performs training "as needed." (Tr. 277). Documentary evidence established ESC provided Empire employees 18 training session from 2013 -2016, including two identified as new hire training (Exh. R-3).[3] Laborer 2 received his new hire training and a supplementary training in fall protection in 2015

[3] The record contains no documentation of new hire training for Foreman 2 or Laborer 1.

(Exh. R-3 pp. 13-15). Laborer 1 and Laborer 2 received training on leading edge work and skylights in March of 2016 (Exh. R-3 p. 4). Laborer 1 received training on fall protection again on May 3, 2016 (Exh. R-3 p. 17). Foreman 1 had attended six training sessions in three years specifically addressing fall hazards and fall protection (Exh. R-3 pp. 1, 4, 9, 10, 12, and 15). Records show Foreman 2 attended one session provided by ESC on fall protection in December of 2015 (Exh. R-3 p. 16).

Collins routinely conducts tool box talks on Monday mornings with his crews (Tr. 170, 181, 184). Collins conceded these were not conducted in Spanish as he does not speak Spanish (Tr. 220). The Monday of the inspection, the crew attended a weekly tool box talk in which the use of harnesses was the topic (Exh. R-6 pp. 3-4). Aerial lift safety had been the topic of the tool box talk two weeks prior (Exh. R-6 pp. 5-6).[4] Foreman 1 and Foreman 2 had attended both. Empire has established it had work rules designed to prevent the violation and it communicated those rules to employees.

Having established the first two elements of the unpreventable employee misconduct defense, Empire must show it took steps to ensure its rules were followed. Empire must establish it made adequate efforts to discover violations and, when violations were found, to correct them through discipline. Collins goes to each of the worksites over which he has supervisory authority at least three times per week (Tr. 131, 193). Collins had been to the worksite the day of the inspection and observed the crew using appropriate fall protection. Empire also uses ESC's services to conduct random, unannounced, inspections of its worksites. ESC conducts 10 of these inspections per month of both Empire's service and production divisions (Tr. 271). ESC produces a written report of these inspection for Empire (Tr. 272, 279; Exhs. C-12 and R-5). Empire has established it took reasonable steps to detect violations of its work rules.

It is not enough that Empire detected violations. Empire must also have taken steps to correct violations through effective enforcement of its rules. In assessing the effectiveness of Empire's enforcement efforts, I have considered the fact the entire crew, including two employees with the title of foreman, were engaged in the violative conduct. The Commission

[4] Empire's Fall Protection Program (Exh. R-1) does not mention tying off in aerial lifts. The tool box talk Empire provided on June 6, 2016, states "It is a good idea to tie off." (Exh. R-6 p. 5) The only written rule in the record does not contain a strict requirement. Nevertheless, I find the preponderance of the evidence establishes Empire had a requirement to tie off of which employees were aware.

has held "the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule." *GEM Industries, Inc*., 17 BNA OSHC 1861, 1965 (No. 93-1122, 1996). "A supervisor's breach [of] a company safety policy is strong evidence that implementation of the policy is lax." *Jensen Construction Co*., 7 BNA OSHC 1477, 1480 (No. 76-1538, 1979). Although Foreman 2 was not "in charge" of the worksite, in giving him the title of foreman, Empire entrusted him with authority. Foreman 2 testified he could have directed the two laborers on the worksite to don their harnesses (Tr. 107). Because Empire had two individuals on the worksite with the title and authority of foremen, the efficacy of its safety program, in particular its enforcement efforts, must be given heightened scrutiny.

Collins testified Empire has a progressive disciplinary policy (Tr. 195). First offenses receive a verbal warning; a second offense may receive a written warning; a third offense may result in termination. Collins testified there was some flexibility in the program. For example, an employee may receive more than one verbal warning depending on the severity of the offense (Tr. 195). He does not generally document verbal warnings. He stated he is able to keep track of employees who are repeat offenders because he has a small workforce under his supervision (Tr. 200). He testified he addresses both those offenses he observes as well as those reported to him from the ESC inspectors (Tr. 201, 205). He testified he always administers some type of discipline if an ESC report indicates a safety violation (Tr. 222). An ESC inspector testified he raises any safety violations he observes with the foreman on site and had observed the foreman administering discipline, including written warnings (Tr. 286-87).

Collins broad description of Empire's enforcement efforts suggests a robust program. The heighted scrutiny required in this case, however, requires I look to the details. In this case, the devil is in the details.

At the beginning of each work day, Empire requires its crews to complete a "job inspection check list." (Tr. 138, Exh. R-4) According to Foreman 2, this is done to ensure the worksite is safe and to ensure the employees know what safety equipment is required (Tr. 138). The completed list for the day of the inspection contains inaccuracies. Foreman 1, who completed the sheet, checked "yes" for use of a safety monitor, although the testimony was consistent that the form of fall protection being used was a personal fall arrest system. Laborer 1 signed the document indicating he understood the hazards of the chemicals in use. He admitted at the hearing that he is still unaware of those hazards. The form is written in English. Foreman

2 testified he completes these forms when he is the foreman (Tr. 139). Empire contends Foreman 2 is not able to read English. Based on a careful review of these records, Empire's job inspection check list appears to be nothing more than a paper requirement.

I find the evidence upon which Empire relied to establish it effectively enforced its program unconvincing. The record contains 12 records of written disciplinary warnings issued by Empire (Exh. R-8). One is from 2011; the remainder are from 2014 and 2015. Other than the disciplinary records for violations found at the June 20th inspection, there are none from 2016. The form itself allows for a notation whether it is a first, second, or final warning. Collins's testimony about how the progressive discipline was administered was vague (Tr. 195-96). His testimony regarding the manner in which the disciplinary forms are completed was shifting. He testified with regard to Exhibit R-8:

> Q: The next page is a disciplinary notice for a person named [redacted]. Do you recall that?
>
> A: Yes. This says "safety protocol" but I'm not sure why.
>
> Q: This is from 2014, correct?
>
> A: 3/6/2014. This is before me, before I started. Again…
>
> Q: Well, that's your signature down at the bottom, right?
>
> A: Right, uh huh. A lot of times, sometimes…I won't say a lot but sometimes, I'll end up signing the write up that somebody else wrote because they weren't in the office or they seen it and they'll call it in and put the write up on my desk for so and so. And I'll just sign off on it because he's not one of my guys.

(Tr. 201).

Collins does not document verbal warnings and signs off on written discipline for violations he did not witness and for employees he does not supervise (Tr. 196, 201). Empire's haphazard method of documenting discipline undermines the effectiveness of its program.

Collins assertion that discipline is always administered for safety violations is belied by the record. ESC inspection reports for 2016 show violations of Empire's fall protection program on eight dates (Exh. C-12 pp. 1, 3, 7, 9, 11, 13, 16, 18, and 33); failure of the monitor to wear a high visibility vest on three dates (Exh. C-12 pp. 1, 3, and 5); and failure to properly protect skylights or other holes on two dates (Exh. C-12 pp. 5 and 20). ESC reports from 2015 show improperly erected warning lines on three dates (Exh. C-12 pp. 22, 28, and 30). The record contains no documentary evidence establishing discipline was administered to any Empire

employee for these infractions. Collins testified two of the crews cited in the reports are under his supervision (Tr. 251-61; Exh. C-12 pp. 3, 5, 11, and 24).

The same service division foreman oversaw worksites at which ESC found violations of Empire's fall protection rules on four occasions from October 6, 2015, through April 19, 2016 (Exh. C-12 pp. 3, 5, 24, and 33). The record contains one written disciplinary record for that foreman from December of 2015 (Exh. R-8), but none after, despite having repeatedly allowed unsafe work conditions at his worksites. This foreman was under Collins's supervision. Collins's testimony regarding the handling of this foreman's discipline calls into question Empire's claim it administers a progressive disciplinary policy. With regard to the March 29, 2016, ESC report on the foreman, Collins testified as follows:

> Q: What did you …what, if anything, did you do about that issue that ESC found?
> A: I would get with them the next morning and I would show them this report. And I would address it verbally with them.
> Q: Did you, in fact, do that on this occasion?
> A: Oh, yeah.
> Q: Did you issue [redacted] a verbal warning?
> A: Yes.
> Q: Did you issue him a written warning?
> A: I don't think so.
> Q: Okay. Was it [redacted] first safety offense of any kind?
> A: Safety? No. I mean, I'm sure I could find something on him somewhere.
> Q: Had you issued a verbal safety warning to him before?
> A: Not in regard to the same exact thing I wouldn't say.
> Q: Have you issued him a verbal warning for something else?
> A: Probably.

(Tr. 251-52)

ESC found similar violations of fall protection requirements at that same foreman's worksite the following day (Exh. C-12 p. 5). When asked how those infractions were handled, Collins testified:

> Q: Now this is the day after the previous one, correct?
> A: Yes.
> Q: Did you discipline him two separate times or just the one time?
> A: Probably both separate times.
> Q: Okay. Why didn't you go to a written warning or did you provide a written warning the second time?
> A: I may have. I don't know. I don't know if I did. If I had my write ups so I could find them to look for them. But if it's two separate issues, it may be two

separate verbals. He may not have gotten to a written just yet.
Q: You can't recall one way or the other.
A: Right.

(Tr. 253-54).

When confronted with the most recent ESC report of violations at that same foreman's worksite one month later, Collins attempted to explain away not having disciplined anyone by testifying the employees were in the beginning stages of work (Tr. 261). This assertion is disproved by the report itself (Exh. C- 12 p. 33-35).

Based on the record as a whole, I find Empire's enforcement program lax. Collins testified he uses verbal warnings and corrective action, which he keeps track of in his head, but his recall of past discipline was wanting (Tr. 251-257). In *Stark Excavating, Inc*., 24 BNA OSHC 2215 (Nos. 09-0004 and 09-0005, 2014), the Commission recognized verbal warnings may be adequate in certain cases, but where the employer's policy expressly required written warnings, "giving only oral warnings undermined the policy's progressive nature." *Id*. at 2221. *citing GEM Industrial, Inc.*, 17 BNA OSHC 1891 (No. 93-1122, 1996). Moreover, the Commission found the employer's evidence lacking for failure to provide documentation of any verbal warnings. In so holding, the Commission relied on its prior holdings in *Precast Services, Inc.* 17 BNA OSHC 1454 (No. 93-2971, 1995) and *Rawson Contractors, Inc*., 20 BNA OSHC 1078 (No. 99-0018, 2003), in which it found, although verbal warnings may suffice, it is the rare case and generally requires a showing of a long history of safe work practices despite frequent opportunities for violations and evidence of actually having administered the discipline. The record here establishes to the contrary. When notified of safety violations, Empire did little more than counsel and verbally warn employees, even for repeated infractions.

Empire contends many more documents exist than it submitted into the record. It argues it only submitted disciplinary records for the service division. This is inconsistent with Collins's testimony at least one of the records was for an employee who was "not one of my guys." (Tr. 201). When asked whether the documents in Exhibits R-7 and R-8 constituted all the disciplinary documents he had issued, Collins testified they were not. Empire argues Exhibits R-7 and R-8 are not "an exhaustive list" of all discipline ever issued by Empire and that it is not required to "burden the court with a three-inch stack of disciplinary documents." Empire's assertion in its brief that a three-inch stack of disciplinary records exists is not supported by

record evidence. Crediting Collins's testimony, Empire established there are more documents.[5] It did not establish how many records exist, the dates of those records, the nature of the discipline, or for what violations discipline was issued. Empire has the burden to produce evidence of enforcement of its safety rules. It chose to submit a sampling. It did so at its own peril. I have only the record before me and based on that record, I find Empire has failed to establish it followed its own progressive disciplinary policy when enforcing its safety rules.

Empire has failed to meet its burden to establish the violations alleged in Item 1 and Item 2, Citation 1, were the result of unpreventable employee misconduct.

Classification of Item 1 and Item 2, Citation 1

The Secretary contends the violations alleged in Item 1 and Item 2, Citation 1, were serious. A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. As the Third Circuit has explained:

> It is well-settled that, pursuant to § 666(k), when the violation of a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm *possible*, the employer has committed a serious violation of the regulation. The "substantial probability" portion of the statute refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result, even in those cases in which an accident has not occurred or, in fact, is not likely to occur.

Secretary of Labor v. Trinity Industries, 504 F.3d 397, 401 (3d Cir. 2007) (internal quotation marks and citations omitted); *See also, Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Mosser Construction*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2087-2088 (No. 88-0523, 1993). The likelihood of an accident goes to the gravity of the violation, which is a factor in determining an appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2214.

Both violations alleged in Item 1 and Item 2, Citation 1, exposed employees to a 40 foot

[5] The Commission has recognized a party's failure to submit documents under its control raises an inference those documents either do not exist or would not support its position. *Capeway Roofing Systems, Inc*., 20 BNA OSHC 1331 (No. 00-1968, 2003) (citations omitted); *see also Regina Contr. Co.*, 15 BNA OSHC 1044, 1049 ((No. 87-1309, 1991).

fall. It is undisputed a fall from such a height could result in death or other serious injury. Item 1 and Item 2, Citation 1, are properly classified as serious violations.

Item 1, Citation 2: Alleged Violation of 29 C.F.R. § 1910.1200(h)(1)

Section 1910.1200(h)(1) requires the employer to

> provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.

Item 1, Citation 2, alleges the employer did not "provide training specific to the hazard of chemicals used at the establishment to all employees working with hazardous chemicals" including "Solargard Fluoro-Prime, Solargard 6083 Finish Coat, and Solargard 6083 Based Coat." The Secretary alleges Laborer 1 and Foreman 2 were not trained on the hazards associated with working with the listed products.

Section 1910.1200, or the Hazard Communication standard, applies where chemicals are "present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." It is undisputed the Empire crew was using the chemicals listed in the citation at the worksite (Tr. 162; Exhs. C-8, C-9, and C-10). Empire does not dispute that these chemicals were hazardous (Tr. 78; Exh. C-11). The standard applies.

The Secretary contends neither Foreman 2 nor Laborer 1 had not received hazard communication training. CSHO Young testified she requested training documentation during the inspection, but received none confirming Foreman 2 or Laborer 1 had received hazard communication training (Tr. 77). She conceded documentation of training for other employees was provided. The record contains no documentary evidence establishing Foreman 2 received hazard communication training. He testified he received new hire training, but there is also no documentary evidence to support that assertion. Foreman 2 testified he knew how to read an MSDS, but was never asked when he was trained to do so. Nor was he asked at the hearing whether he knew the hazards associated with the chemicals he was using. The Secretary has the burden to prove Foreman 2 also had not received hazard communication training. Based on this record, I find the Secretary has failed to do so.

Laborer 1 testified he did not know the hazards associated with the chemicals he was

using (Tr. 102). Although he testified he had received new hire training, there is no documentary evidence corroborating he attended such training. Nor does the record contain any information about what that training covered with regard to Laborer 1 specifically. Laborer 1 further testified that although he had received some training on reading a material safety data sheet (MSDS), he could not recall whether it was before or after the inspection (Tr. 179). He testified Empire had a book containing MSDS's, but did not know whether it existed prior to the inspection and conceded it was not present at the worksite (Tr. 181). The preponderance of the evidence establishes Laborer 1 was not trained on the hazards of the chemicals with which he was working.

Empire argues the standard does not require the employer provide chemical-specific information and training, citing to the Commission's holding *Cagle's Inc.,* 21 BNA OSHC 1738 (No. 98-0485, 2006). In *Cagle's,* the Commission held under the plain language of the standard, "an employer complies …by informing employees of the dangers posed by chemicals falling into the relevant 'categories of hazard,' identifying their location in the plant or the process in which they are used and training employees on those hazard categories." 21 BNA OSHC at 1744. The record as a whole establishes Empire did not meet this standard. Empire produced records of training, including hazard communication training, but none indicate Laborer 1 received that training. Laborer 1 could not identify any of the hazards associated with the chemicals present at the worksite with which he was working. The record establishes not only that Empire failed to provide chemical-specific training to Laborer 1, it failed to provide him any training regarding the chemicals in use. The Secretary has met her burden.

Reasonable diligence required Empire be aware of the chemicals used by its employees at the worksite and ensure they were trained in those hazards. Empire had constructive knowledge of both the use of the chemicals by its employees and the fact they had failed to provide any type of training to at least one employee using those chemicals.

The Secretary alleged Item 1, Citation 2, was an other than serious violation. The Act does not define what constitutes an other than serious violation. It does provide definitions of both de minimis and serious violations. The Commission has recognized an other than serious violation falls somewhere between the two. *Crescent Warf and Warehouse Co.*, 1 BNA OSHC 1219, 1222 (No. 1, 1973). It has defined an other than serious violation as having "a direct and immediate relationship between the violative condition and occupational safety and health, but

not of such relationship that a resultant injury or illness is death or serious physical harm." *Id*. At least one of the chemicals in use at the worksite was a carcinogen and hazardous if inhaled (Tr. 78; Exh. C-11). Ensuring employees are aware of such hazard when working with chemicals has a relationship to worker safety and health. Item 1, Citation 2, is properly classified as an other than serious violation.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). 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." *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

The gravity of Item 1, Citation 1, is moderate. The basket of the aerial lift provides some protection from falls and employees were exposed for a very short period of time. The likelihood of an injury is low, but if an accident were to occur, the injury could be death. Empire is a small employer with a variable workforce of 10 – 30 employees. There was no evidence of a history of violations and the company has taken steps toward protecting its workforce such as providing individual safety equipment and training. Empire is entitled to a reduction in the gravity based penalty. The Secretary's proposed penalty of $2,272.00 is appropriate.

The gravity of Item 2, Citation 1, is high. The crew was working on a sloped metal roof in proximity to the edge. The entire crew was exposed to the hazard, but, for only a short period of time. As Laborer 1 testified, it was the end of the day and the crew was hot and tired. That is

exactly the time when they would be less vigilant. Under the circumstances, the likelihood of injury was high. I have considered the same reduction factors as with Item 1, Citation 1, in assessing a penalty for Item 2, Citation 1. The Secretary's proposed penalty of $3,741.00 is appropriate.

The Secretary has not proposed a penalty for Item 1, Citation 2. Although the chemicals in use were hazardous if inhaled, the risk of inhalation was reduced due to the employees working with the chemical outside where sufficient ventilation would have been provided (Tr. 83). The Secretary established exposure for only one employee. No penalty is warranted.

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:

1. Item 1, Citation 1, alleging a serious violation of 29 C.F.R. § 1926.453(b)(2)(v) is affirmed, and a penalty of $2,272.00, is assessed;
2. Item 2, Citation 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(1) is affirmed, and a penalty of $3,741.00, is assessed; and
1. Item 1, Citation 2 alleging an other than serious violation of 29 C.F.R. § 1910.1200(h)(1) is affirmed, and no penalty is assessed.

SO ORDERED.

/s/

Dated: May 18, 2017

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia