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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MAGNUM CONTRACTING INC., Respondent.	OSHRC DOCKET NO. 18-0311

Appearances:

Timothy Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado
For Complainant

David Enget., Magnum Contracting Inc., Fargo, North Dakota
For Respondent

Before: Judge Patrick B. Augustine – United States Administrative Law Judge

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Magnum Contracting, Inc. ("Respondent") worksite in Fargo, North Dakota on January 24, 2018. (Stip. No. 17). As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging one serious violation of the Act. Respondent timely contested the Citation. (Notice of Context "NOC"). The Court held pre-trial telephone conferences on April 25, 2018 and July 31, 2018. (Order, April 25, 2018); (Order, Aug. 1, 2018). Complainant requested summary judgment via a motion which contained Joint Stipulations of material and relevant facts. While Respondent agreed to the Joint Stipulations of

material and relevant facts, it argued the Joint Stipulations and its responses entitled it to judgment in its favor. (Compl't Motion for Summary Judgment); (Resp't Response to Motion for Summary Judgment). The Court gave both parties the opportunity to reply to the opposing party's arguments on this issue of summary judgment. (Order, Aug. 1, 2018).

Although the motion and the parties' responses are framed within the summary judgment context, the motion and responses are mischaracterized. Both parties agreed that Commission Rule 61 applied to this case. (Order, April 25, 2018). Commission Rule 61 states, in part, "[A] case may be fully stipulated by the parties and submitted to the Commission or Judge for a decision at any time." 29 C.F.R. § 2200.61 (2018). The parties fully stipulated to all material and relevant facts. As such, the Court will treat the request as one for a decision based on stipulated record under Commission Rule 61.[1]

II. Jurisdiction

The parties stipulated the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). (Stip. No. 1); (Order, April 25, 2018). Respondent further stipulated, at all times relevant to this matter, it was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). (Stip. No. 3); *See Slingluff v. OSHRC,* 425 F.3d 861 (10th Cir. 2005).

III. Stipulations

The parties submitted Joint Stipulations to the Court, which are set forth below:

1. The Administrative Law Judge has subject matter and personal jurisdiction over the dispute in this case.

1. Furthermore, applying the standards for summary judgment is inappropriate for a stipulated record. The judge's function on a motion for summary judgment is to determine whether there are genuine, material, disputed issues for trial; it is not to weigh the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (2005). Here all the relevant and material facts were stipulated and are undisputed.

2. The Secretary employs Casey Bedingfield as a Compliance Safety and Health Officer for the Occupational Safety and Health Administration ("OSHA"), assigned to OSHA's Bismarck, North Dakota, Area Office. He served in that position at all pertinent times.

3. Magnum is, and was at all pertinent times, a North Dakota corporation engaged in construction activities specializing in steel erection. Magnum is an employer and its activities affect interstate commerce.

4. On January 17, 2018, Magnum was engaged in construction work, erecting a steel building at 3270 Veterans Boulevard, Fargo, North Dakota, 58104 as part of new commercial office space called Eagle Ridge Plaza.

5. [redacted] and Austin Brown were employed by Magnum as supervisors on the project. Both had responsibility for performing specific construction tasks as well as managing the work of other employees.

6. Toward the end of the work shift, [redacted] and Brown decided to try to weld one additional area on the building before work ceased for the day. Magnum's two personnel lifts were in use. [redacted] and Brown had been using a forklift for a couple of days to lift both materials and personnel. They decided to utilize the forklift to raise [redacted] up to the second floor of the building so that [redacted] could perform welding.

7. [redacted] and Brown attached a Haugen work platform to the forks of the JLG G9-43A telehandler they had been using. The platform has a screened floor and removable sides, which were properly attached at the time. It is a temporary structure which can be taken apart and moved from job site to job site. This platform is rarely used, which has been only once or twice a year. The use is very limited due to the fact it requires two employees, rather than one employee on a boom lift. The telehandler is known as a rough terrain forklift; it has a boom with forks attached and large knobby tires for use on uneven ground. Attached to these stipulations are pages from Haugen's website regarding its platforms, and accurate photos of the platform and forklift involved in the accident.

8. [redacted] and Brown attached the platform by placing the forks inside two pieces of channel iron attached under the platform designed for that purpose. The platform had been manufactured with pins designed to secure the platform to the forks but had been modified to accept a variety of fork lengths and eliminate the pins. Instead, Magnum always provided a chain with the platform so that the platform could be chained to the forklift's mast. But [redacted] and Brown did not use it. They did not secure the platform to the forklift in any other manner either. The platform was supported only by the forks.

9. [redacted] then climbed onto the platform with welding equipment. Brown raised the platform approximately twelve feet (12') into the air and drove the forklift toward the building.

10. While the forklift was in motion, the platform slid off the forks and crashed to the ground below. [redacted] fell out of the platform and onto the ground. He suffered injuries including three broken ribs and a partially collapsed lung.

11. Magnum does not have a work rule prohibiting driving forklifts while employees are in work platforms or requiring the platforms to be secured to the forklifts. [redacted]'s signature appears on a February 20, 2015 sign-in sheet for a toolbox talk entitled "Elevating Personnel with Forklifts." Items in the written material which [redacted] signed include "The platform must be securely attached to the forks or mast" and "The platform must not travel from point to point with the work platform elevated at a height greater than 4 feet while workers are on the platform." There is no evidence that Brown had ever received any such training.

12. Both [redacted] and Brown completed a national Safety Council forklift operator's course, but it did not address the issue of forklifts transporting employees in work platforms which are not secured to the forklifts. [redacted] and Brown both completed an OSHA approved 10-hour course on construction topics, but the topic is not addressed there either.

13. The operations and safety manual for the JLG G9-43A telehandler, as well as a sticker inside the cab, state that that forklift should not be driven while personnel are on a work platform. The operations and safety manual for the telehandler was available for review for all operators and was stored in the telehandler.

14. Magnum's Safety and Risk Manager frequently visits worksites to provide safety training, distribute safety gear, check equipment and observe workers to ensure they are working safely. He had visited the Eagle Ridge site twelve times prior to the accident. The platform had been delivered to the site just prior to the accident and was not in use through the Safety and Risk Manager's visits.

15. During 2016 and 2017 Magnum had disciplined four employees for infractions of safety rules, by issuing three written disciplinary actions and one verbal reprimand. Magnum issued verbal reprimands to [redacted] and Brown for the actions leading up to the accident.

16. Moving a forklift horizontally while supporting an unattached occupied work platform creates a hazard of falling. If an accident occurs, there is a substantial probability that death or serious physical harm could result, as happened to [redacted].

17. After receiving notice of the accident, OSHA assigned Mr. Bedingfield to conduct an inspection, which he did on January 24, 2018 (Inspection No. 1290271).

18. On February 8, 2018, OSHA timely issued the citation that is at issue in this case, which alleges a violation of 29 C.F.R. § 1926.451(c)(2)(v). On February 23, 2017 [sic] Magnum timely contested the citation.

19. The proposed penalty is gravity-based and assessed properly pursuant to OSHA's Field Operations manual and is appropriate for the violation within the meaning of § 17(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et eq., (the "Act"). The gravity-based penalty was originally $12,934.00. The severity was considered high given the serious injuries that can occur from falling at heights and the injuries which [redacted] suffered. The probability was considered greater given the uneven icy terrain, the fact that the employees were rushing, and the serious injuries received. Magnum received a 30%

reduction for its size. No good faith reduction was given since Magnum received OSHA citations in 2014 and 2016. The proposed penalty is $9,054.00.

IV. Factual Background

Respondent is a steel erection company based out of North Dakota. (Stip. No. 3). For the Eagle Ridge Plaza project, Respondent was responsible for erecting the steel frame of an office building. (Stip. No. 4).

Austin Brown is a foreman for Respondent and served as leadman for the Eagle Ridge Plaza project from December 10, 2017 through January 6th, 2018. (Austin Brown's Written Statements of Fact ¶ 1-2) [hereinafter Brown Aff.]. [redacted] is also a foreman for Magnum Contracting Inc. and was assigned to the Eagle Ridge Plaza project on January 8, 2018. ([redacted]'s Written Statements of Fact ¶ 1) [hereinafter [redacted] Aff.]. Brown and [redacted] were both in supervisory roles and oversaw the activities of other employees on the project. (Brown Aff. ¶ 2-3); ([redacted] Aff. ¶ 2); (Stip. No. 5).

On January 17, 2018, [redacted] and Brown decided to use a telehandler and platform to perform last-minute welding work before the end of the work day. (Stip. No. 6). [redacted] and Brown attached a Haugen work platform to a JLG G9-43A telehandler by sliding the forks into the appropriate pieces of channel iron under the platform. (Stip. No. 7 and 8). Respondent provided a chain with the work platform to secure the platform to the telehandler. (Stip. No. 8); (Tim Warren's Written Statements of Fact ¶ 2) [hereinafter Warren Aff.]. Brown forgot to apply the chain and [redacted] failed to check whether the chain was in place. (Brown Aff. ¶ 6); ([redacted] Aff. ¶ 5). The platform was not secured in any other manner. (Stip. No. 8).

While [redacted] was on the platform, Brown raised it to the height of the second floor—approximately twelve feet—and moved forward toward the building. (Stip. No. 9 and 10). The

horizontal movement caused the platform to slide off the forks and fall to the ground along with [redacted]. (Stip. No. 10). [redacted] suffered three broken ribs and a partially collapsed lung. *Id*.

Complainant responded to the injury and conducted an inspection of the Eagle Ridge Plaza site. (Stip. No. 17). Complainant alleged a serious violation of 29 C.F.R. § 1926.451(c)(2)(v) for using a forklift to support an unsecured platform and moving a forklift horizontally while it was occupied. *Id*.

V. Controlling Case Law

To establish a *prima facie* violation of Section 5(a)(2) of the Act, Complainant must prove that: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994)

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.
> Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014)

VI. Discussion

Following the accident, Complainant inspected the Eagle Ridge Plaza worksite and alleged a serious violation of the Act in Citation 1, Item 1 as follows:

29 CFR 1926.451(c)(2)(v): Fork-lifts were used to support scaffold platforms while the entire platform was not attached to the fork and the fork-lift was moved horizontally while the platform was occupied:

(a) On or about January 17, 2018 an employee suffered a fall of approximately twelve feet when the Haugen work platform he was to perform welding activities from slid off the forks of a JLG G9-43A telehandler at 3270 Veterans Boulevard in Fargo, North Dakota.

The cited standard states "[f]ork-lifts shall not be used to support scaffold platforms unless the entire platform is attached to the fork and the fork-lift is not moved horizontally while the platform is occupied." 29 C.F.R. § 1926.451(c)(2)(v) (2018).

A. The standard applies to the cited condition.

The parties stipulated the JLG G9-43A telehandler is a "rough terrain forklift". (Stip. No. 7). The telehandler had a boom with forks attached. *Id*. Generally, OSHA and the Commission consider telehandlers using fork attachments to be forklifts. *Salco Construction, Inc.*, 21 BNA OSHC 1662 (No. 05-1145, 2006) (A.L.J.) (classifying a telehandler as a forklift regulated under 29 C.F.R. § 1926.451 rather than an aerial lift regulated under 29 C.F.R. § 1926.453 when a fork attachment was used). Both parties consistently referred to the telehandler as a forklift, and it is therefore subject to the requirements of 29 C.F.R. § 1926.451.

To determine whether a surface is a "scaffold platform," the characteristics of the surface must be compared to the regulatory definition of "scaffold" and "platform." *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385 (No. 92-262, 1995). The regulatory definition of scaffold is "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." 29 C.F.R. § 1926.450(b). The definition of platform is "a work surface elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated planks, fabricated decks, and fabricated platforms." *Id*. The parties stipulated the Haugen work platform was a "temporary

surface" that was supported by a forklift. (Stip. No. 7). The Haugen work platform was described as a "screened floor with removable sides" and was elevated to the second story. (Stip. No. 7 and 9). The platform was "above lower levels" and is descriptively consistent with a fabricated deck or platform. The Haugen work platform meets the plain language definition[2] of scaffold platform.

The classification of the Haugen work platform as a scaffold platform is supported by Commission case law. The court in *Salco Construction, Inc.* characterized a platform similar to the Haugen work platform as a scaffold platform when supported by a telehandler. 21 BNA OSHC 1662. Where the Commission considered whether painters' picks were a scaffold platform, it focused on the "elevated" and "temporary" parts of the regulatory definition. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385. The Commission found that painters' picks were a scaffold platform because they were work surfaces above the ground that were moved around the job site. *Id*. Similarly, the work platform supported by a telehandler in this case is an elevated work surface that could be moved around the job site. Applying the Commission's reasoning in *Armstrong Steel Erectors, Inc.*, the Haugen work platform meets the regulatory definition of a scaffold platform.

The JLG G9-43A telehandler is a forklift that lifted a scaffold platform. Accordingly, 29 C.F.R. § 1926.451(c)(2)(v) applies to the cited condition.

B. The terms of the standard were violated.

A forklift may only be used to support a scaffold platform if it is secured and the forklift is not moved horizontally. Here, the platform was not secured properly while employees moved the scaffold horizontally. The platform was not secured in any way and was solely supported by the

[2] When determining the meaning of a standard, the Commission first looks to its text and structure. *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003). "If the meaning of the [regulatory] language is 'sufficiently clear,' the inquiry ends there." *Beverly Healthcare-Hillview*, 21 BNA OSHC 1684, 1685 (No. 04-1091, 2006) (consolidated) (citing *Unarco Commercial Prods*., 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993)), *aff'd in relevant part*, 541 F.3d 193 (3d Cir. 2008).

fork attachment. (Stip. No. 8). Respondent did not use the provided chain to secure the platform. *Id*. Brown moved the telehandler horizontally when he drove towards the building. (Stip. No. 9). The platform slid off the forklift because it was unsecured while the forklift was moved in a horizontal direction. As such, the Court finds Respondent violated the terms of 29 C.F.R. § 1926.451(c)(2)(v).

C. Employees were exposed to the hazard covered by the standard.

"The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in a zone of danger." *RGM Construction, Co.*, 17 BNA OSHC 1229 (No. 91-2107, 1995). Actual exposure to a hazard demonstrates that an employee was in the zone of danger and proves employee exposure. *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976).

In this case, employees were actually exposed to the hazard covered by the standard, which addresses fall hazards associated with work performed on scaffolding. The Commission has found that when an employee falls and is injured, "actual exposure to the fall hazard…is unquestioned." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076 (No. 90-2148, 1995). Here, [redacted] fell from a scaffold platform and was injured because the platform was moved horizontally and was not secured in violation of 29 C.F.R. § 1926.451(c)(2)(v). Because [redacted] was actually exposed to the fall hazard covered by the standard, the Court finds Complainant proved this element of its *prima facie* case.

D. The employer had actual knowledge of the violation

To prove knowledge, the Secretary can show a supervisor had either actual or constructive knowledge of the violation and such knowledge is generally imputed to the employer. *Revoli Const. Co*., 19 BNA OSHC 1682 (No. 00-0315, 2001). Actual knowledge is established when a supervisor directly sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.*, 5 BNA OSHC 1202 (No. 11015, 1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent"). Actual knowledge can also be established when a supervisor participates in misconduct themselves. *See Dover Elevator Co.*, 16 BNA OSHC 1281 (No. 91-862, 1993) (holding that the misconduct of a supervisor was imputed to the employer); *Dana Container, Inc.*, 25 BNA OSHC 1776 (No. 09-1184, 2015) (following *Dover Elevator* and imputing employee knowledge of their own misconduct to the employer). Knowledge may be imputed to the employer through its supervisory employee. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093 (No. 10-0359, 2012) (quoting *Access Equip. Sys.*, 21 BNA OSHC 1400 (No. 03-1351, 2006)).

It is well-settled an employee who has been delegated authority over other employees, even if only temporarily, is a supervisor for the purposes of imputing knowledge to an employer. *Access Equipment Systems. Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) (employee who was "in charge of" or "the lead person for" one or two employees who erected scaffolds "can be considered a supervisor). Both Brown and [redacted] were Foremen with supervisory roles on the Eagle Ridge Plaza project. (Stip. No. 5). They were both aware they did not secure the platform to the telehandler and Brown knew he was moving the forklift horizontally towards the building. (Stip. No. 8-10). When Brown and [redacted] violated 29 C.F.R. § 1926.451(c)(2)(v) they had actual knowledge of their own actions and the violation. Under Commission precedent, that knowledge

is imputed to Respondent. *Dover Elevator Co.*, 16 BNA OSHC 1281 (finding that a supervisor who connected an extension cord to an operable but unprotected circuit was aware that he violated a safety standard and knowledge was imputed to the employer); *Dana Container, Inc.*, 25 BNA OSHC 1776 (No. 09-1184, 2015) (finding that a supervisor who entered a trailer tank without performing required atmospheric testing had knowledge of his own misconduct which was imputed to the employer).

The Court finds that (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual knowledge of the violation. Complainant established Respondent's prima facie violation of Section 5(a)(2) of the Act, and the Court AFFIRMS Citation 1, Item 1.

E. The violation was serious.

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would occur; he need only show if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072 (No. 88-0523, 1993).

The cited standard addresses the hazards associated with falling from a platform that is elevated above lower levels. Both parties stipulated that a fall resulting from a violation of the cited standard could potentially cause death or serious physical harm. (Stip. No. 16). In this case an injury actually occurred, and [redacted] suffered a punctured lung and multiple broken ribs from falling. (Stip. No. 10). *See e.g.*, *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir.

1977) (holding that injuries to employees constitute at least prima facie evidence that the hazard was likely to cause death or serious injury). The Citation was properly classified as serious.

F. The Court rejects the affirmative defense of unpreventable employee misconduct.

To establish the affirmative defense of "unpreventable employee misconduct", Respondent must show that: (1) it has established work rules designed to prevent the violation, (2) it has adequately communicated those rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations have been discovered. *Jensesn Construction Co.,* 7 BNA OSHC 1477 (No. 76-1538, 1979). Respondent bears the burden of proof to establish the defense. *Id.*

When the alleged misconduct is that of a supervisor, the proof of "unpreventable employee misconduct" is more rigorous and more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. *Archer-Western Contractors Ltd.,* 15 BNA OSHC 1013 (No. 87-1067, 1991). Involvement by a supervisor in a violation is "strong evidence that the employer's safety program was lax." *Daniel Constr. Co.,* 10 BNA OSHC 1549 (No. 16265, 1982).

An effective work rule must be designed to prevent the violation or "be clear enough to eliminate employee exposure to the hazard covered by the standard." *Beta Construction Co.,* 16 BNA OSHC 1435 (No. 91-102, 1993). The Commission has specifically defined a work rule as "an employer directive that requires or proscribes certain conduct, and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J. K. Butler Builders, Inc.,* 5 BNA OSHC 1075 (No. 12354, 1977). Work rules are not required to be written; the only requirement is that they are clearly communicated to

employees. *Aquatek Systems, Inc.*, 21 BNA OSHC 1400 (No. 03-1351, 2006). Clear communication depends on adequate training and instructions designed to prevent the violation. *J. K. Butler Builders, Inc.*, 5 BNA OSHC 1075.

Respondent stipulated it did not have a work rule that required securing a platform on a forklift or prohibited moving a forklift horizontally while supporting a platform with an employee on it. (Stip. No. 11). However, Respondent later provided, in its Response opposing the entry of summary judgment, written statements by [redacted] and Brown, which state that they were both familiar with relevant safety rules in Respondent's Safety Manual. (Brown Aff. ¶ 4); ([redacted] Aff. ¶ 3). Brown asserted the Safety Manual was on site and available to employees. (Brown Aff. ¶ 4). The provided Safety Manual states:

> The entire platform must be attached to the fork, and the forklift is not to be moved horizontally while the platform is occupied. The forks must be placed in the scaffold sleeves and the platform secured to the mast. (Ex. 1).

There is also a section of the Safety Manual titled Elevating Personnel, which requires an employee to "[s]ecurely attach the platform to the lifting carriage or forks." (Ex. 1.) Complainant points to a requirement in the Safety Manual to "[a]lert elevated personnel before moving the platform," as proof that the safety rules violate the standard and therefore cannot be a work rule. (Compl't Reply to Resp't Response to Motion for Summary Judgment). However, this requirement does not specify horizontal or vertical movement, and Complainant's assumption that it refers to horizontal movement is unsupported. Vertical movement is a normal and expected part of elevating employees and it stands to reason that safety standards about "movement" would refer to vertical movement. Notwithstanding the stipulation that no work rule existed, there is evidence

Respondent had written safety rules designed to prevent the violation of 29 C.F.R. § 1926.451(c)(2)(v).[3]

Although there may be a work rule, it is only considered an effective work rule if it is clearly communicated to employees. *Jensesn Construction Co.*, 7 BNA OSHC 1477. Respondent originally stipulated that there was no work rule. (Stip. No. 11). Respondent later presented a "recently discovered" Safety Manual that contained a safety rule prohibiting [redacted] and Brown's actions. (Resp't Response to Motion for Summary Judgment). The Safety Manual was "discovered" almost eight months after the accident and seven months after filing the NOC. *Id.*[4] The manner and timing in which the safety rules were discussed and produced gives the impression the rules were a recently remembered written formality rather than a clearly communicated and practiced work rule. Respondent's seeming unfamiliarity with its own alleged work rule creates a reasonable inference that the work rule was not effective or clearly communicated. *Ultimate Distribution Systems, Inc.*, 10 BNA OSHC 1568 (No. 79-1269, 1982) (stating that the Court may draw reasonable inferences based on circumstantial evidence).

[3] The Court gives Respondent the benefit of the doubt the work rule set forth in the Safety Manual was in existence at the time of the inspection. Even though the Court has concluded a very late produced and recently discovered work rule was in existence at the time of the inspection which contradicts the Joint Stipulation it agreed to on this point, Respondent's affirmative defense fails as it has not carried its burden on the second element of the defense as set forth in the narrative of the Decision.

[4] Respondent offered no reason for the late discovery and submission of the work rules. These proceedings were conducted under the adopted Rules for Simplified Proceedings. *See* Subpart M of 29 C.F.R. Part 2200 (29 C.F.R. §§ 2200.200 - 2200.211). Where Respondent raises an affirmative defense, the Judge, under Commission Rule 206(b) shall order the employer to disclose to the Secretary such documents relevant to the affirmative defense. In this case, the Judge, pursuant to an Order dated April 25, 2018 directed Respondent to produce to the Secretary all documentation in its possession and control to support its alleged affirmative defense of employee misconduct within twenty (20) days of the Order. Respondent did not comply with this Order since the first time such evidence was produced was in Respondent's Response to the Motion for Summary Judgment dated August 6, 2018. The Secretary did not lodge an objection to the late submission of such evidence and has not been prejudiced by such late submission and consideration in that it was provided an opportunity to reply to such late submission of documents. *See* Court's Order dated August 1, 2018. The Secretary did address these documents and Respondent's arguments as to the affirmative defense in a Reply brief dated August 17, 2018.

Furthermore, Respondent bears the burden of proof the work rule was clearly communicated. *Jensen Construction Co.*, 7 BNA OSHC 1477 (No. 76-1538, 1979). Where the Commission has found that this element is satisfied, the employer provided evidence beyond the mere existence of the rules. *United Contractors Midwest, Inc.*, 26 BNA OSHC 1049 (No. 10-2096, 2016) (finding effective work rule communication based on evidence that a work rule was communicated during orientation for all employees, regular trainings, annual supervisory trainings, and directly to the offending employee the day before the inspection); *Westar Energy*, 20 BNA OSHC 1736 (No. 03-0752, 2004) (finding effective work rule communication based on evidence that a Safety Manual was discussed with every employee upon hiring and during other trainings). Here, Respondent offers no evidence the rules contained in the Safety Manual were communicated to employees. On the contrary, the relevant sections of the Safety Manual seem to have been forgotten at the time Respondent stipulated to their non-existence.

Respondent attempted to provide evidence that training on the subject was provided. Both parties stipulated that [redacted] signed into a toolbox talk entitled "Elevating Personnel with Forklifts" on February 20, 2015. (Stip. No. 11). The toolbox talk covered requirements to securely attach a platform to a fork and to "not travel from point to point with the work platform elevated at a height greater than 4 feet while workers are on the platform." *Id*. Although both parties stipulated Brown had not received a similar training, Respondent provides written statements by Brown and Warren that state otherwise. (Brown Aff. ¶ 5); (Warren Aff. ¶ 4). Brown signed into a Safety Toolbox Topic discussion on "Personnel Work Platform Safety", which states a platform must be "securely attached to the lifting carriage or forks" and that forklifts "must never be driven with occupants elevated in the platform." (Ex. 3). Brown also asserts he was trained to use the

chain with the Haugen Personnel Platform, but no supporting evidence is provided. (Brown Aff. ¶ 5).[5]

Although there is evidence that suggests Respondent's employees have been exposed to relevant safety topics, the evidence does not demonstrate *effective* communication of a work rule. The training materials are inconsistent with each other and the Safety Manual on whether horizontal movement is prohibited when a platform is occupied at all, occupied and elevated, or occupied and specifically "elevated at a height greater than 4 feet." (Stip. No. 11). Effective communication of a work rule is undermined by a lack of consensus on what the rule is. *PSP Monotech Industries*, 22 BNA OSHC 1303 (No. 06-1201, 2008) (holding that where a work rule was communicated in an inconsistent and confusing manner, the work rule was not adequately communicated to employees). Additionally, Brown's training in the area seems to have been forgotten at the time stipulations were made. Although Respondent offered the sign-in sheet as evidence of the training, the fact the training was initially overlooked calls into question the effectiveness of that training in communicating the rules.

Although Respondent presents some evidence to support a claim that a work rule existed and was communicated, the Court finds Respondent did not communicate that rule effectively. An effectively communicated work rule is supposed to be explicit, mandatory, and clear enough that it eliminates employee exposure to a hazard. *J. K. Butler Builders, Inc.*, 5 BNA OSHC 1075; *Beta Construction Co.*, 16 BNA OSHC 1435. The standard of evidence to demonstrate an effectively communicated work rule is higher in cases of supervisor misconduct. *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013. Here, both employees involved in the violation were supervisors. The

5. Additional trainings are discussed in the stipulated facts. Both parties agree that relevant safety standards were not covered in the trainings and they are therefore not considered when examining whether a work rule was effectively communicated.

Safety Manual and toolbox talks demonstrate inconsistencies in the safety rules and policies. The assertion the work rule was adequately communicated was undermined by Respondent's stipulations that no work rule existed and that certain alleged trainings did not occur. The trainings offered by Respondent are not as frequent or consistent as trainings seen in *United Contractors Midwest, Inc.* and *Westar Energy* where the safety rule was covered in orientation, annual supervisory trainings, and regularly scheduled trainings for all employees. 26 BNA OSHC 1049; 20 BNA OSHC 1736. The material presented to the Court does not demonstrate a clear and explicit work rule designed to prevent the violation of 29 C.F.R. § 1926.451(c)(2)(v). As such, the Court rejects Respondent's claim of unpreventable employee misconduct.[6]

VII. Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Complainant determined the gravity of the violation to be high based on the higher severity and greater probability of injury. (Stip. No. 19). Injuries resulting from a fall hazard above twelve

[6] It is not necessary to analyze the further requirements of the affirmative defense since Respondent has failed to carry its burden on this element.

feet are serious which justifies the higher severity determination. *Id*. The greater probability determination is justified because employees were rushing and operating a forklift on uneven and icy terrain. *Id*. Complainant issued an initial penalty determination of $12,934 based on the gravity and then reduced the penalty to $9,054 by applying a 30% size reduction in line with OSHA's Field Operation Manual. Respondent received previous OSHA citations in 2014 and 2016. *Id*. As such, reductions for good faith and history were not applied. *Id*. Respondent stipulated to all factors relevant to penalty determination and did not offer any arguments contesting the amount of the proposed penalty. (Stip. No. 19); (*See* Resp't Response to Motion for Summary Judgment). Complainant's determination and justification for each of the penalty factors is appropriate. Based on the totality of the circumstances introduced in the record for this violation, the Court adopts the proposed penalty of $9,054.

ORDER

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED as a SERIOUS citation and a penalty of $9,054 is ASSESSED.

Date: November 21, 2018 */s/ Patrick B. Augustine*

Denver, CO

Patrick B. Augustine
JUDGE - OSHRC