



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

OUTFRONT MEDIA, INC.,

Respondent.

OSHRC Docket No. 17-2202

APPEARANCES:

For the Complainant:

R. Peter Nessen, Esq.
Senior Trial Attorney
U.S. Department of Labor
Boston, Massachusetts

For the Respondent:

Richard J. Antonelli, Esq.
Brian D. Lipkin, Esq.
Babst, Calland, Clements and Zomnir, P.C.
Pittsburgh, Pennsylvania

BEFORE: William S. Coleman
Administrative Law Judge

The Respondent, Outfront Media, Inc. (Outfront), is a corporation in the business of outdoor advertising. One of the thousands of billboards that Outfront owns and maintains nationwide is located on N. Main Street in Waterbury, Connecticut. On October 5, 2017, a compliance safety and health officer (CO) from the Occupational Safety and Health Administration (OSHA) observed Outfront employees working on that billboard while more than four feet above ground level without any means or method of fall protection. (T. 24). An OSHA

inspection and investigation ensued that resulted in OSHA issuing to Outfront a serious citation (Citation) that alleged three grouped violations (designated citation items 1a, 1b & 1c) and that proposed a penalty of \$12,675.

Item 1a alleges a violation of 29 C.F.R. § 1910.28(b)(1)(i) for failing to ensure that employees repairing the billboard on October 5, 2017 “were protected from the hazard of falling more than four feet to the ground” by using appropriate means or methods of fall protection.

Item 1b alleges a violation of 29 C.F.R. § 1910.30(a)(3)(i) for failing to ensure that employees repairing billboards “were trained in fall hazards and how to avoid such hazards.”

Item 1c alleges a violation of 29 C.F.R. § 1910.132(d)(1) for failing to “ensure that a Workplace Hazard Assessment in ‘tasks and sites’ specifics was conducted to determine necessary and appropriate types of personal protective equipment (PPE) for the employees” who would be repairing the billboard on October 5, 2017.

Outfront timely contested the Citation and proposed penalty and thereby brought the matter before the independent Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act (Act). 29 U.S.C. § 659(c). The Commission docketed the matter on December 21, 2017. The Secretary of Labor (Secretary) thereafter filed his formal complaint that re-alleged the allegations and proposed penalty set forth in the Citation. The Commission’s Chief Judge assigned the matter to the undersigned for hearing and decision. The hearing was conducted in Hartford, Connecticut, on November 8–9, 2018. Post-hearing briefing was completed on May 10, 2019.

The principal issues for decision are as follows:

- Did the Secretary prove by a preponderance of the evidence that Outfront failed to exercise reasonable diligence to discover the fall protection violations? (Item 1a; 29 C.F.R. § 1910.28(b)(1)(i)).

Decision: No. The Secretary did not prove Outfront had constructive knowledge of the violative conduct.

- Did the Secretary prove by a preponderance of the evidence that a reasonably prudent employer in Outfront’s circumstances would have provided different training than Outfront provided on the nature of fall hazards in the work area and how to recognize them? (Item 1b; 29 C.F.R. § 1910.30(a)(3)(i)).

Decision: No. The evidence is insufficient to establish that a reasonably prudent employer would have provided different training.

- Did the Secretary prove by a preponderance of the evidence that Outfront failed to assess the Waterbury billboard to determine whether hazards were present, or likely to be present, that would necessitate the use of fall protection equipment and other PPE? (Item 1c; 29 C.F.R. § 1910.132(d)(1)).

Decision: No. Outfront conducted a hazard assessment that met the requirements of the cited standard.

Because the Secretary did not meet his burden of proof on these issues, all three citation items must be vacated.

FINDINGS OF FACT

The following facts were established by at least a preponderance of the evidence:

1. Outfront is a corporation that constructs, installs, and maintains billboards for the display of advertising along roads and highways. (T. 101-102, 155-57, 287). Outfront employs approximately 2,000 workers in approximately 35 markets nationwide. (Answer, ¶ 2; T. 163, 263, 270). Outfront is an employer and is engaged in a business affecting interstate commerce. (Answer, ¶ 3).

2. The operations office for Outfront’s designated “Hartford/New Haven” Connecticut market is in North Haven, Connecticut, and is staffed by approximately nine employees. (T. 163; Ex. R-5). The North Haven office is responsible for about 1,000 billboard displays in its market area. (T. 230-31).

3. Outfront maintains two basic types of billboards: “bulletin” billboards and “poster” billboards. Bulletin billboards are generally higher above ground level than poster billboards. (T. 233-34). The display area of bulletin billboards is generally 14x48 feet, while the display area of the poster billboards is generally 10x22 feet. (T. 220-21). All the bulletin billboards in Outfront’s Hartford/New Haven market have integrated engineered anchor points or cable-based horizontal and vertical lifeline systems, either as part of their original construction or by subsequent modification. (T. 171, 221, 233-34, 362-63). Outfront is in the process of retrofitting the poster billboards in the Hartford/New Haven market with integrated engineered anchorage points or cable-based engineered lifeline systems, but some of the poster billboards in that market have not yet been retrofitted with such engineered systems. (T. 38, 101-102, 220-221, 277-80, 233-34, 362-63).

4. A small proportion of the bulletin billboards in the Hartford/New Haven market have what are sometimes described as “passive” fall protection systems, which are systems integrated into the structure of the billboard that require no additional fall protection equipment to be donned by a worker. (T. 212-213, 264, 392-94, 418-19).

5. Despite the differences between the bulletin billboards and poster billboards, work performed on either type involves similar hazards. (T. 63-64, 145, 241-243, 273, 355-56, 363). Work on both bulletin billboards and poster billboards is generally performed well above ground level and thus gives rise to fall hazards. (T. 145, 243, 273, 355, 363).

Fall Protection Training

6. Outfront provides all employees who work on its billboards fall protection training. (T. 124, 157-58, 239, 287, 373-74). All employees receive the same training, regardless of whether a

particular employee works predominately on poster billboards or bulletin billboards. (T. 124-25, 164).

7. As part of this training, employees are instructed on Outfront's "Personal Protective Equipment & Fall Protection Policy" (Policy). Upon successful completion of training, each employee reviews a one-page document that sets forth the Policy and upon signing the document expressly certifies the following: "MY SIGNATURE BELOW CERTIFIES THAT I UNDERSTAND AND WILL COMPLY WITH [OUTFRONT'S] POLICY AS STATED." (T. 114, 182, 293; Ex. R-9). The Policy states in relevant part:

In any situation where an employee is exposed to a potential fall hazard of greater than four (4) feet for general industry activities ... fall protection equipment shall be used to limit all free fall hazards to six (6) feet or less in accordance with applicable OSHA requirements, OUTFRONT safety rules, and jobsite conditions. All employees performing services on sign structures **MUST** wear a full body harness with shock-absorbing lanyards and double pelican hooks, and/or a self-retracting lifeline as necessary or required, provided by management. Management's intent is for each employee to be tied off 100 % while working on the billboard. Employees **MUST BE AT ALL TIMES** attached to permanent safety cables or other appropriate anchorages while working on [Outfront's] sign structures. If permanent safety cables are not in place, alternative fall protection equipment and methods **MUST** be used.

(Ex. R-9 (emphases in original)).

8. The Policy further states as follows:

Any employee who observes or suspects an unsafe condition is obligated to terminate any further activity on the jobsite, and immediately report the condition to the [Outfront] Operations Manager who will immediately **RED TAG** that jobsite as out-of-service until such time that proper repairs and/or corrections can be made to ensure a safe and healthy workplace.

(*Id.* (emphasis in original)).

9. Each of the employees that the CO observed on the Waterbury billboard on October 5, 2017 had undergone Outfront's fall protection training, and each had certified in writing that he understood and would comply with the Policy. (Ex. R-9).

10. Outfront issues to each employee fall protection PPE for use on both bulletin billboards and poster billboards. The PPE provided includes a full body harness, connectors, lanyards, and tie-off adapters. (T. 125-26, 172-76, 244, 313, 365-66; Exs. C-10, R-4 & R-9). Employees travel to their job locations with their provided fall protection PPE. (T. 27, 49, 87, 180-81, 217, 230). Outfront provides appropriate training to its employees on how to identify, inspect, maintain, and wear all provided fall protection PPE. (Stipulation at T. 176).

11. As part of initial fall protection training for new employees, Outfront provides each employee a copy of its "Fall Protection Training Manual" (Manual). (T. 36, 132, 181, 239, 292, 375-76; Ex. C-20).

12. The Manual provides general information about the fall hazards associated with elevated work. (Ex. C-20, p. 11). The Manual emphasizes that fall hazards are "one of the most common workplace hazards" and "one of the highest causes of death in the workplace." (*Id.*). The Manual further informs that "complacency," "horseplay," and lack of housekeeping at a worksite can contribute to creating a fall hazard. (*Id.*, p. 19).

13. The Manual also provides information and instructions regarding the use and maintenance of the following:

- a. three types of fall protection systems – fall restraint, work positioning, and fall arrest (Ex. C-20, pp. 23-25);
- b. two types of anchors – certified and improvised (Ex. C-20, pp. 29-33);

- c. connectors (snap hooks, carabiners,¹ lanyards, and shock absorbers) (Ex. C-20, pp. 39-47);
 - d. body holding devices (harnesses) (Ex. C-20, pp. 51-56);
 - e. lifelines (vertical, horizontal, and self-retracting) (Ex. C-20, pp. 61-69);
 - f. ladders and other climbing systems (Ex. C-20, pp. 73-78); and
 - g. information on the calculation of fall distances. (Ex. C-20, pp. 80-81).
14. Outfront provides new employees initial fall protection training in a group setting. (T. 109-110, 124, 162-63, 184-86, 283-84; Exs. R-4 & R-8).
15. The Operations Manager at Outfront’s North Haven office is Mr. Richard Bourne, and he is responsible for conducting fall protection training for the employees of that office. (T. 110, 158, 245).
16. The fall protection training that Mr. Bourne conducts at the North Haven office consists of the following:
- a. Giving a “pre-test” to assess trainee competency prior to training. (T. 164-65, 288, 296; Ex. R-13);
 - b. Showing fall protection videos. (T. 58, 184, 239, 288, 296, 374);
 - c. Making a PowerPoint presentation titled “The ABCDs of Fall Protection.” (T. 139-40, 165-68, 360; Ex. C-21);
 - d. Giving a post-test to determine post-training competency. (T. 186, 288, 291-92, 296; Ex. R-13);
 - e. Demonstrating how to use PPE with the use of a “prop kit.” (T. 174, 244); and

¹ See 29 C.F.R. § 1910.140(b) (defining “carabiner”); *see also* Ex. C-20, p. 42.

- f. Providing practical instruction in fall protection and fall rescue on an actual billboard. (T. 158, 296).
17. The PowerPoint presentation addresses the following subjects:
- a. Three types of anchor points: (1) improvised anchors, which must be capable of supporting 5,000 pounds as determined by a competent person; (2) certified anchor points, which must be rated at 3,600 pounds by a qualified person such as an engineer; and (3) engineered systems. (Ex. C-21, pp. 3-4).
 - b. A description of the “truck test,” which pertains to identifying improvised anchors, as is described in ¶ 19, *infra*. (*Id.*, p. 3).
 - c. Examples of “bad” anchor points such as platforms, platform supports, and wooden stringers. (*Id.*, pp. 4-5).
 - d. Examples of “good” anchor points such as engineered lifelines, engineered anchor points, and “significant structural components” like “vertical foundation beams” or “horizontal cross-members.” (*Id.*, p. 5).
 - e. Examples of anchor adapters. (*Id.*, p. 6).
 - f. The use of a rated ladder or a portable horizontal lifeline kit as an “alternative anchor point.” (*Id.*, pp. 6-7).
 - g. The use and inspection of body harnesses. (*Id.*, pp. 7-9).
 - h. The use and inspection of connectors, including examples of “good” and “bad” connectors. (*Id.*, pp. 10-12).
 - i. The use and inspection of lanyards. (*Id.*, pp. 12-13).
 - j. Instructions on the “threshold level” of fall distance when employees “must start to tie off.” (*Id.*, p. 12).

k. Instructions on how to calculate a fall distance. (*Id.*, pp. 13-14).

l. The use and inspection of self-retracting lifelines. (*Id.*, p. 14-15).

18. Mr. Bourne presents the PowerPoint “slide by slide,” explaining the content of each slide, and invites questions. (T. 166, 283-84).

19. During the presentation, Mr. Bourne explains that an improvised anchor point must be rated to support 5,000 pounds. (T. 168). Because “nobody knows what it weighs to pick up 5,000 pounds,” Mr. Bourne instructs his employees on a commonly used rule of thumb that is known as the “truck test.” (T. 168; Ex. R-7, pp. 7-8). The “truck test” entails a competent person assessing whether a potential anchor point could support the weight of a full-sized pickup truck such as a Ford F-150. (T. 168, 383-84). A potential anchor point would be deemed unsuitable for use as an improvised anchor point if it were assessed to be incapable of supporting such a load. (T. 168).

20. Mr. Bourne also discusses unsuitable (“bad”) anchor points with his employees, such as railings, wood members, or platforms. (T. 169-70).

21. Throughout the course of training, Mr. Bourne emphasizes Outfront’s requirement that employees always use fall protection when working at height. Outfront nominally refers to this as its “100% tie-off” policy, which is described in more detail in ¶¶ 38-40, *infra*. (T. 210-11, 297-98).

22. Outfront has a company-wide policy to provide employees “refresher training” in fall protection once a year, but Mr. Bourne’s practice in the North Haven office has been to conduct that refresher training twice a year. (T. 124, 158, 296; Ex. R-4). The semi-annual refresher training is substantially similar to the initial fall protection training. (T. 124, 158, 296; Ex. R-4).

23. Outfront's fall protection training addresses the nature and recognition of fall hazards associated with working on any Outfront billboard.

24. Outfront's fall protection training addresses the identification of suitable anchor points and the PPE necessary to provide fall protection while working on any Outfront billboard, including training to refrain from working on a billboard that lacks suitable anchorages or alternative means of providing required fall protection.

25. Outfront's fall protection training addresses fall hazards associated with both bulletin billboards and poster billboards. (T. 124-25, 164, 168).

26. All Outfront's employees, including all the employees whose conduct on October 5, 2017 resulted in the Citation being issued, have received the fall protection training described above. (T. 124-25, 131, 160-62, 164, 185, 287-89; Ex. R-8).

27. Each of the four employees who the CO observed working on the Waterbury billboard on October 5, 2017 understood the nature of fall hazards associated with working on billboards. Each of those employees possessed the knowledge, training, and experience both (a) to recognize when the construction, configuration, and condition of any Outfront billboard required the use of fall protection PPE, and (b) to refrain from working at height on a billboard that lacked suitable anchorages or alternative means of providing required fall protection.

Workplace Hazard Assessments

General Hazard Assessments

28. In 2007, Outfront's Vice President of Environmental Health and Safety, Robert Chesonis, who is based in Fairfield, New Jersey, conducted a general assessment of the hazards associated with working on Outfront's billboards nationwide. (T. 240-45). In conducting his assessment, Mr. Chesonis traveled to multiple markets around the country, spoke with fall

protection consultants, observed workers in the field, and interviewed workers and managers. (T. 240-41).

29. As a result of that 2007 general hazard assessment, Mr. Chesonis updated Outfront's fall protection training program, including the training manual and PowerPoint presentation used in training. (T. 243-44). Mr. Chesonis also developed a "prop kit," which contained the fall protection PPE that Outfront provides employees, for demonstrative use in formal training. (T. 244).

30. Based on the 2007 hazard assessment, Mr. Chesonis reasonably concluded that the PPE supplied to its crews for work on billboards was "generally appropriate for the various applications for the poster [billboards]." (T. 243).

31. In 2016, Mr. Chesonis performed another general assessment of the hazards associated with working on Outfront's billboards nationwide. (T. 245-47). As a result of that 2016 effort, Mr. Chesonis "slightly updated" Outfront's fall protection training for conformance with OSHA's new safety standard pertaining to walking-working surfaces, which was published as a final rule in November 2016. (T. 247-48).

32. While conducting these general hazard assessments, Mr. Chesonis observed workers working on bulletin billboards and poster billboards. (T. 242, 246, 271-73). Mr. Chesonis reasonably determined that the hazards associated with the two types of billboards were similar and that fall hazards existed with respect to both. (T. 243, 246, 271-73). As part of his assessments, Mr. Chesonis evaluated whether the fall protection PPE that Outfront provided to its employees was sufficient, and he reasonably concluded that it was. (T. 243, 247).

33. In addition to the "formal" assessments performed in 2007 and 2016, Mr. Chesonis monitors developments pertaining to fall hazard protection for billboards, such as regulatory

changes like the OSHA general industry standard pertaining to walking-working surfaces that was promulgated in November 2016. (T. 247-48).

Site-specific Hazard Assessments

34. Outfront does not ordinarily send a manager to conduct a site-specific hazard assessment of a particular billboard before a crew begins work on that billboard. (T. 219, 263-64). Rather, Outfront requires the assigned crew to assess a specific billboard and determine, before any worker ascends the billboard, whether the required work can be performed in conformance with Outfront policies. (T. 171, 232, 263-64, 281, 401; Ex. R-17, pp. 4 & 11).

35. Every billboard has unique characteristics, such as the presence or absence of certified anchor points, that bear on what fall protection PPE to use. (T. 171, 217, 401). Billboards that lack certified anchor points may or may not have points that are suitable for use as improvised anchor points. (T. 217). Employees are required to assess such billboards and identify any suitable improvised anchor points before ascending such a billboard. (T. 151-52, 171-72, 410).

36. If an employee determines that PPE other than what has been taken to the worksite is necessary to provide required fall protection, that PPE is provided before any employee ascends the billboard. (T. 180-81, 217, 317).

37. Employees must refrain from performing assigned work when the work cannot be performed in compliance with Outfront policies. (T. 117-119, 183-84, 217, 227-28; Ex. R-9). So, in circumstances in which a billboard has no certified or appropriate improvised anchor points, and no other means or methods of fall protection are available to perform the assigned work, employees must not perform any work at height. (T. 126-27, 151-52, 183-84, 217).

Reasonable Diligence in Discovering Fall Protection Violations

Outfront's Fall Protection Policies

38. Outfront requires employees to utilize fall protection at all times while working at heights of four feet or more. Compliance with this requirement almost always entails an employee wearing and using fall protection PPE to “tie off” to an appropriate anchorage. (T. 126, 171, 183-84, 213, 264-66, 297-98, 419; Exs. R-4 & R-9). Employees are instructed not to ascend a billboard if it has no suitable anchorages, and if no alternative means of fall protection is available. (T. 126-27, 183-84; Exs. R-4, R-9, C-21 at p. 5).

39. Outfront refers to this policy with the vernacular term “100% tie-off” policy. (T. 126, 183-84, 264-66, 297-98). That vernacular term is a misnomer, because employees are not required to “tie-off” when there is available some other appropriate method or means of fall protection that does not involve actually “tying off” with fall protection PPE. (T. 213-15, 264).

40. Outfront’s fall protection training orients employees to so-called “passive” fall protection systems, such as guardrail systems, even though very few of Outfront’s billboards are constructed with engineered “passive” systems.² (T. 149, 212-213, 264, 310, 418-19).

41. Outfront’s nominal “100% tie-off” policy is embodied in the Policy described in ¶¶ 7 & 8, *supra*. The final sentence of the block quote in ¶ 7 contemplates that employees are not required to tie off where all the required work can be accomplished while using an existing “passive” fall protection system. (T. 149). Nevertheless, the Policy does not prohibit an employee

² The term “guardrail system” is defined in section 1910.21(b) and the requirements for such systems are set forth in section 1910.29(b). *See also* Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), 81 Fed. Reg. 82494, 82649 (Nov. 18, 2016) (to be codified at 29 C.F.R. pt. 1910), (describing guardrails as “passive fall protection devices”). The term “passive” fall protection connotes measures that “require[] no additional fall protection equipment to be donned by the worker.” (T. 392-393). In contrast, “active” fall protection “requires the climber to do something to attach and utilize the [fall protection] system.” (T. 394).

from taking a “belt and suspenders” approach to fall protection by both tying off to appropriate anchorages while also taking advantage of any “passive” fall protection features engineered into the billboard. (*E.g.*, T. 310).

42. All Outfront employees who work at height, including the employees the CO observed working on the Waterbury billboard on October 5, 2017, review and sign the Policy in which the nominal “100% tie-off” policy is described. (Ex. R-9). Outfront’s fall protection training entails review of the Policy. (T. 210-11, 266, 297-98). At Outfront’s North Haven office, Mr. Bourne also frequently reinforces this training by reminding employees of the “100% tie-off” rule before they depart for their worksites. (T. 158-59, 297-98).

43. Mr. Bourne orients employees at the North Haven office, including the employees that the CO observed on October 5, 2017, to “passive” fall protection systems, and communicates that such systems are not prevalent on Outdoor’s billboards. (T. 110-11, 213-14; Ex. C-20, p. 23). The vast majority of the training relates to personal fall protection systems³ that by their nature entail the wear and use of fall protection PPE. (Ex. C-21).

44. Any Outfront employee who successfully completes fall protection training understands the import of Outfront’s fall protection rule and Outfront’s “100% tie-off” policy.

45. Outfront had a work rule in place to address fall hazards.

46. Outfront adequately communicated its work rule to its employees. Outfront’s employees had the knowledge, training, and experience (a) to recognize circumstances to which the work rule applied, and (b) to identify the means or methods required to comply with the work rule under those circumstances.

³ The term “personal fall protection system” is defined in section 1910.21(b).

Progressive Discipline for Fall Protection Violations

47. Outfront's fall protection Policy contains a progressive disciplinary protocol that is applicable to violations of the Policy. Under that protocol, the sanction for an employee's first violation is a five-day suspension, and the sanction for a second violation is termination of employment. (T. 54, 120, 253, 293, 367-68; Ex. R-9). Comparing Outfront's progressive discipline protocol to the protocols of two other major companies in the outdoor advertising industry, one is stricter and the other is more lenient. (T. 368-73).

48. Outfront consistently and uniformly applies the Policy's progressive discipline protocol whenever it determines that an employee has violated the policy. (T. 103-06, 111-12, 127-28, 191-93, 199-200, 207-08, 252-53, 257-62, 304; Exs. R-3, R-4, & R-12). Outfront effectively enforces its work rule regarding fall protection.

Random, Unannounced Worksite Observations

49. Outfront managers are required to conduct unannounced worksite observations of employees in the field for compliance with company safety policies at least four times a month. (T. 187-88). The operations manager for each office is generally responsible for conducting the field observations, and at least once monthly the general manager of each office (who is the immediate supervisor of the operations manager) is required to accompany the operations manager on those field observations. (T. 188).

50. Worksites are randomly selected for field observations, and typically more than a single worksite is observed on days when field observations are conducted. (T. 188, 228-30; Ex. R-5).

51. Mr. Bourne, as Operations Manager of the North Haven office, conducts field observations at least four times a month. (T. 187-188). Following each field observation, Mr. Bourne documents the observation by completing a "Field Observation Survey" form, which

identifies the location of the billboard, the identity of the employees observed, and states whether the employees were wearing PPE and complying with safety procedures. (T. 188-89; Ex. R-5).

52. Between January 21, 2014 and November 29, 2017,⁴ Mr. Bourne or other staff⁵ in Outfront's North Haven office conducted field observations of more than 230 worksites and completed a Field Observation Survey for each. (Ex. R-5).

53. In conducting field observations from 2014 through 2017, Mr. Bourne observed one or more of the four workers who the CO had observed on October 5, 2017 on approximately 90 different occasions, including some observations at worksites involving poster type billboards. (T. 192-94; Ex. R-5, Bates pp. 254 & 319). Every time the four workers were observed, they were properly utilizing PPE for fall protection. (T. 192-94; Ex. R-5).

54. Whenever any Outfront employee, whether based in the North Haven office or elsewhere, is discovered in the course of a field observation to be violating Outfront's fall protection policy, Outfront imposes progressive discipline in accordance with its Policy. (T. 190-92, 252-53; Ex. R-5, Bates p. 178; Ex. R-12).

55. Outfront exercised reasonable diligence by conducting regular and random field observations of its work crews as a means of (a) supervising employees, (b) taking measures to prevent violations from occurring, and (c) discovering violations that do occur.

⁴ These are the inclusive dates of the Field Observation Surveys presented in evidence. (Ex. R-5, Bates pp. 196 & 376). Many of the survey forms contain a header for "CBS Outdoor," which is the predecessor company to Outfront. (*E.g.*, Ex. R-5, Bates p. 170; T. 113, 294, 332).

⁵ While most of the Field Observation Surveys submitted by Outfront were completed by Mr. Bourne, some were completed by an individual with initials A.P., whose job title the record does not disclose, and who perhaps was responsible for conducting required field observations when Mr. Bourne was not available. (*E.g.*, Ex. R-5, Bates p. 324).

Events Preceding the Issuance of the Citation

Employee Discipline for Violation of Fall Protection Policy in March 2017

56. On March 31, 2017, an official from OSHA's area office in Hartford telephoned Outfront's North Haven office and spoke with Mr. Bourne. The official informed Mr. Bourne that OSHA had received a report from some third-party that Outfront employees had been seen that day working on a certain billboard in Hartford without fall protection equipment.⁶ (T. 103-04, 195-97, 301-03).

57. Outfront investigated the report and identified the employees assigned to work on the identified billboard. Those employees were the same four employees that six months later, on October 5, 2017, the CO observed repairing the Waterbury billboard. (T. 195-99, 254-56, 302-03). Mr. Bourne had most recently conducted a field observation of these same four employees 11 days earlier, on March 20, 2017, when he had observed them properly using fall protection PPE and following safety procedures. (Ex. R-5, Bates p. 24).

58. As a result of that internal investigation, all four employees acknowledged in writing that they "did not maintain 100% continuous tie-off while working at height" on March 31, and that "[t]his action was in direct conflict with [Outfront's] initial/refresher training ... regarding fall protection and working at heights." (Ex. R-3).

59. All four employees executed sworn affidavits that on March 31, 2017 they had violated Outfront's "fall protection policy to maintain 100% tie-off at all times or not to climb and work on structures where continuous tie-off could not be achieved." (Ex. R-4).

60. As a result of their March 31, 2017 violations of the Policy, all four employees were suspended for five days without pay, in accordance with Outfront's progressive discipline protocol

⁶ There is no evidence whether OSHA's receipt of this third-party report and subsequent phone call to Outfront resulted in any other official action on the report.

that is contained in the Policy. (T. 127, 199, 257-58, 303-04; Exs. R-3 & R-4).

61. Between March 31 and October 5, 2017, all or some of the four employees who had been disciplined for the violation on March 31 were observed in random, unannounced field observations of at least thirteen different worksites, and they were complying with Outfront safety policies for each observation. (Ex. R-5, Bates pp. 158, 160, 343-44, 346, 355-56, 358, 361-63, 372-73). The two field observations closest in time to October 5, 2017, were on September 19, when all four employees were observed, and on September 27, when two of the employees were observed. (Ex. R-5, Bates pp. 158 & 160).

The Crew's September 2017 Site Visit

62. On September 20, 2017, Mr. Bourne directed the four employees who would later be tasked to repair the Waterbury billboard to “stop by and look at” the billboard because it had been reported to have some sections “sliding down.” (T. 201-02; Ex. R-1). This poster billboard was about 40 years old, had no engineered anchor points or other integrated fall protection features, and was in visible disrepair. (T. 109, 202, 221-22). The purpose of the site visit was for the crew to assess the billboard and determine “what was needed to fix” it. (T. 203, 209-10). As part of that assessment, each of the employees had been trained to evaluate the structure of the billboard for the method and means of providing fall protection to complete needed work. (T. 135-36, 146-47, 171, 209-10, 281).

63. The four employees understood that part of the site visit would entail assessing the billboard for potential safety hazards and determining whether PPE would be required to complete the job in accordance with the Policy. (T. 135-36, 146-47, 171, 202-04, 209-10, 232, 281, 410-12; Ex. R-17, p. 11).

64. Each of the four employees had sufficient training, knowledge and experience to identify what repairs were required on any particular billboard and whether making those repairs

would expose a worker to a fall hazard that would require the worker to use certain fall protection PPE. (T. 78, 135-36, 146-47, 232, 281, 315-16, 410-12; Ex. R-17, p. 11).

65. Each of the employees knew that if any additional equipment were needed to conduct the repairs to the billboard, that equipment was available and would be provided. (T. 181, 216-17, 230).

66. Following the site visit on September 20, 2017, the employees reported that “the wood stringers in the back” of the billboard were rotted out and needed to be replaced. (T. 204; Ex. R-1). The employees did not report that performing this repair presented any safety-related obstacles that they were not equipped to address. (T. 209).

The Crew’s Failure to Use Fall Protection PPE on October 5, 2017

67. On October 5, 2017, around 7 to 8 a.m., the same four employees who had evaluated the Waterbury billboard about two weeks before on September 20 — Messrs. Anderson, Martin, Symmes, and Trudel — were directed to travel to the billboard to make the needed repairs they had identified during their site visit on September 20. (T. 24, 107-08, 305-06). Each of those employees had the same job title – “Sign Installer.” (T. 77, 287). Outfront had not designated any of them to be the lead person or to have any supervisory role. (T. 108).

68. The CO was driving past the billboard at about 9:30 a.m. while on his way to conduct another inspection. He saw the crew working on the billboard and suspected that workers were working at height without required fall protection, so he stopped his vehicle and approached the crew on foot. (T. 24).

69. One of the employees (Mr. Symmes) was doing carpentry work on the ground, but the other three — Messrs. Anderson, Martin, and Trudel — were working on the billboard at heights greater than four feet, and none were wearing a harness or otherwise using any fall protection equipment. (T. 25-26, 121-22; Exs. C-1 through C-9, C-18 & C-19).

70. Mr. Trudel and Mr. Anderson were standing on a makeshift work platform that the crew had created by placing a 2x8 inch board on top of three cross supports that were part of the billboard's structure, so that the 2x8 ran about two-thirds the length of the billboard. (T. 259-60). This makeshift platform was visibly bowed downward from the weight of the two men. (*Compare* photos at Exs. C-7 & C-8 with photo at Ex. C-4). While standing on this makeshift platform, Messrs. Trudel and Anderson were situated in between two parallel horizontal pieces of the billboard's frame that were about two feet apart and at about pelvis height on the men. The horizontal piece in front of them was a wood board (likely a 2x6 inch board) that ran the length of the billboard and was situated in between the upper front and the upper rear parallel and horizontal angle irons that were part of the billboard's frame (T. 206), both of which also ran the length of the billboard. The horizontal piece behind the two workers was the described upper rear horizontal angle iron. (T. 34; photos at Exs. C-1 through C-16; videos at C-18 & C-19).

71. Mr. Martin was standing on a horizontal board that was part of the billboard's structure that was situated at about the mid-point of what would be the display area of the billboard. Mr. Martin was maintaining his balance by grasping the horizontal upper front angle iron (described in the preceding paragraph) that was slightly above his head. (Exs. C-1, C-6 through C-9, C-18, C-19).

72. The two horizontal pieces of the billboard's structure that Messrs. Trudel and Anderson were standing in between were not part of any engineered fall protection system. Neither was the horizontal board that Mr. Martin was standing on. These pieces were part of the billboard's frame. (T. 38, 206). All the employees had the training, knowledge, and experience to recognize that these horizontal members of the billboard were part of the billboard's frame and not part of any "passive" fall protection involving platforms and railings. (T. 225-26, 233, 259-60, 306-07).

73. The billboard had no engineered fall protection system. (T. 217, 221-23, 233; Exs. C-4 & C-13). All the employees present had the knowledge, training, and experience to recognize that the billboard did not have any engineered fall protection system. (T. 109, 314).

74. The CO accurately determined that Mr. Martin had been working at a height of approximately 12 feet above ground level and Messrs. Anderson and Trudel at a height of approximately 15 feet above ground level. (T. 31).

75. Neither Mr. Trudel, Mr. Anderson, nor Mr. Martin was wearing a harness or otherwise using any fall protection PPE while working at height on the billboard. (T. 121-22). With their training, knowledge and experience, each of those employees knew that he was violating Outfront's Fall Protection Policy. (T. 307, 314).

76. Upon approaching the crew on foot, the CO first spoke briefly with Mr. Symmes, who was doing carpentry work while on the ground. When Mr. Trudel noticed the CO speaking to Mr. Symmes, Mr. Trudel dismounted the billboard and approached the CO. (T. 29; video at Ex. C-19). In response to the CO's questions, Mr. Trudel stated he was not the foreman but that he was the most senior worker present. Mr. Trudel stated further that none of the four workers was "in charge," and he identified the project manager to be Mr. Bourne in the North Haven office. (T. 29, 108; Ex. C-19). The CO did not speak with either Messrs. Martin or Anderson. (T. 31).

77. In response to the CO's questions, Mr. Trudel said that he believed he was not required to use fall protection PPE because the horizontal members of the billboard that he was standing in between were sufficient as a "passive restraint." (T. 34, 109). In stating this to the CO, Mr. Trudel was engaging in prevarication in an attempt to justify and excuse his failure to wear fall protection PPE while working at height on the billboard. In actuality, Mr. Trudel knew that he should have been using fall protection PPE to comply with both Outfront's policy and OSHA standards. (T.

314). Mr. Trudel knew that he, along with Messrs. Anderson and Martin, had been caught in the act of not using that PPE when required. (T. 302). He knew that if Outfront discovered he had violated the Policy a second time that he would be fired. (T. 120). Mr. Trudel contrived this explanation in an attempt to convince the CO that he had not violated fall protection standards, and to avoid being fired for having committed a second violation of the Policy.

78. The billboard on which the CO observed the employees working had neither certified anchor points nor locations that would serve as suitable improvised anchor points, and the employees knew this. (T. 109, 137, 217, 307). The employees should not have commenced work on the billboard under the Policy, and the employees knew this. (T. 109, 137, 151-52, 217, 317).

79. The CO contacted Mr. Bourne and Mr. Chesonis separately and reported details of his inspection to each. (T. 34-35, 205-206).

80. Messrs. Bourne and Chesonis then investigated the crew's conduct at the Waterbury billboard and concluded that Messrs. Anderson, Martin, and Trudel had been working more than four feet above ground level without utilizing fall protection equipment in violation of the Policy. (T. 207-08, 258-62; Exs. R-3 & R-4). Because this was the second Policy violation of each of those three employees, on October 10, 2017, Outfront terminated the employment of each of them. (T. 111-12, 207-08, 258-62; Ex. R-2).

81. On November 14, 2017, OSHA issued Outfront the three-item serious Citation.

DISCUSSION

The Commission obtained jurisdiction under section 10(c) of the Act upon Outfront's timely filing of a notice of contest. 29 U.S.C. § 659(c). Outfront has employees and is engaged in a business affecting commerce, and thus meets the Act's definition of "employer." 29 U.S.C. § 652(5).

All items in the Citation allege violations of safety standards promulgated pursuant to section 6(b) of the Act. 29 U.S.C. § 655(b). To establish a violation of such a standard, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994); *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

The three alleged violations, which the Secretary has grouped and proposed a single penalty for all three,⁷ are addressed below in the following sequence: the training violation (Item 1b); the hazard assessment violation (Item 1c); the fall protection violation (Item 1a).⁸

Item 1b – Section 1910.30(a)(3)(i) – Fall hazard training

Citation Item 1b alleges a violation of 29 C.F.R. § 1910.30(a)(3)(i), which provides that “[t]he employer must train each employee in ... : (i) The nature of the fall hazards in the work

⁷ *Cf. Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1394 (No. 97-0755, 2003) (noting that the Commission has the discretion to assess a single penalty for distinct but potentially overlapping violations).

⁸ The safety standards cited for Items 1a and 1b are part of the standard pertaining to “walking-working surfaces” that was promulgated as a final rule in November 2016. Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), 81 Fed. Reg. 82494 (Nov. 18, 2016) (to be codified at 29 C.F.R. pt. 1910). Section 1910.28(b)(1)(i), cited in item 1a, was effective on January 17, 2017. Section 1910.30, “Training Requirements,” cited in item 1b, was effective May 17, 2017. 81 Fed. Reg. at 82890; 29 C.F.R. § 1910.30(a)(1).

area and how to recognize them.”⁹

Item 1b alleges that Outfront violated this standard on October 5, 2017 in that it “did not ensure that the employees exposed to fall hazards while performing ‘tasks’ from the vertically structured billboards were trained in fall hazards and how to avoid such hazards.”

To establish non-compliance with a training standard, the Secretary must show the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances. *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2126 (No. 96-0606, 2000), *aff’d*, 255 F.3d 122 (4th Cir. 2001), citing *Archer-W. Contractors, Ltd.*, 15 BNA OSHC 1013, 1019-20 (No. 87-1067, 1991) *aff’d*, 978 F.2d 744 (D.C. Cir. 1992), and *El Paso Crane & Rigging Co., Inc.*, 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993). Where an employer has provided the type of training at issue, the Secretary must “show some deficiency in the training provided.” *Id.*, quoting *Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1086 (No. 91-2494, 1997). As discussed below, the Secretary failed to prove that a reasonably prudent employer would have provided any different or additional training than Outfront provided in the nature of the fall hazards associated with working on billboards, and how to recognize those fall hazards.

The Secretary stipulated that Outfront provided employees certain fall protection training (Stipulation at T. 176) and does not claim that Outfront provided no training at all on the nature of fall hazards and how to recognize them. Rather, the Secretary argues that Outfront’s fall protection training was deficient in the following three particulars: (1) that the training did not address the

⁹ The term “fall hazard” is defined to be “any condition on a walking-working surface that exposes an employee to a risk of harm from a fall on the same level or to a lower level.” 29 C.F.R. § 1910.21(b). The term “walking-working surface” is defined to be “any horizontal or vertical surface on or through which an employee walks, works, or gains access to a work area or workplace location.” *Id.* The term “lower level” is defined in pertinent part as follows: “*Lower level* means a surface or area to which an employee could fall. Such surfaces or areas include, but are not limited to, ground levels...” *Id.*

fall hazards associated with working on poster billboards (Sec’y Br. 8-9); (2) that the “100% tie-off” policy was “contradictory and confusing” (Sec’y Br. 9-12); and (3) that the training on anchorage points was vague and confusing. (Sec’y Br. 12-13).

The Secretary’s contention that Outfront’s training was inadequate must be considered within the context of Outfront’s training program as a whole. Accordingly, Outfront’s actual training program is reviewed first, followed by consideration of the Secretary’s asserted deficiencies in that training.

The Policy on which Outfront employees are trained states that “[i]n any situation where an employee is exposed to a potential fall hazard of greater than four (4) feet ... fall protection equipment shall be used” (Ex. R-9). Likewise, the Manual provided to each employee emphasizes that fall hazards are “one of the most common hazards” in the workplace when working at height. (Ex. C-20, p. 11). Outfront’s fall protection rule, nominally called the “100% tie-off” policy, served to emphasize the presence of fall hazards associated with working at height on billboards and that the use or presence of adequate fall protection was an imperative. (Findings of Fact, ¶¶ 38-40). Mr. Bourne frequently reminded the employees at the North Haven office of the existence of fall hazards on billboards and the imperative of complying with the fall protection rule. (T. 158-59). One member of the four-person crew that the CO observed working on the Waterbury billboard corroborated the frequency of Bourne’s exhortations, remarking that the fall protection policy was “beaten into our heads.” (T. 298). The existence of a written work rule to address the fall hazards associated with work on billboards, and frequent reinforcement of that work rule from management, have been recognized as components of an adequate training program. *See Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2087 (No. 06-1542, 2012) (noting safety handbook and “100-percent tie off” rule as aspects of an adequate fall protection

training program); *N&N Contractors*, 18 BNA OSHC at 2127 (employer’s “written work rule” and meetings to “reinforce company safety policy” were evidence of the adequacy of fall protection training under the construction industry fall protection training standard at 29 C.F.R. § 1926.503(a)(1)).¹⁰

Outfront provides both initial training in fall protection and annual refresher training (semi-annual refresher training at the North Haven office) in a group setting. (Findings of Fact, ¶¶ 14 & 22). Each of the employees the CO observed on the Waterbury billboard received initial training in fall protection and semi-annual refresher training, with Mr. Trudel having received this formal training twelve separate times during his tenure with Outfront. (Findings of Fact, ¶ 26; T. 140). The written tests and PowerPoint presentation utilized during this training identified the fall hazards inherent in working at height on billboards and emphasized the imperative of adequate fall protection. (Exs. C-21 & R-13). Mr. Bourne delivered the PowerPoint presentation “slide by slide” and solicited employee questions. (Findings of Fact, ¶ 17). The employees also received practical instruction on the use of fall protection equipment, both in a classroom setting and a field setting on an actual billboard. (Findings of Fact, ¶ 16(e), (f)). These elements of Outfront’s training have been recognized as elements of an adequate training program. *See S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1898-99 (No. 12-1045, 2016) (finding a PowerPoint presentation which served as a “discussion guide” and the use of “performance tests” were aspects of an

¹⁰ The cited training standard is largely derived from the fall protection training standard contained in the construction industry standards at section 1926.503(a)(1). *See* Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), 81 Fed. Reg. 82,494, 82,638 (Nov. 18, 2016) (to be codified in 29 C.F.R. Part 1910) (“OSHA drew most of the training requirements [of section 1910.30] from the construction fall protection standard.”). Commission precedent applying that corresponding construction industry fall protection training standard constitutes at least persuasive authority with respect to the derivative standard in part 1910 that was cited here.

effective training program); *Thomas Indus.*, 23 BNA OSHC at 2087 (fall protection training received during employee orientation or “a comparable refresher course” and “hands-on’ training” were aspects of an adequate fall protection training program); *N&N Contractors*, 18 BNA OSHC at 2127-28 (training received at the employer’s corporate office and at the work site were evidence of the adequacy of fall protection training under the construction industry fall protection training standard).

Outfront’s billboards have varying configurations respecting the presence of certified or improvised anchorages, and Outfront’s training instructed employees on the recognition of suitable improvised anchor points. (Findings of Fact, ¶¶ 13(b), 17(a)-(d), 19, 20, 35). Outfront’s training on anchorages included real world examples of “good” (i.e., suitable) and “bad” (i.e., unsuitable) improvised anchor points. (Findings of Fact, ¶¶ 17(c) & (d), 20). *See El Paso Crane & Rigging Co.*, 16 BNA OSHC at 1426 (observing that where appropriate fall protection must be selected on a “situation-by-situation basis,” and that “a company that tells its employees what fall protective equipment is available and describes its use, or the circumstances in which it must be used, may quite conceivably be doing all that anyone could reasonably do.”). With respect to identifying suitable improvised anchorages, Outfront instructed its employees to employ a widely known rule of thumb known as the “truck test” in assessing whether an improvised anchor point will withstand a 5,000-pound load. (Findings of Fact, ¶ 19). *See* 29 C.F.R. § 1910.140(c)(13)(i) (providing that anchorages be “[c]apable of supporting at least 5,000 pounds ... for each employee attached”).¹¹

¹¹ Subparagraph (ii) of 29 C.F.R. § 1910.140(c)(13) provides an alternative method for assuring an anchorage has adequate load bearing capacity and entails the involvement of a “qualified person” as defined in § 1910.140(b), such as a professional engineer. 29 C.F.R. § 1910.140.

As described below, the Secretary has not established that a reasonably prudent employer would have provided substantially different or additional training under the circumstances than Outfront provided, and thus has not shown that Outfront's training was inadequate.

(1) Bulletin v. poster billboards

First, the Secretary argues Outfront's training did not address fall hazards that are peculiar to poster billboards like the Waterbury billboard involved here. (Sec'y Br. 8). This argument is rejected. The greater weight of the evidence is that the hazards associated with working on bulletin billboards and poster billboards are similar, if not substantially identical. (Findings of Fact, ¶ 5). The fact that bulletin billboards are generally more recently constructed, are more likely to have certified anchorages, and are higher off the ground than poster billboards does not alter the fact that fall hazards exist with either type of billboard involving employees working at heights of four feet and higher. (Findings of Fact, ¶ 5). Outfront's training was reasonably geared to address fall hazards present on both types of billboards, as is corroborated by evidence that employees at the North Haven office routinely worked on poster billboards and demonstrated proficiency in complying with Outfront's fall protection policy in doing so. (T. 243, 271-73, 297, 367; Ex. R-5, Bates pp. 254, 319).

In support of the argument that the training was inadequate with respect to fall hazards unique to poster billboards, the Secretary relies on Mr. Trudel's testimony that he was not trained in fall protection for poster billboards. (T. 109-10). Mr. Trudel's testimony in this regard was conclusory and unconvincing. Mr. Trudel did not describe how the training he received was somehow not apt to poster billboards generally, or the Waterbury poster billboard specifically. (T. 110). To the contrary, Mr. Trudel had been observed at least twice before this incident working on poster billboards while properly using PPE for fall protection. (T. 188, 193-94; Ex. R-5, Bates pp. 254 & 319). The preponderant evidence establishes that Outfront's employees at the North

Haven location, including Mr. Trudel, had been trained in recognizing and addressing the fall hazards associated with working on a poster billboard, Mr. Trudel's unconvincing, conclusory testimony to the contrary notwithstanding.

The Secretary also argues that the testimony of the expert witness for Outfront that "some equipment" is appropriate for use on bulletin billboards but not poster billboards demonstrates that Outfront's training was deficient with respect to working at heights on poster billboards. (T. 401-402). That testimony does not diminish the expert's stated and reasonably supported conclusion that Outfront's fall protection training addressed appropriate PPE to be used under varying circumstances, including the type of billboard involved. (T. 375, 380-81, 386-87; Ex. R-17, p. 6). *See El Paso Crane & Rigging Co.*, 16 BNA OSHC at 1426 ("[a]n employer's instructions are not necessarily deficient just because they allow the employees discretion as to how to proceed, particularly where the working circumstances are such that no one form of protection is capable of being used every time").

Moreover, the cited standard simply requires training on the "nature of the fall hazards in the work area and how to recognize them." 29 C.F.R. § 1910.30(a)(3)(i). Even though some fall protection PPE may be apt only for bulletin billboards, this does not establish that Outfront's training was deficient with respect to *recognizing* the nature of fall hazards common to both bulletin and poster billboards. (Findings of Fact, ¶ 5). The Secretary simply did not adduce evidence that specifically identified how the training Outfront provided was inapt or deficient with respect to work on poster billboards.

The Secretary has not established that a reasonably prudent employer would have provided different or additional training to what Outfront provided relating to poster billboards.

(2) “100% tie-off” policy

The Secretary next argues Outfront’s “100% tie-off” policy was “contradictory and confusing” because Outfront acknowledged that tying off was not required in circumstances where a billboard was constructed with an engineered “passive” fall protection system such as a guardrail system. (Sec’y Br. 9-12). The Secretary notes that Outfront trained employees that fall protection PPE was not required where adequate “passive” systems were in place, so that the “100% tie-off” policy was in actuality a “100% fall protection” policy. (Sec’y Reply Br. 2).

While this characterization of Outfront’s nominal “100% tie-off” policy is accurate, the evidence is insufficient to support the conclusion that employees were confused or misunderstood the import of Outfront’s fall protection rule. *See Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001) (a work rule is sufficiently precise where it “requires or proscribes certain conduct and ... is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood.”) (quoting *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076 (No. 12345, 1977) *aff’d*, 319 F.3d 805 (6th Cir. 2003)). The term “100% tie-off” is a vernacular expression to epitomize a policy that required the use of some form of appropriate fall protection whenever working at height on a billboard. (Findings of Fact, ¶ 38 & 39). In Outfront’s work environment, the use of appropriate fall protection almost always entailed the use of fall protection PPE because very few of Outfront billboards were constructed with engineered “passive” fall protection systems that obviated the need for workers to wear and use (by “tying-off”) fall protection PPE. (Findings of Fact, ¶ 40). The Secretary’s parsing and deconstruction of phrases and sentences in Outfront’s Policy (Sec’y Br. 10-11; Ex. R-9), though showing that the Policy probably could have been stated with greater precision and clarity, does not establish that the language employed was insufficiently precise or clear to communicate to

Outfront's employees the Policy's main idea — that the use of appropriate fall protection was an imperative at all times when working at height.

Further, the evidence established that Outfront's training imparted the knowledge and understanding that enabled employees to recognize whether any given billboard was configured with an engineered "passive" fall protection system. (Findings of Fact, ¶¶ 40 & 43). It is apparent that the Waterbury billboard, an aging poster billboard that was in visible disrepair (T. 202, 221-22), had no such engineered fall protection system (T. 109, 217), and that any employee who had completed Outfront's training would have recognized this. (Findings of Fact, ¶ 43 & 73). Mr. Trudel recognized "that there were no safety cables designed or on this board to utilize" on the Waterbury billboard. (T. 109). Mr. Trudel was not credible in testifying that he regarded the two horizontal members of the billboard structure that he was standing in between (the angle iron behind him and a 2x6 inch board in front of him, both at about pelvis height), in combination with the makeshift work platform on which he was standing (that the crew had created by placing an unsecured 2x8 inch board across three supports), constituted an adequate passive rail system that negated the need to tie-off with fall protection PPE. (T. 109-11, 226, 260; Exs. C-1, C-4, C-8, C-12 through C-16). Instruction provided to Mr. Trudel and the other employees regarding guardrail systems included instruction that such systems are engineered into the billboard. (T. 215). Mr. Trudel understood this. (T. 109-110). Given Mr. Trudel's training and his approximate 10 years of experience working on billboards with both Outfront and with two other outdoor advertising companies (T. 100), his stated belief that the makeshift 2x8 wood platform he stood on, the horizontal angle iron behind him, and the horizontal 2x6 in front of him, provided fall protection that was an appropriate alternative means of fall protection on a billboard that was about 40 years old and falling apart, strains credulity and is simply beyond belief. (*See* T. 396-97). While the

CO apparently accepted Trudel's explanation at face value (T. 93-94), the undersigned as the finder of fact is obliged to evaluate his testimony in light of other evidence in the record to which the testimony can be compared and to examine the testimony for internal consistency and intuitive plausibility. *See Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (“[F]actors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness's story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it.”).

Contrary to the Secretary's contention, the evidence is insufficient to establish that the nominal “100% tie-off” policy lacked sufficient clarity or generated confusion among Outfront workers regarding the imperative to be protected by some form of adequate fall protection, whether “active” or “passive,” at all times while working at height. The evidence is further insufficient to establish that an employee receiving Outfront's training would not be competent to recognize what forms of fall protection were available on a given billboard. The Secretary has thus failed to identify any deficiency in Outfront's training with regard to its “100% tie-off” policy. *Cf. Paul Betty*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981) (finding that work rule had not been adequately communicated where the senior employee at the jobsite did not recognize that a situation called for the work rule to be implemented).

(3) Anchor points

Finally, the Secretary argues that Outfront's training regarding anchor points is vague and confusing in that (1) “Outfront fails to explain how” the topics of “‘good’ anchorage points, and approved load of anchorage points, work together,” and (2) Outfront's training on the “truck test” (for assessing whether a potential improvised anchorage is suitable) was flawed because one employee's testimony suggested that he did not accurately comprehend the test. (Sec'y Br. 12-13).

Outfront’s training materials are sufficiently explanatory to defeat the Secretary’s first criticism. The training materials and the training provided employees make sufficiently clear that anchor points must be suitable, and that suitable (i.e., “good”) anchor points include engineered anchorages and suitable improvised anchorages. (Findings of Fact, ¶¶ 13(b), 17(a)-(d), 19, 20).

In support of his second criticism, the Secretary cites to testimony from an Outfront employee in which the employee misstated the minimum rating for an improvised anchor point, which is 5,000 pounds. *See* 29 C.F.R. § 1910.140(c)(13)(i). It is apparent from the cited testimony that the employee confused the approximate weight of a full-size pickup truck with its load capacity, which is less than its weight. (T. 290, 311). This apparent confusion notwithstanding, the totality of the employee’s testimony established that he understood the “truck test” and how to apply it in identifying appropriate improvised anchor points. (T. 168, 289-90, 383). The witness’s confusion on the nomenclature used to describe a truck’s load capacity does not establish that it is inappropriate for a reasonably prudent employer to instruct employees on using the “truck test” in identifying appropriate improvised anchor points. *Cf. Paul Betty*, 9 BNA OSHC at 1383 (employee was inadequately trained where he had only a “general awareness of the cited standards’ requirements”).

The Secretary failed to prove that the fall protection training Outfront provided was deficient. Accordingly, Item 1b of the Citation must be vacated.

Item 1c – Section 1910.132(d)(1) – Hazard assessment

Item 1c alleges a violation of section 1910.132(d)(1), which provides in relevant part that “[t]he employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of [PPE].” Item 1b alleges that Outfront violated this standard with respect to the Waterbury billboard in that Outfront “did not ensure that a Workplace Hazard

Assessment in ‘tasks and sites’ specifics was conducted to determine necessary and appropriate types of [PPE] for the employees who were assigned to perform ‘tasks’ from vertically structured billboards.”

In 2007 and again in 2016, Outfront conducted formal general companywide hazard assessments. (Findings of Fact, ¶¶ 28-32). These general assessments are insufficient by themselves to meet the requirements of section 1910.132(d)(1), because they lacked an assessment of the particularities of any specific billboard, including the Waterbury billboard. *See Wal-Mart Distrib. Ctr. #6016*, 25 BNA OSHC 1396, 1398-1400 (No. 08-1292, 2015) (affirming violation of section 1910.132(d)(1) upon concluding that a hazard assessment conducted at one facility was insufficient to meet requirement to conduct a hazard assessment for a different facility, in part because the employer “never verified the equivalency of the conditions between the two facilities”), *aff’d in relevant part*, 819 F.3d 200 (5th Cir. 2016).

The preponderant evidence established that Outfront conducted a site-specific hazard assessment of the Waterbury billboard on September 20, 2017 in conjunction with the site inspection that the four employees conducted before the start of work on that billboard on October 5, 2017. (Findings of Fact, ¶¶ 62-66). Implicit in Mr. Bourne’s instruction that the employees “check board” (Ex. R-1, p. 2) and “stop by and look at” the billboard (T. 201-02) was a directive to conduct a hazard assessment for possible safety hazards, including fall hazards, and determine what safety equipment was necessary to complete the work. (Findings of Fact, ¶ 62). All four employees understood this to be an implied task as a result of their knowledge, training, and experience. (Findings of Fact, ¶ 63). Moreover, all four employees were competent persons capable of assessing the billboard for hazards and determining what PPE would be necessary to address those hazards in the course of making needed repairs to the billboard. (Findings of Fact,

¶ 64; T. 203, 209-10; Ex. R-17, p. 11). See section 1910.140(b) (defining the term “competent person” to mean “a person who is capable of identifying existing and predictable hazards in any personal fall protection system or any component of it, as well as their application and uses with related equipment”). Mr. Trudel confirmed this to be his implicit understanding when he acknowledged that he knew that among the reasons for inspecting the billboard before beginning work on it was to make sure that the crew could work safely, notwithstanding that the crew was not explicitly instructed to do so. (T. 135-36).

The Secretary argues that a provision in the Policy precluded delegating the task of conducting a site-specific hazard assessment to non-managerial employees. (Sec’y Br. 14-15). The provision to which the Secretary points provides as follows: “Management, with employee participation, will make a hazard assessment and determine the [PPE] required for the task assigned.” (Ex. R-9).

The cited standard does not prohibit an employer from delegating the task of conducting a hazard assessment to non-managerial employees. See *N&N Contractors*, 18 BNA OSHC at 2127 (employer may allow properly trained employees discretion in how to proceed with work and determining the PPE that is required in view of the work process selected); *El Paso Crane & Rigging Co.*, 16 BNA OSHC at 1426 (where necessary PPE will vary on a “situation-by-situation basis ... a company that tells its employees what fall protective equipment is available and describes its use, or the circumstances in which it must be used, may quite conceivably be doing all that anyone could reasonably do.”). Even if the delegation of this task to the work crew is regarded as being contrary to the recital in the Policy quoted above, that variance does not equate to a violation of the cited standard. See *Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2066 (No. 78-1443, 1984) (consolidated) (“An employer’s safety recommendations do not

establish that such precautions were necessary in order to comply with a standard.”), *aff'd*, 764 F.2d 32 (1st Cir. 1985). The employees’ site visit met the requirement of section 1910.132(d)(1) to conduct a hazard assessment. *See Wal-Mart Distrib. Ctr. #6016*, 25 BNA OSHC at 1399; *El Paso Crane & Rigging Co.*, 16 BNA OSHC at 1426; *Infra-Red Bldg. & Power Svc., Inc.*, No. 17-1511, 2019 WL 5893218 at *13-14 (O.S.H.R.C.A.L.J, Oct. 7, 2019) (finding that training employees to assess a job site and determine what type of PPE should be worn was “consistent with” 29 C.F.R. § 1910.132(d)(1)); *see also* Nonmandatory Compliance Guidelines for Hazard Assessment and Personal Protective Equipment Selection, App’x B to Subpart I of 29 C.F.R. pt. 1910 (indicating that a “walk-through” survey of a worksite conducted by a “safety officer” is a component of an adequate hazard assessment).

The Secretary further argues that because Outfront’s training was deficient, the employees could not be regarded to be “competent persons” to assess what fall protection PPE would be required to work on the Waterbury board, so that any hazard assessment the employees’ conducted was inadequate. However, as found in discussing Item 1b of the Citation, the Secretary failed to establish that Outfront’s training was deficient. The employees, as competent persons in the area of identifying and recognizing fall hazards, were capable of conducting a hazard assessment of the Waterbury billboard and determining what fall protection measures were necessary to safely complete the work. *See El Paso Crane & Rigging Co.*, 16 BNA OSHC at 1426; *cf. Baker Tank Co.*, 17 BNA OSHC 1177, 1179 (No. 90-1786-S, 1995) (recognizing that properly instructed employees can carry out an employer’s duties under the Act).

Finally, the Secretary points to uncontroverted evidence that Outfront did not prepare a written certification that documented the site-specific hazard assessment that the employees

conducted. (Sec’y Br. 16). Such a written certification is required by section 1910.132(d)(2).¹² However, the citation item alleges that Outfront failed to conduct a hazard assessment, not that Outfront failed to properly document that it had done so. *See Jake’s Fireworks, Inc.*, 26 BNA OSHC 1738, 1750 n.10 (No. 15-0260, 2017) (ALJ) (finding that, although lack of a written certification was “strong evidence” that no hazard assessment occurred, it was not sufficient to prove a violation of sec. 1910.132(d)(1)) *aff’d*, 893 F.3d 1248 (10th Cir. 2018). As previously described, Outfront conducted a hazard assessment that met the requirements of the cited standard, section 1910.132(d)(1).

The Secretary has not proven that Outfront’s site-specific hazard assessment of the Waterbury billboard did not meet the requirements of section 1910.132(d)(1). Accordingly, Item 1c of the Citation is vacated.

Item 1a – Section 1910.28(b)(1)(i) – Protection from fall hazards

Item 1a alleges a violation of section 1910.28(b)(1)(i), which provides:

(b) *Protection from fall hazards--(1) Unprotected sides and edges.* (i) Except as provided elsewhere in this section, the employer must ensure that each employee on a walking-working surface with an unprotected side or edge that is 4 feet (1.2 m) or more above a lower level is protected from falling by one or more of the following:

- (A) Guardrail systems;
- (B) Safety net systems; or
- (C) Personal fall protection systems, such as personal fall arrest, travel restraint, or positioning systems.

The Citation alleges that Outfront violated the standard because it “did not ensure that the employees who were performing ‘tasks’ from the vertically structured billboards were protected

¹² Section 1910.132(d)(2) provides: “The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.”

from the hazard of falling more than 4 feet to the ground by the use of appropriate personal fall arrest systems/devices or utilizing other means [or] methods.”

Outfront contests only the “knowledge” element of the Secretary’s burden of proof, contending that the evidence is insufficient to establish that Outfront knew, or with the exercise of reasonable diligence could have known, of the violative conduct. The Secretary does not contend that Outfront had *actual* knowledge of the employees’ violative conduct, arguing only that he proved constructive knowledge.¹³ (Sec’y Br. 17-19). As described below, the Secretary has failed to carry his burden to prove constructive knowledge.

To prove constructive knowledge, the Secretary must show that Outfront’s lack of actual knowledge of a violative condition was due to a failure to exercise reasonable diligence. *See Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999). “In assessing reasonable diligence, the Commission considers several factors, including an employer’s obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring.” *S.J. Louis Constr.*, 25 BNA OSHC at 1894. The regular enforcement of disciplinary procedures also bears on whether an employer exercised reasonable diligence. *See Thomas Indus. Coatings*, 23 BNA OSHC at 2088-

¹³ The Secretary did not attempt to prove, and does not argue, that any of the four crew members working on the Waterbury billboard had sufficient authority to be deemed a supervisor for purposes of imputing their actual knowledge of the violative conduct to Outfront. *See e.g., Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 352, 355 (3d Cir. 1984) (finding that the crew leader of a three-person electrical utility crew at a remote worksite was a supervisor whose actual knowledge of a violative condition could be imputed to the employer). Attempting to establish imputed actual knowledge would have been inconsistent with the Secretary’s theory of the case that the employees did not know that they were violating Outfront’s fall protection work rule because their fall protection training had been inadequate. (Sec’y Br. 7-13). *Cf. Paul Betty*, 9 BNA OSHC at 1383 (finding that work rule had not been adequately communicated where the senior employee at the jobsite did not recognize that a situation called for the work rule to be implemented).

89. Whether an employer has exercised reasonable diligence is a question of fact that will “vary with the facts of each case.” *Martin v. OSHRC*, 947 F.2d 1483, 1485 (11th Cir. 1991).

The Secretary argues Outfront failed to exercise reasonable diligence because: (1) it lacked adequate work rules and training (Sec’y Br. 19); (2) it failed to adequately supervise employees (*Id.* at 18-19); and (3) it failed to adequately assess the Waterbury billboard work site for potential hazards (*Id.* at 18). Each of these arguments is addressed in turn.

(1) Adequate training and work rules

In arguing that Outfront’s employees lacked adequate training and work rules, the Secretary relies on his arguments made in connection with the alleged training violation (Item 1b) that Outfront’s fall protection training was inadequate. As the discussion above rejecting those arguments concluded, the Secretary failed to prove that a reasonably prudent employer would have provided fall protection training that was substantially different than the training Outfront provided, including training respecting the nature of fall hazards on poster billboards and how to recognize them. The Secretary similarly failed to establish that Outfront’s work rule, nominally identified as the “100% tie-off” policy, lacked sufficient clarity or generated confusion among Outfront workers regarding the imperative to be protected by some form of adequate fall protection at all times while working at height.

(2) Adequate supervision of employees

The Secretary argues Outfront failed to adequately supervise its employees. In support of this argument, the Secretary faults Outfront for having no managerial or supervisory employee in charge of the crew, and propounds the following rhetorical question: “If an employer can avoid responsibility by placing no one in charge, then why would the employer ever do so?” (Sec’y Reply. Br. 4).

Longstanding precedent holds that the presence of supervisory personnel at a worksite is not a *sine qua non* of adequate supervision. See *N. Y. State Elec. & Gas Corp. v. Sec’y*, 88 F.3d 98, 109 (2d Cir. 1996) (“Insisting that each employee be under continual supervisor surveillance is a patently unworkable burden on employers.”); *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2182 (No. 02-1024, 2003) (employer whose practice was not to assign supervisory personnel to be present fulltime at widespread worksite locations determined not to have had constructive knowledge of employee’s violative conduct). Rather, in assessing the adequacy of employee supervision, the Commission looks to the whole of an employer’s monitoring, compliance, and disciplinary efforts, viewed in light of any past violative conduct of employees. See *Stahl Roofing Inc.*, 19 BNA OSHC at 2182-83; *Hackensack Steel Corp.*, 20 BNA OSHC 1387 (No. 97-0755, 2003); *Sw. Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000); *Michael Barr*, No. 19-0258, 2019 WL 7176889, at *9-10 (O.S.H.R.C.A.L.J., Nov. 18, 2019).

The Secretary has not established that Outfront failed to exercise reasonable diligence in the supervision and monitoring of its work crews. Outfront supervisors conduct random field observations of employees working on various billboards at least four times a month. (Findings of Fact, ¶¶ 49 & 50). Employees who fail to comply with Outfront’s Fall Protection Policy receive significant discipline for both a first and a second violation, with the sanction for the second violation being termination of employment. (Findings of Fact, ¶ 47). These are attributes of an effective monitoring and enforcement program. Cf. *Thomas Indus. Coatings, Inc.*, 23 BNA OSHC at 2087-88 (disciplinary program where the entire crew could be suspended without pay if one member violated fall protection policies); *Stahl Roofing, Inc.*, 19 BNA OSHC at 2182 (progressive disciplinary program ranging from oral reprimand to termination); *N.Y. State Elec. & Gas Corp.*, 19 BNA OSHC at 1229 (enforcement program calling for random site inspections).

Outfront supervisors had observed one or more of the three employees who were violating the fall protection policy on October 5, 2017 at about 90 different worksites between January 2014 and October 2017, and at each of those worksites the employees had been following Outfront's fall protection work rules. (Findings of Fact, ¶ 53). In the two instances in which the employees were determined to have violated Outfront's Fall Protection Policy, they were disciplined according to Outfront's progressive discipline policy. (Findings of Fact, ¶¶ 60, 80).

The Secretary argues the absence of a foreman or other supervisor on the four-person crew is particularly “jarring given ... Outfront's understanding of these employees' safety history.” (Sec'y Br. 18). The record is silent with respect to whether Outfront increased monitoring of these employees following their violation of the fall protection rule in March 2017. *Cf. Hackensack Steel Corp.*, 20 BNA OSHC at 1389 (noting that multiple previous OSHA violations should have led the foreman to do “more to discover safety violations than he did.”). Nevertheless, the record does show that all or some of the four employees on that crew were subject to site observations at least 13 times from April through September 2017, and that each time they were following safety rules. (Findings of Fact, ¶ 61). Given the overall positive record of employee compliance with the fall protection rule, and the incentives in place for employees to follow that policy in order to avoid the severe discipline mandated by Outfront's progressive discipline policy, the Secretary has not established that Outfront failed to exercise reasonable diligence in its supervision and monitoring of its employees working in the field. *See Stahl Roofing, Inc.*, 19 BNA OSHC at 2182 (“Where the evidence fails to show that the employer should have perceived a need for additional monitoring or that such an effort would have led to the discovery of instances of employee misconduct, increased supervisory efforts to monitor employee compliance are not required.”) (quoting *Dover Elevator Co.*, 16 BNA OSHC 1281, 1287 (No. 91-862, 1993)). The evidence also

demonstrated that Outfront disciplined its employees in every instance where a violation of its Fall Protection Policy was found to have occurred. (Findings of Fact, ¶¶ 48, 60, 80). Indeed, the four employees here had been disciplined in connection with a Policy violation just six months prior to this one, and they knew their employment would be terminated if they violated the policy a second time. (T. 120, 293; Exs. R-3 & R-4). These circumstances weigh against a finding that Outfront failed to exercise reasonable diligence in monitoring its worksites, despite the employees' first known violation six months earlier. See *Thomas Indus. Coatings, Inc.*, 19 BNA OSHC at 2088-89 (uniformity of discipline weighs in favor of a finding of reasonable diligence); *F.A. Gray, Inc.*, 12 BNA OSHC 1311, 1314 (No. 83-517, 1985) (finding no lack of reasonable diligence, in part, where employees were "experienced" and knew they would be fired for breaking the employer's safety rule) (view of Commissioner Cleary).

The Secretary compares the instant matter to *Public Utils. Mgmt. v. Sec'y of Labor*, 417 F. App'x 58 (2d Cir. 2011) (unpublished), and argues that the court there found lack of adequate supervision even where a foreman had been designated to look for safety violations.¹⁴ The Secretary argues that in contrast, "Outfront's 'supervision' is ... far worse; it is absent." (Sec'y Br. 19). This argument is rejected. The court in *Public Utils. Mgmt.* noted, "[d]epending on the circumstances, close supervision may or may not be reasonably necessary to attain compliance

¹⁴ It is likely that the only court of appeals to which the Secretary could seek review of a final order of the Commission in this matter is the Second Circuit, because the alleged violations arose in Connecticut, and there is evidence that Outfront's principal office is in New York. (T. 280). See 29 U.S.C. § 660(b); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has ... applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent."). It should be noted that the Second Circuit has determined not to accord its decision in *Public Utilities Management* precedential effect within the circuit because it was issued as a "summary order." See 2d. Cir. R. 32.1.1(a) ("Rulings by summary order do not have precedential effect."); *Public Utils. Mgmt. v. Sec'y of Labor*, Docket No. 10-0123-ag (2d. Cir. 2011) (summary order).

with safety rules.” 417 Fed.App’x at 63, quoting *N.Y. State Elec. & Gas Corp.*, 88 F.3d at 109 (emphasis added). The Second Circuit in *Public Utils. Mgmt.* thus did not rule that the existence of a designated foreman or other supervisor at the worksite is dispositive of adequate supervision.

The Secretary did not demonstrate a lack of reasonable diligence in Outfront’s monitoring of its worksites or enforcement of its work rules.

(3) Hazard assessment of the workplace

Reiterating his arguments made in support of the alleged hazard assessment violation (Item 1c), the Secretary argues Outfront “took no action to inspect the [Waterbury billboard] for potential hazards.” (Sec’y Br. 18). However, as previously discussed in vacating Item 1c, Outfront demonstrated that the four employees understood that part of their site visit on September 20, 2017, would involve assessing the billboard for potential hazards and determining what PPE would be required to complete the job in accordance with Outfront’s Fall Protection Policy, and that each was competent to make such an assessment. (Findings of Fact, ¶¶ 62-64). The employees performed a hazard assessment that met the requirements of section 1910.132(d)(1).

Based on the foregoing, the Secretary did not demonstrate that Outfront failed to exercise reasonable diligence to discover the violations and therefore did not demonstrate that Outfront had constructive knowledge of its employees’ violative conduct.¹⁵ Accordingly, Item 1a of the Citation is vacated.

¹⁵ In view of the Secretary’s failure to prove the alleged fall protection violation, Outfront’s affirmative defense that the violation was the result of unforeseeable employee misconduct need not be addressed. *Cf. Burford’s Tree, Inc.*, 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010) (“The Commission has considered these same factors in evaluating both an employer’s constructive knowledge and the merits of an employer’s unpreventable conduct affirmative defense.”), *aff’d*, 413 F. App’x 222 (11th Cir. 2011) (unpublished).

ORDER

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a). If any finding of fact is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the contrary notwithstanding. Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 1a of the Citation, alleging a serious violation of 29 C.F.R. § 1910.28(b)(1)(i), having not been proven, is VACATED.
2. Item 1b of the Citation, alleging a serious violation of 29 C.F.R. § 1910.30(a)(3)(i), having not been proven, is VACATED.
3. Item 1c of the Citation, alleging a serious violation of 29 C.F.R. § 1910.132(d)(1), having not been proven, is VACATED.

/s/

WILLIAM S. COLEMAN
Administrative Law Judge

Dated: May 4, 2020