UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

MARTY J. WALSH, Secretary of Labor, United States Department of Labor, Complainant, v. GREENBRIER CENTRAL LLC, Respondent.	OSHRC Docket No. **20-1192**

DECISION AND ORDER

Attorneys and Law firms

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

I. INTRODUCTION

Greenbrier Central LLC manufactures tank railcars at a facility in Marmaduke, Arkansas. On January 22 and 23, 2020, the United States Department of Labor, through its Occupational Safety and Health Administration (OSHA), conducted an inspection of the facility in response to a report of an injury sustained by an employee who required hospitalization.[1] Two OSHA compliance safety and health officers (CSHOs) conducted the inspection and found no violation of the Occupational Safety and Health Act of 1970, (the Act), 29 U.S.C. §§ 651-78, related to the reported injury.[2] One of the CSHOs, however, observed Greenbrier employees working near openings atop railcars without the use of fall protection. It was his opinion that the employees were

[1]The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order 8-2020, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020), *superseding* Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012) (Order No. 1-2012 was in effect when the citation was issued). The terms "Secretary" and "OSHA" are used interchangeably herein.

[2] A "Compliance Safety and Health Officer" is "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. §1903.22(d).

exposed to fall hazards greater than four feet from the tops of the railcars to the lower levels of the railcars' interiors.

On July 22, 2020, OSHA's Little Rock, Arkansas, Area Director issued a one-item Citation and Notification of Penalty to Greenbrier,[3] which alleged Greenbrier violated 29 C.F.R. § 1910.28(b)(3)(i), by failing to ensure its employees were "protected from falling through any hole . . . that was 4 feet (1.2 m) or more above a lower level by" fall protection. The Secretary proposed a penalty of $10,603 for the Citation. Greenbrier timely contested the Citation, and the case was designated for Simplified Proceedings by the Chief Judge where the complaint and answer requirements were suspended.[4]

The parties stipulated the Commission has jurisdiction over this action, and Greenbrier was a covered employer under the Act (*Joint Status Report and Joint Prehearing Statement,* ¶¶ c.I & c.II). Based on the stipulations and the record evidence, the Court concludes the Commission has jurisdiction over this proceeding under section 10(c) of the Act, and Greenbrier is a covered employer under section 3(5) of the Act. The Court held a bench trial remotely via Zoom on April 27, 2021, and the parties filed post-trial briefs on July 2, 2021.

The facts of the case are not in dispute. The only contested element of proof is whether the cited standard applies to the cited conditions (Tr. 221-24). The Secretary contends he established Greenbrier committed a serious violation of 29 C.F.R. § 1910.28(b)(3)(i). Greenbrier argues that the cited standard does not apply, based on its regulatory history and on OSHA-published documents related to the railcar industry. Greenbrier argues even if the Court finds the cited standard applies, the Secretary has failed to provide the railcar industry with fair notice of the application of § 1910.28(b)(3)(i) to railcars since prior published statements by OSHA indicated that "rolling stock" was exempt from citation under the Subpart D standards.[5]

Pursuant to Commission Rules 90 and 209, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes

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[3] The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[4] Although the Federal Rules of Evidence are generally inapplicable in simplified proceedings, the parties stipulated to their applicability, as authorized by Commission Rule 209(c) (*J. Status Report and J. PreHr'g Statement,* ¶ h).

[5] OSHA categorizes railcars as rolling stock. *See* Notice of Reopening of the Rulemaking Record for Walking and Working Surfaces; Personal Protective Equipment (Fall Protection Systems), 68 Fed. Reg. 23,528, 23,529-30 (proposed May 2, 2003) (to be codified at 29 C.F.R. pt. 1910) ("[R]olling stock includes covered and uncovered rail cars, hopper cars, tank cars, and trailers."). Therefore, the terms "rolling stock" and "railcar" are used interchangeably herein.

its final disposition of the proceedings under section 12(j) of the Act. 8 29 U.S.C. § 661(j). For the reasons indicated *infra*, the Court **VACATES** the Citation.

II. BACKGROUND

In July of 2019, The Greenbrier Companies acquired the manufacturing operations of American Railcar Industries, including the facility in Marmaduke, Arkansas. Greenbrier Central LLC, a subsidiary of The Greenbrier Companies, took over operations of the Marmaduke facility (Tr. 118, 135).[6] Greenbrier manufactures tank railcars designed to haul liquid or gas commodities. The facility comprises several buildings (called shops) connected by rail lines. In the steel shop, steel components are rolled and welded together to form a tank. Employees then install "brake components, various handrails, ladders, [and] steps," to the tank to transform it into a railcar. The railcar is placed on rails before it leaves the steel shop and moves only by rail thenceforth. After testing for quality assurance, the railcar is moved to either the new lining shop or the exterior coating shop (Tr. 156-58).

In the new lining shop, employees blast the interior of each railcar to remove rust and mill scale formed during the rolling process. After blasting the interior, they install a lining to ensure the purity of commodities hauled by the railcar. The railcars are then inspected and "any little minor defects or flaws" are painted (touched up) by employees "typically with an artist brush or 2-inch brush before the car is completed and sent over to the other paint shop." (Tr. 137.) Thomas Friar, Greenbrier's lining shop operations manager, stated he could inspect and touch up a railcar in 10 to 15 minutes. "But if someone may be newer, it might take a little longer. It is precision work, kind of tedious." (Tr. 138.)[7]

Touchup employees access the railcar tops by climbing stairs to a mezzanine level (Tr. 88). From there, they step onto the tops of the railcars. The tops of the railcars are curved and surrounded by steel railings bolted to the railcar tops to prevent exterior falls. An employee accessing a railcar top sits down next to two circular openings in the center of the top.[8] The

[6] The Secretary issued the Citation to "Greenbrier Companies, Inc., d/b/a Greenbrier" on July 22, 2020. The parties stipulated the correct name of the cited company is "Greenbrier Central LLC." (*J. Status Report and J. PreHr'g Statement* ¶¶ c.II & c.V; Tr. 7.)

[7] The reported injury that triggered the OSHA inspection occurred in the new lining shop. The employee was injured while inside one of the railcars when he slipped and fell, injuring his hip. This incident is unrelated to the conditions atop the railcars cited in Item 1 (Tr. 136-37, 150-52).

[8] Exhibit C-4 comprises a number of photographs showing railcars in the new lining shop. Photographs at Bates pages 000020 and 000026 through 000030 show touchup employees sitting atop railcars as they work.

openings are large enough to accommodate a ladder and allow a person to climb into and out of the railcar's interior (Tr. 23-25, 45-46, 104-05, 126).[9]

Although people can intentionally climb through the openings to enter and exit the railcar interiors, the Greenbrier employees who appeared as witnesses did not think it was possible for anyone to fall through the openings. Friar "would not say it would be possible to fall in" the openings from the top of the railcar. "It's small. There's a lip that's about 6 to 8 inches tall on the nozzle that would not allow your foot to slip inside of it or any other part of your body." (Tr. 142.)[10] Sanford Cunningham, Greenbrier's line shop superintendent, agreed that it was not possible for a person to fall through the opening (Tr. 105-106). Greenbrier plant manager Brent Bonvillain did not "see a risk" of an employee stepping into the opening while working on top of a railcar (Tr. 127).

Scott Sharpe is the senior environmental, health, and safety (EHS) manager at the Marmaduke facility. He is a certified safety professional and a certified hazardous materials manager (Tr. 171-72). Sharpe does not believe the openings in the railcar tops present a fall hazard to touchup employees. "[T]hey are seated at that time and that hole is a smaller hole. It would be very hard to fall into. . . . You have to have a specific reason to be up there. So, no one would just walk through and step into the hole either." (Tr. 192.) He also thinks the 6- to 8-inch-high nozzle prevents employees from slipping into the hole (Tr. 193).

Greenbrier notified OSHA on January 14, 2020, that an employee had been injured at its facility. The local OSHA area office assigned CSHO Stephen Heller and another CSHO to investigate the report. They arrived at the facility on January 22, 2020 (Tr. 18-19). After meeting with company representatives, the CSHOs conducted a walk-around inspection of the multi-building facility (Tr. 20-21). While in the new lining shop, Heller observed three touchup employees sitting atop three railcars near the openings in the tops. He believed the employees were exposed to fall hazards to the interiors of the railcars. He noted that the employees were not wearing harnesses or using any other form of personal fall protection (Tr. 21-23).

[9] The CSHO did not take measurements of the openings because he did not deem it safe to step onto the railcar tops (Tr. 58-59). It is undisputed that the holes were large enough for a person to fit through.

[10] The raised nozzles encircling the railcar openings can be seen in the photographs at Bates pages 000020, 000021, and 000029 of Exhibit C-4.

Following the inspection, Heller recommended that the Secretary cite Greenbrier for a violation of § 1910.28(b)(3)(v)(a).[11] After reviewing the case file for the inspection, on July 22, 2020, OSHA's Little Rock, Arkansas, Area Director chose instead to cite Greenbrier for violating the standard at issue, § 1910.28(b)(3)(i) (Tr. 57-58, 74-75).

III. THE CITATION

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety & Health Review Comm'n (CF & I Steel Corp.),* 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. § 651(b)). "The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards." *Id*. "To implement its statutory purpose, Congress imposed dual obligations on employers. They must first comply with the 'general duty' to free the workplace of all recognized hazards." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013). "They also have a 'special duty' to comply with all mandatory health and safety standards." (*Id*.)

"With respect to the latter, Congress provided for the promulgation and enforcement of the mandatory standards through a regulatory scheme that divides responsibilities between two federal agencies." (*Id.*) "The Secretary establishes these standards through the exercise of rulemaking powers." *CF & I Steel Corp*., 499 U.S. at 147. *See* 29 U.S.C. § 665. Pursuant to that authority, the standards at issue in this case were promulgated. Meanwhile, the Commission is assigned to conduct adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam).

Under the law of the Eighth Circuit where this case arose,[12] the Secretary establishes a prima facie case for the violation of an OSHA standard by showing: (1) "the cited standard applies

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[11] Section 1910.28(B)(3)(v)(a) requires employers to ensure employees are

> protected from falling through a hatchway and chutefloor hole by . . . [a] hinged floor-hole cover that meets the criteria in § 1910.29 and a fixed guardrail system that leaves only one exposed side. When the hole is not in use, the employer must ensure the cover is closed or a removable guardrail system is provided on the exposed sides[.]

[12] The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Marmaduke, Arkansas, in the Eighth Circuit. Respondent's principal place of business is in Lake Oswego, Oregon, in the Ninth Circuit. (See *J. Status Report and J. PreHr'g Statement* ¶¶ c.2). The Commission has held that where it is highly probable that a case

and that its requirements were not met"; (2) "employees were exposed to, or had access to, the violative condition"; and (3) "the employer knew or, through the exercise of reasonable diligence, could have known of this condition." *Jacobs Field Servs. N. Am., Inc. v. Scalia,* 960 F.3d 1027, 1033 (8th Cir. 2020) (quoting *Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002)). "Standards under the Act should be given a reasonable, commonsense interpretation." *Id*. (quoting *Donovan v. Anheuser-Busch, Inc*., 666 F.2d 315, 326 (8th Cir. 1981).

Item 1: Alleged Serious Violation of § 1910.28(b)(3)(i)

Item 1 alleges that Greenbrier employees "were performing touchup work on top of tanker cars. Employees were exposed to falls approximately 6 feet above the lower level without fall protection." Although the Secretary does not specify in the alleged violation description that he is citing Greenbrier for alleged exposure to falls to the interior of the railcars (through the entry hatch), and not to the exterior of the railcars, interior falls are the focus of the cited standard and is the issue the parties litigated. "The cited standard addresses the hazard of falling through any hole that is four feet or more above a lower level, which in this instance would be the open hatch located where employees work at the top." (*Sec'y's Br.,* p. 5.)

The cited standard provides: "The employer must ensure: Each employee is protected from falling through any hole (including skylights) that is 4 feet (1.2 m) or more above a lower level by one or more of" covers, guardrail systems, travel restraint systems, or personal fall arrest systems. Greenbrier stipulates it "did not provide the protections specified in 29 C.F.R. § 1910.28(b)(3)(i)." (*Resp't's Br.*, p. 1.) Neither does it dispute the elements of exposure and knowledge.[13] Greenbrier argues the cited standard does not apply to railcars or, if it does, the Secretary has failed to provide fair notice of its application to the regulated community.

IV. ANALYSIS

The cited standard is found in Subpart D, the "Walking-Working Surfaces" provisions of the general industry standards. Section 1910.21(a), the "Scope" provision, provides Subpart D

will be appealed to a particular circuit, it generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court applies the precedent of the Eighth Circuit in deciding the case where it is highly probable the case would be appealed.

[13] Under *Respondent's Issues of Law* in the parties' *J. Status Report and J. PreHr'g Statement,* Greenbrier lists "Whether the issued citation is properly classified as Serious?" (*Id.* at ¶ b.2.3). Greenbrier does not address the characterization of the cited item in its brief but states it "believed there was no risk of employees falling through the holes on top of the car because the holes were too small to fall through and, furthermore, the nozzles would prevent someone from sliding into them." (*Greenbrier's Brief,* p. 35.)

"applies to all general industry workplaces. It covers all walking-working surfaces unless specifically excluded by an individual section of this subpart." Section 1910.28, the "Duty to have fall protection and falling object protection" provision, "requires employers to provide protection for each employee exposed to fall and falling object hazards." 29 C.F.R. § 1910.28(a)(1).

Section 1910.21(b) defines a "walking-working surface" as "any horizontal or vertical surface on or through which an employee walks, works, or gains access to a work area or workplace location." It is undisputed Greenbrier's touchup employees gain access to their work areas by stepping onto the tops of railcars and then sitting on the surfaces of the railcars to perform touchup work. The tops of railcars are, therefore, walking-working surfaces. Section 1910.21(b) defines a "hole" as "a gap or open space in a floor, roof, horizontal walking-working surface, or similar surface that is at least 2 inches (5 cm) in its least dimension." Here, the openings at issue allow people to enter and exit the railcars. The openings are holes.

A. The Cited Standard Applies

Based on these definitions and the language of § 1910.28(b)(3)(i), the Secretary argues the standard manifestly applies to the cited conditions. Greenbrier contends the Court must consider supplementary documents issued by OSHA when determining the applicability of the cited standard. Greenbrier argue § 1910.28(b)(3)(i) does not apply to railcars based on the Secretary's continued unwillingness to revise Subpart D. "Protection against falls from railcars is not specifically addressed in Subpart D. A review of the lengthy regulatory history of Subpart D demonstrates that OSHA gave extensive consideration over several years to the potential inclusion of railcars and chose not to include them." (*Resp't's Br.,* p. 17.) Greenbrier contends the Court should look to the regulatory history of Subpart D to determine its applicability to the cited railcars. According to Greenbrier, "[i]t is well-established that government agency preambles and opinion letters should be considered in order to gain an understanding of regulatory intent, regardless of whether a regulation is ambiguous." (*Resp't's Br.*, pp. 17-18). The Court does not agree.

As the Supreme Court has admonished us, "the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Here, the language of § 1910.28(b)(3)(i) is unambiguous. Subpart D applies to walking-working surfaces. The definition of walking-working surfaces encompasses the tops of railcars, onto which employees step and sit to perform work. The cited standard requires

employers to provide covers, guardrail systems, travel restraint systems, or fall arrest systems to protect employees who have access to holes in walking-working surfaces that are 4 feet or more above lower surfaces. The entry hatches on the tops of the railcars are holes that are more than 4 feet above the interior floors of the railcars. None of these terms creates confusion, and the meaning of the cited standard is clear. Therefore, the Secretary has established § 1910.28(b)(3)(i) applies to the cited conditions.

B. Greenbrier Lacked Fair Notice of the Cited Standard's Applicability

As noted *supra*, Greenbrier argues even if the Court finds the cited standard applies, the Secretary has failed to provide the railcar industry with fair notice of the application of § 1910.28(b)(3)(i) to railcars since prior published statements by OSHA indicated that rolling stock was exempt from citation under the Subpart D standards. The Court concludes OSHA's prior published statements *are* relevant to Greenbrier's argument that it lacked fair notice.

1. The 1990 Proposed Rule

OSHA originally adopted a walking-working surface standard in 1971 as "part of the initial package of standards promulgated by OSHA in 1971 under section 6(a) of" the Act. 75 Fed. Reg. at 28863. In 1973, OSHA published a proposed revision of Subpart D, but withdrew it in 1976 because it was outdated. In 1990, OSHA proposed a new Subpart D that did not specifically address fall protection for railcars. It did, however, propose the following exemption at § 1910.21(a)(1):

> (a) *Scope and application*. This subpart covers all walking and working surfaces that are used by employees, except as follows:
> (1) This subpart does not apply to surfaces that are an integral part of self-propelled, motorized mobile equipment[.]

2. The Miles Memorandum

In 1996, John B. Miles, Jr., the Director of OSHA's Directorate of Enforcement Programs issued a memorandum regarding "Enforcement of Fall Protection on Moving Stock" to "clarify OSHA's enforcement policy relating to fall hazards from the top of 'rolling stock' such as rail tank or hopper cars and tank or hopper truck or trailers." (Ex. C-21, Bates p. 000154). The Miles Memorandum, which was corrected on February 6, 2009, clarifies that OSHA's enforcement

policy "is that falls from rolling stock [] will not be cited under Subparagraph D." (Ex. C-21, Bates p. 000155).[14]

3. The 2003 Notice of Reopening of the Rulemaking Record

In 2003, OSHA published a notice of reopening of the rulemaking record and public comment period for Subpart D. 68 Fed. Reg. 23528 (May 2, 2003). OSHA stated that it was seeking additional comments because the 1990 proposal had become outdated by industry practices and equipment design.

> OSHA is requesting additional comment on whether rolling stock and self-propelled, motorized mobile equipment should be covered or excluded from subpart D. . . . [R]olling stock includes covered and uncovered rail cars, hopper cars, tank cars, and trailers.
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> The preamble [to the 1990 proposed rule] also included examples of equipment that OSHA intended to exclude from coverage, but did not specify whether rolling stock were included in those examples (55 FR 13365). OSHA received comments saying that all rolling stock should be excluded from coverage (Docket S-041; Ex. 3-46). An OSHA memorandum issued to its Regional Administrators on October 18, 1996, interpreted the proposal as excluding rolling stock from subpart D (Docket S-029; Ex. 1-16-2). In anticipation of a final revised rule, the memorandum directed OSHA inspectors not to cite rolling stock under subpart D.

Id. at 23530.

4. The 2010 Notice of Proposed Rule

In 2010, OSHA issued a notice of proposed rulemaking for Subpart D where it defined rolling stock as "any locomotive, railcar, or vehicle operated exclusively on a rail or rails." 75 Fed. Reg. 28862 (May 24, 2010). Thus, the railcars at issue meet OSHA's definition of rolling stock. OSHA once again sought comments regarding the applicability of Subpart D to rolling stock.

> OSHA is requesting additional comment on whether specific regulations are needed to cover falls from rolling stock and commercial motor vehicles. Existing subpart D does not specifically address or exclude fall protection on rolling stock or motor vehicles from coverage. . . . OSHA is specifically seeking comment on whether it should include requirements specifying that when employees are exposed to falls from rolling stock and motor vehicles at heights greater than 4 feet, protective work practices, methods, or systems must be instituted. OSHA is also requesting comment on how it should define "rolling stock" and "motor vehicles," or if the terms as defined are sufficiently inclusive.

Id. at 28867.

[14] *See* https://www.osha.gov/laws-regs/standardinterpretations/1996-10-18 (Aug. 19, 2021).

Referring to the Miles Memorandum, OSHA conceded it "did not result in clear direction to the public or to OSHA's field staff. . . . [T]he understanding of the 1996 memorandum also varied among commenters." *Id.*

5. The 2016 Final Rule

In 2016, OSHA published its final rule. 81 Fed. Reg. 82494 (Nov. 18, 2016). After an extensive listing in the preamble of comments regarding the applicability of Subpart D to rolling stock (*Id.* at 82505-09), OSHA concluded it would again defer clarification of the issue.

> Since the Agency did not propose any specific fall protection requirements for rolling stock or motor vehicles, OSHA has not included any in this final rule. However, it will continue to consider the comments it has received, and in the future the Agency may determine whether it is appropriate to pursue any action on this issue.

Id. at 82509.

Fair Notice Analysis

In *Latite Roofing & Sheet Metal Co., Inc.,* 21 BNA OSHC 1282 (No. 02-0656, 2005), OSHA cited a roofing company for failing to provide fall protection to its employees. OSHA had previously cited the employer several times for the same conduct. Each time, the employer and OSHA had resolved the citations when the employer demonstrated the use of fall protection was infeasible, and it had developed an alternative fall protection plan in accordance with Subpart M.

> In developing the plan, Latite relied on a July 12, 1995, memorandum by then-Deputy Assistant Secretary of Labor James Stanley (the 'Stanley memorandum'), which indicated that contractors complying with Subpart M's provisions for fall protection plans would not always have to demonstrate infeasibility or greater hazard at each project site. This memorandum also stated that "proper notice" would be given to employers if OSHA came across or developed abatement methods that were "equal to or better than those set forth in the attached plans."

Id. at *2.

Despite the Stanley memorandum, OSHA went on to cite Latite several more times over the years for violating the fall protection standard. One of those citations resulted in a Commission trial where the judge affirmed the violation. The Commission reversed the judge's decision and held,

> Having considered the record as a whole, particularly the parties' fifteen-year history of inspections and citations involving residential fall protection, followed by settlements, along with possible confusion engendered by the Stanley memorandum, we conclude that Latite lacked fair notice that its conduct at the time

> of the subject citation did not comply with the standard. *See, e.g., Martin v. OSHRC (CF&I)*, 499 U.S. 144, 158 (1991) (Secretary's decision to use citation as initial means to announce interpretation may bear on adequacy of notice to regulated parties); *cf. Gen. Elec. Co. v. EPA ("GE")*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (even if agency's interpretation is reasonable, penalty cannot be sustained unless regulated party had fair notice of interpretation).

Id. at *3. The Commission based its conclusion in part on Latite's reliance on the Stanley memorandum.

> Latite could reasonably have interpreted the Stanley memorandum as meaning that it was not required to make a site-specific showing of infeasibility at all similar residential building sites, and that it would be notified before being cited if OSHA was planning to change its position and insist that Latite use a previously unemployed fall protection system. *See GE*, 53 F.3d at 1333-34 (unclear policy statement contributed to lack of fair notice).

Id. at *4. The Commission also considered the history of the standard's enforcement and the inconsistency of the Secretary's conduct in addressing the standard.

> Given the Secretary's lengthy and confusing course of conduct with Latite, we conclude Latite lacked notice at the time of the citation that it was under a duty to implement one or more of the fall protection systems the Secretary proposed, and therefore could no longer rely on its alternative plan. *See Diebold v. Marshall*, 585 F.2d 1327, 1336-37 (6th Cir. 1978) (looking at 'collection of several factors' including common practice and pattern of administrative enforcement; while employers are under duty of inquiry, duty is not triggered where employer looking at language of regulation or industry practice would believe it was exempt from standard's requirements). *See also GE*, 53 F.3d at 1332 (confusion and disagreement within agency is evidence that employer did not receive fair notice).

Id.

The Commission addressed the Miles Memorandum in *Erickson Air-Crane, Inc.*, No. 07-0645, 2012 WL 762001 (OSHRC March 2, 2012), with regard to a citation for a violation of the general duty clause. The Miles Memorandum states the Secretary may cite an employer for a fall hazard from railcars under the general duty clause "where feasible means exist to eliminate or materially reduce the hazard" from the tops of railcars (Ex. C-21, Bates p. 000155). The Secretary contended the Miles Memorandum supported citing Erickson for a general duty clause violation: "[T]he Secretary argue[d] that the Memorandum's reference to rolling stock 'positioned inside or contiguous to a building or other structure where installation of fall protection is feasible'—the one specific circumstance identified in the Memorandum where fall protection on rolling stock is

required—put Erickson on notice that it had to provide fall protection under the circumstances at issue." *Erickson,* 2012 WL 762001, at *4. The Commission disagreed:

> [T]he Memorandum did not provide such notice, particularly considering (1) its broad exemption of all rolling stock from the fall protection standards, limited only by the very specifically described circumstance regarding rolling stock located inside or next to a building or structure, which is inapplicable here, and (2) the indication that under the general duty clause, the agency only requires administrative measures that reduce fall exposure, which are clearly distinct from the fall protection methods sought here by the Secretary. In these circumstances, we find that Erickson did not have notice of any duty to use fall protection equipment or provide the related training with respect to its tanker truck. *See Miami Indus., Inc.*, 15 BNA OSHC at 1262-64, 1991 CCH OSHD at p. 39,739 (finding lack of notice where employer relied on OSHA's prior approval of abatement method).

Id. at *5.

Here, the Secretary interprets *Erickson* as supporting the applicability of § 1910.28(b)(3)(i) in this case, based on the *Erickson* Commission's statement that "the policy described in the Memorandum regarding the enforcement of subpart D, the PPE standard, and the general duty clause as applied to tanker trucks that are not adjacent to a building or structure is consistent—the use of fall protection equipment is not considered feasible and thus, not required under any one of these provisions." *Id.* at *4. Working backwards from the Commission's reasoning, the Secretary argues that since Greenbrier's touchup employees work "atop stock that is positioned inside of or contiguous to a building or other structure where the installation is feasible," then the cited standard applies (Ex. C-21, Bates p. 000155). This interpretation ignores the context of the quoted language. The Miles Memorandum provides that when rolling stock is in or contiguous to a structure where installation is feasible, the Secretary may cite the employer for a violation of § 1910.132(d), found in Subpart I (*Personal protective equipment*). The Miles Memorandum provides a blanket exemption from citations under Subpart D, where the standard at issue is found.

In another case, the Commission found the employer lacked fair notice where an OSHA "clarification letter" created more confusion than clarity.

> Our primary concern here is with the adequacy of the Secretary's notice to regulated parties. The interpretation of section 1910.212(b) that the Secretary advances in this case is inconsistent with a previous OSHA "clarification letter" dated November 2, 1978, which is still available on OSHA's website. In the letter, which Oberdorfer introduced into evidence at the hearing and cited in its post-hearing brief, OSHA's

> then Chief of Occupational Safety Programming states that "[m]achines that do not walk, move or present a tipping or falling-over hazard do not need to be anchored."
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> On review, the Secretary provides neither a response to Oberdorfer's notice argument regarding this letter nor any rationale for changing her interpretation. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (agency changing course must provide a reasoned analysis for the change). Under these circumstances, we cannot find that the Secretary's interpretation is reasonable or that Oberdorfer was afforded fair notice of the Secretary's interpretation that the standard applied to machines with pre-punched holes in the bases in the absence of evidence showing instability. *See Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (due process prevents deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires).

Oberdorfer Indus., Inc., 20 BNA OSHC 1321, 1330-31 (Nos. 97-0469 & 97-0470, 2003).

Here, as in *Oberdorfer*, the Secretary failed to offer a response to Greenbrier's notice argument, despite Greenbrier's pretrial statement that fair notice was one of only three issues in dispute. *See* J. Status Report and J. PreHr'g Statement, ¶ b.2.2 ("Whether the Secretary has afforded the regulated community fair notice of his position in this case that the cited regulation is applicable to the tank car referenced in the citation?"). The Secretary does not mention fair notice in its post-trial brief, and he provides no rationale for contravening the explicit instructions of the Miles Memorandum.

As with the Stanley memorandum, the Miles Memorandum served to muddle, rather than illuminate, the issue. Nonetheless, since 1996, the Secretary has signaled through the Miles Memorandum that OSHA's enforcement policy is that "falls from rolling stock [] will not be cited under Subparagraph D." Significantly, even though OSHA did not codify a rolling stock exclusion in the 2016 final rule, the Miles Memorandum continues to represent OSHA's current enforcement policy since it has not been countermanded by a subsequent enforcement policy and still appears on OSHA's web page under its "Standard Interpretations" tab. Under these circumstances, the Court concludes Greenbrier lacked fair notice that it was required to comply with § 1910.28(b)(3)(i) and therefore, Item 1 must be vacated. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Item 1 of the Citation is **VACATED**.

SO ORDERED.

/s/
JOHN B. GATTO, Judge

Dated: September 3, 2021
Atlanta, GA