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. EVERGREEN CONSTRUCTION COMPANY, Respondent.	OSHRC Docket No. 12-2385

ON BRIEFS:

Radha Vishnuvajjala, Attorney; Charles F. James, Counsel for Appellate Litigation; Ann S. Rosenthal, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Andrew N. Gross, General Counsel; HB NEXT Corporation, Lawrenceville, GA
For the Respondent

DECISION

Before: MACDOUGALL, Acting Chairman; and ATTWOOD, Commissioner.

BY THE COMMISSION:

Evergreen Construction Company was the general contractor for the construction of a Hyatt House hotel in Atlanta, Georgia. On June 12, 2012, the Occupational Safety and Health Administration inspected the multi-employer worksite and observed employees of subcontractor Nunez Construction working close to the perimeter edges of the hotel's fourth floor without fall protection. OSHA subsequently issued Evergreen a serious citation, alleging a violation of the construction fall protection standard, 29 C.F.R. § 1926.501(b)(1), based on the exposure of Nunez's employees.[1] The judge affirmed the citation, finding that Evergreen was the controlling

[1] The cited provision requires that "[e]ach employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." The citation alleged that "[o]n or about 6/12/2012, employees

employer at the worksite and that, although it lacked actual knowledge of the violative condition, it did have constructive knowledge.[2] *See Summit Contractors Inc.*, 22 BNA OSHC 1777, 1781 (No. 03-1622, 2009) ("controlling employer is one who 'has general supervisory authority over the worksite, including the power to correct safety and health violations or require others to correct them.' ") (quoting OSHA's Multi-Employer Citation Policy, OSHA Instruction CPL 02-00-124 § X.E.1 (Dec. 10, 1999)); *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015) (to establish knowledge, Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the hazardous condition), *aff'd*, 659 F. App'x 181 (5th Cir. 2016), *petition for cert. filed* (U.S. Jan. 25, 2017) (No. 16-950).

On review, Evergreen argues that the judge erred in finding it had constructive knowledge of Nunez's failure to use fall protection.[3] The two Commission members are divided on this issue. To resolve this impasse, the members agree to vacate the direction for review, thereby allowing the judge's decision to become the final appealable order of the Commission, with the precedential value of an unreviewed administrative law judge's decision. *See, e.g.*, *Action Elec. Co.*, 25 BNA OSHC 2120, 2121 (No. 12-1496, 2016), *appeal docketed*, No. 16-15792 (11th Cir. Sept. 1, 2016); *Cranesville Aggregate Cos.*, 25 BNA OSHC 2001, 2002 (No. 09-2011 & 09-2055, 2016) (consol.), *appeal docketed*, No. 16-2055 (2d Cir. June 17, 2016); *Texaco, Inc.*, 8 BNA OSHC 1758, 1760 (No. 77-3040 & 77-3542, 1980) (consol.); *Rust Eng'g Co.*, 11 BNA OSHC 2203, 2205 (No. 79-2090, 1984); *Safeway, Inc.*, 20 BNA OSHC 1021, 1023 (No. 99-0316, 2003), *aff'd*, 382 F.2d 1189 (10th Cir. 2004); *Timken Co.*, 20 BNA OSHC 1070, 1072 (No. 97-0970, 2003). *See also* 29 U.S.C. §§ 659(c), 660(a)-(b), 661(i).

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were exposed to fall hazards of 30 feet 8 inches to the ground below while working within 1 foot of the unprotected edge of the 4th floor with no fall protection."

[2] There was no dispute before the judge regarding the applicability, noncompliance, and exposure elements of the Secretary's prima facie case. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part,* 681 F.2d 169 (1st Cir. 1982) ("To prove a violation, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.").

[3] Evergreen does not challenge the judge's finding that it was a controlling employer, and the Secretary does not challenge the judge's finding that Evergreen lacked actual knowledge of the violative condition.

Accordingly, the direction for review is vacated. The separate opinions of the two participating Commission members follow.

SO ORDERED.

/s/
Heather L. MacDougall
Acting Chairman

/s/
Dated: April 26, 2017 Cynthia L. Attwood
Commission

Separate Opinion of Acting Chairman MacDougall

MACDOUGALL, Acting Chairman:

The only issue on review is whether the Secretary established that Evergreen Construction had constructive knowledge of a violative condition created by one of its subcontractors and to which only that subcontractor's employees were exposed.[1] The judge concluded that this element of the Secretary's burden of proof was met because: (1) reasonable diligence required Evergreen, as the worksite's "controlling employer," to inspect the work of Nunez Construction, the subcontractor in question, during a one to three-hour period at the beginning of the day on which OSHA inspected the worksite; and (2) Evergreen had an inadequate safety program with regard to enforcing Nunez's compliance with OSHA safety requirements.[2]

I would find that the judge erred on both counts. First, demanding a level of reasonable diligence from Evergreen equal to that which would be required if its own employees were exposed to the cited hazard is completely at odds with the Secretary's own principle that the diligence required of a controlling employer is less than that of an exposing employer. Second, I would find that the actions Evergreen took to enforce its own safety program with respect to another employer's safety compliance not only met but exceeded any responsibility it may have under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. Therefore, for the reasons

[1] None of the other elements of the Secretary's prima facie case are in dispute. *See Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part,* 681 F.2d 169 (1st Cir. 1982) ("To prove a violation, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.").

[2] On review, Evergreen does not dispute its status as a "controlling employer," so I would not disturb the judge's finding on that issue. However, I have previously expressed concerns about whether the Secretary has the authority to cite an employer for a violation when its own employees are not exposed to the hazard. In my view, the OSHA's Multi-Employer Citation Policy (MEP), OSHA Instruction CPL 02-00-124 (Dec. 10, 1999) is in tension with the OSH Act's statutory language. *Ryder Transp. Serv.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) (concurring, Commissioner MacDougall). *See IBP, Inc. v. Herman*, 144 F.3d 861, 865 (D.C. Cir. 1998) (expressing doubt about validity of MEP and noting tension between MEP and statute)*; see also Summit II*, 23 BNA OSHC 1196 (No. 05-0839, 2010) (dissenting, Commissioner Thompson), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011).

detailed below, I would find that Evergreen lacked constructive knowledge of Nunez's failure to use fall protection and the citation should be vacated.

Background

Evergreen was the general contractor for a project that involved the construction of a six-story building on three acres of land. As general contractor, Evergreen contracted with various subcontractors to perform work on the project, which led to as many as twenty subcontractors present at the worksite at one time.[3] Nunez was a masonry subcontractor that started work on the second floor of the building in early May 2012, and worked intermittently over the next month as floor slabs were put into place. Its work included constructing the walls for the building out of concrete block.

On June 12, 2012, OSHA compliance officer, Charles Johnson, arrived at the worksite around 10:00 a.m. He observed Nunez's employees building walls close to the unprotected edge of the building's fourth floor, which Evergreen does not dispute lacked exterior walls, guardrails, or safety nets to protect against falls. Plans for the project reflect that the distance from the fourth floor to the ground was 31 feet. After observing and photographing the fall hazards, the CO met with Donald DiRenno, Evergreen's site superintendent, in the company's onsite trailer and then accompanied him to the fourth floor where DiRenno confronted Adam Nunez, the subcontractor's owner, and said: "Didn't I tell you to get some fall protection on?"

As Evergreen's site superintendent, DiRenno served as the onsite construction supervisor and safety manager for the entire project. He typically walked the worksite "a couple of times in the morning and a couple of times in the afternoon and more if required" to check on the progress of the work, look for safety issues, and point out to subcontractors any safety violations he observed. When he saw a safety violation, he would stop the subcontractor employee involved, contact the worker's foreman or supervisor, and explain the issue and how to correct it. He testified that "[t]he work is stopped until the situation is rectified, depending on the severity. It could be anything from a ten-minute fix to several hours or days." Through his inspections, DiRenno found Nunez employees working without fall protection on several occasions. Each time he took corrective action: on two to three of these occasions, DiRenno provided fall protection equipment

[3] At the time of the OSHA inspection, approximately eight to ten subcontractors were present on the worksite.

(such as harnesses, rails, and lanyards) to Nunez employees, and at other times he sent Nunez employees home.

On June 11, 2012, the day before the OSHA inspection, DiRenno inspected the worksite twice and saw Nunez's employees working without fall protection both times, once in the morning and once in the afternoon. On both occasions, he directed them to use fall protection. The following day, from 7:00 a.m. until the CO arrived at the trailer around 11:00 a.m., DiRenno was in meetings with representatives of various subcontractors and others, including Adam Nunez, in the trailer's conference room; he had not yet inspected the worksite that morning. It is not clear from the record when Nunez actually began its work that day, but its employees typically worked a later schedule than other subcontractors on the project; Nunez typically arrived at the worksite between 8:00 and 9:00 a.m. and finished its day at 4:00 or 4:30 p.m., while other subcontractors typically worked from 7:00 a.m. until 3:30 p.m.

Discussion

I. Reasonable Diligence

To establish constructive knowledge, the Secretary must show that the employer, with the exercise of reasonable diligence, could have known of a hazardous condition. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). An employer has a duty "to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard." *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1051 (No. 91-3467, 1995) (citations omitted). Under the Secretary's own MEP, an employer's duty to exercise reasonable care where its own employees are not exposed to the hazard "is less than what is required of an employer with respect to protecting its own employees," such that a general contractor need not inspect the worksite as frequently as an employer whose own employees are exposed to the hazard. *See Summit Contractors Inc.*, 22 BNA OSHC 1777, 1781 (No. 03-1622, 2009) (citing OSHA's Multi-Employer Citation Policy, OSHA Instruction CPL 02-00-124 § X.E.2 (Dec. 10, 1999)).

Apparently ignoring this lessened duty, the Secretary maintains that DiRenno should have immediately inspected Nunez's fall protection compliance before its employees even began work on the morning of the OSHA inspection.[4] This would raise the controlling employer's duty to

[4] Contrary to my colleague's assertion that "[n]o inspection was necessary," the Secretary unequivocally states: "Reasonable diligence required that Evergreen *inspect* Nunez's fourth floor

exercise reasonable diligence to an unreasonable level. Discharging his responsibilities as Evergreen's onsite supervisor for a 3-acre project with as many as ten subcontractors present at the time in question, DiRenno inspected Nunez's work twice the day before OSHA arrived—once in the morning and once in the afternoon—and on both occasions, he directed the subcontractor to comply. In addition, DiRenno met with Adam Nunez at 7:00 a.m. the very next morning, one of several regular meetings at which safety issues were discussed. This means that DiRenno had already informed Nunez of its compliance obligations up to three times in less than twenty-four hours.[5]

In these circumstances, requiring DiRenno to set aside his other work commitments and obligations on the morning of the OSHA inspection to—within the one-to-three hour timeframe before OSHA arrived[6]—watch for the arrival of Nunez's employees and inspect the area where

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work area when Nunez began work in the morning of the day of the [OSHA] inspection." (Emphasis added). Further, as a controlling employer, reasonable diligence did not require Evergreen to verify—either through Nunez or an inspection—the conditions that existed on the morning of June 12, 2012, *before employees arrived and began working*.

[5] My colleague is dismissive of DiRenno's morning meeting with Nunez, claiming that there is no evidence of the June 12th meeting's contents. She concedes, however, that such meetings included the subcontractors who "need to have things brought to their attention." While neither Evergreen nor my decision "specifically" rely on this meeting, I would find that it is reasonable to infer that safety was among "the concerns" DiRenno addressed with Nunez that morning, given what he observed the day before. The Secretary, who carries the burden of proof, has not shown otherwise. In any event, I note that a scheduling meeting, which included subcontractors, was held on June 11th "stressing fall protection and safety on the project," so even if DiRenno's meeting on the morning of June 12th is discounted, Nunez was still informed of its fall protection obligation three times in twenty-four hours. My colleague engages in circular reasoning when she dismisses this meeting for purposes of Evergreen's exercise of reasonable diligence, but then credits it, with no evidence in the record that Nunez employees had begun work and thus had violated the cited standard that day, for "requir[ing] DiRenno to determine at his early morning meeting with Nunez whether the company had taken the steps necessary to comply with the standard."

[6] The Secretary contends that Nunez's noncompliance became evident the day before the OSHA inspection (thus, on June 11, 2012), and therefore, the violative condition existed for a long enough period of time that DiRenno had a reasonable opportunity to discover it. However, I would reject the Secretary's contention and find, like the judge on this issue, that the violative condition, as cited, existed only for a small window of time on June 12, 2012—specifically, the one-to-three hour window that covers the time between Nunez's arrival and the CO's. The Secretary's argument not only ignores the citation, as amended, which states that the violation existed "on or about June 12, 2012," but it also assumes that DiRenno's knowledge of Nunez's prior

they were working, yet again, is equivalent to requiring that Evergreen engage in constant monitoring. *Cf. LJC Dismantling Corp.*, 24 BNA OSHC 1478 (No. 08-1318, 2014) (Secretary failed to establish lack of reasonable diligence where employer whose own employees were exposed had inspected site multiple times a day and improperly planked scaffold existed for about two hours after beginning of work day); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1976) ("[A]s a practical matter, it is impossible for a particular employer … to constantly inspect the worksite to detect hazards created by others.") In fact, the Secretary and my colleague would have us hold Evergreen to an even higher standard of diligence than an employer whose own employees are exposed, as such employers have never been expected to continuously monitor their *own* employees for safety. *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2183 (No. 00-1268 & 00-1637, 2003) (consol.) (quoting *N. Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 109 (2d Cir. 1996)) ("Insisting that each employee be under continual supervisor surveillance is a patently unworkable burden on employers."). Indeed, the multi-employer cases relied upon by the Secretary have consistently held general contractors to a much lower standard of reasonable

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noncompliance is somehow relevant to determining what constituted reasonable diligence on the morning of June 12. My colleague makes this same assumption, citing a number of cases where an employer knew its own employees—in other words, cases not involving multi-employer liability—either routinely violated or followed safety rules. The few multi-employer liability cases relied upon by my colleague for this point involve general contractors who had *yet to discover* a subcontractor's noncompliance—and thus, had yet to take action—despite the violation existing in plain view and for a significant amount of time. In contrast, DiRenno had discovered Nunez's noncompliance twice the day before *and took action both times*. The next opportunity for DiRenno to inspect Nunez was the next day once Nunez's employees arrived at the worksite prior to the start of OSHA's inspection. The only issue, then, is whether diligence required DiRenno to inspect Nunez during that brief timeframe.

Equally flawed is the Secretary's attempt to rely on the fact that DiRenno's trailer window looked out on the fourth floor where Nunez was working—the idea presumably being, according to the Secretary, that all DiRenno had to do was look out the window to discharge his duty to inspect. My colleague makes a similar argument, noting that the "lack of anchorages … was in plain view" and that DiRenno "could simply have asked Adam Nunez to show him the guardrails or anchorages and other necessary equipment he planned to use." This claim again assumes that the Secretary has defined reasonable diligence here in terms of something less than an inspection. Moreover, both arguments assume that determining what constitutes reasonable diligence in the first place includes consideration of how "easy" it is discharge your obligation. The Commission has never defined reasonable diligence in such terms. The question is simply whether reasonable diligence *required* the cited employer to discover the violative condition—the ease with which that discovery could ultimately have been made is irrelevant.

diligence, as befits their secondary role. *See McDevitt Street Bovis Inc.*, 19 BNA OSHC 1108, 1110 (No. 97-1918, 2000) (where violative condition was in plain view and existed for "significant period of time," general contractor could have known of its existence through exercise of reasonable diligence) (citing *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994) (same)). Thus, Commission precedent simply does not support the Secretary's and my colleague's attempt here to impose an impossibly high standard of diligence on a "controlling employer."

Nor is there precedent requiring a general contractor to inspect a subcontractor's compliance with the frequency the Secretary claims reasonable diligence demanded here. Evergreen went beyond any duty it had to Nunez's employees given DiRenno's multiple inspections of the worksite each day. In fact, DiRenno's practice of inspecting the worksite twice in the morning and twice in the afternoon is commendable. It is counterproductive for the Secretary to punish Evergreen for these efforts; essentially, the Secretary is claiming that DiRenno's frequent inspections and frequent admonitions to Nunez to comply with safety requirements *increased* Evergreen's obligation to inspect. This logic is punitive towards general contractors that have an active, onsite safety presence. *Cf. David Weekley Homes*, 19 BNA OSHC 1116, 1119 (No. 96-0898, 2000) (vacating citation where general contractor had limited onsite presence and Secretary conceded that general contractor had discretion over how frequently to inspect). Perhaps, if the Commission were to adopt the Secretary's theory in this case, a general contractor would be better off not having an onsite supervisor in charge of safety inspecting the worksite as frequently as DiRenno did, lest the supervisor discover a subcontractor out of compliance and actually take action, as DiRenno did. As the Secretary and my colleague would have it, by discovering and addressing noncompliance, a general contractor's obligation to monitor and inspect is not lauded; it inexplicably grows. This position also ignores the reality of the work obligations and time constraints placed on a general contractor's onsite supervisor, particularly one as engaged with the project's numerous subcontractors as DiRenno, and on a worksite as large and active as this one.

For all of these reasons, I would find that Evergreen and its supervisor, DiRenno, exercised reasonable diligence as a "controlling employer" on a multi-employer worksite and therefore, the Secretary failed to establish that the company had constructive knowledge on these grounds.

II. Evergreen's Safety Program

I would also reject the Secretary's alternative theory that Evergreen had constructive knowledge based on its alleged failure to implement and enforce an effective safety program for Nunez's employees. As with reasonable diligence, the Secretary seeks to hold Evergreen responsible for Nunez's noncompliance as if Evergreen were the employer of Nunez's employees. According to the Secretary, Evergreen should have applied a progressive disciplinary policy to Nunez's employees. However, he cites no relevant precedent as support for this view, which is unsurprising because the Commission has never held in any multi-employer case that an employer must progressively discipline or otherwise implement an effective safety program with respect to another employer's employees.[7] *Cf. Summit Contractors Inc.*, 23 BNA OSHC 1196, 1207 (No. 05-0839, 2010) (examining general contractor's failure to have work rules for or to train its *own* supervisors and employees), *aff'd*, 442 F. App'x. 570 (D.C. Cir. 2011).

It is undisputed that Evergreen's program—which the judge deemed "commendable"—included having a written safety plan in place at the worksite, conducting multiple daily safety inspections, training its own employees in safety, holding safety meetings with subcontractors, and pointing out safety issues to both its own employees and subcontractors' employees. The judge nonetheless found that Evergreen's program was deficient as it related to Nunez's employees because DiRenno's efforts to secure the subcontractor's compliance were not consistently successful. Both the judge and the Secretary have conveniently ignored that it was Nunez who was responsible for obtaining its own employees' compliance—not Evergreen.[8] Nunez's failure to comply is a reflection of Nunez's inadequate safety program, not Evergreen's. In my view,

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[7] The Secretary cites a single case in support of his argument. *ComTran Grp. Inc. v. U.S. Dept. of Labor*, 722 F.3d 1304, 1308 (11th Cir. 2013) ("[T]he Secretary can show knowledge based upon the employer's failure to implement an adequate safety program[.]"). However, *ComTran* was not a multi-employer liability case and the primary issue before the Eleventh Circuit—whether the Secretary has to show the foreseeability of a supervisor's misconduct before the supervisor's knowledge of that misconduct can be imputed to the employer—is clearly not the issue before the Commission now. *ComTran* says nothing about whether the adequacy of a general contractor's safety program depends on whether it can always obtain a subcontractor's compliance or whether it administers progressive discipline to subcontractors.

[8] Nunez's subcontract with Evergreen acknowledges this responsibility and states that "[t]he subcontractor shall maintain its own safety program which shall in all cases meet all applicable federal, state and/or local safety-related laws and regulations."

Evergreen exceeded its responsibility as a general contractor on a multi-employer worksite. Not only did it inspect and point out safety violations when they were observed, Evergreen sometimes went so far as to provide Nunez with fall protection equipment, despite the fact that Nunez was contractually obligated to provide its own fall protection, and at times sent Nunez employees off the worksite for the lack of fall protection.[9] In short, Evergreen utilized various enforcement methods with Nunez, who apparently complied on at least some occasions; the Secretary has not shown that Evergreen's response to Nunez's noncompliance was insufficient.[10] *See David Weekley Homes*, 19 BNA OSHC at 1117-18 (holding that Secretary failed to show what additional action general contractor should have taken when on prior occasions, subcontractors had complied with requests for corrective action).

Before the judge, the Secretary relied on the project's Site Specific Safety Plan (SSSP)—which addressed safety issues relevant to the worksite and was distributed to all subcontractors—to argue that Evergreen should have followed its program's progressive disciplinary policy with regard to Nunez. On review, the Secretary no longer explicitly relies on this document. In any event, I would find that the judge erred in finding that the SSSP's progressive disciplinary policy applied to Nunez. The SSSP neither commits, let alone obligates, Evergreen to administer progressive discipline to Nunez's employees. One section states that "[n]on-compliance with [SSSP] will result in disciplinary action provided for in the company discipline program" but it does not specify which company's plan is being referred to——Evergreen's or the relevant subcontractor's plan. In contrast, Appendix D to the SSSP, which is entitled "Subcontractor Safety Program Acknowledgement Form," contains the following statement: "I understand that any violations of the safety rules and/or regulations are grounds for removal from jobsite."[11] This

[9] The Secretary's argument and the judge's finding that progressive discipline, including verbal and written warnings, should have been used prior to Evergreen's removal of a subcontractor's employees who violate safety rules seems to undermine the efforts of a controlling employer to set a zero-tolerance policy for safety violations on its projects.

[10] Evergreen terminated its contract with Nunez in August 2012, and the Secretary has not argued that Evergreen should have terminated the contract sooner.

[11] Although my colleague suggests that Evergreen violated its own safety policy by verbally reprimanding Nunez employees on June 11, rather than removing them from the worksite as DiRenno had done on prior occasions, Evergreen was under no obligation to do so in every instance. In my view, what matters is that Evergreen took appropriate action and in all instances, that is exactly what DiRenno did.

form explicitly states that it applies to subcontractors and contains a place for a subcontractor's competent person to sign an acknowledgement that the subcontractor understands and agrees to fulfill certain duties; the discipline outlined in this form is what Evergreen voluntarily applied to subcontractors, and DiRenno clearly followed it whenever he sent Nunez employees home upon discovering fall protection violations.[12]

In addition to consistently taking action each time it discovered Nunez working without fall protection, Evergreen also took several steps to remind Nunez of its obligation to work safely. These steps included offering training to subcontractors at the weekly safety meetings it held on the project and holding regular—typically daily—meetings with the foremen of Evergreen's subcontractors, reminding them about safety. Moreover, an email sent by Evergreen's assistant project manager to DiRenno, Evergreen's project manager, and all of the project's subcontractors (including Nunez) on the afternoon of June 11, shows that it was not just DiRenno who reminded subcontractors about fall protection:

> As discussed during today's schedule meeting, any person working outside the guard rails on the upper floors MUST BE TIED OFF with the proper fall protection

[12] Thus, I would reject the Secretary's claim that Evergreen's lack of documentation regarding safety inspections undermined the numerous efforts it made to implement an effective safety program at this project. While DiRenno conceded that he did not fill out a weekly safety inspection checklist for any hazardous condition involving a subcontractor as required by Evergreen's safety manual, document weekly meetings and tool box meetings with subcontractors, fill out the hazard notifications for Nunez or any other subcontractors at the worksite, or keep any meeting records, this lack of additional paperwork does not diminish DiRenno's unrebutted testimony that he notified subcontractors of hazards during his frequent inspections and held weekly meetings, tool box meetings, and sometimes daily meetings with subcontractors. I would give far more weight to his actions, not the lack of related paperwork, in finding that Evergreen set a high standard for safety on this project. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 1287 (No. 91-862, 1993) ("In evaluating the adequacy of a safety program, the substance of the program is determinative rather than its formal aspects.").

Equally lacking merit is the Secretary's reliance on seven written warnings issued by Evergreen between September 27, 2011 to December 16, 2011, to subcontractor employees at other, unrelated projects as evidence of Evergreen's alleged safety program failures here. The SSSPs for the other projects are not in the record, so I would not presume they contain identical terms as the one for the Hyatt House project. Further, the record does not show that DiRenno issued or was aware of any of the warnings at those other sites or that any such warnings were or should have been issued to subcontractor employees on this project. Moreover, as noted above, there is no precedent establishing a requirement that a "controlling employer" apply a progressive disciplinary policy to its subcontractor's employees, so even if Evergreen had such a practice at other sites, that does not create an obligation for it to do so here.

> gear. We have provided straps at all CMU walls for body harnesses to attach. Please make sure workers are attached to these straps and not the metal cables. Failure to properly tie off will result in workers being sent home from the jobsite.

For all of these reasons, I would find that Evergreen had a commendable safety program and while the company was under no obligation to apply its progressive disciplinary policy to Nunez, it made reasonable efforts at this worksite to enforce safety compliance by all of its subcontractors, including Nunez. Therefore, the Secretary failed to establish that the company had constructive knowledge on these grounds. Accordingly, I would vacate the citation.

/s/

Dated: April 26, 2017

Heather L. MacDougall
Acting Chairman

Separate Opinion of Commissioner Attwood

ATTWOOD, Commissioner:

This case presents only one issue—whether Evergreen Construction, the general contractor and "controlling employer" at a hotel construction project in Atlanta, Georgia, had knowledge of its subcontractor's failure to provide any form of fall protection to its workers as they constructed walls in plain view at the perimeter edges of the fourth floor of the building.[16] The judge found that, although Evergreen did not have actual knowledge of the violative condition, it did have constructive knowledge because it failed to exercise reasonable diligence to detect these conditions, and because Evergreen failed to enforce its safety program.

In my view, Evergreen had constructive knowledge because its superintendent knew that Nunez Construction had violated the fall protection standard on the morning and again on the afternoon of the day before OSHA inspected the worksite, yet did not exercise reasonable diligence to prevent the same violation from occurring prior to OSHA's inspection of the worksite the next day.[17]

Background

Evergreen was the general contractor for a project to construct a six-story hotel on a three acre plot of land in Atlanta, Georgia. In early May 2012, Evergreen hired Nunez to construct the interior walls of the building, which would be composed of concrete blocks. On the morning of June 12, 2012, on the fourth floor (at that time the top) of the building, Nunez was engaged in

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[16] There was no dispute before the judge regarding the applicability, noncompliance, and exposure elements of the Secretary's prima facie case. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part,* 681 F.2d 169 (1st Cir. 1982) ("To prove a violation, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.").

[17] Because I would find constructive knowledge based on Evergreen's lack of reasonable diligence to prevent the violation, I would not address the adequacy of Evergreen's safety program. I note, however, that there is no dispute that on June 11, the day before the inspection, DiRenno twice discovered Nunez in violation of the fall protection standard, yet failed to follow its own alleged safety practice and remove Nunez from the worksite.

obvious, widespread, and deliberate violations of the OSHA fall protection standard.[18] So obvious, in fact, that OSHA received an anonymous phone call about the violations from someone who was "driving north on [Interstate] 75," which bordered the worksite. When Charles Johnson, the responding OSHA compliance officer, arrived at the site at around 10:00 a.m., he observed numerous persons working without fall protection "on every corner" and "on every side" of the L-shaped building's fourth floor, which did not have exterior walls, guard rails, or safety nets to protect against falls.[19] The workers were in plain view from both Interstate 75 and from Evergreen's onsite trailer, which was located approximately ten to twenty-five feet from one side of the building.

Johnson conducted an opening conference in the onsite trailer with Evergreen's superintendent and onsite safety manager, Donald DiRenno. During their discussion, Johnson pointed out of DiRenno's office window at some of the exposed workers laying block at the edge of the fourth floor. DiRenno identified the workers as employees of Nunez. Following the conference, DiRenno accompanied Johnson to the building's fourth floor, where they observed numerous Nunez employees and Adam Nunez, the company's owner, working near the edge of the floor without any of the required fall protection equipment[20]—the cited standard requires guardrails, safety nets, or personal fall protection (harnesses, lanyards, and anchorage points), none of which were present.[21] As a result of this inspection, OSHA cited Evergreen pursuant to its

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[18] The fourth floor was approximately 30 feet above the ground. The walls Nunez was constructing on June 11 and 12 ran perpendicular to, and intersected with, the floor's perimeter.

[19] Because the floor was not equipped with guardrails or safety nets, each exposed Nunez employee was required to be protected by a personal fall arrest system ("personal fall protection"). See n. 6, *infra.* A photograph of one area of the building shows more than ten workers and Adam Nunez working next to the edge of the fourth floor without personal fall protection. Other unprotected workers were photographed on other sides of the building.

[20] Indeed, Johnson testified that he was told by Nunez employees that they had been working on the fourth floor for three days, and "they had never installed fall protection."

[21] Evergreen was cited for a violation of 29 C.F.R. § 1926.501(b)(1), which requires that "[e]ach employee on a walking/working surface . . . with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." A "personal fall arrest system" is "a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a . . . body harness and may include a lanyard, deceleration device, lifeline, or suitable combination of these." 29 C.F.R § 1926.500(b). An "anchorage," sometimes referred to as a "tie-

Multi-Employer Worksite Policy on the basis that Evergreen, as the "controlling employer," knew or with the exercise of reasonable diligence could have known of Nunez's violation of the fall protection standard.[22]

At the hearing, DiRenno testified that Nunez had a history of failing to comply with the fall protection standard, as well as other safety requirements, such as wearing hard hats and work boots. Indeed, he agreed that he was "aware that there was an issue with Nunez Construction's fall protection." He stated that Nunez was not very reliable regarding "[m]anpower, safety, showing up to the job at the proper time; pretty much everything in general," and that he met with Nunez about those problems "[d]aily. Almost every day." Those meetings usually occurred between 7:00 and 8:30 in the morning. DiRenno asserted that when he found Nunez not complying with the fall protection standard, he sent the workers off the site: "Fall protection violations, I sent them home. I stopped the work, brought them all down to the ground, lectured them and sent them home"—the "work is stopped until the situation is rectified."[23] However, although DiRenno testified that he discovered Nunez employees working without fall protection twice on June 11, the day before the OSHA inspection, DiRenno simply told Nunez to use fall protection both times. It is indisputable that Nunez failed to comply after either request, because, when compliance officer Johnson inspected the fourth floor the next day, no anchorages had yet been installed, which meant that none of the other components of a personal fall arrest system could have been used either.

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off," is "a secure point of attachment for lifelines, lanyards or deceleration devices." *Id.* Anchorages must be "capable of supporting at least 5,000 pounds . . . per employee attached . . . ." 29 C.F.R. § 1926.502(d)(15).

Nunez was also cited for a violation of 29 C.F.R. § 1926.501(b), as well as a violation of 29 C.F.R. § 1926.451(g) (requiring fall protection on scaffolds). OSHA records indicate that Nunez neither contested the citations nor paid the assessed penalties. *See* OSHA **Inspection No. 633338.015 - Nunez Construction LLC, dated 6/12/2012,** https://www.osha.gov/pls/imis/establishment.inspection_detail?id=633338.015 (last visited 03/28/2017).

[22] OSHA's Multi-Employer Citation Policy, OSHA Instruction CPL 02-00-124 (Dec. 10, 1999) (CPL), sets out OSHA's policy for issuing citations for violations on multi-employer worksites. The policy "neither imposes new duties on employers nor detracts from their existing duties under the OSH Act." *Id.* at § IX.B. The policy contains definitions and examples of "controlling employer," "creating employer," "exposing employer," and "correcting employer." CPL at § X.

[23] DiRenno testified that on two or three occasions he provided one or two Nunez workers with lanyards and harnesses instead of sending them off the site.

DiRenno testified that from 7:00 to 8:00 a.m. on June 12, the day of the inspection, he met in his office with Nunez and "some other people on the job." DiRenno did not explain the purpose or contents of that particular meeting, but testified that he had "daily meetings with subcontractors every morning in my office, the ones that I see that need to have things brought to their attention." DiRenno then held a meeting in the trailer's conference room with Evergreen's electrical contractor and other Evergreen officials. At some point while DiRenno was in that meeting, Nunez began work on the fourth floor, without installing guardrails, anchorages, or equipping its employees with lanyards, lifelines, and body harnesses. DiRenno was still in the meeting when OSHA's Johnson presented himself.

Before the judge, the Secretary argued that Evergreen had both actual and constructive knowledge of the violation, based on DiRenno's knowledge of Nunez's failure to provide fall protection twice on June 11, and his failure to inspect the worksite at the start of work on June 12. The Secretary also argued that Evergreen's failure to effectively enforce its safety program required a finding of constructive knowledge. The judge rejected the Secretary's claim that Evergreen had actual knowledge of the violation on the day of OSHA's inspection.[24] However, she found constructive knowledge: "if Evergreen had exercised reasonable diligence and inspected the area of the worksite where Nunez Construction was working when they began work

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[24] In finding that Evergreen lacked actual knowledge, the judge stated:

> If the Citation had alleged violations for any of the days referred to by DiRenno and [Evergreen senior project manager] Goodwin, actual knowledge could be established based on their testimony. The Citation issued in this matter, however, alleges the violation occurred only on June 12, 2012, the day of the inspection. DiRenno's and Goodwin's knowledge do not establish actual knowledge on the date cited.

The citation, as amended, actually states that the violation occurred "on *or about* June 12, 2012," not "only on June 12, 2012" as the judge found. The Secretary, however, does not challenge this aspect of the judge's decision, only arguing that Evergreen had constructive knowledge of the violation. I would note, however, that contrary to my colleague's claim that the Commission is somehow constrained from even considering the events of June 11, the citation's language, "on or about," means "approximately; at or around the time specified." *See Black's Law Dictionary* 1198 (9th ed. 2009). In addition, even if the citation had omitted this language, record evidence of events the day before the cited condition that bear upon the extent of Evergreen's duty to exercise reasonable diligence on June 12 can properly be considered. *See Caterpillar*, 17 BNA OSHC 1731, 1732-33 (No. 93-373, 1996) (considering events three years prior to time of cited violation), *aff'd*, 122 F.3d 437 (7th Cir. 1997).

on the jobsite on the day of the inspection, it would have discovered the employees were working without fall protection."[25] As I discuss below, I would agree with this part of the judge's constructive knowledge finding.

Discussion

A long line of cases, commencing with *Grossman Steel*, establish the basic principle that a controlling employer on a multi-employer worksite is responsible for other employers' violations that it "could reasonably have been expected to prevent or abate by reason of its supervisory capacity."[26] *Grossman Steel & Aluminum*, 4 BNA OSHC 1185, 1188 (No. 12775, 1975); *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) (stating a "general contractor [is] responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity"); *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994) (controlling employer "is responsible for violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite."); *Blount Intl. Ltd.*, 15 BNA OSHC 1897, 1899 (No. 89-1394, 1992); *Red Lobster Inns of America, Inc.*, 8 BNA OSHC 1762, 1763 (No. 76-4754, 1980); *Summit Contractors, Inc., 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010) (same), aff'd*, 442 F. App'x 570 (D.C. Cir. 2011). The general structure of the knowledge inquiry in a case resting on multi-employer liability is identical to that of the typical case, in which the employer is being cited for a violation it commits with respect to its own employees. Thus, in all cases the Secretary must prove that the employer had actual or constructive knowledge of the violation. And in all cases constructive knowledge is established when an employer "with the exercise of reasonable diligence could have known about the existence of [the violation]." *Centex-Rooney*, 16 BNA OSHC at 2130 (controlling employer); *LJC Dismantling Corp.*, 24 BNA OSHC 1478, 1480-83 (No. 08-1318, 2014) (exposing employer). Reasonable diligence typically "requires the

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[25] The judge also found that constructive knowledge had been established based on Evergreen's failure to effectively enforce its safety program. As stated above, I would find it unnecessary to address this aspect of the judge's decision because constructive knowledge was clearly established by Evergreen's failure to exercise reasonable diligence to prevent the violation.

[26] Evergreen does not contest that it had the authority to obtain abatement of this violation. Indeed, its contract with Nunez sets out Evergreen's right to both issue and enforce safety directives, and specifically states that Evergreen had the right "to take whatever steps it deem[ed] necessary to address [safety] issue[s]."

formulation and implementation of adequate work rules and training programs to ensure that work is safe, as well as adequate supervision of employees. . . . [It] also requires an employer to inspect the work area, anticipate hazards to which employees may be exposed and take measures to prevent the occurrence of violations." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

The Commission and OSHA, however, have recognized that "the extent of the measures that a controlling employer must implement to satisfy [its duty of reasonable care] 'is less than what is required of an employer with respect to protecting its own employees.' " *Summit Contractors*, 22 BNA OSHC at 1781 (No. 03-1622, 2009) (quoting OSHA's Multi-Employer Citation Policy, OSHA Instruction CPL 02-00-124 § X.D.2. (Dec. 10, 1999)). As the CPL explains, "[t]his means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired." CPL at § X.D.2.

Evergreen relies on a controlling employer's lesser duty of reasonable care to argue that it was reasonably diligent on the morning of the inspection and "could not reasonably have known of [Nunez's] fall protection hazard." To support this argument, Evergreen points to its general safety practices at the worksite, claiming that it "inspected the job site continually each day throughout the morning and afternoon"; it "took active safety enforcement steps each time [it] observed safety violations"; and it would "stop the work," and the work would remain stopped "until the situation is rectified." Evergreen also claims that DiRenno was particularly attentive to Nunez because "Nunez did not always comply with fall protection requirements," and highlights the significance of the two fall protection incidents on June 11. Evergreen then asserts that in "all of the noted instances" DiRenno took "appropriate and direct enforcement action," which the company claims on some occasions included providing harnesses, rails, or lanyards to Nunez or disciplining Nunez workers "by dismissal from the jobsite, not to return without the proper equipment."[27] Evergreen argues that its general attention to safety on the worksite and its particular attention to Nunez constitutes reasonable diligence; therefore, reasonable diligence did not require that it inspect Nunez's work on the morning of June 12 prior to OSHA's arrival.

[27] DiRenno did not take either of these actions when he discovered the violations on June 11.

The Secretary challenges these claims, and argues that, given Evergreen's knowledge that Nunez was not complying with the fall protection standard on two occasions the day before the inspection, and Nunez's history of noncompliance with the fall protection standard over the six weeks prior to the inspection, reasonable diligence required Evergreen to determine whether Nunez had come into compliance when work began the following morning. Accordingly, the Secretary argues that Evergreen's failure to take action in this regard requires a finding of constructive knowledge.

Based on my analysis of the events of June 11 and 12, I would find that reasonable diligence required DiRenno to determine Nunez's compliance status at the beginning of the work day on June 12. DiRenno told compliance officer Johnson that, following his detection of Nunez's fall protection violation on the morning of June 11, and again, after he found Nunez in violation that afternoon, he had told Nunez that "they needed fall protection on the fourth floor." However, when Johnson arrived at the worksite the next day, Nunez had still not installed guardrails or anchorages, and at least a dozen workers including Nunez himself were not wearing body harnesses. Without anchorages from which to tie off, the remaining components of a personal fall protection system are useless. Thus, it is undeniable that Nunez had made no effort to comply with the fall protection standard on June 11 or prior to OSHA's inspection on June 12. And, because DiRenno found Nunez out of compliance *twice* on June 11, he obviously knew by the second incident that Nunez had still not followed his direction to comply, which he had given that same morning.

The following morning—the day of the OSHA inspection—DiRenno met with Nunez before the work began. Evergreen specifically characterizes this meeting as one to discuss Nunez's safety issues.[28] Yet, in spite of this meeting, Nunez and his crew were working on the fourth floor in plain view without anchorages, lanyards, or harnesses when compliance officer Johnson arrived at the site two to three hours later. This should not have surprised DiRenno. Given Nunez's repeated flouting of the fall protection standard the day before—and DiRenno's knowledge of it—DiRenno and Evergreen should have known that the violative condition was likely to continue to

[28] My colleague relies on this morning meeting as well, noting that, together with the two incidents of the previous day, "DiRenno had already informed Nunez of its compliance obligations up to three times in less than twenty four hours." As I have noted, there is no evidence as to the contents of that meeting.

exist on the morning of June 12. *Cf. Brooks Well Serv*., 20 BNA OSHC 1286, 1291 (No. 99-0849, 2003) ("Once a condition has been shown to exist, it is presumed to continue unless there is evidence to the contrary.") (citing *Central Pac. Ry. v. Alameda County*, 248 U.S. 463, 468 (1932)); *Hermitage Concrete Pipe Co.*, 10 BNA OSHC 1517, 1520 (No. 4678, 1982) (realistic estimate of probabilities suggests workplace conditions tend to remain the same). Under these circumstances, reasonable diligence required DiRenno to determine at his early morning meeting with Nunez whether the company had taken the steps necessary to comply with the standard—either installing guardrails, or installing anchorages and obtaining other personal fall protection equipment.[29] *N&N Contractors,* 18 BNA OSHC at 2121 (stating that reasonable diligence "also requires an employer to . . . take measures to prevent the occurrence of violations"); *Centex-Rooney*, 16 BNA OSHC at 2130 (No. 92-0851, 1994) (A controlling employer "is responsible for violations of other employers where it could reasonably be expected *to prevent* or detect and abate the violations due

[29] My colleague criticizes the Secretary's argument because it "assumes that DiRenno's knowledge of Nunez's prior non-compliance is somehow relevant to determining what constituted reasonable diligence on the morning of June 12." Commission precedent establishes that an employer's knowledge of past behavior is not just relevant, but often dispositive when determining whether an employer had constructive knowledge. See *N&N Contractors.,*18 BNA OSHC at 2123-24 (finding constructive knowledge where employer knew that employees routinely violated its fall protection work rule); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2070 (No. 96-1719, 2000) (relying on evidence of previous compliance with safety rules to find "no basis . . . to believe Kerns should have recognized that more intensive supervision was necessary to prevent . . . violations."); *LJC Dismantling,* 24 BNA OSHC at 1481 (relying on lack of evidence employee had previously violated safety requirement to find no constructive knowledge); *Stahl Roofing, Inc*., 19 BNA OSHC 2179 (Nos. 00-1268 and 00-1637, 2003) (no constructive knowledge where employees involved had good safety records and had not previously been found in violation of Stahl's safety rules). And *McDevitt Street Bovis* and *Centex-Rooney*, cases cited with approval by my colleague, rely on evidence that violations existed for a significant period of time to find constructive knowledge. *McDevitt Street Bovis*, 19 BNA OSHC at 1110 (violative scaffold in plain view and erected for significant period of time); *Centex-Rooney*, 16 BNA OSHC at 2130 (conditions in plain view and existed for significant period of time). *See R.P. Carbone v. Occupational Safety & Health Review Comm'n*, 166 F.3d 815, 819-20 (6th Cir. 1998) (general contractor had knowledge of subcontractor's lack of fall protection where condition was in plain view and lasted for two weeks).

If my colleague's point is that DiRenno's repeated (and ignored) direction on June 11 that Nunez comply with the fall protection standard somehow cleared the slate, such that DiRenno's obligation on June 12 was no greater than it would have been had he not caught Nunez out of compliance twice on June 11, for the reasons discussed above, I disagree.

to its supervisory authority and control over the worksite.") (emphasis added). In my view, DiRenno's inexplicable failure to do so establishes Evergreen's lack of reasonable diligence.[30]

This finding does not amount to holding Evergreen to the same standard of diligence as is required of an exposing employer. Had it not been for Nunez's repeated failures to comply with the fall protection standard over the few weeks that it had been working at the site, and its two failures to comply on the day before the inspection, DiRenno's safety practices—inspecting the worksite several times a day and ordering correction when he found safety violations—would have likely discharged Evergreen's duty of reasonable care. However, given what DiRenno actually knew about conditions on the fourth floor less than 24 hours earlier—that he had ordered Nunez once in the morning to get fall protection, yet found the company out of compliance a second time in the afternoon—reasonable diligence required DiRenno to at least determine whether Nunez had taken the actions necessary to comply the following morning. No inspection was necessary—DiRenno could have determined when he met with Nunez in his office that morning whether Nunez had in fact taken such actions.[31] Thus, my colleague's claim that this view would require Evergreen to engage in "constant monitoring" is misplaced.

In *Grossman Steel*, the Commission stated the rationale for holding a general contractor responsible for taking reasonable care that its subcontractors are complying with health and safety standards:

> [T]he general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which affect the entire site. The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. It is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected.

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[30] A finding of lack of reasonable diligence is also consistent with compliance officer Johnson's testimony that Nunez workers told him they had been working on the fourth floor for three days without fall protection. Without the installation of anchorages, it is clear that no personal fall protection could have been used during the entire time Nunez was working on that floor.

[31] Even if an inspection was somehow required, the lack of anchorages (or any other means of complying with the standard) was in plain view. *R.P. Carbone Const.,* 166 F.3d at 820 (general contractor liable for subcontractor's lack of fall protection because the "violations occurred in plain view and could be seen from all around the worksite"). DiRenno need not have waited until the arrival of the Nunez employees to discover that they had no means to comply with the fall protection standard. He could simply have asked Adam Nunez to show him the guardrails or anchorages and other necessary equipment he planned to use.

Grossman Steel, 4 BNA OSHC at 1188. *See Marshall v. Knutson Const. Co.*, 566 F.2d 596, 599 (8th Cir. 1977) (same). Here, Evergreen was "well situated to obtain abatement" of Nunez's flagrant fall protection violations. "Reasonable diligence implies effort, attention, and action . . . ." *N&N Contractors*, 18 BNA OSHC at 2124. In my view, Evergreen did not meet this standard.

Therefore, I would affirm the judge's decision and find that Evergreen had constructive knowledge because it failed to exercise reasonable diligence to detect and prevent the violation.

/s/
Cynthia L. Attwood
Commissioner

Dated: April 26, 2017

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

Secretary of Labor, Complainant, v. Evergreen Construction Company, Respondent.	OSHRC Docket No. **12-2385**

Appearances:

Sophia Haynes, Esquire, U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Complainant

Andrew N. Gross, General Counsel, H B Training & Consulting, LLC, Lawrenceville, Georgia
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 651 *et seq*. Evergreen Construction Company (Evergreen), is a construction company located in Atlanta, Georgia. On June 12, 2012, Occupational Safety and Health Administration (OSHA) compliance officer Charles Johnson conducted an inspection of Evergreen at a jobsite located at 3200 Cobb Galleria Parkway, Atlanta, Georgia, where Evergreen was the general contractor on a project to build a Hyatt House hotel. Based upon Johnson's inspection, the Secretary of Labor (Secretary) on October 1, 2012, issued a Citation and Notification of Penalty (Citation) with one item to Evergreen alleging a serious violation of 29 C. F. R. § 1926.501(b)(1), for failing to provide fall protection for employees. The Secretary proposed a penalty of $4,410.00 for the Citation. Evergreen timely contested the Citation and proposed penalty.

The undersigned held a hearing in this matter on January 23, 2014, in Atlanta, Georgia. The parties filed post-hearing briefs on April 25, 2014. For the reasons discussed more fully below, the undersigned affirms the Citation and assesses a penalty in the amount of $4,410.00.

Jurisdiction

The parties stipulated that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act (Tr.7). The parties also stipulated that at all times relevant to this action, Evergreen was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 8).

Background

OSHA initiated an inspection of Evergreen's jobsite as a result of an anonymous complaint regarding conditions at the jobsite located at 3200 Cobb Galleria Parkway near Interstate 75 in Atlanta, Georgia (Tr. 16). The building under construction was a Hyatt House hotel, a six story building on three acres of land (Tr. 43; Exhs. C-2, C-3). Evergreen was the general contractor for the jobsite, and there were approximately 20 subcontractors and 40 workers onsite (Tr. 33, 37, 67). As a result of the anonymous complaint, OSHA Compliance Officer Charles Johnson was assigned to conduct an inspection of the jobsite. As Johnson approached the jobsite in his vehicle from the southwest interstate side of the building, he observed employees located next to an unprotected edge of the building, not wearing fall protection (Tr. 17; Exhs. C-4, pp.1-3, 6-11). Johnson circled the entire facility, and saw work was being performed on the building's exterior walls. He observed fall hazards on every corner, on every side of the facility, and that there were no guardrails (Tr. 17). As he circled the facility, Johnson saw a job trailer located on the east side, approximately 25 feet from the front of the building under construction. In an open area nearby, there were materials being staged, a latrine, and a parking lot (Tr. 8). Johnson also observed the building construction manager's trailer was located on the west side, about 25 feet on the northwest side of the building in front of the building (Tr. 18).

The employees Johnson observed when he arrived were working on the fourth floor of the building, which was the top of the building at that time. Johnson estimated the top of the building was approximately 30 feet from the ground floor. The plans reflect the distance was 31 feet (Tr. 23-24). The fourth floor was partially built. There were no walls and there were no guardrails or safety nets around the edges on the fourth floor (Tr. 26-27). Johnson observed employees

working from all edges (Tr. 24, 25; Exh. C-4). All of the edges on the southwest and northeast were unprotected (Tr. 24).

After circling the building, Johnson went into the trailer to conduct an opening conference. He met with Donald DiRenno, onsite construction supervisor, safety manager and superintendent for Evergreen. DiRenno was in a meeting in the conference room at the time Johnson entered the trailer. Johnson explained why he was there (Tr. 34 76-78). Afterwards, he and DiRenno left the conference room and went to DiRenno's office to conduct the opening conference (Tr. 34). While in DiRenno's office, Johnson showed DiRenno, through the office window, the fall protection violations occurring on the jobsite (Tr. 34). DiRenno told Johnson that those employees were employees of Nunez Construction, masonry subcontractor on the jobsite (Tr. 24, 25, 34-35; Exh. R-3). The employees were installing concrete masonry units to construct the walls for the building (Tr. 25).

Once the opening conference was completed, Johnson conducted a walk around inspection accompanied by DiRenno (Tr. 35). While on the fourth floor of the building, Johnson observed there was no personal fall arrest system for the workers on the fourth floor, with the exception of rails near the elevator shaft (Tr. 27; Exh. C-4, pp. 13-14). There also was no place to tie off, in the area on the fourth floor where the employees were working (Tr. 27; Exhs. C-4, pp. 13-14, C-9). Johnson observed an employee without fall protection leaning over the side of the building (Tr. 29). He saw an employee standing on a scaffold on the fourth floor (Tr. 30; Exh. C-4, p. 10). Johnson also observed Mr. Nunez walking approximately two feet from an opening on the fourth floor, where he could fall 31 feet (Tr. 36). DiRenno approached Mr. Nunez, owner of Nunez Construction, and said to him, "Didn't I tell you to get some fall protection on?" (Tr. 37, 39). An Evergreen engineer on the fourth floor was observed marking lines (Tr. 38). This employee acknowledged to Johnson there was no fall protection on the fourth floor, but he did not know why (Tr. 38-39). Nunez Construction employees told Johnson they had been on the fourth floor for three days, and they had never installed fall protection (Tr. 38).

Although there was no fall protection on the fourth floor, fall protection was present on the third floor of the building. The fall protection on the third floor included rails, wire rope and anchorage points against the walls (Tr. 36).

As a result of the fall protection violations observed by Johnson during the inspection, the Secretary issued the Citation at issue in this matter to Evergreen due to its authority as controlling employer on the jobsite (Tr. 41).

Discussion

The Secretary alleges Evergreen violated OSHA's fall protection standard found in Subpart M of Part 1926.

The Citation
Alleged Serious Violation of § 1926.501(b)(1)

The Secretary charges Evergreen with a violation of § 1926.501(b)(1) of the fall protection standard and alleges in Citation 1, Item 1:

> Employees were exposed to fall hazards of 30 feet 8 inches to the ground below while working within 1 foot of the unprotected edge of the 4th floor with no fall protection.

Section 1926.501(b)(1) provides:

> *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Multi-Employer Worksite Policy

The Secretary issued the instant Citation pursuant to his Multi-Employer Worksite Policy. The Multi-Employer Worksite Policy is the guidance used by the Secretary for issuing citations to the creating, exposing and controlling employers on a jobsite (CPL 02-00-142). Evergreen does not dispute it was the general contractor on the jobsite with supervisory authority and control over the subcontractors, including Nunez Construction, working on the jobsite (Tr. 33, 41, 53-55, 92). The Secretary contends that as general contractor on the jobsite, Evergreen is responsible for the cited violation due to its position as controlling employer.

None of Evergreen's employees was exposed to the conditions cited by OSHA. Only employees of subcontractor Nunez Construction were exposed. Recent Commission case law provides that the Secretary may cite a non-exposing, controlling employer under the Multi-Employer Worksite Policy. In *Summit Contractors*, 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010), the seminal case on the Commission's current position regarding the policy, the Commission held:

> "[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act . . . to protect not only its own employees but those of other employers engaged in a common undertaking." *McDevitt Street Bovis,* 19 BNA OSHC at 1109, 2000 CCH OSHD at p. 48,780 (citation omitted). With respect to controlling employer liability "an employer may be held responsible for the violations of other employers where it could be reasonably expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Id.* (citation omitted); *Grossman Steel,* 4 BNA OSHC 1188, 1975-1976 CCH OSHD at p. 24, 791.

The Secretary asserts the instant Citation was issued to Evergreen because it was the controlling employer on the jobsite (Secretary's brief, p. 15; Tr. 33, 41). Evergreen does not dispute that it was the general contractor with supervisory authority and control over the jobsite. Therefore, as required by *Summit, id.,* Evergreen must exercise reasonable care to prevent and detect violations that may occur on the jobsite.

Elements of the Secretary's Burden of Proof

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group, Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The first three elements of the Secretary's case are undisputed. Evergreen concedes the standard is applicable, the terms of the standard were violated, and employees were exposed to the fall hazard (Evergreen's brief, p. 7). Therefore, the only element for determination is whether Evergreen knew or could have known with the exercise of reasonable diligence of the violative condition.

Employer Knowledge

The Secretary must establish actual or constructive knowledge of the violative conditions by Evergreen in order to prove a violation of the standard. It is the Secretary's burden to adduce sufficient evidence to establish the knowledge element of his case. In order to show employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*.,

12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of, or was responsible for, the violation. *Todd Shipyards Corp*. 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

The Secretary contends that Evergreen had both actual and constructive knowledge of the fall protection violations (Secretary's brief, pp. 9-13). The undersigned disagrees with the Secretary that Evergreen had actual knowledge of the violative conditions on the day of the inspection.

The Court of Appeals for the Eleventh Circuit recently discussed the Secretary's knowledge element in the *ComTran Group, Inc.* decision:

> As for the knowledge element [ ], the Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer (citations omitted). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See e.g., Secretary of Labor v. Kansas Power & Light Co*., 5 O.S.H. Cas. (BNA) 1202, at *3 (1977)(holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent"). An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's minconduct but he was in close enough proximity that he should have. *See, e.g., Secretary of Labor v. Hamilton Fixture*, 16 O.S.H. Cas. (BNA) 1073 *17-19 (1993) (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, see *New York State Elec. & Gas Corp.,* 88 F.3d 103, 105-06 (2d Cir. 1996) (citations omitted), with the rationale being that ---in the absence of such a program ---the misconduct was reasonably foreseeable.

ComTran Group Inc., 722 F.3d 1304, 1307-1308 (11th Cir. 2013).

Actual knowledge refers to an awareness of the existence of the conditions allegedly in noncompliance. *Omaha Paper Stock Co.*, 19 OSHC 2039 (No. 01-3968, 2002). Although the violative conditions were in plain view, there is no evidence in the record to show that Evergreen was aware on the day of the inspection that Nunez Construction employees were working without fall protection.

The Secretary argues that actual knowledge is established by the fact that Nunez Construction employees working without fall protection could be seen from the window in DiRenno's office (Secretary's brief, p. 10). There is no evidence, however, that DiRenno saw the employees from his office at the time the employees were working without fall protection. Instead, the evidence shows that on the day of the inspection, DiRenno was conducting a meeting in a conference room in the trailer at the time Johnson approached the trailer between 10:00 a.m. and 11:00 a.m. (Tr. 35, 76). The meeting began at approximately 8:00 a.m. (Tr. 77). Nunez Construction typically began work between 8:00 a.m. and 9:00 a.m. (Tr. 72). When Johnson entered the trailer, he first met DiRenno in the conference room, at which time DiRenno took him to his office (Tr. 34). While they were in DiRenno's office, Johnson showed DiRenno the employees could be seen from his office window working without fall protection. DiRenno responded the employees were Nunez Construction employees. Other than when Johnson directed DiRenno to look out of his office window at the employees, there is no evidence that DiRenno actually saw the employees working without fall protection, or even that DiRenno was in his office at the time they were working unprotected. There was no evidence adduced at the hearing that he or any other Evergreen employee, through whom knowledge could be imputed, was aware that Nunez employees had begun working that morning or were seen working without fall protection.

The Secretary also asserts that actual knowledge is established by the admissions of DiRenno and Will Goodwin, Evergreen's Senior Project Manager (Secretary's brief, p. 10). Both DiRenno and Goodwin testified they knew Nunez Construction did not use fall protection prior to the date of the inspection. Neither, however, testified to being aware Nunez Construction failed to use fall protection on the day of the inspection. If the Citation had alleged violations for any of the days referred to by DiRenno and Goodwin, actual knowledge could be established based on their testimony. The Citation issued in this matter, however, alleges the violation occurred only on June 12, 2012, the day of the inspection. DiRenno's and Goodwin's knowledge do not establish actual knowledge on the date cited.

The Secretary further argues that actual knowledge is established by Evergreen's admissions that there were no guardrails or attachment points on the fourth floor of the building (Secretary's brief, p. 10). The Secretary's argument is two-fold: (1) Evergreen created the conditions and therefore was aware of the lack of fall protection; and (2) because Evergreen knew there were no guardrails or attachment points for employees, it was aware Nunez Construction

employees were working without fall protection. This argument fails to establish actual knowledge. It is essentially a reasonable diligence argument for constructive knowledge, the "could have known" portion of the knowledge element.

Constructive knowledge depends on "whether, with the exercise of reasonable diligence, [the employer] could have discovered the [violative condition]." *Donohue Indus., Inc.*, 20 BNA OSHC 1346, 1348-49 (No. 99-0191, 2003). "Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Donohue Indus., Inc.,* id at 1349. Here, the undersigned finds Evergreen could have discovered the violative condition.

As argued by the Secretary, Evergreen was aware that there were no physical barriers or safety nets to protect employees from falling, and no tie off points for employees. Therefore, Evergreen "could have known" employees working near the edge on the fourth floor of the building would be unprotected from falls of 31 feet. Further, Evergreen had prior knowledge Nunez employees did not use fall protection as required on the jobsite. DiRenno testified that prior to the OSHA inspection, he warned Nunez employees about not using fall protection; took them off the job until they acquired fall protection; and sent them home for not utilizing fall protection. DiRenno testified he even sometimes provided fall protection equipment for the Nunez employees (Tr. 71). He testified he observed safety violations by Nunez Construction several times:

> Q: Now, do you recall how many occasions did you have to observe safety violations by Nunez Construction?
> A: Several.
> Q: And, could you walk us though each of them to the extent of your recollection?
> A: Yes. You know, as I was doing my inspections, several things. Nunez's safety harnesses, people not even dressed properly, not wearing the proper safety equipment, such as hard hats, work boots, not only safety harnesses and lanyards and tie-offs, I stop the work, we stopped these employees from working, I brought him over or his foreman who wasn't always on site.
>
> I brought his foreman over, explained to him that we needed to stop the work, needed a get proper dress, proper harnesses, proper lanyards, whatever the situation might be, and stopped the work until they got them.
>
> And then, eventually, just remove them from the job after I've talked to them, after I stopped the work, I said "You guys need to go home. Come back tomorrow. Come back when you have the proper equipment."

(Tr. 69-70).

. . .

> Q: And, you said there were several instances that you had addressed safety problems with Mr. Nunez or his foreman?
> A: Yes.
> Q: Now, I believe you stated that you sent some of them home. Why would you sometimes send them home on some occasions and not send them home on other occasions?
> A: Well, some things, like I said, were just a hard hat or work boots which they had in their truck. They went down and got the hard hat and got the work boots, came and showed it to me and I let them go back to work.
> Q: And, what about safety violations that involved fall protection?
> A: Fall protection violations, I sent them home. I stopped the work, brought them all down to the ground, lectured them and sent them home.
> Q: Can you recall - -
> A: Well, I sent them off the job. I don't know if they went home, but I sent them off the site.

(Tr. 70–71). According to DiRenno, he probably provided Nunez Construction employees with fall protection equipment such as harnesses, rails, lanyards, personal fall protection, enough for one or two people, maybe two or three times (Tr. 71).

The evidence also reveals that DiRenno knew the Nunez Construction employees did not wear fall protection the morning and afternoon of the day before the OSHA inspection (Tr. 35, 63). In addition, on the day of the OSHA inspection, after the opening conference, DiRenno told Mr. Nunez, "Didn't I tell you to get some fall protection on?" (Tr. 37, 39).

Although Nunez Construction had been on the jobsite only a few weeks, its reputation for not wearing fall protection was well known by DiRenno. Further, DiRenno testified they were not very reliable regarding "man power, safety, showing up to the job at the proper time; pretty much everything in general" (Tr. 74). In light of DiRenno's awareness of Nunez Construction's propensity to work without the necessary fall protection, if Evergreen had exercised reasonable diligence and inspected the area of the worksite where Nunez Construction was working when they began work on the jobsite on the day of the inspection, it would have discovered the employees were working without fall protection. The evidence reveals a two to three hour time period between 8:00 a.m. or 9:00 a.m. when Nunez Construction began work on the building, to 10:00 a.m. or 11:00 a.m. when Johnson arrived at the conference room, during which an inspection could have been conducted to determine whether Nunez Construction's employees were protected

from fall hazards. The violative conditions were not discreet. They were in plain view, and with the exercise of reasonable diligence, Evergreen could have known they existed.

The record is clear that Evergreen had a superintendent in charge of safety on the jobsite, had a safety program in place, conducted safety meetings, trained employees, sent emails regarding fall protection and inspected the jobsite regularly (Tr. 67, 72, 83, 84; Exhs. C-6, C-7, C-8). This is commendable. If those measures had been implemented effectively with respect to Nunez Construction, its employees may not have been exposed to fall hazards. As set forth above, the record evidence reveals that Evergreen took some steps to get Nunez Construction to comply with the fall protection requirements. Many of those steps, however, did not comply with the requirements of its safety program which required written warnings and termination from the jobsite (Tr.; Exh. C-6, p. 4-11).[32] Evergreen's Site Specific Safety Plan specifically makes Section 4 of Evergreen's Safety Plan addressing enforcement and its progressive discipline policy effective to subcontractors on the jobsite (Exhs. C-6, p. 4-11, C-7, p.3). The measures actually implemented at the jobsite were not effective in securing the compliance of Nunez Construction with the fall protection requirements of the cited standard on the jobsite, specifically on the day of the inspection. The undersigned finds Evergreen had constructive knowledge of the violative conditions. The Secretary has established a violation of § 1926.501(b)(1).

The Secretary issued the Citation as a serious violation. Under § 17(k) of the Act, a serious violation exists if there is a "substantial probability that death or serious physical harm could result" from the violation. A fall from 30 feet to the ground would likely result in serious physical harm. Johnson testified it could result in death (Tr. 27). The violation is properly classified as serious.

[32] Evergreen terminated its contract with Nunez Construction in August 2012, however the record fails to substantiate the termination was due to its failure to use fall protection (Tr. 101-102). DiRenno testified "I think it was a combination of everything: schedules, performance, manpower, safety and a combination of other things is why they were terminated" (Tr. 89).

Penalty Determination

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

Evergreen had thirty employees under its control, however, only three were employed by the establishment and covered by the inspection (Exh. C-1). Due to its small size a 30% reduction in penalty was applied. In addition, a 10% reduction was allowed since Evergreen had been inspected within the previous five years, with no history of serious OSHA violations (Exh. C-1). No reduction in the penalty for good faith was permitted because there were deficiencies in the implementation of Evergreen's safety program (Exh. C-1).

The undersigned agrees with the Secretary's assessment as to the gravity of the violation, which was rated a high due to the high possibility of permanent disability or death should an employee fall, and the greater probability of an injury occurring because employees worked within one foot of the edge (Exh. C-1). Three employees were exposed to the fall hazard. Accordingly, it is determined that the proposed penalty of $4,410.00 is appropriate for the Citation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that Item 1 of the Citation, alleging a serious violation of § 1926.501(b)(1), is AFFIRMED and a penalty of $4,410.00 is assessed.

SO ORDERED.

/s/
SHARON D. CALHOUN
Judge

Date: July 8, 2014
Atlanta, Georgia