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. LAKE ERIE CONSTRUCTION COMPANY, INC. Respondent.	:	OSHRC Docket No. 02-0520

APPEARANCES:

Laura V. Fargas, Esq., Department of Labor, Washington, DC
For the Complainant

Roger K. Sabo, Esq., Schottenstein, Zox and Dunn, Columbus, OH
For the Respondent

DECISION

Before: RAILTON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

At issue before the Commission are two alleged fall protection violations, one serious and one repeat, issued to Lake Erie Construction Company (Lake Erie). Judge Michael Schoenfeld affirmed both violations as alleged and assessed a total penalty of $4,450.[1] For the following reasons we affirm the violations, group them for penalty purposes, and assess a

[1] The judge vacated a third item that is not on review.

single penalty of $4,000.

Background

Lake Erie is in the business of light highway construction. On February 20, 2002, its employees were changing an overhead highway sign on Medina Road in Fairlawn, Ohio, when compliance officer Thomas R. Henry of the Occupational Safety and Health Administration (OSHA) inspected the worksite. Henry, who was driving to another jobsite, stopped to inspect when he observed one employee, Robert Simon, working on the sign without any fall protection, and another employee, Eric Livengood, detaching his lanyard and moving along the sign's supporting structure before reattaching the lanyard to another area of the structure. At compliance officer Henry's request, Lake Erie's designated foreman at the site, Jeffrey Schaffer, who had been uncrating a new sign when Henry arrived, ordered Simon to get down from the sign in the basket of a bucket truck. Employee Livengood also descended in the basket after he finished unbolting the sign.

Serious Citation 1, Item 2

In Citation 1, Item 2, the Secretary alleged that Simon's failure to wear a harness with a lanyard attached to the basket of the bucket truck was in violation of 29 C.F.R. § 1926.453(b)(2)(v), which requires: "A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." On review, Lake Erie argues only that the Secretary failed to establish knowledge of the violation.[2]

To prove knowledge, the Secretary must show that Lake Erie either knew or, with the exercise of reasonable diligence, could have known of the violative conduct. *See, e.g., Pride Oil Well Svc.*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶ 29,807 (No. 87-692, 1992).

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[2] To establish a violation of an OSHA standard, the Secretary must prove that (1) the standard applies to the cited conditions; (2) the employer did not comply with the terms of the standard; (3) employees had access to the violative conditions; and (4) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

The judge found that Lake Erie had both actual and constructive knowledge of the violation.

We agree with the judge's finding of constructive knowledge.[3] "An inquiry into whether an employer was reasonably diligent involves 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." *Stahl Roofing Inc.*, 19 BNA OSHC 2179, 2181, 2002 CCH OSHD ¶ 32,646, p. 51,218 (No. 00-1268, 2003) (consolidated). Here, the record shows that Lake Erie had not established a work rule prohibiting the cited conduct because it erroneously believed that there was no requirement for tying off while ascending or descending in the basket of a bucket truck. According to Lake Erie's safety director and co-owner, Kenneth Bleile, the company used the bucket trucks instead of ladders because it considered the bucket truck itself to be fall protection or "a piece of safety equipment." However, Lake Erie does not dispute the applicability of the standard to the cited conditions, and proving knowledge does not require that the Secretary demonstrate that Lake Erie was aware that it was in violation of an OSHA standard. *Peterson Brothers Steel Erection Co.*, 16 BNA OSHC 1196, 1199, 1993-95 CCH OSHD ¶ 30,052, p. 41,299 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994).

Lake Erie correctly states that a "lack of a specific written rule does not *ipso facto* require a finding of constructive knowledge." However, the Commission has held that a work rule is "an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501-2, 2001 CCH OSHD ¶ 32,397, p. 49,866 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003) (*Danis Shook*), citing *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076, 1977-78

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[3] Because we have found constructive knowledge, we need not address the judge's finding of actual knowledge.

CCH OSHD ¶ 21,585, p. 25,902 (No. 12354, 1977). Thus, while an employer need not have a *written* work rule, it must have a rule that reflects the requirements of the cited standard and is clearly and effectively communicated to employees. *Stahl Roofing Inc.*, 19 BNA OSHC at 2181-82, 2002 CCH OSHD at p. 51,218; *GEM Industrial Inc.*, 17 BNA OSHC 1861, 1863 n.5, 1995-97 CCH OSHD ¶ 31,197, p. 43,688 n. 5 (No. 93-1122, 1996), *aff'd*, 149 F.3d 1183 (6th Cir. 1998). In this case, it was undisputed that Lake Erie had neither established nor communicated a work rule addressing the cited standard's specific requirement to tie off in the basket of the lift while working. Therefore, we find that the Secretary established constructive knowledge of the cited conduct, and we affirm Serious Citation 1, Item 1.[4]

Repeat Citation 2, Item 1

In Citation 2, Item 1, the Secretary cited Lake Erie for a repeat violation of section 1926.501(b)(15), which requires that "each employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system,

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[4] Chairman Railton agrees that the record as a whole demonstrates that the Secretary sustained her burden of persuasion that Lake Erie had constructive knowledge of both alleged violations. For the reasons stated in his separate opinion in *Timken Co*., 20 BNA OSHC 2034, 2041-44 (No. 97-1457, 2004), he would treat the so-called employee misconduct defense not as an affirmative defense but would use the elements thereof as rebuttal evidence on the issue of constructive knowledge. In this matter, he finds that Lake Erie failed to adequately rebut the Secretary's case of constructive knowledge and that the evidence it did adduce on this issue weighs in favor of the Secretary's case. The company did not have an adequate fall protection program as evidenced by its lack of a work rule regarding such protection when employees worked in or from a bucket, its lax enforcement of fall protection in general, and its failure to discipline employees for failing to use fall protection while working on the sign.

Commissioner Rogers, in rejecting Lake Erie's unpreventable employee misconduct defenses, would simply apply Commission precedent and note that "the defense[s] fails here for largely the same reasons upon which we base our finding of constructive knowledge of the violation[s] at issue[.]" *Danis Shook*, 19 BNA OSHC at 1502-03, 2001 CCH OSHD at p. 49,865. She finds no reason to opine on issues not necessary to the resolution of this case.

safety net system, or personal fall arrest system." It is undisputed that Simon worked from the sign's supporting structure without any fall protection whatsoever, and that Livengood lacked adequate fall protection when he detached his single lanyard and moved along the sign's supporting structure before reattaching the lanyard. Again, Lake Erie argues that the Secretary failed to establish knowledge of the violative conduct. The judge predicated his finding of constructive knowledge on evidence showing that "Lake Erie was not reasonably diligent in ensuring that employees who work at heights have appropriate fall protection." For the following reasons, we affirm the judge.

There is no dispute that Lake Erie's written safety program makes no mention of fall protection. On review, Lake Erie argues that it effectively established and communicated a fall protection rule by sending employees to a union-sponsored training course in January 1999, three years before the subject inspection. Lake Erie maintains that its fall protection policy "is reflected in the fall protection quiz given to its employees" at the 1999 training session, *i.e.*, a "true/false" quiz question from the course that addressed fall protection requirements for employees on walking/working surfaces 6 feet or more above lower levels.

Regardless of whether Lake Erie had a work rule,[5] it is clear from the evidence of record that the company failed to supervise its employees adequately. Indeed, the evidence shows a lack of effort on Lake Erie's part to ensure the use of fall protection and little concern by Lake Erie employees that failing to use fall protection would result in disciplinary action. *See CMC Electric Inc.*, 18 BNA OSHC 1737, 1740-1, 1999 CCH OSHD ¶ 31,817, p. 46,746 (No. 96-0169, 1999), *aff'd in pertinent part*, 221 F.3d 861 (6th Cir. 2000). Foreman Schaffer testified that he made no effort to communicate to Livengood the necessity for using

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[5] In Chairman Railton's view, the evidence in the record is sufficient to conclude that Lake Erie had a work rule requiring the use of fall protection while working on the sign.

Commissioner Rogers would conclude that Lake Erie clearly lacked a fall protection work rule ("an employer directive that requires or proscribes certain conduct"), whether written or unwritten. *See Danis Shook*, 19 BNA OSHC at 1501-02, 2001 CCH OSHD at p. 49,866.

a double lanyard even though he acknowledged that removing the bolts from the top of the sign would require Livengood to get out of the bucket truck and move along the sign's supporting structure. Schaffer also was "not sure" why Livengood used a single rather than a double lanyard for the job. He speculated that Livengood "might have thought he was just going to stay in the bucket." Reasonable diligence requires more than this. *See Carlisle Equip. Co. v. United States Secretary of Labor*, 24 F.3d 790, 794 (6th Cir. 1994) ("[r]easonable diligence implies effort, attention, and action not mere reliance upon the action of another"). Livengood himself gave no indication that he intended to stay in the bucket. He testified that he used only one lanyard because he believed the sign "was kind of small" and that "there was plenty to hold onto" when he detached the lanyard and moved along the structure of the sign without fall protection. Lake Erie endorsed Livengood's lax approach to fall hazards. Company safety director Bleile testified that he evaluated Livengood's conduct after the inspection and decided not to take any disciplinary action against him because it was his belief that Livengood "did everything properly." Bleile's testimony is consistent with the view expressed by Lake Erie on review that Livengood's conduct did not pose a serious fall hazard because he "was able to reach above his head and grab a support bar in the position."[6]

We find further evidence of Lake Erie's lax supervision in the conduct of Simon, who

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[6] We find no merit in Lake Erie's claim in this regard. Under section 17(k) of the Occupational Safety and Health Act of 1970 ("The Act"), 29 U.S.C. §§ 651-678, a violation is serious if there is a substantial probability that death or serious physical harm could result. The Commission has long held that "[t]his does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Pressure Concrete Construction Co.*, 15 BNA OSHC 2011, 2018, 1991-93 CCH OSHD ¶ 29,902, p. 40,813 (No. 90-2668, 1992), citing, inter alia, *Natkin & Co.*, 1 BNA OSHC 1204, 1205, 1971-73 CCH OSHD ¶ 15,679, pp. 20,967-68 (No. 401, 1973). Here, Livengood was working on a sign structure more than 20 feet above a highway road, and we find it likely that death or serious physical harm would have resulted if he had fallen.

had 18 years of experience with the company and was also a foreman (though not serving as such on this particular job). Simon chose to work on the sign without wearing any fall protection whatsoever. When asked at the hearing why he did not wear a safety harness with a lanyard, Simon stated, "I did not take the time to put one on." *See e.g., CMC Electric Inc.*, 18 BNA OSHC at 1741, 1999 CCH OSHD at p. 46,746-47 (lax safety program where three employees, who were supervisors on other projects, failed to where hard hats); *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017, 1991-93 CCH OSHD ¶ 29,317, p. 39,378 (No. 87-1017, 1991), *aff'd without published opinion,* 978 F.2d 744 (D.C.Cir. 1992) ("[a] supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax"). Lake Erie's nonchalant handling of its fall safety responsibilities in this case came only a few months after OSHA cited it for the failure of two employees to use fall protection when working on a bridge wall approximately 25 feet above a busy highway. Until the issuance of that prior citation, Lake Erie had not utilized its disciplinary program for inadequate fall protection since 1998. Under these circumstances, we find that Lake Erie failed to exercise reasonable diligence to prevent the violative conduct. Accordingly, we find that the Secretary established constructive knowledge of the violative conduct, and we affirm the citation for failure to ensure that employees on the sign structure were protected from falling by the use of appropriate fall protection as required by section 1926.501(b)(15).

Lake Erie also argues that the judge improperly affirmed this item as a repeat violation. A violation is repeated under section 17(a) of the Act, 29 U.S.C. § 666(a), if, when it is committed, there was a Commission final order against the employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979) (*Potlatch*). The Secretary may establish a prima facie case of substantial similarity by showing that a citation against the employer for violating the same standard has become a final order, and the burden then shifts to the employer to rebut that showing. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1598, 1994 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994) (citing *Potlatch*). "[T]he principle factor in determining whether

a violation is repeated is whether the two violations resulted in substantially similar hazards." *Amerisig Southeast, Inc.*, 17 BNA OSHC 1659, 1661, 1995-97 CCH OSHD ¶ 31,081, p. 28,171 (No. 93-1429, 1996), *aff'd,* 117 F.3d 1433 (11th Cir. 1997).

Here, the Secretary based the repeated characterization of this violation on the existence of the prior 2001 citation for a violation of the same standard that became a final order prior to the violation in this case. According to compliance officer Henry, who also conducted the inspection in that case, the citation alleged Lake Erie's employees were erecting a fence along the parapet on the side of a bridge located 25 feet over a highway without using fall protection. On September 13, 2001, the parties settled the citation in an agreement in which Lake Erie agreed "to correct the violations as cited" and "to pay the proposed penalty." The judge found substantial similarity because the hazard in both cases was a fall of more than 6 feet and, in both, Lake Erie failed to ensure that its employees used appropriate fall protection.

On review, Lake Erie argues that the violations are not substantially similar because the method of abatement in the prior citation required the use of a scissor lift rather than personal fall protection equipment. However, similarity of abatement is not the criterion for finding a repeat violation; it is whether the two violations resulted in substantially similar hazards. *Stone Container Corp.*, 14 BNA OSHC 1757,1987-90 CCH OSHD ¶ 29,064 (No. 88-310,1990). We find that the record supports the judge's finding that these violations were substantially similar because both involved the same standard and the same hazard, a fall of more than 20 feet to a road below. Accordingly, we affirm the violation as repeated.

Penalties

In assessing penalties, section 17(j) of the Act requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. 29 U.S.C. § 666(j). We find that it is appropriate in this case to assess one penalty for these closely related violations. Although not strictly duplicative, both items require Lake Erie to ensure that its employees wear adequate personal fall protection

equipment. *See L.E. Myers Co.*, 16 BNA OSHC 1037, 1048, 1993-95 CCH OSHD ¶ 30,016, p. 41,134-35 (No. 90-945, 1993) (assessing a single penalty for two violations that are substantially similar is appropriate). Accordingly, giving due consideration the statutory factors set forth at section 17(j) of the Act, we assess a single penalty of $4,000 for Citation 1, Item 2, and Citation 2, Item 1.

Order

We affirm a serious violation of section 1926.453(b)(2)(v) and a repeat violation of section 1926.501(b)(15), and assess a single penalty of $4,000.

SO ORDERED.

/s/_____
W. Scott Railton
Chairman

/s/_____
Thomasina V. Rogers
Commissioner

Dated: September 23, 2005

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. LAKE ERIE CONSTRUCTION, INC., Respondent.	DOCKET NO. 02-0520

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BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On February 20, 2002, a Compliance Officer ("CO") of the Occupational Safety and Health Review Administration ("OSHA") observed two of Respondent's employees working 22 feet above the ground in the latticework behind the Route 77 exit sign over Medina Road in Fairlawn, Ohio. Because it appeared that the workers did not have appropriate fall protection, the CO stopped to conduct an inspection. As a result, the Secretary issued to Respondent Lake Erie Construction, Inc., ("Lake Erie") a Citation and Notification of Penalty ("Citation")

alleging serious violations of the terms of 29 C.F.R. §§1926.416(a)(1) and 1926.453(b)(2)(v) and a repeated violation of the terms of 29 C.F.R. §1926.501(b)(15). (Tr. 8-10, 80). A hearing was held in Columbus, Ohio. Both parties have submitted post-hearing briefs.

Jurisdiction

In its Answer, Lake Erie admits that the Commission has jurisdiction over the action. During the hearing, Lake Erie's safety director testified that the company performs work in more than one state. I therefore find that Lake Erie is involved in interstate commerce. Accordingly, I conclude that the Commission has jurisdiction over the subject matter and the parties. (Tr. 144, 151).

Background

The undisputed facts are as follows. Lake Erie is a highway construction contractor and was in the process of replacing the Route 77 exit sign as part of a larger signage job when the CO drove by. For the sign-replacement job, Lake Erie assigned a four-man crew which included a foreman, Jeffrey Schaffer, and crew members Eric Livengood and Robert Simon.[1] After the crew arrived at the job site on the morning of February 20, 2002, Livengood obtained a harness with one lanyard and rode up in the basket of a bucket truck to the latticework located behind the existing sign. The base of the sign was 22 feet above the highway below. Schaffer, who had operated the controls for the bucket truck from its base, went into the trailer to remove the new sign from its attachments. Shortly thereafter, Simon rode up in the basket to the sign to help Livengood. Simon operated the bucket truck from controls located on the side of the basket. Simon did not obtain or wear any form of personal fall protection, and, when he reached the sign, he joined Livengood out on the latticework. Because Schaffer was in the trailer at the time, he did not see what Simon was doing. Ten minutes later, the CO drove by and observed Simon and Livengood. He stopped to investigate and had Simon ordered down from the sign. In view of both the CO and Schaffer, Simon came down in the basket. (Tr.7-8, 22-24, 80-90, 108, 126-129, 144, 167, Exh. C-1). The Secretary's allegations concern the proximity of the basket to overhead electrical wires during Simon's descent, Simon's failure to tie-off while in the basket of the bucket truck, and the adequacy of the fall protection for both workers while they were in the latticework.

[1] The fourth crew member was brought to operate the material crane, which was to be used to place the new sign. The crane is not involved in this citation. (Tr. 82).

Discussion

Serious Citation 1, Item 1

This citation item alleges a violation of 29 C.F.R. §1926.416(a)(1). The cited standard provides that "(n)o employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means." In order to establish application of the standard the Secretary chose to cite, it was incumbent on the Secretary to show that Simon came so close to the power circuit that he could have had contact with it, either inadvertently or through his work. *See, Cleveland Consol. Inc*., 13 BNA OSHC 1114, 117 (No. 84-696, 1987) (discussing what factors will establish that a worker was in "such proximity that contact was possible.")[2] For the following reasons, I conclude that the Secretary failed to make this showing.

First, I am not persuaded that the evidence showed that Simon came within 3 feet of an overhead wire, as is alleged in the citation. That factual allegation was based solely on a statement that a Lake Erie employee purportedly made to the CO, and I find it was adequately rebutted at the hearing. Simon and Schaffer testified that the bucket had come no closer than 6 feet to the wire, and Livengood, who was on the latticework at the time, testified that it had come no closer than 8 feet. (Tr. 16-19, 38, 91-92, 112, 133-138).[3] I observed the CO and Lake Erie's three witnesses on the stand and have reviewed their testimony for consistency. None appeared to be lacking veracity on this issue. The CO, however, obtained no evidence to corroborate the reported out-of-court statement on which the citation was based. He did not measure the distance between the power pole and the end of the highway or the sign, and did not endeavor to discover the potential height of the basket or length of the boom. He also failed to question any of the other witnesses, even though, arguably,

[2] For the elements the Secretary must prove for a *prima facie* showing of a violation under §5(a)(2) of the Act, see *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553, 1986), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

[3] At the hearing, Simon testified that he did not recall telling the CO that he had come within 3 feet of a wire. (Tr. 131, 138).

Livengood was in a good position to observe whether Simon came close to the wire. Finally, the photographs taken by the CO of Simon's descent admittedly do not accurately indicate the distance in question. (Tr. 56-59, Exhs. C-4, 5, 7 & 8).

Second, the record does not persuade me that 6, 8 or 10 feet, the only other measurements testified to, fall within the terms of the standard. None is within arm's reach, and the Secretary submitted no facts, such as evidence that Simon held long-handled or unwieldy tools, or even that the basket boom could have extended another 6 or more feet from its closest position to the wire, that would support finding that this distance was "such proximity that **contact** was possible." (Emphasis added.)

In her brief, the Secretary points out that the CO had consulted and used 29 C.F.R. §1926.550(a)(15) as "guidance" when he recommended issuance of this citation item. 29 C.F.R. §1926.550(a)(15) prohibits an operator of a crane or derrick from allowing the machinery or its load to come within 10 feet of an electrical line, and the Secretary argues that the CO's reference establishes application of the cited standard, regardless of whether Simon was 3 or 6 feet away from a wire. By implication, she suggests that I, too, use 29 C.F.R. §1926.550(a)(15) as guidance on this issue. I decline to do so. First, the Secretary did not cite Lake Erie for a violation of the terms of 29 C.F.R. §1926.550(a)(15). Second, she could have but has never sought to amend the citation to allege that its terms were violated. Third, and more importantly, there is nothing in this record which would support the application of a crane and derrick standard to the bucket truck involved in this citation. Finally, allowing the Secretary to comb through volumes of regulations which are not applicable and have not been cited or even referred to in the citation for ones to "provide guidance," raises the specter of significant due process and notice problems. The Secretary's argument is accordingly rejected and this citation item is vacated

Serious Citation 1, Item 2

This item alleges a violation of 29 C.F.R. §1926.453(b)(2)(v), which requires that an employee wear a body belt and attach a lanyard to the basket or boom when working from an aerial lift. I find that the standard applies and that its terms were violated. Lake Erie does not dispute that the bucket truck constitutes an aerial lift, and Simon failed to use a body belt during his descent in the basket. I also conclude that an employee was exposed to a hazard; Simon was not attached within

the basket and was thus exposed to the hazard of being bounced or knocked out while the boom was in operation. *See Salah & Pecci Constr. Co., Inc.*, 6 BNA OSHC 1688 (No. 15769, 1978) (wherein an aerial lift malfunction caused an employee to be tipped out of the basket and fatally injured.)

The record demonstrates that Lake Erie had actual knowledge of the violation because Schaffer was standing on the ground near the sign and observed Simon descend. Schaffer was the Lake Erie employee responsible for controlling the crew's work at the site, and he was therefore a supervisor. (Tr. 77-81, 89-90, Exh. C-13). Under Commission precedent, his actual knowledge is imputed to the company. *See, Halmar Corp.*, 17 BNA OSHC 1014 (No. 94-2043, 1997).[4]

The record also demonstrates that Lake Erie had constructive knowledge of the violation. On the one hand, it is apparent that Lake Erie attempts to ensure worker safety; it maintains a written safety policy and disciplinary procedure, it distributes written safety rules to its employees, and it conducts on-site safety inspections. Lake Erie also requires that its employees attend safety training offered through and in cooperation with the various unions, and it is evident that some form of aerial lift safety was addressed during this training. On the other hand, the company has no specific identifiable requirement that its employees tie-off while in the basket. This consistent with the company's safety director's testimony that the "man lift" [sic] itself was the fall protection. Further, Lake Erie's written safety rules do not require that employees use fall protection when working at heights under any circumstance. (Tr. 118-121 & 155-163, Exhs. C-15, 20 & 22, R-1, 2 & 4-8). It is the responsibility of an employer to take all reasonable steps to eliminate a preventable hazard. *Brock v L.E. Myers Co., High Voltage Div., ("L.E. Myers")* 818 F.2d 1270, 1277 (6th. Cir., 1987); *see also A/C Elec. Co.*, 956 F.2d 530, 535 (6th. Cir., 1991). Indeed, in the Sixth Circuit, where this case arises, an employer's failure to properly instruct its employees on a necessary safety precaution will establish the Secretary's *prima facie* case of constructive knowledge of the violation. *L.E. Myers*, 1277. Clearly, Lake Erie's failure to require its employees to tie-off while riding in the basket is tantamount to a failure to communicate this safety requirement. It also shows, in my opinion, that

[4] The Secretary argues that Simon should be "deemed" a supervisor because he had acted as a foreman in the past, and that his knowledge, along with Livengood's, should therefore be imputed to the company. I do not address this argument because I have found that actual and constructive knowledge otherwise exist.

the company did not take all reasonable steps to eliminate this hazard. Accordingly, I conclude that the Secretary has established that Respondent had constructive knowledge of the violation. This citation item is affirmed.

In its brief, Lake Erie argues that it should not be held responsible for this violation because Simon was not "working" within the meaning of the standard when he was descending from his work station. The Commission has already considered and rejected this precise argument. *See Salah & Pecci Constr. Co.*, 6 BNA OSHC at 1689. "Work" necessarily includes the activity of gaining access to the work station. *Gelco Builders, Inc.*, 5 BNA OSHC 1104 (No. 14505, 1977). I find that Simon was "working" within the meaning of the standard because he was descending from his work station, and Lake Erie' argument is rejected.

The Secretary has classified the violation as serious. I find the proposed classification appropriate because Simon could have sustained serious physical injuries if something had occurred to cause him to tip out of the basket. I also find, however, that the Secretary's proposed penalty of $900.00 is too high for this citation item.[5] Simon used the basket solely to ascend and descend from the sign, and the basket's sides, which were 44 inches high, provided some protection from a fall. The likelihood of injury was therefore lower than if Simon's work required him to remain in the basket for an appreciably longer period of time or if the basket had had lower or even no sides, and it is evident that the Secretary did not take these factors into consideration when she determined the amount of the proposed penalty. After giving due consideration to these facts, as well as the size of the company and the lack of evidence that it had previously violated standards relating to aerial lift safety, I conclude that a penalty of $450.00, rather than $900.00, is appropriate. This item is accordingly affirmed as a serious violation and a penalty of $450.00 is assessed.

Repeat Citation 2, Item 1

This citation item alleges a repeat violation of 29 C.F.R.§1926.501(b)(15). The cited standard provides as follows: "...(E)ach employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall

[5] Once a proposed penalty has been contested, the sole authority to determine the penalty rests with the Commission. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621 (No. 88-1962, 1994). The Secretary's proposed penalty at that point is hortatory at most.

arrest system." Because Simon and Livengood were at least 22 feet above the roadway when they were in the latticework, I conclude that the standard applies and that employees were exposed to the hazard.

The evidence also demonstrates that the standard's terms were violated. Undisputably, Simon had no personal fall protection system when he was in the latticework, and this alone proves the violation. Additionally, the evidence has persuaded me that Livengood's system was inadequate for the job. Livengood was sent up in the basket on the face-side of the 10 foot wide sign, with only one 5 foot long lanyard. In order to perform his task, Livengood had to mount the latticework and travel along the back of the sign in order to disconnect the sign's attachments. Because he had only one lanyard, however, he had to unhook and re-attach himself in order to perform his job. He was thus unhooked and unprotected for a brief period of time. Had he had two lanyards, he could have attached one before un-hooking the other, and thus could have remained protected the whole time. (Tr. 33-34, 109, 115).[6]

I also conclude that the Secretary has established the knowledge element of her case. First, I find that Lake Erie should have known that Livengood's fall-protection system was inadequate for this job. As is indicated above, it was impossible for Livengood to have tied off only once because of the position of the bucket truck, the width of the sign, and the length of the single lanyard attached to his system. Lake Erie has been involved in highway construction since 1985, performs upwards of four hundred contracts a year, and has experience replacing signs like the one involved in this case. It therefore reasonably should have been aware that the job of dismantling and or replacing a 10 foot wide sign required the use of two lanyards. (Tr. 83-86, 144-145, Exhs. C-1, C-2, R-10). Second, it is evident that Lake Erie knew or should have known that Livengood's harness in fact contained only one lanyard. Schaffer operated the controls to send Livengood up to the sign. Schaffer

[6] Lake Erie argues that Livengood required only one lanyard because the sign was only 10 feet wide and the lanyard was 5 feet long. This argument assumes that Livengood should have tied off once, somewhere towards the middle of the sign. It is clear, however, that Livengood had to get to the center of the latticework in order to reach this tie-off point, and I find that this was impossible to do without un-clipping at least once, based on the location of the bucket truck. Further, the fact that Livengood un-clipped while performing his work tends to disprove the company's assertion. (Tr. 97-98).

also testified that he had handed the harness and lanyard to Livengood. (Tr. 88, 108). Schaffer therefore knew or should have known that Livengood had only one lanyard, and, as supervisor, his knowledge is imputed to the company.

I also conclude that Lake Erie had constructive knowledge of the violation as it pertained to the instance involving Simon. It cannot be denied that Lake Erie undertook to ensure that employees working at heights were protected from falls; the company provided safety harnesses and lanyards to its employees at the job site, and its employees were aware that they should wear them. Further, as is discussed above, Lake Erie required its employees to attend union-organized safety training where OSHA's fall-protection requirements were addressed.[7] Arguably, by requiring employees to attend this training, the company may be seen to have adopted any safety rules covered therein. This, however, is not enough. As is indicated above, an employer must take all reasonable steps to eradicate preventable hazards. These steps may include imposing work rules and communicating the rules to employees. *L.E. Myers*, at 1277. *Compare, Stahl Roofing, Inc.*, Nos. 00-1268; 00-1637 (February 21, 2003). [Commission slip opinion]. Because Lake Erie's written safety rules do not require that employees who work at heights use fall protection, it was reasonably foreseeable that employees would believe that compliance with fall protection requirements would not be enforced on the job, despite the union training they received in this regard. Moreover, it is reasonable to infer that the company in fact did not inspect its work sites to ensure that proper fall protection was used, as the safety director's job-site checklist is silent on this issue. Finally, it appears on this record that Lake Erie did not amend its written safety rules even after receiving an OSHA citation for a fall-protection violation six months before the inspection that resulted in the issuance of this citation. (Tr. 158-160, Exhs. C-15 & 20, R-1, 2 & 8). These omissions are tantamount to a failure to adequately communicate its safety rules to its employees. They also establish that Lake Erie was not reasonably diligent in ensuring that employees who work at heights have appropriate fall protection. Under *L.E.*

[7] There was also proof that about 6 months before this inspection, the company had issued two written disciplinary warnings to employees who had failed to use fall-protection. These warnings, however, were issued four days after service of an OSHA citation for the underlying safety hazards and almost one month after the violations had occurred. These warnings therefore show to me only that the company will discipline an employee for a fall protection-related safety violation after OSHA has cited in this regard. (Exhs. C-15 & R-8).

Myers, therefore, constructive knowledge of this violation has been established, and this citation item is affirmed.

The Secretary classified this citation item as repeated based on Lake Erie's prior violation of 29 C.F.R. §1926.501(b)(15). (Exh. C-15). To establish that a violation is repeated, the Secretary must show that there was a final Commission order against the same employer for a substantially similar violation at the time of the alleged repeated violation. *Potlach Corp.*, 7 BNA OSHC 1061, 1064 (No. 16183, 1979). The Secretary makes out a *prima facie* case of similarity where, as here, the two violations were of the same specific standard. *Id.* at1063. The prior citation was issued because Lake Erie allowed employees at a previous job to work unprotected on an unguarded bridge which was over 25 feet above the highway below it. Thus, the hazard in both cases was a fall of more than 6 feet to the ground and both involved Lake Erie's failure to ensure that its employees used appropriate fall protection. I therefore find substantial similarity between the two violations so as to allow the former to provide the basis for classifying the latter as a repeated violation. (Tr. 34-37).[8] The Secretary's classification of this citation item is accordingly affirmed.

In arriving at an appropriate penalty, I have considered that the employees involved could have been injured or killed if they had fallen to the highway below them while working. The workers were exposed for short periods of time, there is evidence of only one prior fall protection violation on the part of the company, and Lake Erie has otherwise endeavored to ensure that its employees had a safe working environment. After weighing all of these factors, as well as the company's size, I find that a penalty of $4,000.00 is appropriate. A penalty of $4,000.00 is accordingly assessed for this violation.

Respondent's Defense of Un-preventable Employee Misconduct

Lake Erie asserts that it should not be held responsible for any of the alleged violations

[8] Lake Erie argues that the two violations were not substantially similar because the employees involved in the first citation were exposed to falling from a bridge, not lattice works and were supposed to have used a scissor lift, not harnesses, as fall protection. These differences, in my view, do not rebut the Secretary's *prima facie* showing. The hazard, *i.e.*, falling from a structure above a roadway to the surface below, was the same in both situations and both violations could have been avoided by the use of personal fall protection systems. Even if, as asserted, Respondent had *intended* to use a different form of fall protection in the earlier situation, the similarity of the nature of the violations is persuasive. (*See* Tr. 41-42).

because they occurred solely as the result of Simon's un-preventable misconduct. To establish a defense of un-preventable employee misconduct, an employer must prove that: (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated these rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *See Cerro Metal Products Div.* 12 BNA OSHC 1821 (No. 78-5159, 1986). As is set out *supra,* Lake Erie had a safety program that included written rules and on-site inspections, and there was evidence that the company disciplined employees for certain safety infractions. In order to establish the asserted defense, however, an employer must not only show that it had a safety program; it must show that that program addressed the specific violation at issue. *See Capform, Inc.*, 16 BNA OSHC 2040, 2043 (No. 91-1613, 1994); *see also Danis-Shook Joint Venture XXV*, 19 BNA OSHC 2166, 2170 (No.01-4038, 2003). It is on this issue that Lake Erie's proof falls short. As is indicated above, the company's written work rules are completely silent on the issue of fall protection. Moreover, even though Simon, while not a mumpsimus about safety belts, knew that he should have worn a harness and lanyard while on the sign. And even though employees were trained through the unions in OSHA's fall protection requirements, a review of this record reveals no distinct evidence that Lake Erie had a formal rule, whether oral or otherwise, delineating the circumstances under which it, as an employer, requires its employees to use fall protection. (*See* Tr. 128-129). Finally, as is noted above, the safety director's inspection checklist does not identify fall protection as an item, which indicates that the company did not adequately endeavor to prevent the occurrence of this type of violation. Lake Erie has thus failed to establish this defense.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of the Act.
2. The Commission has jurisdiction over the parties and the subject matter of this case.

3. Respondent was not in violation of the terms of 29 C.F.R. §1926.416(a)(1)

4. Respondent was in violation of the terms of 29 C.F.R. § 1926.453(b)(2)(v). This violation was serious and a penalty therefore of $450.00 is appropriate.

5. Respondent was in violation of the terms of 29 C.F.R. §1926. 501(b)(15). This violation was repeated and a penalty therefore of $4,000.00 is appropriate.

ORDER

1. Citation 1, Item 1 is VACATED.

2. Citation 1, Item 2 is AFFIRMED as a serious violation and a penalty of $450.00 is assessed.

3. Citation 2 Item 1 is AFFIRMED as a repeated violation and a penalty of $4,000.00 is assessed.

/s/
Michael H. Schoenfeld
Administrative Law Judge

Dated: May 27, 2003
Washington, D.C.