THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

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.

J. FLETCHER CREAMER & SON, INC.,

Respondent.

Docket No. 24-1055

DECISION AND ORDER

APPEARANCES:

For the Complainant:

Amanda Wilmsen, Esq.
Susannah Kroeber, Esq.
Office of the Solicitor
U.S. Department of Labor
New York City, New York

For the Respondent:

Michael Rubin, Esq.
Jeff Leslie, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Phoenix, Arizona & Dallas, Texas

BEFORE: William S. Coleman
U.S. Administrative Law Judge

INTRODUCTION

In January 2024, three employees of Respondent J. Fletcher Creamer & Son, Inc. (JFC) were injured when 12-inch steel piping that was undergoing pneumatic pressure testing suddenly separated under the pressure. Unbeknownst to the JFC foreman who controlled the pneumatic

pressure, his crew had not completely assembled the piping components. The pressurized piping calamitously separated because it had not been completely assembled.

The Occupational Safety and Health Administration (OSHA) investigated the injurious incident and later issued JFC a citation that alleged two workplace safety violations. JFC timely contested the citation, thereby bringing the matter before the independent Occupational Safety and Health Review Commission (Commission) for adjudication pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (Act). 29 U.S.C. § 659(c).

JFC is a heavy civil contractor based in Hackensack, New Jersey. Among the types of construction projects that JFC works on is installing utilities like natural gas pipelines. (T. 476). JFC had been subcontracted to install about 370 linear feet of new 12-inch steel gas main as part of the reconstruction of the River Road bridge that passes over highway I-287 in Piscataway, New Jersey. (T. 479; Ex. R-23). The new pipeline segment would be tied into an existing 12-inch gas main. (T. 295-96).

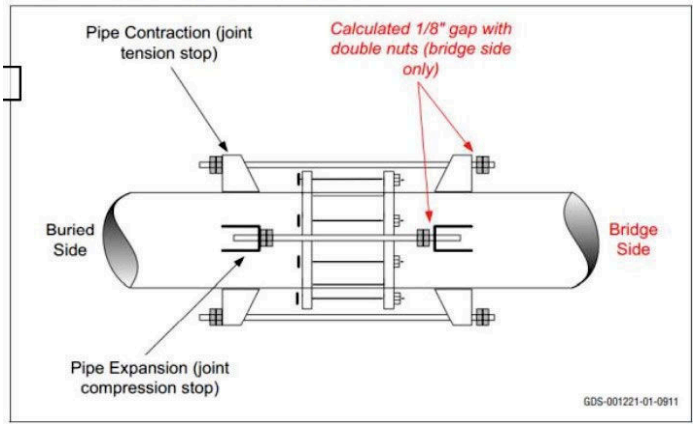
The new pipeline segment would be aboveground (and over I-287) on the underside of the bridge deck and underground along the road's two approaches to the bridge. JFC installed the aboveground (under bridge deck) segment first. (T. 295). JFC then assigned a different JFC crew comprised of five employees (a foreman, three laborers, and an equipment operator) to install the two underground segments. (T. 295; Exs. J-1 & C-6 at 1-2).

The pipeline was designed to have two mechanical *couplers* integrated into each underground segment, for a total of four couplers.[1] The diagram below (not to scale) depicts how

[1] The couplers were sometimes referred to at the hearing as *couplings* and *dressers*. (A company named Dresser manufactured the couplers. *See* Ex. R-17.)

each coupler would be connected to the steel pipes. (Ex. R-5 at 4, figure 9.50). In the diagram, the coupler is the middle component, and steel pipes have been inserted into both ends.

Figure 9.50: Example of Offset Coupling Restraint – Bridge Connection



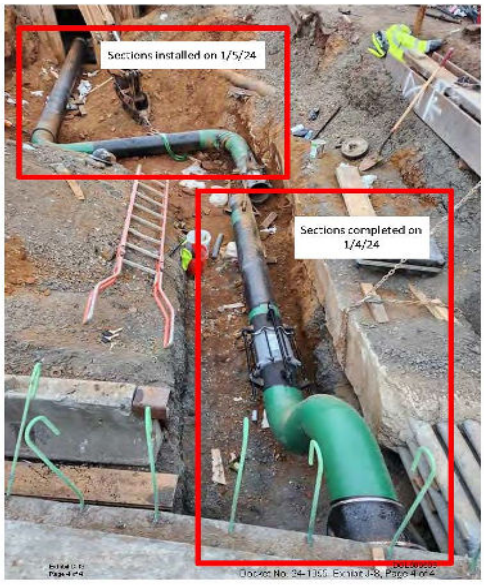
To completely install a coupler required that it be secured to the steel pipes by four threaded restraining bolts (sometimes called "restraining rods" at the hearing). (Only three of the four restraining rods are depicted in the diagram above.) The threaded restraining rods were to be inserted through bolt holes on metal tabs (referred to as "ears" at the hearing) welded to the exterior surface of the steel pipes. (T. 124, 162-63, 338). The restraining rods would be secured in place with threaded nuts that would keep the coupler connected to the steel pipes.

The JFC crew first completely installed the piping for south approach and then turned to the north approach. On January 4, the crew installed about half of the piping for the north approach, which included installing the third coupler. (T. 316, 327; Ex. J-8 at 4). Among the tasks that remained for the crew to perform the next day (January 5) were to install the remainder of the piping for the north approach and to perform a pneumatic pressure leak test on the piping for the north approach. (T. 295-96).

On January 5, the crew's three laborers inserted steel pipes into both ends of the project's fourth and final coupler. Then one of the laborers (the record does indicate which) installed that coupler's restraining rods, but he did not completely assemble the rods and nuts. (Ex. C-6 at 2). (The record evidence does not reveal exactly how the restraining rods and nuts were not completely assembled).

The foreman never inspected the fourth coupler to ensure that his crew had completely installed the restraining rods. Rather, before the crew finished installing the restraining rods, the foreman walked to a location on the bridge deck where the equipment for applying pneumatic pressure to the piping was located. Sometime after the foreman reached that equipment, he was informed that he could start a required pneumatic pressure test to test for leaks. (T. 303). He proceeded to do so and started applying pneumatic pressure to the piping. About 30 minutes after the pressurization started, and while two laborers continued working directly on the piping being pressurized, the steel pipe inserted into the fourth coupler's "bridge side" suddenly and violently separated from the coupler. (*See* photos, Ex. J-4A & Ex. R-5 at 2). The loose piping struck both laborers who were working directly on it — one suffered two broken shins, and the other suffered a broken ankle. The third laborer working near the other two was struck by debris and sustained facial lacerations.

The post-incident photo below shows the piping after the separation. (Ex. J-8 at 4; T. 316). The project's third coupler is at the bottom of the photo—the crew had correctly installed it on January 4. The separated fourth coupler is in the upper third of the photo:



OSHA investigated and later issued to JFC a Citation and Notification of Penalty (Citation) that alleged two violations: (1) a violation of section 5(a)(1) of the Act [29 U.S.C. § 654(a)(1)] known as the Act's *general duty clause*; and (2) a violation of an OSHA construction industry training standard codified at 29 C.F.R. § 1926.21(b)(2).

Following JFC's timely contest of the Citation, the matter was assigned to the undersigned Commission judge for adjudication. A three-day hearing was conducted remotely through videoconference technology on August 13–15, 2025. Post-hearing briefing was completed on January 16, 2026.

The section 5(a)(1) claim alleges that the "[u]se of pneumatic pressure testing is a recognized hazard" that on January 5 exposed employees "to being struck by piping and components" in the following manner:

> [JFC] employees at River Road Bridge/287, NJ were exposed to being struck by piping and fittings when they were working adjacent to a new Nat Gas pipeline that was under pneumatic testing at approximately 90 psi. Employees were cleaning, wrapping, [and] leak testing with green soap … .

The second citation item alleged a violation of 29 C.F.R. § 1926.21(b)(2), which is a construction industry training standard that provides: "The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." JFC is alleged to have violated § 1926.21(b)(2) in the following manner:

> On January 05, 2024, the employer failed to train its employees in the recognition and avoidance of unsafe conditions during the pressure testing of a new NAT-GAS pipeline. Employees were in close proximity cleaning, wrapping pipe and leak testing while the pressure test was taking place. This condition exposed employees to explosion hazards.

The dispositive issues are:

- Whether the Foreman's constructive knowledge of the hazardous condition is imputable to JFC because JFC's safety program was inadequate. [OSH Act sec. 5(a)(1)]

  Decision: The Secretary failed to prove JFC's safety program was inadequate and thus failed to prove the *employer knowledge* component of the section 5(a)(1) claim.

- Whether JFC's existing safety measures to eliminate or materially reduce the hazardous condition were inadequate. [OSH Act sec. 5(a)(1)]

  Decision: The Secretary failed to prove that conscientious safety experts would prescribe other or additional means and methods to eliminate or materially reduce the hazard and thus failed to prove the fourth enumerated element of the section 5(a)(1) claim.

- Whether a reasonably prudent employer in the same circumstances as JFC would have done more to train its employees in the recognition and avoidance of unsafe conditions during pneumatic pressure leak testing of a new natural gas steel pipeline. [29 C.F.R. § 1926.21(b)(2)]

  Decision: The Secretary failed to prove that JFC was non-compliant with the cited training standard, § 1926.21(b)(2).

For the reasons set forth below, both alleged violations are vacated.

FINDINGS OF FACT

The facts as set forth in the Introduction above and in the following numbered paragraphs were established by at least a preponderance of the evidence:

1. J. Fletcher Creamer & Son, Inc. (JFC) maintains its principal office in Hackensack, New Jersey. The company engages in heavy civil construction such as highway, street, bridge, and public utility construction. (Answer to First Amended Complaint, ¶ 2). JFC employs on average 800 to 850 employees and at any given time may have up to 125 active work sites. (T. 350). JFC is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Occupational Safety and Health Act of 1970 (Act) and is an employer within the meaning of section 3(5) of the Act. (*Id.* ¶ 4).

2. As part of a construction project to demolish and reconstruct the River Road bridge in Piscataway, New Jersey, that crosses over highway I–287, JFC was subcontracted to install 370 linear feet of new 12–inch diameter steel natural gas pipeline for the reconstructed bridge. The new pipeline segment would be tied into an existing 12-inch gas main. (T. 43, 350-51).

3. The new pipeline segment would traverse the underside of the bridge deck (and over I–287) for about 241 feet. At each end of the bridge, the pipeline would pass through a headwall and would be buried under River Road's approaches to the bridge for about 65 linear feet on each side. (Ex. R-24 at 12).

4. The owner and operator of the pipeline is a utility company named Public Service Electric and Gas (PSE&G). (T. 296, 351). JFC was required to perform the work according to PSE&G's specifications and with piping materials provided by PSE&G. (Ex. C-5 at 1; Ex. R-24 at 2 &12).

5. PSE&G's project plans specified that each of the two underground portions of the pipeline would include two Dresser "style 40" steel couplers spaced about 10 feet apart. The couplers would become integral components of the pipeline. The function of the couplers is to relieve stress on the pipeline due to expansion, contraction, and earth settlement near the bridge abutments. (Ex. R-7 at 226-30 & 245-46). Each coupler had an outside diameter of 12.75 inches and was approximately 20 inches in length. (Exs. R-17, R-23 at 19, R-24 at 12, & J-6).

6. Plain end 12-inch steel pipes would be inserted into both ends of each coupler, and the pipes and coupler would be secured together by long threaded bolts (referred to as *restraining rods*). The restraining rods would be inserted through metal tabs that had been welded to the exterior surfaces of the steel pipes inserted into the coupler's opposite ends. The restraining rods would be secured in place by threaded nuts screwed onto the threaded rods. (T. 338). (*See* diagram *supra* in the Introduction.)

7. JFC assigned a five-person crew (comprised of a foreman, three laborers, and an equipment operator) to install the pipeline segments that would be underground at both approaches to the bridge. (T. 295; Exs. J-1 & C-6 at 1-2). In the days before the injurious incident on January 5, that crew had fully installed the two couplers at the bridge's south approach, and the day before the crew had fully installed the first of two couplers on the bridge's north approach. (*See* Exs. J-8 at 4 & R-5 at 2).

8. The crew's work plan on January 5 included installing the remainder of the piping for the north approach and performing a pneumatic pressure leak test on that piping. (T. 295-96).

9. On January 5, 2024, the crew did not completely install the restraining rods on the second coupler on the north bridge approach. The crew foreman (Foreman) did not watch the laborers complete all their work installing the restraining rods. Rather, the Foreman told the crew that he was departing from that area to walk to a location on the bridge deck where he would operate equipment to commence a pneumatic pressure leak test of the piping at the bridge's north approach. (T. 302-03; Ex. R-5 at 5). The Foreman instructed the crew to inform him when they were ready for him to start the pressure test. (T. 303). Sometime after reaching the location where the equipment for pressurizing the pipeline was set up, the Foreman received the go-ahead to start the pressure test, erroneously believing that the restraining rods had been completely installed. (T. 332-35). The Foreman then started applying pneumatic pressure while the three crew laborers continued working in the pipeline excavation. Two of the laborers were performing tasks directly on the piping, wrapping parts of it with protective tape (the green colored parts of the pipe shown in the photo above) and also "jeeping" the pipe (*jeeping* "means running an electrode along the pipe to check for any issues with the coating or the pipe" [T. 300]).

10. It was the Foreman's customary practice for his crew to wrap and jeep steel pipe that is under pneumatic pressure for a leak test. (T. 301, 336-37).

11. Neither the Foreman nor any other JFC supervisor had actual knowledge that the Foreman was pressurizing piping on which a coupler's restraining rods were not completely installed.

12. The Foreman failed to exercise reasonable diligence in pressurizing the incompletely installed pipeline segment while employees continued working in the test area.

13. Pneumatic pressure reached the test pressure level of 90 psi within about 20 minutes after the Foreman started pressurization. (T. 168, 188, 335). About 30 minutes after starting pressurization, stored pressure caused the steel pipe connected to the coupler's bridge-end to separate from the coupler because the restraining rods that would have prevented the separation had not been fully installed. (T. 495). The loose piping material struck and seriously injured the two laborers who were working directly on the piping, and debris propelled by the shifting pipe struck and injured the third JFC laborer who was working near the other two. (T. 44-45, 170; Ex. R-5 at 1-2).

14. When the piping separated, the crew had not yet applied any soap solution to its joints and welds, and so the laborers had not yet begun to observe the piping for soap bubbles that would signify a leak. (T. 301, 336-37).

15. The same crew that had failed to completely install the restraining rods on the coupler on January 5 had correctly installed the restraining rods on three identical couplers in the days prior (two couplers on the south approach, and the third coupler on the north approach). (T. 316, 327-28; Exs. R-5 at 5 & J-8 at 4). The crew had correctly installed the third coupler the day before, January 4. (Exs. J-8 at 4 & R-5 at 2, 4, and 7).

16. JFC recognized that conducting pneumatic pressure leak testing on incompletely assembled steel piping and components while employees worked in or near the test area was a hazardous condition that was likely to result in death or serious physical harm if an injurious incident were to occur. (T. 303, 338-39, 361-64, 399-400; Exhibits J-1 at 7 & R-11).

17. JFC had a written *Steel Pipe Pressure Testing Policy*, the body of which was comprised of eight bullet points as follows (Ex. R-11):

Before any pressure testing is performed, the following conditions are to be met:

- The local District Manager must [be] called in advance to be informed of the test
- A qualified and trained company supervisor will oversee all steel pipe pressure testing
- The supervisor will perform an onsite test briefing with all members of the crew to discuss the job/scope of the project and testing requirements
- Inspector[2] must be present on site and informed before the test is started
- All ends of the pipe to be tested will be exposed, all test fittings and tooling will be inspected
- Pressure protocol including but not limited to test pressure, duration of test, depressurizing, test documentation, removal of fittings and any other special requirements will be submitted to the client prior to any testing for their approval
- A testing JHA will be performed with the entire crew so that everyone is aware of the scope as well as their roles and responsibilities
- The company supervisor will remain on site during connection, pressurization and depressurization of the line(s). If the test duration is to continue during off hours, all exposed ends are to be properly safeguarded

18. JFC developed a Job Hazard Analysis (JHA) form titled *Pipe Installation – Steel*. Among the hazards the JHA identified for the overall activity of steel pipe installation was "Caught/Struck by," and among the *Corrective Action* bullet points the JHA form identifies to address the identified hazards were the following (Ex. J-1 at 7):

- pressure test – confirm all fittings & air connections such as cotter pins & whip checks are in place….
- pressure test – ensure proper fittings/caps are installed - no air is to be added to any line before excavating to ensure both ends are properly secured (capped)

[2] The "inspector" referred to would be a representative of the owner and operator of the pipeline being pressure tested, which on this project was PSE&G. On this project, PSE&G assigned that individual the title *project inspector*. (Ex. R-7 at 333; T. 332-33).

> • steel pipe pressure testing policy must be followed & attached as part of the [JHA]

19. The Foreman and his crew went over the JHA at the start of the day on January 5, 2024, and each of them physically signed the electronic JHA form before starting to work that day. (T. 297-98; Ex. J-1 at 9). They had done the same thing on each of the three days immediately preceding January 5. (Ex. R-2).

20. U.S. Department of Transportation (USDOT) regulations require that workers involved in installing and pressure testing natural gas pipelines complete certain training that meets specified requirements. (T. 353). To conform with this regulatory mandate, PSE&G required that the JFC employees who would be involved in the pipeline installation and pressure testing successfully complete training that satisfied these USDOT requirements. (T. 522). All members of the JFC crew working on January 5, including the Foreman, successfully completed that training, which an independent third-party training organization delivered to them. (T. 351-53; Ex. R-7 at 49, Ex. J-9 at 10-13). This training was known as Operator Qualification (OQ) training and entailed three days of classroom instruction plus a fourth day for hands-on evaluation in a field environment. (T. 320-21). Other than the OQ training, JFC did not provide employees with additional formal training specific to the installation and pressure testing of natural gas steel pipelines. (T. 352-53).

21. PSE&G prescribed a pressure of 90 psi for the pneumatic leak test. That pressure is 5.5% of the 12-inch steel pipe's *specified minimum yield strength* (SMYS). The operating pressure for the gas main would be 60 psi, which is 3.6% of the pipe's SMYS. (Ex. R-24 at 18-19). Both the test and operating pressures impose relatively low stress levels on the 12-inch steel pipe used here. (T. 498, 556-59). There was no evidence that JFC's industry recognized that the new

pipeline materials installed here would be susceptible to exploding, rupturing, or otherwise sustaining damage at a pressure level of 5.5% of their SMYS.

22. There is no industry recognized risk of the new pipe material here failing when subjected to pneumatic pressure of less than 50% SMYS. (T. 490, 494, 507; Ex. C-1 [ASME B31.8-2022] at 75, sec. 841.3.6, Safety During Tests).

23. JFC developed work rules that were adequate to prevent employees from conducting pneumatic pressure leak testing on incompletely installed piping. JFC adequately communicated those work rules to the Foreman and the laborers on the Foreman's crew. JFC's overall safety program for communicating work rules affecting workplace safety and health was also adequate.

24. JFC took steps to prevent employees from conducting pneumatic pressure testing on incompletely installed piping, and those steps were adequate.

25. JFC enforced its work rules affecting workplace safety and health by administering a generally adequate progressive discipline policy when violations were discovered.

DISCUSSION

The Commission obtained jurisdiction under section 10(c) of the Act upon the Secretary's receipt of JFC's timely filed notice of intent to contest. (T. 10). 29 U.S.C. § 659(c); 29 C.F.R. §§ 1903.17(a) & 2200.33. JFC is an "employer" as defined in section 3(5) of the Act and is thus subject to the compliance provisions of section 5(a). 29 U.S.C. §§ 652(5) & 654(a). (T. 10-11).

Section 5(a)(1) Claim
[*Citation 1, Item 1*]

The Act's general duty clause, section 5(a)(1), provides: "Each employer ... shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

To prove a section 5(a)(1) violation, the Secretary must establish by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Peacock Eng'g, Inc.*, 26 BNA OSHC 1588, 1589 (No. 11-2780, 2017); *accord W. World, Inc. v. Sec'y of Lab.*, 604 F. App'x 188, 192 (3d Cir. 2015) (unpublished); *BHC Nw. Psychiatric Hosp., LLC v. Sec'y of Lab.*, 951 F.3d 558, 563 (D.C. Cir. 2020).[3] In addition to proving these four elements are two other requirements: the preponderant evidence must show (1) "that employees were exposed to the asserted hazard," and (2) "that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition." *Peacock Eng'g, Inc.*, 26 BNA at 1589.

A. The Condition or Activity Presenting a Hazard

"In a general duty clause case, the hazard must be defined in a way that apprises the employer of its obligations, and identifies conditions and practices over which the employer can reasonably be expected to exercise control." *Mo. Basin Well Serv., Inc.*, 26 BNA OSHC 2314,

[3] Because New Jersey is the site of both the worksite and JFC's principal office, the Secretary may file a petition for judicial review of a final order of the Commission in this matter only in the U.S. Court of Appeals for the Third Circuit. JFC could file such a petition in either the Third Circuit or the D.C. Circuit. 29 U.S.C. § 660. Absent conflicting precedent from either the Third Circuit or D.C. Circuit, Commission precedent controls. *See Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096 n.4 (No. 10-0359, 2012) (Commission "follow[s] [its] own precedent" where the circuit court "has neither decided nor directly addressed [an] issue") (quoting *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1110-12 (No. 97-1918, 2000)). But "[w]hen the law of the circuit to which a case would likely be appealed differs from the Commission's case law," the law of that circuit controls. *Brooks Well Serv., Inc.*, 20 BNA OSHC 1286, 1292 (No. 99-0894, 2003). If the outcome here, which favors JFC, becomes a final order of the Commission, JFC would presumably not petition for judicial review, while the Secretary could file a petition for judicial review only with the Third Circuit. This decision's consideration of circuit court authority therefore focuses on Third Circuit precedent.

2316 (No. 13-1817, 2018) (citation modified). To meet this requirement, the Commission has ruled that "a hazard must be defined in terms of a preventable consequence of the work operation," *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1121 (No. 88-572, 1993), or "in terms of preventable practices or conditions" "which *increase* the likelihood of" an injurious incident. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986). Such specificity in pleading a section 5(a)(1) claim is necessary to "give[] the employer *fair notice* of its obligations under the Act by specifying conditions or practices which are within the employer's control." *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1168 (No. 91-3344, 2000) (emphasis added).

The section 5(a)(1) claim here describes the hazardous condition/practice to have been that "employees … were exposed to being struck by piping and fittings when they were working adjacent to a new Nat Gas pipeline that was under pneumatic testing at approximately 90 psi."

JFC argues that the section 5(a)(1) claim fails to define the hazard in a way that apprises it of its obligations because the claim "allege[s] nothing about pressure testing that specifically constitutes a hazard." (Resp't Responsive Br. 3; *see also* Resp't Brief-in-Chief 6-7). Consequently, JFC contends, "the Secretary has failed to give [JFC] fair notice of its obligations under the Act." (Resp't Responsive Br. 3, citing *Beverly Enterprises*).

In support of this position, JFC points to the testimony of its expert witness, who is a professional engineer, that there was no potential for the pipeline *materials* to fail (i.e., rupture, fracture, or the like) at the test pressure of 90 psi. JFC's expert witness described the 90-psi test pressure as being "very, very low relative to [the pipeline's] strength." (T. 556-59, 498). Quantitively, the test pressure of 90 psi was 5.5% of the pipeline's *specified minimum yield strength* (SMYS). (Ex. R-24 at 11 & 19; T. 501-02, 557-59). A steel pipe's SMYS relates to the

elasticity of its material when under pressure and constitutes "the guaranteed strength at which there would be no permanent deformation to the material." (T. 501-02).

As drafted, the section 5(a)(1) claim suggests that the pneumatic pressure test here was intended to test the pipeline not only for leaks but also for *strength* (i.e., whether the materials could withstand pressure at 90 psi without rupturing or fracturing or the like). The testimony of the inspecting OSHA compliance safety and health officer (CO), who drafted the original Citation, indicates that he intended the alleged violation to be understood in that very way. (*See*, *e.g.*, T. 66, 188). The Secretary perpetuates that understanding in post-hearing briefing. *See* Sec'y Brief-in-Chief 4 ("The very purpose of the [pneumatic pressure] test is to assess the pipe's integrity and whether it suffers any infirmity").

The Secretary's apparent belief that the pipeline's *strength* was being tested by subjecting it to pneumatic pressure of 90 psi reflects a fundamental misunderstanding of the nature of the pneumatic pressure test here. The pressure test was *not* done to determine whether the piping could withstand pressure of 90 psi without rupturing or being damaged.[4] Rather, PSE&G required JFC to conduct a pressure test for the sole purpose of determining whether any of the welds or joints on the piping *leaked* at 90 psi (which was 150% of the pipeline's operating pressure of 60 psi). (T. 221, 247). PSE&G required the leak test be done at a pressure of 90 psi at least in part because pipeline safety regulations issued by the USDOT (which apply to pipeline operators like PSE&G) mandate that a piping system like the one involved here undergo pressure testing for

[4] The gas main would be operated at 60 psi, which is 3.6% of the pipe's SMYS. (Ex. R-24 at 18-19). Training materials used to train JFC employees in pipeline pressure testing correctly instructed that a USDOT regulation (49 C.F.R. § 192.505) requires pressure testing for *strength* when the pipeline is to operate at SMYS of 30% or higher. (Ex. J-3 at 3). There is no evidence that JFC was required or undertook to test the pipeline here for strength.

leaks at a test pressure of no less than 90 psi. 49 C.F.R. § 192.509(b).[5] *See also* Ex. R-7 at 333 (PSE&G's Gas Distribution Standards that note pressure testing of piping systems is subject to compliance with USDOT regulation § 192.509).

The parts of the piping system that would be observed for *leaks* during the pressure test at 90 psi were limited to areas that JFC had welded and the pipe/coupler joints. (T. 221-22). The leak test requires that JFC employees apply a soap solution to the welded areas and the pipe/coupler joints and then observe those areas for soap bubbles signifying a leak. Employees tasked with watching for soap bubbles necessarily do so from close range when the pressure in the piping is being held at 90 psi. (E.g., T. 336-37). Employee proximity to the pipeline while it is under test pressure of 90 psi is a necessary component of the leak testing that PSE&G required JFC to perform for PSE&G to satisfy a USDOT requirement.

The CO's apparent misunderstanding that there was a risk of the pipeline rupturing under pneumatic pressure of 90 psi led to frequent references during the hearing to the potential for "rupturing" at that test pressure. (E.g. T. 30, 43, 45-46). These frequent references were made even though all three "fact" witnesses at the hearing, including the CO, correctly understood that the actual injurious event did not involve the pipeline literally rupturing, but rather that a pipe and coupler separated calamitously upon the sudden release of stored pneumatic pressure. (CO

[5] This USDOT regulation, 49 C.F.R. § 192.509, is captioned "Test requirements for pipelines to operate below 100 p.s.i. (689 kPa) gage," and provides:

> Except for service lines and plastic pipelines, each segment of a pipeline that is to be operated below 100 p.s.i. (689 kPa) gage must be leak tested in accordance with the following:
>
> (a) The test procedure used must ensure discovery of all potentially hazardous leaks in the segment being tested.
>
> (b) … each main to be operated at or above 1 p.s.i. (6.9 kPa) gage must be tested to at least 90 p.s.i. (621 kPa) gage.

testimony, T. 53, 63-64, 199-201, 219, 255-57; Foreman testimony, T. 314-15, 339-40; JFC Risk Manager testimony, T. 365, Ex. J-8 at 1, Ex. R-5 at 1). The violent separation of a steel pipe and the coupler due to restraint installation failure is a very different kind of event from the rupture of pipeline materials. (T. 496).

The uncontroverted expert testimony is that the prescribed test pressure of 90 psi posed no risk of causing the pipeline materials to fail (i.e., rupturing or fracturing, or the like). The expert testimony was consistent with an applicable industry consensus standard providing that when the test pressure exceeds 50% of the pipeline's SMYS, which is more than nine times the pressure exerted on the pipeline here at the test pressure of 90 psi, a pipeline operator must "take all practicable steps to keep persons not working on the testing operation outside of the testing area." (Ex. C-1 at 75, ASME Code for Pressure Piping, B31.8-2022, sec. 841.3.6, *Safety During Tests*; *see also* Ex. R-24 at 24). A USDOT pipeline safety regulation that applies to pipeline operators, 49 C.F.R. § 192.515(a), prescribes substantially the same requirement.[6] (Ex. R-24 at 19 & 24).

[6] The Citation quoted 49 C.F.R. § 192.515 in full. (The Secretary later removed that quotation from the section 5(a)(1) claim via an Amended Complaint.) Section 192.515 is captioned "Environmental protection and safety requirements," and its subparagraph (a) provides:

> In conducting tests under this subpart, each operator shall insure that every reasonable precaution is taken to protect its employees and the general public during the testing. Whenever the hoop stress of the segment of the pipeline being tested will exceed 50 percent of SMYS, the operator shall take all practicable steps to keep persons not working on the testing operation outside of the testing area until the pressure is reduced to or below the proposed maximum allowable operating pressure.

In later removing this quoted language from the section 5(a)(1) claim, the Secretary explained that the quotation (along with some other references in the Citation) was "superfluous." (Sec'y Motion to Amend dated June 18, 2025, at 3). Maybe so, but another reason for striking the complete text of 49 C.F.R. § 192.515 from the Citation and the original complaint might have been that the Secretary came to recognize that this USDOT regulation undermined his theory of the case in that the regulation does not mandate the use of any exclusion zones during pressure testing at the test pressure involved here, which was 5.5% of the pipe's SMYS. (*See* T. 186-90).

The OQ training that the JFC employees received on pressure testing natural gas pipelines was to the same effect. (Ex. J-3 at 3).

"Whether a work condition is recognized as a hazard is a question of fact." *Mo. Basin Well Serv.*, 26 BNA OSHC at 2317. The great weight of the evidence established that the potential of the pipeline material here failing at 90 psi was decidedly *not* recognized to be a hazard. The CO's suggestions in his testimony that there was the potential for failure/rupture of the pipeline at the test pressure of 90 psi is not corroborated by any other evidence but rather was decisively refuted by three critical elements: expert testimony, an applicable industry consensus standard, and USDOT pipeline safety regulations. The CO's testimony respecting the potential for pipeline rupture during the pneumatic leak test at 90 psi, as well as his testimony respecting measures purported to reduce or eliminate that unrecognized hazard, is not credited.

In post-hearing briefing, the Secretary asserts that he "argues precisely what [JFC] acknowledges: that certain aspects of pneumatic pressure testing may present hazards when not executed correctly, … such as the struck-by hazards alleged here." (Sec'y Responsive Br. 2) (quotation modified). This accurately describes some of what the Secretary has *argued*. However, the hazard that the Secretary has *pleaded* does not allege that the struck-by hazard arose from a failure to correctly execute pneumatic pressure testing. Nor does the hazard as pleaded identify any condition or practice within the broader activity of the pneumatic pressure testing that, if performed incorrectly, may expose employees to being struck by piping and fittings.

For these reasons, JFC's argument that the section 5(a)(1) claim as pleaded does not provide it with fair notice of its obligations under the Act by specifying conditions or practices which are within its control is meritorious and is sustained.

However, this pleading deficiency is not fatal to the section 5(a)(1) claim. "The Commission may look to the issues as they are litigated and in particular the manner in which the employer presents its case to help determine whether the employer has had fair notice of the recognized hazard from which it has a duty to protect its employees." *Beverly Enters.*, 19 BNA OSHC at 1169.

The parties did indeed litigate whether rupture/failure of the pipeline materials at 90 psi constituted a struck-by hazard, and as described above, there is no substantial evidence of record that supports that proposition. However, the parties also litigated the issue of whether a struck-by hazard existed by virtue of subjecting an incompletely assembled/installed coupler to pneumatic pressure leak testing at 90 psi.

Both the Secretary and JFC accurately understood in the near aftermath of the injurious incident that the pressurized steel pipe and coupler did not rupture or break but rather suddenly and violently separated and injured employees because the restraining rods had not been completely assembled/installed. Mere days after the failed pneumatic leak test, JFC assessed that the pipe and coupler had separated and its employees injured because the "restraining rods were not installed properly." (Ex. J-8 at 1, "Incident Report – Update 01/09/24"). The JFC Foreman similarly recognized in the aftermath that a pipe had separated from the coupler during the leak test and that the materials had not ruptured. (T. 315, 341-42). And in formally disciplining the Foreman in May 2024, JFC described the incident thus: "Failed pressure test resulting in injury *due to pipe separation*." (Ex. J-7) (emphasis added). Consistent with JFC's assessment, JFC's Risk Manager acknowledged in a pre-hearing deposition that conducting a pressure test on an incompletely installed coupler constitutes a hazard. (T. 361-62).

Further, the investigating CO's violation worksheet, which he prepared before OSHA issued the Citation, similarly described the hazard to have been JFC employees working "within close proximity of [natural gas] [p]iping and dresser coupling pressure testing where there were … *not fully connected* tension rods." (Ex. R-24 at 15, emphasis added). Consistent with that observation, the Citation that the CO drafted alleged that one feasible means to abate the alleged struck-by hazard was "proper and complete installation of all components of mechanical coupler."

At the evidentiary hearing, JFC's theory of the case was grounded in its accurate conclusion that the struck-by hazard to which its employees were exposed was working near an incompletely assembled/installed pipeline segment that was under pneumatic pressure of 90 psi. JFC's attorney articulated that theory in his opening statement at the merits hearing (T. 33-35):

> This case turns on a simple truth. When proper procedures are followed, routine work remains safe. Just as properly installed brakes make driving safe, pneumatic pipe pressure testing at low levels is not hazardous unless a critical step is missed…
>
> The hazard in this case arose only because of an incomplete installation of couplings and rods, an isolated error, not a reflection of [JFC's] practices or knowledge. …
>
> In short, … this is not a case of disregard for safety or failure to instruct. It is a case where a routine procedure wasn't followed….

This opening statement augured the hearing testimony of the professional engineer who served as JFC's expert witness. That expert witness testified that conducting a pressure test at 90 psi without the coupler restraints being completely installed constituted a hazardous condition. (T. 496, 553-54). And in JFC's post-hearing brief, JFC acknowledges that "the record shows the incomplete installation of a restraint on the coupling … caused the separation." (Resp't Brief-in-Chief 7) (internal quotations and punctuation modified). As previously noted, all three fact witnesses at the hearing had come to the same correct understanding before JFC's expert witness

became involved in the litigation. (CO testimony, T. 53, 63-64, 199-201, 219, 255-57; Foreman testimony, T. 314-15, 339-40; JFC Risk Manager testimony, T. 365, Ex. J-8 at 1, Ex. R-5 at 1).

The hearing record thus substantially undermines JFC's contention that it lacked notice of the conditions or practices within its control constituting a hazard. Rather, the hearing record establishes that JFC recognized and plainly understood, even in the early aftermath of the injurious event, that its employees had sustained struck-by injuries when an incompletely assembled/installed coupler separated from a steel pipe while under pneumatic leak test pressure of 90 psi.

The application of pneumatic pressure of 90 psi to the incompletely installed piping and fittings while employees worked nearby is a hazardous condition that both parties plainly understood to have been present at the worksite. The parties held this common understanding prior to the issuance of the Citation, and that understanding continued thereafter uninterrupted in the lead-up to the hearing, during the hearing, and further into post-hearing briefing.

JFC does not contend that the deficient pleading disadvantaged it in defending against the section 5(a)(1) claim. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1263 (No. 06-1416, 2008) (rejecting employer's argument that the alleged violation did not provide it with fair notice, ruling that "the pivotal question is whether prejudice would result because the failure to originally plead the issue disadvantaged the opposing party in presenting its case") (citation modified).

The deficient formulation of the section 5(a)(1) claim here is analogous to the claim in *Beverly Enterprises*, where the Secretary alleged that the hazard that nursing home employees had been exposed to was "manual lifting of residents." There, on review of a Commission judge's decision, the Commission redefined the hazard and determined further that the employer had been provided fair notice of the hazard as the Commission was redefining it post-hearing, ruling:

"Notwithstanding any lack of clarity in the citation and complaint description of the recognized hazard, we find that [the employer] plainly understood that the alleged recognized hazard was its work practices in terms of its unsafe lifting and transferring methods." 19 BNA OSHC at 1169.[7]

The section 5(a)(1) claim is therefore amended post-hearing pursuant to Federal Rule of Civil Procedure 15(b) to identify the practice/condition that exposed employees to a struck-by hazard to have been *conducting pneumatic pressure testing to incompletely assembled steel piping and components while employees worked in the test area*. (Italics represent amended language added post-hearing.)

Because the parties squarely recognized that this was among the issues being litigated, the section 5(a)(1) claim is amended post-hearing to allege the same. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) ("Trial by consent [under FRCP 15(b)] may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue."); *Ostano Commerzeanstalt v. Telewide Sys., Inc.*, 880 F.2d 642, 646 (2d Cir. 1989) (noting that FRCP 15(b)(2) is mandatory, not merely permissive, "in requiring that issues that are tried, though not raised in the pleadings, be treated as if they were raised in the pleadings");

[7] *Beverly Enterprises* is only one example of the Commission exercising its authority in a section 5(a)(1) case to redefine the hazard post-hearing. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004) ("The Commission may define the hazard itself"). Other examples are: *Pelron Corp.*, 12 BNA OSHC 1833, 1835-36 (No. 82-388, 1986) (rejecting both the judge's and the Secretary's formulation of the hazard and instead substituting its own formulation); *Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984), (rejecting the "Secretary's broad, generic definition of the hazard" and substituting its own definition); *U.S. Steel Corp.*, 12 BNA OSHC 1692, 1698 (No. 79-1998, 1986) (rejecting Secretary's allegation that a recognized explosion hazard existed by water coming into contact with molten metal and determining instead that water becoming encapsulated in molten metal was a recognized explosion hazard); *Mid South Waffles, Inc.*, No. 13-1022, 2019 WL 990226, *3 (OSHRC, Feb. 15, 2019) (redefining the hazard to be a "full grease drawer" where the citation alleged employees had been exposed to burn hazards because "the grease drawer was not properly maintained to prevent a grease fire," noting "there is no dispute that the parties litigated the hazard as being that of a 'full grease drawer.' ").

Morrison–Knudsen Co., 16 BNA OSHC at 1112-14 (upholding Commission judge's *sua sponte* post-hearing amendment under FRCP 15(b)(2)).

JFC's fair notice argument is therefore rejected. The description of the alleged hazard, as amended post-hearing pursuant to FRCP 15(b)(2), sufficiently defines the hazard in terms of the *physical agents that could injure* employees, i.e. the piping and fittings. *See Mo. Basin Well Serv.*, 26 BNA OSHC at 2316 (stating the "hazard must be defined in terms of the physical agents that could injure employees rather than the means of abatement") (citation modified). This amended description of the alleged hazard also sufficiently defines it in terms of a *condition over which JFC can reasonably be expected to exercise control* (i.e., conducting pneumatic pressure testing on incompletely assembled/installed steel piping). The section 5(a)(1) claim as amended post-hearing satisfies the pleading requirements for a section 5(a)(1) claim. *See TCP Specialists, LLC v. Sec'y of Lab.*, 178 F.4th 701, 708 (D.C. Cir. 2026) (ruling that Commission judge's definition of the alleged hazard comported with Commission precedent in that it (1) described the hazard in terms of the physical agents that could injure employees ["frac stack" and pressured piping], and (2) identified conditions or practices over which the employer exercised control [employee proximity to the physical agents]).

B. Recognition of the Hazard by JFC or its Industry

"The risk of injury to employees, not the specific incident or accident that results in injury, is the relevant consideration in determining the existence of a recognized hazard."[8] *Wiley*

[8] This is not to say, however, that there may be no nexus between a specific injurious incident and the alleged recognized hazard, as abundant Commission precedent demonstrates. *See, e.g.*, *Pelron,* 12 BNA OSHC at 1835-36 (defining the recognized hazard to be an explosion hazard from the improper handling of a flammable chemical, where the incident that precipitated the OSHA inspection was a fatal explosion that resulted from the improper handling of the flammable chemical), *Mid South Waffles*, 2019 WL 990226, at *3 (determining the recognized hazard to be

Organics Inc., 17 BNA OSHC 1586, 1594 (No. 91-3275, 1996), *aff'd*, 124 F.3d 201 (6th Cir. 1997). "Hazard recognition may be shown by proof that a hazard is recognized as such by the employer or by general understanding in the employer's industry." *Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920, at *7 (OSHRC, Mar. 4, 2019) (citation modified).

"The Secretary can establish actual recognition by, among other things, showing that a supervisor was aware of the hazard." *Henkels & McCoy, Inc.*, No. 18-1864, 2022 WL 3012701, at *3 (OSHRC, July 21, 2022), *aff'd*, No. 22-13133, 2026 WL 950135 (11th Cir. Apr. 8, 2026); *RoadSafe Traffic Sys., Inc.*, No. 18-0758, 2021 WL 5994023, at *4 (OSHRC, Dec. 10, 2021) (imputing to the employer its chief operating officer's recognition of the hazard); *Mo. Basin Well Serv.*, 26 BNA OSHC at 2317-18 (imputing supervisor's recognition of hazard to employer).

An employer's safety precautions, when coupled with other independent evidence, may be sufficient to establish that a cited employer has *recognized* a condition/practice as constituting a hazard. *See Mid South Waffles*, 2019 WL 990226, at *5; *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2007 & 2030-31 (No. 89-0265, 1997) (using employer's knowledge of prior accidents and injuries as basis for employer recognition of hazard); *Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920, *8 (OSHRC, Mar. 4, 2019) ("[T]he record here establishes both that [the employer] had work rules addressing the hazard of workplace violence and that the company,

---

"full grease drawer," where the incident that precipitated the OSHA inspection was a grease fire that resulted from a full grease drawer), *Davey Tree*, 11 BNA OSHC at 1899 (defining recognized hazard "as electrocution from a tree limb contacting a power line because of actions of employees in removing the limb," where the incident precipitating the OSHA inspection was the electrocution of an employee who was removing a tree limb that contacted a power line), *U.S. Steel*, 12 BNA OSHC at 1698 (determining that a recognized explosion hazard exists when water becomes encapsulated in molten metal, where the evidence established that multiple molten metal–water explosions had occurred after water had become encapsulated in molten metal).

through its supervisory personnel, otherwise recognized this hazard," to include "incidents [having been] previously reported to … supervisors").

"Whether a work condition is recognized as a hazard is a question of fact." *Mo. Basin Well Serv.*, 26 BNA OSHC at 2317.

JFC's Risk Manager testified that if the components of a pipeline are "not assembled correctly, yes, there's the potential for a hazard to present itself," and that "[t]here's the potential for the pipe to shift, to move" during pneumatic pressure testing. (T. 361-62). The Risk Manager was also aware of a previous injurious incident on a project in which JFC had been a co-venturer in which a temporary endcap on a pipe did not withstand the pneumatic pressure. (T. 363-64, 399-400).

The JFC Foreman acknowledged understanding that the coupler's restraining rods "are supposed to be installed prior to the pressure testing" and that they served as a "restraint to hold back the coupling." (T. 338). He acknowledged further that in his role as foreman he is "required to watch [the pipeline components] be installed" and that he has "responsibility over [his]crew to make sure they're finishing the job." (T. 339).

JFC devised an electronic JHA form, titled *Pipe Installation – Steel*, which set forth hazards that JFC associated with specific activities within that broader task, along with corrective actions to protect against those hazards. (See Findings of Fact ¶ 17; Ex. J-1). One of the specific activities identified is *Installing pipe – STEEL*, and "Caught/Struck By" is identified as one of the hazards associated with that activity. Included among the JHA form's corrective actions for hazards associated with installing steel pipe were the following two bulleted items: "pressure test – ensure proper fittings/caps are installed" and "steel pipe pressure testing policy must be followed & attached as part of the [JHA]." (Ex. J-1 at 7).

When questioned about the corrective action item in the JHA that provides "pressure test – ensure proper fittings/caps are installed," JFC's Risk Manager testified that "typically the hazard that's present" is that "air can be released from the pipe." (T. 361).

The JHA references JFC's "steel pipe pressure testing policy," the body of which is quoted in full in Finding of Fact ¶ 17 and which is in essence a checklist for pressure testing. The two items in the checklist that are most germane to the hazard recognition element of the section 5(a)(1) claim are: "A qualified and trained company supervisor will oversee all steel pipe pressure testing;" and "All ends of the pipe to be tested will be exposed, all test fittings and tooling will be inspected." (Ex. R-11).

The Foreman and his crew went over the JHA form at the start of the day on January 5, 2024, and each of them physically signed the electronic form before starting to work that day. (T. 297-98; Ex. J-1 at 9). The crew had done the very same thing before starting work on each of the three days before January 5. (Ex. R-2).

The formal disciplinary notices that JFC issued to both the Foreman and his on-site supervisor (whose job title is Superintendent) notified them that discipline was being imposed for "failing to visually inspect the components involved with the pressure test." (Ex. J-7). Conducting such a visual inspection was part of their job requirements "to ensure [the coupler] was installed correctly" before pneumatic pressure was applied. (T. 406-07). JFC's Risk Manager characterized the requirement that JFC supervisors personally inspect the pipeline before applying pneumatic pressure to be a "workplace rule." (T. 407). The gist of the disciplinary notices was that the responsibility to visually inspect the piping before starting a pressure test rested with JFC supervisors and not with the owner of the pipeline whose project inspector was overseeing the pipeline installation. JFC's discipline of the Foreman and his onsite supervisor for violation of

this workplace rule reflects JFC having recognized that the application of pneumatic pressure to an incompletely installed pipeline segment constitutes a hazardous condition.

JFC's policies and procedures that reflect its awareness of the hazard is corroborated by the PSE&G's project specifications, which includes the following in a checklist for "pressure testing" of gas piping project: "If any line couplings were installed, were they restrained?" (Ex. R-7 at 333; T. 519-20, 529-30).

The great weight of the evidence is that JFC recognized that conducting pneumatic pressure leak testing at 90 psi on an incompletely installed piping system with employees in the test area constitutes a hazardous condition or practice.[9]

C. Likely to Cause Death or Serious Physical Harm

To show that a recognized hazard is likely to result in death or serious physical harm, the "Secretary is not required to show that an accident is likely but rather that *if* an accident were to occur, death or serious physical harm would be the likely result." *A.H. Sturgill Roofing, Inc.*, No. 13-0224, 2019 WL 1099857, at *2 (OSHRC, Feb. 28, 2019) (citation modified), quoting *Beverly Enters.*, 19 BNA OSHC at 1188. Major fractures constitute serious physical harm. *Spancrete Ne. Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991). Such injuries occurred here. Those actual injuries are sufficient to establish that serious physical harm was likely to result were an accident to occur. *See Coleco Indus. Inc.*, 14 BNA OSHC 1961, 1964 (No. 84-546, 1991) (actual fatality from recognized hazard established third element of a section 5(a)(1) claim).

[9] Where employer recognition of the hazard is established, it is unnecessary to address whether the employer's industry recognized it. *See Mid South Waffles*, 2019 WL 990226, at *5, n. 15.

D. Knowledge[10]

To establish employer knowledge, "the Secretary must … prove that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition." *Henkels & McCoy*, 2022 WL 3012701, at *6 (citation modified).

"The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer." *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993) (finding foreman had constructive knowledge of employees' violative conduct because "[h]ad the foreman been reasonably diligent in enforcing the safety rule, he would have known of the violation"), *aff'd*, 19 F.3d 643 (3d Cir. 1994) (table).

There is no evidence that the Foreman or any other JFC supervisor had actual knowledge of the hazardous condition (Finding of Fact ¶ 11),[11] and so it is necessary that the Secretary establish that JFC had *constructive* knowledge of the hazardous condition by evidence sufficient to prove that in the exercise of reasonable diligence a JFC supervisor could have known of the hazardous condition. *See Ragnar Benson Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999). "Reasonable diligence turns on several factors, including an employer's obligation to anticipate hazards and take measures to prevent violations from occurring." *Henkels & McCoy*, 2022 WL 3012701, at *7 (citation modified); *see also Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No.

[10] The employer knowledge component of the section 5(a)(1) claim is addressed before addressing the claim's fourth numbered element (feasible means of abatement), which is the analytical approach the Commission took in *Mid South Waffles*, 2019 WL 990226, at *5-6.

[11] The Secretary argues that in addition to the Foreman, his immediate supervisor (a JFC Superintendent) as well as a JFC Safety Superintendent who was also present had actual knowledge of the hazardous condition. (Sec'y Brief-in-Chief 27-28). However, as the hazard has been redefined in this decision, there is no evidence that either the Superintendent or the Safety Superintendent had actual knowledge of the hazardous condition (conducting a pneumatic pressure test to an incompletely assembled pipeline with employees in the test area).

87-692, 1992) (stating that reasonable diligence factors include an "obligation to inspect the work area").

The determination of whether an employer is chargeable with constructive knowledge of a violative condition for failure to exercise reasonable diligence is a question of fact that "will vary with the facts of each case." *Martin v. OSHRC* (*Milliken & Co.*), 947 F.2d 1483, 1484 (11th Cir. 1991) (affirming Commission's finding that employer did not have constructive knowledge of violative condition, stating "[w]e hold that the Commission's finding with respect to reasonable diligence is a question of fact"); *see also Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129 (No. 92–0851, 1994) (finding that a preponderance of the evidence established the cited employer was reasonably diligent and thus not chargeable with constructive knowledge of violative condition).

The great weight of the evidence is that the Foreman failed to exercise reasonable diligence by failing to discern whether the restraining rods had been completely installed before he pressurized the piping.

The Foreman testified that he knew the coupler's restraining rods "are supposed to be installed prior to the pressure testing," and that they served as a "restraint to hold back the coupling." (T. 338). He acknowledged further that in his role as foreman he is "required to watch [the pipeline components] be installed" and that he has "responsibility over [his] crew to make sure they're finishing the job."[12] (T. 339). The Foreman acknowledged that he did not watch his

[12] The Foreman's acknowledgment of these responsibilities is inconsistent with other of his testimony that when JFC disciplined him, management said he "should have gone above and beyond [his] duties and done a walk-down of the pipe before beginning pressure testing" and that JFC had "no rule that [he was] supposed to inspect the pipe." (T. 313). That uncorroborated and somewhat exonerative testimony is not credited against his earlier inconsistent inculpatory testimony quoted in the text.

crew finish installing the restraining rods and that he did not make sure that his crew had correctly installed the restraining rods before he started pressurizing the pipe after the crew informed him the piping was ready.[13] (T. 302-03).

The Foreman's understanding of his responsibilities is consistent with the JHA form that JFC devised for steel pipeline installation. The JHA identified as a "corrective action" for hazards that may be present during that activity "pressure test, ensure proper fittings and caps are installed." (Finding of Fact ¶ 18). The Foreman reasonably understood that this item in the JHA required that the coupler be properly installed before pressurizing the pipe. (*See* T. 328). The Foreman and the members of his crew reviewed the JHA before beginning work on January 5, 2024, and after doing so each person affixed his signature to the JHA. (Ex. J-1). The Foreman and his crew had previously reviewed and signed the JHA on each of the three preceding days—days when the crew had completely installed restraining rods for the other three couplers. (Ex. R-2).

The JHA also contained an item that expressly required compliance with JFC's "steel pipe pressure testing policy." (Ex. R-11, content set forth at Finding of Fact ¶ 17). Among that written

[13] The Foreman also testified during the Secretary's direct examination that he did not speak with the PSE&G inspector before commencing the pressure test and that he told his crew "to let [him] know when they were ready for the pressure test to begin." (T. 302-03). In contrast, during JFC's subsequent questioning, the Foreman contradicted that direct examination testimony, testifying that he had told the PSE&G inspector that he was going to walk to where the controls for applying the pneumatic pressure were located and that he asked the inspector "to let me know when it was ready to put air on it," thus indicating that he expected the PSE&G inspector to confirm the restraining rods had been completely installed. (T. 334-35, 338, 342). The Foreman's dissembling and self-contradictory testimony on subsequent questioning is uncorroborated, and the undersigned gives it no weight. Even if that self-contradictory testimony were credited, it would have been unreasonable for the Foreman to rely on the PSE&G inspector to inspect the restraining rods for complete installation. The Foreman acknowledged that he was responsible for overseeing the work of his crew even though the PSE&G inspector was also present and overseeing JFC's performance. (T. 332-33). *Cf. Fabi Constr. Co. v. Sec'y of Lab.*, 508 F.3d 1077, 1083 (D.C. Cir. 2007) ("Here, the hazard is not under the sole control of another company; instead, [the employers] share control over it. Sharing control is not relinquishing control").

policy's provisions were the following: "[a] qualified and trained company supervisor will oversee all steel pipe pressure testing;" "testing JHA will be performed with the entire crew so that everyone is aware of the scope as well as their roles and responsibilities;" and "all test fittings and tooling will be inspected."

JFC's Risk Manager testified that "had an inspection [of the pipe] been performed" as JFC's JHA and steel pipe pressure testing policy contemplated, such an inspection "would have identified that the [restraining] rods were not … assembled correctly." (T. 365). JFC disciplined both the Foreman and his Superintendent for "failing to visually inspect the components involved with the pressure test." (Ex. J-7). JFC regarded the Foreman and the Superintendent to have the responsibility "to ensure [the coupler] was installed correctly" before pressurizing the pipe. (T. 406-07; Ex. J-7).

JFC's policies and procedures, if followed, would have averted the struck-by hazard that exists when employees work near incompletely installed steel piping and fittings during pneumatic pressure testing. These policies and procedures were reasonable steps for averting that recognized hazard. (T. 365). If the Foreman had followed JFC's reasonable policies and procedures, the incompletely installed restraining rods would have been discovered and corrected, which would have prevented the creation of the hazardous condition. *See Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1815 (No. 87-692, 1992) (noting supervisor who failed to take appropriate measures to prevent violative condition did not exercise reasonable diligence and was charged with constructive knowledge of violative condition); *L&L Painting Co.*, 23 BNA OSHC 1986, 1994 (No. 05-0055, 2012) (finding that employer would have known of employee exposure to violative condition if it had conducted monitoring required by OSHA health standard).

The foregoing establishes that if the Foreman had exercised reasonable diligence, he would have discerned that the restraining rods had not been completely installed and would have ensured that this condition had been corrected before he pressurized the pipe. *See also Capform, Inc.,* 16 BNA OSHC 2040, 2045 (No. 91-1613, 1994) (finding employer knowledge established where the violative condition "would have been readily apparent to a … supervisor"); *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91–3467, 1995) (stating "an employer who lacks actual knowledge can nevertheless be charged with constructive knowledge of conditions that could be detected through an inspection or examination of the worksite").

Under Commission precedent, the Foreman's constructive knowledge of the hazardous condition that he created (specifically, pressurizing an incompletely assembled/installed steel gas pipe with employees in the test area) would be sufficient to impute that constructive knowledge to JFC without any further analysis. *See Aquatek Sys., Inc.*, 21 BNA OSHC 1400, 1401 (No. 03-1351, 2006) ("[T]he Secretary establishes a prima facie showing of knowledge by proving that a supervisory employee was responsible for the violation").

In the Third Circuit, however, more is required. Third Circuit precedent holds "that the Secretary may not shift to the employer the ultimate risk of non-persuasion in a case where the inference of employer knowledge is raised only by proof of a supervisor's misconduct." *Pa. Power & Light Co. v. OSHRC*, (*PP&L*), 737 F.2d 350, 358 (3d Cir. 1984). And so, in the Third Circuit, a component of the Secretary's prima facie case for imputing to an employer its supervisor's constructive knowledge of having created the hazardous condition is proof that the supervisor's conduct "could have been foreseen and prevented by the employer with the exercise of reasonable diligence and care." *Id.* at 354. Proving that "the supervisor's participation was foreseeable" is accomplished "by showing that the employer's safety program was inadequate." *Dana Container,*

Inc., 25 BNA OSHC 1776, 1779-80 (No. 09-1184, 2015) (applying Third Circuit precedent and citing *PP&L*, 737 F.2d at 357-58), *aff'd*, 847 F.3d 495 (7th Cir. 2017). The underlying rationale for this requirement is that the supervisor's misconduct was foreseeable because of inadequacies in the employer's safety program. *See PP&L*, 737 F.2d at 358.

The adequacy of the employer's safety program for purposes of this foreseeability test "depends upon whether the employer: (1) had work rules designed to prevent the violation; (2) adequately communicated those rules to its employees; (3) took steps to discover violations; and (4) effectively enforced the rules when it discovered violations." *Dana Container*, 25 BNA OSHC at 1780, n.9 (citing *PP&L*).[14]

Foreseeability is not an additional factor in the Third Circuit's foreseeability test but rather is an issue that is proved or disproved by an analysis of the specified four factors.[15] *See id.*, 25 BNA OSHC at 1783, n.15.

---

[14] These foreseeability factors are identical to the elements of the affirmative defense of unforeseeable employee misconduct (UEM). *Dana Container*, 25 BNA OSHC at 1783, n. 15; *see also S.J. Louis*, 25 BNA OSHC at 1901, n.24 ("[T]he *elements* necessary to establish the [UEM] defense are essentially the same *factors* used to analyze the adequacy of an employer's safety program when determining constructive knowledge") (emphasis added).

[15] The parties' post-hearing briefs did not address the Third Circuit's foreseeability test. This may be due to the Secretary's flawed framing of the section 5(a)(1) claim and the impact that framing had on the way JFC constructed its defense to it. However, both parties argued the factors that govern the foreseeability test in their respective arguments on JFC's UEM defense. *See Dana Container*, 25 BNA OSHC at 1780 & 1783, notes 9 & 15.

In *Kerns Brothers*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000), the Commission adjudicated the Third Circuit's foreseeability test even though at hearing the parties litigated only the UEM defense. The undersigned proceeds in like fashion here. *But cf. New River Elec. Corp. v. OSHRC*¸ 25 F.4th 213, 225-26 (4th Cir. 2022) (where the Secretary did not put the adequacy of the employer's safety program in "issue during the trial *or* in his post-trial brief," but rather addressed the safety program's adequacy only in connection with the UEM defense, the court ruled that the Commission judge erred in relying on the evidence presented on the UEM defense to find that the employer's "safety program was lacking" and consequently to impute to the employer its supervisors' knowledge of their violative conduct to establish the knowledge element of the Secretary's prima facie case).

The Commission has noted further that "evidence relating to an employer's entire safety program, not just those aspects specific to the citations at issue, is relevant to assessing the program's adequacy for foreseeability purposes." *Dana Container*, 25 BNA OSHC at 1781; *see also PP&L,* 737 F.2d at 358 ("The courts of appeals have consistently held that the adequacy of a company's safety program, *broadly construed*, is the key to determining whether an OSHA violation was reasonably foreseeable and preventable") (emphasis added); *Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1782 (No. 76-2636, 1982) (determining Secretary had not proven section 5(a)(1) claim and commenting that the "Secretary's arguments overemphasize the formal aspects of [the employer's] safety program and fail to give proper significance to its substance").

Other Commission precedent articulates a somewhat different formulation for evaluating whether an employer's safety program is sufficient to meet the employer's obligation to exercise reasonable diligence. That Commission precedent states that "[i]n assessing reasonable diligence" for the purpose of determining whether an employer has constructive knowledge, "the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring." *S.J. Louis Constr. of Tex.,* 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016) (identifying reasonable diligence factors in connection with section 5(a)(1) claim); *see also Pride Oil Well Serv.*, 15 BNA OSHC at 1814 (stating that reasonable diligence factors for purposes of finding employer constructive knowledge includes an "obligation to inspect the work area"), and *Thomas Indus. Coatings*, 23 BNA OSHC 2082, 2088-89 (No. 06-1542, 2012) (evaluating the efficacy of the employer's disciplinary program in determining whether employer exercised reasonable diligence for the purpose of finding employer constructive knowledge).

These *reasonable diligence* factors echo the Third Circuit's four-factor foreseeability test as well as the identical four elements of the UEM defense. The undersigned regards the Third Circuit's four-factor foreseeability test, which the Commission applied in *Dana Container*, to be the substantial equivalent of the four-factor *reasonable diligence* test that the Commission applied in *S.J. Louis* and further regards both tests to embrace the same considerations. *See, e.g., S.J. Louis*, 25 BNA OSHC at 1900 (finding the *reasonable diligence* analysis for imputing knowledge to employer to be dispositive with respect to a separate *foreseeability* analysis required for imputing to the employer a supervisor's knowledge of his own misconduct).

1. *Work Rule to Prevent the Cited Violation*

The Commission has held that a work rule will be deemed adequate if conformance with the rule would prevent a violative or hazardous condition from arising. *AJM Packaging Corp.*, No. 16-1865, 2022 WL 1102423, at *6 (OSHRC, Apr. 1, 2022) (finding adequate a work rule that if followed would prevent the alleged violative condition occurring); *see also Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1056 (No. 86-1087, 1991) (rejecting UEM defense in concluding that the employer did not have work rules "designed to prevent the cited violation").

As described previously, JFC's JHA for *Steel Pipe Installation* and its written *Steel Pipe Pressure Testing Policy* incorporated requirements that installation be completed and that piping be inspected before pressurizing a pipe. (Exs. J-1 & R-11). As discussed in connection with the Foreman's failure to exercise reasonable diligence, the Foreman understood (1) the JHA required that the coupler be properly installed before pressurizing the pipe, (2) that in his role as foreman he was "required to watch [the pipeline components] be installed," and (3) that he had "responsibility over [his]crew to make sure they're finishing the job." (T. 339). This evidence establishes that JFC had work rules that, when followed, would prevent the hazardous condition from occurring.

Moreover, upon consideration of JFC's overall development of work rules to address hazardous conditions or practices (and "not just those aspects specific to the citations at issue" as the Commission instructs in *Dana Container*), substantial evidence supports the conclusion that as a general matter JFC exercises reasonable diligence in developing work rules to prevent hazardous and violative conditions from occurring. 25 BNA OSHC at 1781.

JFC has a formal safety committee led by senior management that is made up of a diverse group of personnel such as project managers, general superintendents, superintendents, project engineers, and representatives of field labor. (T. 402). The safety committee meets on average one or two times a month, but sometimes more frequently as circumstances may require. (T. 402-03). In describing what the safety committee does in the realm of identifying hazards, JFC's risk manager testified (T. 403):

> So the committee essentially, and there's a lot that we cover, but in its simplest form, is for us to come together, get input from all different avenues of the company, and determine … what points are we having. Are there any trends that we're seeing that we need to address? Is there anything that maybe is … in somebody else's realm that I might not see from Hackensack? So they can relay that to us and we can work on identifying any potential solutions … for those items.
>
> We review incidents. We review trends in corrective actions. We get input from the field. If there's any changes in the industry or let's just say seasonal changes, things of that nature that we want to discuss, make sure we're communicating so we can get different suggestions and try and work as a group to accomplish those tasks and initiatives.

A preponderance of evidence establishes that JFC exercises reasonable diligence in striving to identify workplace hazards or violative conditions and in devising procedures and rules to prevent such hazards or conditions from occurring.

2. *Work Rule Adequately Communicated to Employees*

Adequate communication of a work rule is established where employees are aware of a work rule and know when it is to be implemented. *See Texland Drilling Corp.*, 9 BNA OSHC 1023, 1026 (No. 76-5037, 1980) (finding adequate communication of a work rule where employees are trained, experienced, and know of the work rule). Adequate communication of a work rule may be accomplished through training. *Angel Bros. Enters., Ltd.*, No. 16-0940, 2020 WL 4514841, at *5–6 (OSHRC, July 28, 2020) (finding orientation training, bi-annual training, toolbox talks, and an expressed instruction the day prior to the employee's misconduct to have been "more than sufficient to … [prove] adequate communication"), *aff'd* 18 F.4th 827 (5th Cir. 2021); *United Contractors Midwest, Inc.*, 26 BNA OSHC 1049, 1052 (No. 10-2096, 2016) (finding rules adequately communicated where they were explained in new employee orientation, toolbox talks, and annual training sessions, and an employee received express instruction to comply with the rule on the day of the violative conduct); *Thomas Indus. Coatings, Inc.*, 23 BNA OSHC at 2087 (finding Secretary had failed to prove the employer's safety program was inadequate for purposes of constructive knowledge analysis where the three employees that had been involved in violative conduct had attended training on the relevant work rule five months earlier, had attended weekly toolbox talks thereafter, and had received instruction to comply with the rule at the worksite days before the violation).

The Foreman's understanding of the work rule is sufficient evidence that it had been adequately communicated as to him. The Secretary faults JFC's communication of the work rule because the Foreman testified that he was unaware of JFC's written *Steel Pipe Pressure Testing Policy* until after the injurious incident. (T. 310). Accepting this testimony from the Foreman at face value, it does not significantly diminish JFC's otherwise adequate communication of the work rule. The relevant content of the written pressure testing policy was effectively implemented by

the more thorough provisions of the JHA that the Foreman and his crew members reviewed and signed before beginning work on the day of the injurious incident, the provisions of which the Foreman acknowledged he accurately understood.

The Foreman and his crew had similarly reviewed and signed that same JHA before starting to work on the pipeline installation on the three days before the injurious incident. (Ex. R-2). Over those previous three days, the crew had correctly installed the restraining rods for the other three identical couplers on the pipeline segment.

The Foreman and all his crew members had successfully completed the four-day OQ training on natural gas pipe installation and pressure testing that PSE&G required in conformance with USDOT pipeline safety regulations that apply to PSE&G. (Ex. R-5 at 5; Ex. J-9 at 10-13; T. 439). The written training materials presented in evidence for the OQ training, which totaled 253 pages, were prepared by the third-party training organization that delivered the training to the JFC employees. (T. 304; Exs. J-2 & J-3).

The Secretary is critical of the OQ training provided because the training materials developed by the third-party training organization "did not include a discussion of hazards inherent in pneumatic testing and contain only minimal discussion about basic safety precautions." (Sec'y Brief-in-Chief 4). But this criticism harks back to the Secretary's apparent erroneous understanding that the pressure test was being done not only to test for leaks but also to test the strength of the pipeline materials. The Secretary's criticism falls flat in the face of the training materials that accurately impart the USDOT safety requirements for pneumatic pressure leak testing.

The Foreman has worked for JFC as a foreman for 18 years and had conducted hundreds of pipeline pressure tests. (T. 319, 335). The lead laborer on the Foreman's crew had 30 years of

experience in gas pipe installation. (Ex. J-8 at 5). Like the Foreman, laborers on his crew also had been involved in the performance of hundreds of pipeline pressure tests. (Ex. J-8 at 5; Ex. R-5 at 4). The crew members further reported in post-incident interviews that they understood the details of the style of coupler involved, including that the coupler required the installation of restraining rods. (Ex. R-5 at 4-5). The fact that the crew had, in the days before the injurious incident, properly installed restraining rods on the other three couplers corroborates their reporting after the injurious incident that they understood the imperative of completely installing the restraining rods before pressurizing the pipe.

The JHA that the Foreman and his crew reviewed and signed on the day of the injurious incident (and on each of the three days before that day) captured the essential safety measures for addressing hazards in the pneumatic pressure leak testing. (*See* T. 356). Further, on this project, as in all projects, the Foreman and his crew were required to comply with the manufacturer's instructions and the project's design specifications, all of which integrate safety measures. (T. 356-57).

The crew's prior experience, training, and its demonstrated competence in installing identical couplers on this pipeline segment in the days before they failed to completely install the fourth and final coupler is compelling evidence that the training, experience, and instruction given the Foreman and his crew in the installation of the couplers and the conduct of the pressure test was adequate. *See S.J. Louis*, 25 BNA OSHC at 1896 ("More generalized instructions may be permissible in light of an employee's specialized training and experience, just as they may be inadequate in light of an employee's lack of experience, poor safety history, or lack of supervision"); *see also Conn. Light & Power Co.*, 13 BNA OSHC 2214, 2219 (No. 85-1118, 1989) (stating "[a]n employer is justified in placing a great deal of reliance on the judgment of highly

experienced and trained employees with good safety records" in determining that employer was not required to implement additional safety measures to comply with the Act's general duty clause).

Moreover, viewing more broadly JFC's communication of its work rules, a preponderance of the evidence establishes that JFC's overall communication of its work rules was adequate. Newly hired JFC employees undergo two days of onboarding training at a dedicated training center that JFC maintains and operates in Wall, New Jersey. After this initial training, JFC employees and crews rotate through the training center periodically for a combination of classroom and hands-on training on safety and health subjects, including CPR and first aid. (T. 393). JFC's dedicated training center includes a mock streetscape that includes overhead and underground utilities, confined spaces, and other features where hands-on training is given. (T. 392-93).

JFC's training records for the Foreman reflect him having completed 137 JFC-administered formal training courses through 2023, many of them provided at JFC's dedicated training center. (T. 435-37; Ex. J-9 at 5-9). The training records for the Foreman's Superintendent reflect him having completed a similar number of JFC-delivered formal training courses. (Ex. J-9 at 1-4).

JFC's Safety Department is staffed by a total of about 10 employees. (T. 348). JFC safety personnel prepare written materials that are distributed to JFC crews for company-wide weekly toolbox talks on a wide range of safety and health subjects relevant to JFC's workplaces. (T. 420; *see* Ex. R-10, containing 53 one-page Tool Box Talks).

All told, the record evidence establishes that JFC's communication of its work rules, both generally and with respect to work rules relevant to the injurious event here, was adequate.

3. *Adequacy of Steps to Discover Violations*

As previously described, the Foreman and the laborers on his crew had extensive experience in installing natural gas pipelines and conducting pneumatic pressure tests. All JFC

employees working on the project had successfully completed four days of USDOT mandated OQ training in those subject areas. And in the days immediately preceding the injurious incident, the Foreman's crew had correctly installed the restraining rods on three identical couplers.

The Foreman's Superintendent was present at the site, but there is no evidence of his precise actions during the installation of the coupler and the start of the pressure test. (T. 295-96). The only direct evidence that the Superintendent failed to exercise reasonable diligence at the worksite is that JFC disciplined him for dereliction for the same reasons JFC disciplined the Foreman.[16] (Ex. J-7).

In view of the extensive training and experience of the Foreman and his crew, the evidence is far from sufficient to show that JFC should have perceived a need for greater monitoring of the Foreman, his crew, or the Superintendent in the installation of the pipeline and the conduct of the pressure test. The evidence is not preponderant that JFC failed to exercise reasonable diligence in monitoring the work performance of its employees at the worksite. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 1287 (No. 91-862, 1993) ("Where the evidence fails to show that the employer should have perceived a need for additional monitoring or that such an effort would have led to the discovery of instances of employee misconduct, increased supervisory efforts to monitor employee compliance are not required").

[16] In addition to the Foreman's Superintendent, one of JFC's Safety Superintendents was on site at the time of injurious incident, but evidence indicates that he was involved in conducting the field evaluation component of OQ training. (Ex. R-5 at 1 & 5). (The record does not indicate what employees were being evaluated.) While the CO believed that the Safety Superintendent's role at the worksite was to act as a competent person to oversee the crew's activity in the excavation (T. 287), the record evidence is insufficiently developed to establish by a preponderance that this individual was present "to oversee the pipe installation and testing" as the Secretary contends. (Sec'y Reply Br. 18).

Moreover, considering more broadly the steps JFC takes to discover violations or hazardous conditions, the preponderant evidence supports the conclusion that as a general matter the measures JFC takes to discover violative or hazardous conditions are adequate. JFC safety superintendents conduct 300-400 field inspections or audits per month for compliance with rules, expectations, and OSHA requirements. (T. 396-97). And supervisory and managerial employees make safety observations, during which they watch employees work for fifteen minutes and correct, affirm, or stop work based upon employee actions. (T. 397-98).

The Secretary has not carried the burden of proving that the steps JFC took to discover or prevent the hazardous condition that arose here were inadequate, or that the steps to discover or prevent hazardous or violative conditions in general were inadequate.

4. *Effective Enforcement When Infractions Discovered*

The fourth factor in the Third Circuit's foreseeability test assesses whether "the employer effectively disciplines employee misconduct." *L.E. Myers Co.*, 16 BNA OSHC 1037, 1042 (No. 90-945, 1993); *see also Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2182 (No. 00-1268, 2003) (determining that Secretary did not prove employer had constructive knowledge of the violation, in part upon a finding that the employer had adequately enforced its progressive disciplinary policy where evidence indicated that after violations had been identified the progression had been followed); *TNT Crane & Rigging, Inc.*, No. 16-1587, 2022 WL 2102910, at *8 (OSHRC, June 2, 2022) (concluding employer failed to establish UEM defense where there had been no prior discipline imposed for a work rule about which it was "highly unlikely" that there had been no previous violations) *aff'd*, 74 F.4th 347 (5th Cir. 2023); *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2220 (No. 09-0004, 2014) (noting effective enforcement not proven where supervisors regularly failed to impose the employer's specified progressive disciplinary measures), *aff'd*, 811 F.3d 922 (7th Cir. 2016). Both pre-inspection and post-inspection disciplinary measures may be

considered in determining whether an employer has effectively enforced its work rules. *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1863-64, n.6 (No. 93-1122, 1996), *aff'd*, 149 F.3d 1183 (6th Cir. 1998); *Precast Serv., Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) ("Commission precedent does not rule out consideration of *post*-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline") (emphasis in original), *aff'd*, 106 F.3d 401 (6th Cir. 1997).

JFC has established a disciplinary committee made up principally of company safety officials who receive and review disciplinary referrals systemically. (T. 404-05). JFC disciplinary records reflect that in the three years before the injurious event here, JFC imposed formal discipline pursuant to its progressive discipline policy on 49 occasions. (T. 411-12; Ex. R-8; Ex. R-1 at 16-17). Disciplinary measures imposed included suspending and retraining entire crews, as well as imposing individual unpaid suspensions. JFC imposed formal discipline on both the Foreman and his onsite supervisor for their violative conduct here, as previously described. The Secretary suggests that JFC Safety Superintendent who was present on the day of the injurious incident should have initiated disciplinary action against the Foreman that very day (Sec'y Reply Br. 19), but as indicated in footnote 17 *supra*, the evidence is insufficient to establish that the Safety Superintendent was present to oversee the work of the Foreman or his crew and is otherwise insufficient to establish that the Safety Superintendent knew or should have known that the Foreman had failed to exercise reasonable diligence. JFC did not act unreasonably in first completing its internal investigation into the injurious incident before determining whether to discipline the Foreman and the Superintendent.

Viewing JFC's disciplinary practices from a broader perspective, the preponderant evidence establishes that as a general matter JFC exercises reasonable diligence in developing and

then enforcing its safety policies and rules. In describing the process for taking corrective actions when a safety or health issue is identified, JFC's risk manager testified (T. 414-16):

> As noted, our Safety Superintendents or safety team, as they're performing inspections, if they identify any unsafe … actions, items, conditions, they document via a corrective action.
>
> The process essentially is them talking to that employee immediately, talking to … the project team, the folks there, to advise what they've observed. If it can be corrected immediately onsite, they'll do so. If it's something that … maybe … it can't be performed immediately at that point, they document it, they let those individuals know, and they have to follow up with that.
>
> Once that's assigned, that corrective action, it notifies myself, the General Superintendent, the responsible party, who is typically the Superintendent themself. We have an email distribution which includes all of these folks. And it makes us aware of these corrective actions as they're happening in real time, as well as it has a follow-up. So, if it's not closed out timely, we see that and we can act on those items and state, hey, this needs to be addressed or do you need help with this. So those are … routinely submitted as any … issues are identified.

The Secretary has not proven that JFC's enforcement of its safety policies and rules in general is inadequate.

5. *Conclusion—Constructive Knowledge Based on Inadequate Safety Program Not Proven*

Having not proven that JFC's safety program was inadequate in any of the foregoing particulars, the Secretary has not met the burden of proving that the Foreman's act of conducting the pneumatic pressure leak test on the incompletely installed coupler and restraining rods was foreseeable and thus has not proven that JFC had constructive knowledge of that hazardous condition.

The Secretary's failure to prove that JFC had actual or constructive knowledge of the hazardous condition is fatal to the section 5(a)(1) claim, and so that alleged violation must be vacated on this ground alone.

E. Feasible Means to Eliminate or Materially Reduce the Hazard

The fourth enumerated element of a section 5(a)(1) claim requires that the Secretary prove "the existence of a feasible means of materially reducing or eliminating the likelihood of death or serious physical harm to employees." *Mid South Waffles*, 2019 WL 990226, at *6, quoting *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822 (No. 78-5159, 1986).

The Secretary's post-hearing brief summarizes the four discrete asserted measures that the Secretary alleges would materially reduce or eliminate the hazardous condition as follows: "[1] disallowing employees other than the competent person from being present in the pressure testing area while the pipe is pressurized, [2] posting warning signs, [3] ensuring proper installation of all components, including the coupler, and [4] creating an SOP checklist for pipe installation and testing." Sec'y Brief-in-Chief 21. [17]

Here, JFC has undertaken measures to address the hazardous condition as described previously in connection with the constructive knowledge issue. "Where an employer has undertaken measures to address the hazard, the Secretary must show that such measures were inadequate." *Mo. Basin Well Serv.*, 26 BNA OSHC at 2319. Commission precedent suggests two similar ways that the Secretary may establish that an employer's existing safety procedures were inadequate—by demonstrating either (1) "that there was a more effective feasible means by which [the employer] could have freed its workplace of the hazard," *Ala. Power Co.*, 13 BNA OSHC 1240, 1243-1244 (No. 84-357, 1987), citing *Cerro Metal Prods. Div.,* 12 BNA OSHC at 1822, or (2) that there were "specific additional measures" required to abate the hazard. *Pelron*, 12 BNA

[17] In the Secretary's principal post-hearing brief, the Secretary effectively withdrew one of the five asserted measures that had been framed by the pleadings and litigated at the hearing. (Sec'y Brief-in-Chief 21, n.10). That withdrawn measure is not identified or addressed in this decision.

OSHC at 1836. To prove the former, the Secretary must show that " 'conscientious experts, familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard." *Arcadian Corp.*, 20 BNA OSHC 2001, 2011 (No. 93-0628, 2004), quoting *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2032 (No. 89-0265, 1997). To prove the latter, the Secretary must show that "knowledgeable persons familiar with the industry would regard additional measures as necessary and appropriate in the particular circumstances existing at the employer's worksite." *Inland Steel Co.*, 12 BNA OSHC 1968, 1970-71 (No. 79-3286, 1986), citing *Cerro Metal Products Div,*, 12 BNA OSHC at 1822-23; *see also Pelron*, 12 BNA OSHC at 1835 (noting that the Secretary must "prove additional measures that would have materially reduced the risk of harm that conscientious safety experts familiar with the industry would take into account in prescribing a safety program").

In the preceding analysis on the constructive knowledge issue determined that the Secretary had failed to prove that JFC's safety program was inadequate. That same ruling is dispositive on the fourth element of the general duty clause claim. In *Alabama Power Company*, the Commission analyzed whether the Secretary had proven that the employer's existing abatement measures were inadequate by assessing the very same factors that the Third Circuit's foreseeability test employs. *Id.*, 13 BNA OSHC at 1244 (determining whether the employer's existing abatement measures were inadequate by considering "whether [the employer] has established workrules designed to prevent exposure, has properly communicated those rules to its employees, has taken steps to discover noncompliance with the rules, and has effectively enforced its rules in the event of noncompliance"). *Accord Inland Steel*, 12 BNA OSHC at 1976; *Conn. Light & Power Co.*, 13 BNA OSHC at 2217-18; *S.J. Louis*, 25 BNA OSHC at 1900-01, n.24; *Master Constr. Co., Inc.*, No. 18-0170, 2020 WL 1076075, at *11 (OSHRC ALJ, Jan. 27, 2020). And so, for the same

reasons the Secretary failed to prove that JFC had constructive knowledge, the Secretary has likewise failed to prove the existence of a feasible means of materially reducing or eliminating the likelihood of death or serious physical harm to employees.

Moreover, even if the four foreseeability factors were reconsidered in the specific context of the abatement element of the section 5(a)(1) claim, the Secretary's proof fails. The only testimony that the Secretary presented that might qualify as coming from "knowledgeable persons or conscientious safety experts familiar with the industry" was that of the CO.

Before the CO became employed as an OSHA compliance safety and health officer, he had been employed the preceding five years (apparently from around 2015 to around 2020) as a regional safety director for a construction company. (T. 38-40). In that role, the CO was involved in pipeline installation and pressure testing for utilities like PSE&G. (T. 41, 240-41). Over the course of those five years of employment in the construction industry, he observed pneumatic pressure testing being conducted about five or six times.[18] (T. 161).

The CO is not an engineer, and he has no technical training in pipeline installation. (T. 159). The CO's testimony about safe practices for pipeline installation and pneumatic pressure testing is grounded in his five years' experience as regional safety director for a construction company when he had a role in the conducting of five or six pneumatic pressure tests. (T. 289-90). The CO was neither offered nor qualified to provide expert testimony respecting pipeline pressure testing. In contrast, JFC's expert witness is a professional engineer who was qualified

[18] There is no evidence whether any of those five or six pneumatic tests involved relatively lower pressure leak tests versus higher pressure strength tests. The CO drafted, and OSHA issued, the Citation without having any information on the relativity of the 90-psi test to the pipe's SMYS. (T. 188-90). (As described earlier, the test pressure was 5.5% of the pipe's SMYS).

pursuant to Federal Rule of Evidence 702 to provide expert testimony on the discipline of pipeline pressure testing. (T. 471).

The CO's somewhat limited direct experience within the realm of pipeline pressure testing qualifies him minimally as a "knowledgeable person familiar with the industry" and justifies giving his testimony some weight on that topic. *Cf. Inland Steel*, 12 BNA OSHC at 1976-77 (finding testimony of compliance officer, who "was not familiar with the circumstances of" the industry, to be insufficient to prove the feasible means of abatement element of a section 5(a)(1) claim), and *Missouri Well Basin*¸ 26 BNA OSHC at 2319-20 (according no weight to the testimony of an OSHA compliance officer who "was never proffered as an expert with the qualifications necessary to opine … under Federal Rule of Evidence 702" on a technical subject about which he had testified). However, the opinion testimony of JFC's expert witness controverted the CO's testimony on the fourth element of the section 5(a)(1) claim. (T. 518-19). That opinion evidence was duly admitted pursuant to Federal Rule of Evidence 702 and is substantially weightier than the CO's non-expert testimony on the subject. *Cf. Consol. Constr., Inc.*, 16 BNA OSHC 1001, 1006 n. 6 (No. 89-2839, 1993) (noting that the Secretary was not required to present expert testimony to prove his case, but that "when the Secretary chooses not to produce an expert witness, he risks the possibility, as here, of not being able to refute the employer's evidence").

The Secretary has failed to carry the burden to establish that knowledgeable persons or conscientious safety experts familiar with the industry would regard that there were other or additional feasible means that were necessary and appropriate to prevent the hazardous condition from arising. The Secretary's failure to prove the fourth element of the section 5(a)(1) claim constitutes an additional ground for vacating the alleged violation of section 5(a)(1).

Section 1926.21(b)(2)
[*Citation 1, Item 2*]

As described at the outset, the second citation item alleges a violation of 29 C.F.R. § 1926.21(b)(2), which is a construction industry training standard that provides: "The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." The Citation (and the amended complaint) alleges that JFC violated this standard in the following manner:

> On January 05, 2024, the employer failed to train its employees in the recognition and avoidance of unsafe conditions during the pressure testing of a new NAT-GAS pipeline. Employees were in close proximity cleaning, wrapping pipe and leak testing while the pressure test was taking place. This condition exposed employees to explosion hazards.

To establish liability for the alleged violation of an OSHA standard such as alleged here, the preponderant evidence must show: (1) the standard applies to the cited working conditions; (2) there was noncompliance with its terms; (3) employees were exposed to, or had access to, the violative condition; and (4) the employer knew of the violative conditions or could have known with the exercise of reasonable diligence. *Donahue Indus. Inc.,* 20 BNA OSHC 1346, 1348 (No. 99-0191, 2003); *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992); *D.A. Collins Constr. Co. v. Sec'y of Lab.*, 117 F.3d 691, 694 (2d Cir. 1997).

JFC was engaged in construction activity at the worksite, and so the cited standard applies to JFC. *See Jimerson Under-Ground, Inc.*, 21 BNA OSHC 1459, 1461 (No. 04-0970, 2006) (removing existing piping and replacing it with new piping constitutes construction work to which OSHA's construction industry standards apply).

However, for the reasons described below, the Secretary has not proven that JFC failed to comply with the standard in the manner that the Citation alleges.

Section 1926.21(b)(2) has two parts, and only its first part is applicable here. The first part requires that construction employers "instruct each employee in the recognition and avoidance of unsafe conditions" that the employee may encounter on the job.[19] *See El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993) (describing the "first part" of § 1926.21(b)(2) noting the requirement to "instruct each employee in the recognition and avoidance of unsafe conditions")*; Mod. Cont'l Constr. Co. v. OSHRC*, 305 F.3d 43, 50 (1st Cir. 2002) ("The purview of [§ 1926.21(b)(2)] is not limited to training for hazards expressly identified by OSHA regulation").

Section 1926.21(b)(2) "requires that employees be instructed how to recognize and avoid dangerous conditions that they may reasonably be expected to encounter in their workplace." *Pressure Concrete Constr.*, 15 BNA OSHC at 2016. "An employer's obligation to instruct and train is dependent upon the specific conditions [at the worksite], whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard." *W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1236 (No. 99-0344, 2000) (applying the first part of § 1926.21(b)(2)), *aff'd*, 285 F.3d 499 (6th Cir. 2002).

[19] The "second part" of § 1926.21(b)(2) requires construction employers to instruct each employee "in the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." *See Bardav, Inc.*, 24 BNA OSHC 2105, 2111 (No. 10-1055, 2014) (stating that the excavations standard [29 C.F.R. 1926, subpt. P] triggered the employer's duty under § 1926.21(b)(2) to instruct employees who worked in excavations on the requirements of the excavations standard). The Secretary is not contending that JFC failed to instruct employees about any OSHA standard that applies to "pressure testing of a new NAT-GAS pipeline" and thus the second part of the standard is not operative here.

"Because section 1926.21(b)(2) does not specify exactly what instruction the employees must be given, the Commission and the courts have held that an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Pressure Concrete Constr.*, 15 BNA OSHC at 2015. This requires determining whether the cited employer "gave its employees instructions about recognizing and avoiding unsafe conditions that a reasonably prudent employer would have given in the same circumstances." *Id.*

The citation's allegations are premised on the JFC employees working in the test area while the pneumatic pressure test was in progress and asserts that doing so exposed the employees to "explosion hazards." However, as discussed previously, there is no evidence that there was any recognized risk of the pipeline materials rupturing (or exploding) under the test pressure of 90 psi, which was 5.5% of the pipe's SMYS. Rather, the only substantial evidence on this point is that there was no recognized risk of rupture/explosion at the test pressure of 90 psi. The logic of that conclusion is bolstered by the fact that when conducting a leak test using a soap solution, workers must be present in the test area when the pipe is pressurized so that they can watch for soap bubbles surfacing in the soap solution that they apply to the piping's joints and welds. JFC had no obligation to provide instructions on recognizing and avoiding an alleged hazard that neither the employer nor its industry recognized.

Further, if the word "explosion" in the alleged violation were indulgently deemed to encompass the hazard of an incompletely installed piping component violently separating upon the release of stored pneumatic energy, the Secretary would still have failed to prove that JFC was not compliant with the cited training standard. As previously discussed, JFC recognized that such a hazard could potentially exist at the work site, and JFC provided training addressing that potential

hazard, as well as training on other hazards attendant to pipe installation and pressure testing. *See El Paso Crane*, 16 BNA OSHC at 1425 n.8 ("The employer's safety program as a whole is relevant to determining whether there was compliance with" § 1926.21(b)(2)). As described previously, all the JFC employees involved in the pneumatic pressure testing had completed OQ training on pipeline installation and pressure testing that the PSE&G required in conformance with USDOT pipeline safety regulations. The employees also went over a JHA on the day of the injurious incident (as well as on each of the three days prior) that incorporated requirements that would prevent the hazardous condition from arising. *Cf. S.J. Louis Constr. of Tex.*, 25 BNA OSHC at 1896 ("More generalized instructions may be permissible in light of an employee's specialized training and experience, just as they may be inadequate in light of an employee's lack of experience, poor safety history, or lack of supervision"); *AJM Packaging Corp.*, 2022 WL 1102423, at *6, (ruling a work rule to be adequate that, when followed, would prevent the creation of the alleged violative condition). The Foreman understood that his responsibilities included the requirement that he oversee his crew's installation of the piping and that he confirm the crew had properly done so before pressurizing the piping. (T. 302-03, 338-39). The evidence further establishes that instructions were effectively communicated in that the JFC crew members reported in post-incident interviews that they were familiar with the style of coupler involved, including that it required the installation of restraining rods. (Ex. R-5 at 4-5). The crew members' self-reported understanding is corroborated by their having correctly installed three identical couplers and restraining rods in the days immediately preceding the injurious incident. *Cf. Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1019-20 (No. 87-1067, 1991) (determining that violation of § 1926.21(b)(2) for alleged failure to adequately train employees on "rigging and signaling" in crane operations was not proven where crane operators testified that the employees did good jobs

in rigging and signaling, leading the Commission to conclude that "the performance of those employees establishes that they were trained in rigging and signaling"), *aff'd*, 978 F.2d 744 (D.C. Cir. 1991) (unpublished).

The evidence is insufficient to establish that JFC failed to provide the instructions that a reasonably prudent employer in the same circumstances would have provided on recognizing and avoiding unsafe conditions in the conduct of pneumatic pressure leak testing of new steel piping and components. The Secretary has thus failed to prove non-compliance with the cited standard and the alleged violation of § 1926.21(b)(2) must be vacated.

ORDER

The foregoing decision constitutes findings of fact and conclusions of law on all material issues of fact, law, or discretion in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, Item 1, as amended, alleging a serious violation of section 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1), is VACATED.

2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.21(b)(2), is VACATED.

s/ *William S. Coleman*
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: September 29, 2026