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.

QUINLAN ENTERPRISES,

Respondent.

OSHRC Docket No. 12-1698

REMAND ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued a three-item serious citation to Quinlan Enterprises alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, with a total proposed penalty of $11,400. On July 26, 2013, Administrative Law Judge Sharon D. Calhoun issued a decision in which she affirmed as serious the violations alleged in Items 1 and 3 of the citation, vacated Item 2, and assessed a total penalty of $7,200. Quinlan filed a petition with the Commission on August 13, 2013, challenging the merits of both violations affirmed by the judge. The case, which arises in the Eleventh Circuit, was directed for review on August 22, 2013. For the following reasons, we remand this case to the judge for further proceedings consistent with this opinion.

In its petition, Quinlan renews the primary argument it made before the judge. Specifically, Quinlan contends that the two workers "exposed to the cited conditions were not, at the time, working for Quinlan[,]" because "[t]he work being performed was not contractually Quinlan's, and the individuals were not paid by Quinlan for the work." According to Quinlan, the workers "on their own initiative and following pressure from the general contractor, abandoned their workstations for Quinlan and proceeded to do work for the general contractor."

The judge summarily dismissed Quinlan's argument in the following footnote from her decision:

> The undersigned has considered all arguments raised by the parties, including Quinlan's arguments that the employees were not Quinlan's employees at the time of the inspection because they were performing work requested by the general contractor, which was not within the scope of Quinlan's work on the jobsite. The undersigned has considered this and all other arguments not specifically addressed herein and finds they have no merit and are not supported by a preponderance of the evidence.

Without a fuller statement explaining the basis for her conclusion, we cannot determine why the judge found that Quinlan's argument has "no merit" and which of Quinlan's assertions she found "not supported by a preponderance of the evidence." 5 U.S.C. § 557(c) ("All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record[.]"); *see* 29 U.S.C. § 659(c) (cross-referencing 5 U.S.C. § 554); 5 U.S.C. § 554(c) (cross-referencing 5 U.S.C. §§ 556 and 557). Accordingly, we instruct the judge to make factual findings and legal conclusions as to Quinlan's argument, and to explain these findings and conclusions.

If the judge, upon full consideration of this issue, determines that the exposed workers were employed by Quinlan at the time of the alleged violations, we direct her to then consider whether the issue of knowledge in this case is affected by the Eleventh Circuit's recent decision in *ComTran Group., Inc. v. DOL*, 722 F.3d 1304 (11th Cir. 2013). *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) (stating that Commission generally applies precedent of circuit to which case will likely be appealed "even though it may differ from the Commission's precedent"). In *ComTran*—issued two days before the judge's decision in the current case was docketed but after it was transmitted to the parties, 29 C.F.R. § 2200.90(b)—the Eleventh Circuit held that in cases where "the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the misconduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct[,]" such as "evidence of lax safety standards." *ComTran*, 722 F.3d at 1316.

Here, in affirming the violations alleged in Items 1 and 3, the judge found that Quinlan had "[a]ctual knowledge" of the violative conditions because its leadman, whose knowledge the judge found was imputable to Quinlan, had personally engaged in the violative conduct. Before

the judge, Quinlan argued that the Secretary bears the burden of proving that the leadman's conduct was reasonably foreseeable, citing *L.R. Willson & Sons, Inc.*, 134 F.3d 1235 (4th Cir. 1998), as support for its contention. The judge, however, relied on Commission precedent, *L.E. Myers Co.*, 16 BNA OSHC 1037, 1040 & n.6, 1993-95 CCH OSHD ¶ 30,016, p. 41,126 & n.6 (No. 90-945, 1993), in placing the burden on Quinlan to show that "it had a thorough safety program which was adequately enforced and communicated and that the violative conduct of the employee was idiosyncratic and unforeseeable."

In its petition, Quinlan argues once again that "the burden of proof is on the Secretary of Labor to show that [the leadman's] conduct was reasonably foreseeable." Therefore, on remand, the judge should consider the applicability of the Eleventh Circuit's decision to the two affirmed violations if she concludes that Quinlan employed the exposed workers. Depending on the judge's resolution of the *ComTran* applicability issue, she may allow the parties to "further develop[]" the record. *ComTran*, 722 F.3d at 1318.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: Spetember 26, 2013

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

Secretary of Labor, Complainant, v. Quinlan Enterprises, Respondent.	OSHRC Docket No. 12-1698

Appearances:

Uche N. Egemonye, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Frank L. Kollman, Esq., Kollman & Saucier, P.A., Timonium, Maryland
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Quinlan Enterprises (Quinlan) engages in steel erection activities. On February 9, 2012, Occupational Safety and Health (OSHA) compliance officer Gordon Bower conducted an inspection of Quinlan's worksite at the Dougherty High School Construction Renovation Project located at 1800 Pearce Avenue in Albany, Georgia. As a result of OSHA's inspection, the Secretary issued a Citation and Notification of Penalty to Quinlan on August 7, 2012, alleging Quinlan violated three construction standards of the Occupational Safety and Health Act of 1970 (Act).

Item 1 alleges a serious violation of 29 C.F.R. § 1926.501(b)(1) for failing to protect employees from falling with the use of guardrail systems, safety net systems or personal fall arrest systems, while they were working on a walking/working surface with an unprotected edge 6 feet or more above a lower level. Item 2 alleges a serious violation of 29 C.F.R. § 1926.760(b)(3) for failing to ensure that employees exposed to fall hazards of 25 to 32 feet while

engaging in connector activities, were able to tie off personal fall arrest systems to a suitable anchorage point or were protected from falling by another means. Item 2 was amended to allege, in the alternative, a violation of 29 C.F.R. § 1926.760(a)(1) contending that employees engaged in steel erection activity on a walking/working surface with an unprotected side or edge more than 15 feet above a lower level were not protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.[1] Item 3 alleges a serious violation of 29 C.F.R. § 1926.1053(b)(4) for using a ladder for other than the purpose for which the ladder was designed. The Secretary proposed penalties in the amount of $4,200.00 each for Items 1 and 2 and $3,000.00 for Item 3. The total amount of the proposed penalties is $11,400.00.

Quinlan timely contested the citation and the case was designated for the Commission's Conventional Proceedings. The undersigned held a hearing in this matter on January 29, 2013, in Savannah, Georgia. The record was kept open for thirty days for the trial depositions of Miguel Pacheco, John B. Hall and Humberto Vargas. Pacheco's deposition occurred on February 28, 2013. No other depositions were taken. Therefore, the record was closed on March 5, 2013.[2] Post-hearing briefs were filed by the parties on April 26, 2013.

For the reasons discussed below, Item 1 is affirmed and a penalty of $4,200.00 is assessed. Item 3 is affirmed and a penalty of $3,000.00 is assessed. Item 2 as cited and as amended is vacated.

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act, 29 U.S.C. § 659. The record establishes that at all times relevant to this action, Quinlan was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). Further, the parties stipulated to jurisdiction and coverage (Tr. 9).

Background

Quinlan Enterprises, a sole proprietorship owned by John Quinlan, engages in steel erection activities (Tr. 7, 205-206). Quinlan was hired to perform the steel erection at the worksite known as the Dougherty High School project (Tr. 206). The Dougherty High School

[1] Order Granting Complainant's Motion to Amend Pleading to Conform to the Evidence, issued May 13, 2013.
[2] Order Closing the Record, issued March 5, 2013.

project involved expanding a building on the site (Pacheco Trial Depo. 14-15). The worksite was a multi-employer worksite. Kinney Construction (Kinney) was the general contractor for the project (Tr. 160). Gerdau AmeriSteel, which engages in structural steel fabrication, was a subcontractor for Kinney (Tr. 58-59, 164, 234, 235). Gerdau AmeriSteel does not perform the actual steel erection, so it hired Quinlan as its subcontractor to perform the steel erection activities on the jobsite (Tr. 206). Quinlan's work on the jobsite involved anchoring bridges which sustained the structure and reinforcing part of the building (Pacheco Trial Depo. 15). Quinlan's proposal (revised) for the Dougherty High School Project provided that they would supply labor, supervision and equipment to erect structural steel, bar joist, floor deck, roof deck and shear studs (Exh. R-2).

Quinlan employs approximately thirty employees, four of whom were working on the jobsite at the time of the OSHA inspection (Tr. 206, 216). Quinlan had been working at the jobsite since September 2011 (Tr. 16, Exh. C-2). On the day of the inspection, Quinlan employees were to anchor clips inside the building (Pacheco Trial Depo. 17-18, 25). This work involved welding a clip underneath a beam on the roof and putting in epoxy bolts (Tr. 215-251). Quinlan had been engaged in the anchoring work activity for approximately two weeks prior to the OSHA inspection. Pacheco testified that the work required them to anchor the walls from the beam to the wall so that the walls would not fall (Pacheco Trial Depo. 18). Quinlan's work on February 9, 2012, was described by Kinney's superintendents, as well as Miguel Pacheco, as installing plates or clips on the concrete block wall (Tr. 119, 132, 157). Charlie Hall, Superintendent for Kinney, also testified that Quinlan's work involved bridging and running perimeter angle at the bar joist, which he testified is steel erection activity (Tr. 198-199; Exh. C-7).

According to Pacheco, 15 minutes before the end of the work day on February 8, 2012, the day before the OSHA inspection, Hall asked him if Quinlan could help angulate, *i.e.* "to put an angle up where it goes" (Pacheco Trial Depo. 25-26). Pacheco said they did not have time (Pacheco Trial Depo. 25-26). Quinlan's employees left the site without performing the work Hall had asked them to assist with.

On February 9, 2012, the day of the OSHA inspection, Quinlan began work on the jobsite at 7:30 that morning and resumed their work of welding the clips, as they had done in the two weeks prior (Pacheco Trial Depo. 24-25, 27, 28). At 10:00 that morning, Hall arrived on the

worksite and again asked Pacheco to help him put the angles up because the concrete truck was in position (Pacheco Trial Depo. 26). Pacheco testified that he grabbed his harness and his beamer and pulled himself up (Pacheco Trial Depo. 26). Hall asked Pacheco to hold the angles for the rebars to be put in (Pacheco Trial Depo. 37). This was the work Pacheco was performing at the time the OSHA inspector arrived onsite on February 9, 2012 (Tr. 254, 263). Hall testified that the Quinlan employees were doing embedded angle work as depicted in the photographs, but denies that he ordered the Quinlan employees to perform the work (Tr. 176; Exhs. C-7, C-9). According to Joseph Hanniford, project manager for Gerdau AmeriSteel, embedded angle work was not work which was to be performed by it or Quinlan (Tr. 237, 238).

On February 9, 2012, Safety and Health Compliance Officer Gordon Bower (Bower) initiated an inspection of the Dougherty High School Construction Renovation Project worksite. The inspection was a scheduled inspection from the Dodge Report[3] (Tr. 48-50). When Bower first arrived at the site he observed individuals walking and/or standing on a concrete block wall, and as a result, he was concerned about fall hazards (Tr. 54, 55). He took photographs of the conditions he observed while standing near an empty construction trailer (Tr. 54). A worker passed by and asked if he could help him. Bower told him he was looking for Kinney Construction, and the individual pointed towards Kinney's trailer, which Bower explained was empty (Tr. 52). The individual went to get someone from Kinney while Bower waited, and when he returned he told Bower to follow him; that he found Charlie (Tr. 52). Bower was taken to an area of the worksite where several individuals were located. Charlie Hall identified himself as a superintendent for Kinney (Tr. 53). While Bower spoke with Hall, Paul Anthony approached and identified himself as the senior project superintendent for Kinney (Tr. 53). Bower then initiated an opening conference with Kinney, during which time Bower explained why he was on site and obtained permission to inspect the jobsite (Tr. 53).

During the opening conference with Kinney, Bower showed the superintendents the photographs he had taken of the employees he observed working without fall protection (Tr. 53). Kinney's superintendents identified the individuals depicted in the photographs as employees of Kinney, Quinlan and a masonry subcontractor (Tr. 53-54; Exhs. C-3, 4, 5, 6 and 9). The superintendents identified the workers depicted on the block wall as steel erectors from Quinlan

[3] Bower described the Dodge Report as a report generated by the Area Offices consisting of notifications of construction projects (Tr. 48-49; Exh. C-1).

(Tr. 44). They also identified Miguel Pacheco as the foreman for Quinlan (Tr. 55, 57, 58; Exh. R-1). Hall testified he observed Pacheco directing employees on the site during the week of the inspection (Tr. 192-193). Once they finished looking at the photographs, Bower began his walk around inspection of the jobsite with Kinney's superintendents (Tr. 54). During the walk around inspection, Kinney's superintendents pointed out Pacheco who was then standing on the ground, and informed Bower that Quinlan was a subcontractor of Gerdau AmeriSteel, whom Kinney had contracted with to perform the steel erection work on site (Tr. 58-59).

Bower approached Pacheco and identified himself. Pacheco identified himself to Bower as the "bossman foreman . . . foreman" for Quinlan (Tr. 59, 147). Bower explained the scope of the inspection and asked Pacheco if he had been on the concrete block wall and the roof. After looking at the photographs, Pacheco identified himself and Humberto[4] as the employees on the concrete block wall and roof (Tr. 59-60). Bower then asked Pacheco to complete a form providing background information for Quinlan (Tr. 60; Exh. C-2). Pacheco agreed to complete the Construction Site Inspection Information form, took it and walked away (Tr. 60; Exh. C-2). After Pacheco left, Bowers continued the walk around inspection with Kinney's superintendents (Tr. 60, 64).

Later during the inspection, Bower approached Pacheco and Joseph Hall, a Quinlan foreman for another jobsite, as they were sitting in a pickup truck (Tr. 61-62, 64). Pacheco had called Joseph Hall to come to the inspection site to assist him with completing the form (Tr. 62, 63, 285). While sitting in the truck completing the form, they called Quinlan's owner to let him know that OSHA was on the jobsite (Tr. 65). Mr. Quinlan told Joseph Hall and Pacheco not to talk to OSHA and to leave the jobsite (Tr. 65). Pacheco returned the form to Bower and told him that while on the block wall and the roof, he wore a harness, but he did not have the beamer up there, which was the reason he was not connected (Tr. 65, 133). Pacheco also told Bower he had been installing plates and clips on the concrete block wall (Tr. 82). Pacheco and Joseph Hall then left the jobsite (Tr. 65).

During the inspection, Bower was unable to determine whether the employees he observed were actually engaged in connecting activities (Tr. 133). However, he made other determinations relating to the activities occurring onsite. Bower determined the height of the roof from ground level was 14 feet 9 inches where Pacheco was standing when photographed

[4] Humberto was later identified as Humberto Vargos, a welder for Quinlan (Tr. 71, 83, 91).

(Tr. 69, 76). He estimated that Pacheco worked 12 inches from the edge and was standing approximately 32 feet from the ground while installing plates and clips on the concrete block wall and that he was unprotected from the edge, exposed to a fall hazard (Tr. 70, 72, 81-82; Exh. C-7, p. 1). Bower observed that Pacheco and Vargas had harnesses on at all times (Tr. 119). Bower also observed a ladder onsite which was not secured from slipping when in the closed position, as it was not tied at the top (Tr. 94, 152 Exh. C-9, pp. 1-4). Pacheco identified himself in Exhibit C-8 stepping from the unsecured ladder (Tr. 94-95; Exh. C-8, p. 4). He also identified Hall (superintendent for Kinney) as being on the ladder (Tr. 144). Hall testified that Quinlan's employees used the ladder as depicted in Exhibit C-9 and that the ladder was not secure (Tr. 168, 180; Exh. C-9, pp. 3, 4). As a result of Bower's inspection of Quinlan's worksite, OSHA issued the three-item citation at issue here.

DISCUSSION

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

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

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

The standards cited here are found in Subpart M which covers fall protection standards, Subpart R which covers steel erection standards and Subpart X which covers standards for stairways and ladders.

The Citation

Item 1: Alleged Serious Violation of 29 C.F.R. § 1926.501(b)(1)

The citation alleges:

> Each employee on a walking/working surface with an unprotected side or edge which was 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.
>
> a) At the Band room roof deck on the Dougherty High School construction site on or about February 9, 2012 and times prior to, employees standing and/or walking at or near the unguarded edges of the approximately 22 feet wide roof deck were exposed to fall hazards of about 14 feet 9.5 inches.

Section 1926.501(b) (1) provides:

> (b)(1) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

As set forth in item 1, the Secretary contends Quinlan violated § 1926.501(b)(1) by failing to protect employees at or near unguarded edges from falling 14.5 feet to the lower level.

Applicability

The parties vigorously disagree as to the activities Quinlan employees were engaged in at the time of the inspection and whether those activities were steel erection activities[5]. Despite the disagreement as to the activities being performed, there is no dispute that construction work was being performed by Quinlan on the jobsite and that employees were working at heights of at least 14.9 feet without the benefit of fall protection. The record evidence shows Quinlan was responsible for performing steel erection work on the jobsite (Tr. 206). However, the evidence shows that at the time of the inspection, Quinlan's employees were installing embedded angles on the building being expanded, which the evidence reveals is not steel erection work (Tr. 175, 176, 257; Exh. C-7). While performing the embedded angle work, the employees were working near an unprotected edge at a height of at least 14.9 feet (Tr. 69. 76). As such, the employees must be protected from falling.

The cited standard falls under Subpart M which applies to and covers fall protection in construction workplaces. The undersigned finds the Secretary properly cited the fall protection standard under Subpart M, as the employees were not engaged in steel erection activity at the time of the inspection. Even if they were engaged in steel erection activity, Subpart M under certain circumstances could nonetheless be cited appropriately. The Commission, in *Bratton Corp.*, 14 BNA OSHC 1893, 1896 (No. 83-132, 1990) held:

> [T]he steel erection standards in Subpart R do not preempt application of the general construction standards to steel erection work "where general standards provide meaningful protection to employees beyond the protection afforded by

[5]The undersigned has considered all arguments raised by the parties, including Quinlan's arguments that the employees were not Quinlan's employees at the time of the inspection because they were performing work requested by the general contractor, which was not within the scope of Quinlan's work on the jobsite. The undersigned has considered this and all other arguments not specifically addressed herein and finds they have no merit and are not supported by a preponderance of the evidence.

> the steel erection standards" *Williams Enterprises, Inc.,* 11 BNA OSHC 1410, 1416, 1983-84 CCH OSHD ¶ 26,542 p. 33,877 (No. 79-843, 1983), *aff'd in pertinent part,*744 F.2d 170 [11 OSHC 2241] (D.C. Cir.1984).

Quinlan's employees were engaged in construction work activity at heights for which fall protection was required. Further, the Dougherty High School Project was a construction site involving the expansion of a building. The standard is applicable.

Compliance with the Standard's Terms

Quinlan's employees were working more than 6 feet from the lower level as they were installing the embedded angles on the roof of the building (Tr. 69, 76, 176; Exh. C-7). Although Vargas and Pacheco wore harnesses, the evidence shows neither employee was tied off (Tr. 128, 133, 292; Exhs. C-3, 4, 5, 7). There is no personal fall protection system if employees are not tied off, despite wearing the appropriate equipment. A personal fall arrest system is defined in § 1926.500(b) as:

> a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body belt or body harness and may include a lanyard, deceleration device, lifeline, or suitable combinations of these . . .

If the fall protection system has no anchorage (secure point of attachment) it cannot arrest the fall. In addition, as depicted by the photographic evidence, there were no guardrails or safety net systems in place (Exhs. C-3, 4, 5, 7). No other means of fall protection was being used by the employees at the time of the inspection (Tr. 55, 70, 128, 133, 292). The terms of the standard were violated.

Access to the Violative Condition

Two Quinlan employees were observed by Bower working at heights in excess of 6 feet without fall protection. Quinlan employee Vargas was photographed standing on a deck which Bower determined was approximately 14.9 feet from the ground (Tr. 69, 76, 82-83, 91; Exh. C-7). Quinlan employee Pacheco was photographed standing on a brick wall. Bower measured the distance where Pacheco was working to be approximately 32 feet from the ground (Tr. 81-82; Exh. C-7). Bower estimated that both employees worked within 12 inches of the edge (Tr. 70, 92-93; Exh. C-9, p.3). No evidence was introduced to contradict these measurements. Exposure is established.

Knowledge

Finally, the Secretary must establish actual or constructive knowledge of the violative conditions by Quinlan. The Secretary must prove the employer either knew, or with the exercise

of reasonable diligence could have known, of the violative condition. *Dun-Par Engineered Form Co.,* 12 BNA OSHC 1962, 1965 (No. 82-928, 1986) (*Dun-Par*). "The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) (citation omitted), *aff'd,* 255 F.3d 122 (4th Cir. 2001); *Dun-Par*, 12 BNA OSHC at 1965. Knowledge of a hazard may be established where both the violative condition and the employees are in a conspicuous location or are otherwise readily observable. *Hamilton Fixture*, 16 BNA OSHC 1073, 1089 (No. 88-1720, 1993) (*Hamilton*), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994).

At the hearing, Mr. Quinlan denied that Pacheco was the lead person at the jobsite on February 9, 2012, but admitted he had served as lead person on the Dougherty High School project five to six weeks prior to the OSHA inspection (Tr. 207, 226-227). Mr. Quinlan further testified that Vargas and Pacheco worked together on February 9, 2012, and did not need a lead person or boss, as they were working together. According to Mr. Quinlan, if he wanted to change something he would call Pacheco because he spoke English, and he provided directions by telephone to his employees (Tr. 214-215, 220, 246-247). Additionally, regarding work at the worksite on February 9, 2012, Mr. Quinlan testified on cross examination in response to questioning regarding whether Pacheco directed the employees of Quinlan on February 9, 2012, as follows:

> A. He didn't have any employees to direct that day, but him and Humberto. There was no direction needed. If he had another helper there he might've said, hey, come over here and help me or go over there and help Humberto, you know.

(Tr. 228).

Inconsistent with his trial testimony that Pacheco was not a lead person, Mr. Quinlan testified during his deposition on August 3, 2012, that Pacheco was his foreman and that he could stop work if an unsafe condition was present (Tr. 208-210, 212). The undersigned credits Mr. Quinlan's deposition testimony over his trial testimony denying that Pacheco was a lead person on February 9, 2012. His deposition testimony is consistent with the testimony of Kinney's superintendents that Pacheco was the foreman onsite and the person they contacted for Quinlan. Further, the undersigned finds that the cross examination testimony of Mr. Quinlan quoted above is an admission that Pacheco provided direction on the jobsite on February 9, 2012.

Whether Pacheco was "officially" a foreman on the site is not controlling. A preponderance of the evidence shows he was a lead man at the time of the OSHA inspection. An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1537-1538 (No. 86-360, 1992) (consolidated). The undersigned finds that Pacheco was a supervisor for purposes of imputing knowledge to Quinlan. Actual knowledge of the violative condition is established, as Pacheco, lead man, failed to use fall protection while working more than 6 feet above the next lower level. Accordingly, the Secretary has met his burden of employer knowledge and has established a prima facie case as to the cited standard.

An employer may rebut the Secretary's prima facie showing of knowledge with evidence that it took reasonable measures to prevent the occurrence of the violation. Moreover, when the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee. *Archer-W. Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

Employee Misconduct (Isolated Incident)

Quinlan contends that the violation was the result of an isolated incident of unpreventable employee misconduct. To prove this defense, "an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule." *Schuler-Haas Elec. Corp*., 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006) (citations omitted) (*Schuler-Hass*). An employer may rebut the Secretary's prima facie showing with evidence that it took reasonable measures to prevent the occurrence of the violation. In addition, the employer has the burden of showing "that the violative conduct of the employee was idiosyncratic and unforeseeable." *L. E. Myers Co.,* 16 BNA OSHC 1037, 1040 (No. 90-945, 1993) (*L.E. Myers*).

Work Rule

The Secretary contends Quinlan did not have an applicable work rule regarding fall protection (Secretary's Brief, pp. 25-27). The undersigned disagrees. The evidence adduced shows Quinlan has a safety program and safety rules specifically regarding fall protection

(Exhs. R-4, R-5, R-6). It also has safety rules in English and Spanish (Exhs. R-5, R-6). Quinlan has several safety rules relating to fall protection, including the rule that "All employees will be required to have and use a safety harness with lanyard attached." (Exh. R-4). Given this evidence, the undersigned concludes Quinlan has a safety rule regarding fall protection. Merely having a work rule, however, is not enough. A work rule is defined as "an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J.K. Butler Builders, Inc.,* 5 BNA OSHC 1075, 1076 (No. 12354, 1977). An employer's work rule must be clear enough to eliminate the employees' exposure to the hazard covered by the standard and must be designed to prevent the cited violation. *Beta Constr. Co.*, 16 BNA OSHC 1434, 1444 (No. 91-102, 1993) (*Beta*). The undersigned finds that Quinlan's work rule is clear and was designed to prevent the cited violation; however it was not adequately communicated.

Adequately Communicated

The employer must show that it has communicated the specific rule or rules that are in issue. *Hamilton*, 16 BNA OSHC at 1090, *N.Y. State Elec. & Gas Corp*., 17 BNA OSHC 1129, 1134 (No. 91-2897, 1995). The communication element of the misconduct defense is met when the employees are well-trained, experienced and know the work rules. *Texland Drilling Corp*., 9 BNA OSHC 1023, 1026 (No. 76-5037, 1980). Quinlan provided minimal evidence regarding the communication of its work rules. Mr. Quinlan testified that safety training for its employees was provided, however no specifics as to the training was adduced (Tr. 266-269). For example, although sign in sheets from weekly safety meetings were adduced at the hearing, those sign in sheets fail to reflect specifics regarding the content of the training (Exhs. R-4, C-2, C-10). Further, inconsistent with Mr. Quinlan's testimony that sign in sheets reflected safety training, Pacheco testified that they were used to show receipt of pay checks (Pacheco Trial Depo. 29-30; Exh. C-10). The undersigned finds that Quinlan has not adequately communicated its work rules regarding fall protection to its employees.

Enforcement

Commission precedent allows consideration of both pre- and post-inspection discipline. *See Am. Eng'g & Dev. Corp.,* 23 BNA OSHC 2093, 2097 (No. 10-0359, 2012) (finding that one instance of delayed discipline two months after the inspection did not undermine its otherwise strong enforcement policy). However, post-inspection discipline is not a substitute for an

effective enforcement program prior to the inspection. *See Jersey Steel Erectors,* 16 BNA OSHC 1162*,* 1165 n.3 (No. 90-1307, 1993), *aff'd in unpublished opinion*, 19 F.3d 643 (3d Cir 1994) (finding termination of foreman following OSHA inspection did not make up for ineffective enforcement policy prior to inspection).

Quinlan's discipline policy notified employees that if they don't follow the rules or know their job, "we enforce disciplinary action to meet our contract requirements" (Exh. R-5, pp. 17-18). Further, Mr. Quinlan testified that the safety policies are enforced by firing employees, sending them home without pay and reprimanding them (Tr. 268). This enforcement policy is not in the safety program adduced at the hearing, however. According to Mr. Quinlan, Vargas and Pacheco were not paid by Quinlan for the work they performed on February 9, 2012, and they were nearly fired for failing to follow his instructions to do their scheduled work (Tr. 253-256). Further, Quinlan issued a Letter of Reprimand to Pacheco on August 7, 2012, as a result of his failure to use fall protection (Tr. 265-266; Exh. R-3). The only evidence adduced at the hearing to show pre-inspection discipline for safety violations, however, was Mr. Quinlan's testimony that employees in the past were terminated. No specifics were provided (Tr. 268). The undersigned finds Quinlan did not have an effective enforcement program prior to the inspection to compare with the post-inspection discipline given as a result of the cited violations. Therefore, its post-inspection discipline cannot properly be considered an effective enforcement program.

Foreseeability and Preventability

The defense of unforeseeable employee misconduct requires "that the violative conduct of the employee was idiosyncratic and unforeseeable." *L. E. Myers*, 16 BNA OSHC at 1040. Because the evidence as to the employee misconduct defense was so sparse, the undersigned finds the evidence is insufficient to establish that the misconduct of its supervisor was unforeseeable. Accordingly, Quinlan has failed to put forth sufficient evidence to show that it had a work rule which was adequately communicated and enforced and therefore has not made the requisite showing to rebut the Secretary's prima facie case. Therefore, Item 1 is affirmed.

Classification

The Secretary contends that Item 1 is a serious violation of the Act. Under § 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. According to Bower, if an

employee were to fall he could sustain serious or debilitating injuries or death (Tr. 98-100). Item 3 is properly cited as serious.

Item 2: Alleged Serious Violation of 29 C.F.R. § 1926.760(b)(3) or 29 C.F.R. § 1926.760(a)(1) in the alternative, as amended

Item 2 of the citation alleges:

> Section 1926.760(b)(3): Each connector working at heights over 15 and up to 30 feet above a lower level, was not provided with a personal fall arrest system, positioning device system or fall restraint system and wear the equipment necessary to be able to be tied off; or was not provided with other means of protection from fall hazards in accordance with paragraph (a)(1) of this section.
>
> (a) At the B/Wall on the Dougherty High School construction site on or about February 9, 2012, employees standing on the top of a masonry block wall and/or the scaffold planks on the top level of a five-level tubular weld frame scaffold system, were exposed to fall hazards from 25 feet up to 32 feet, while engaged in laying out and welding metal connectors activities, as a result of the employers failure to ensure the employees were able to tie-off personal fall arrest systems to a suitable anchorage point, or were fall protected by another means.

Section 1926.760(b)(3) provides:

> (b) *Connectors.* Each connector shall:
> (1) Be protected in accordance with paragraph (a)(1) of this section from fall hazards of more than two stories or 30 feet (9.1 m) above a lower level, whichever is less;

In the alternative for item 2, the Secretary alleges a violation of § 1926.760(a)(1) which provides:

> (a) *General requirements.* (1) Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning devices systems or fall restraint systems.

Both of the cited standards are found in Subpart R which covers steel erection. In considering the elements required for the Secretary's prima case, an analysis of the applicability of the cited standards is the same for each. Section 1926.750(a) sets forth the scope and applicability of Subpart R as follows:

> (a) This subpart sets forth requirements to protect employees from the hazards associated with steel erection activities involved in the construction, alteration, and/or repair of single and multi-story buildings, bridges, and other structures where steel erection occurs. The requirements of this subpart apply

to employers engaged in steel erection unless otherwise specified . . .

In the originally issued citation item, the Secretary contends Quinlan's employees Pacheco and Vargas were connectors and not properly protected. A "*connector"* is defined in the standard as "an employee who working with hoisting equipment, is placing and connecting structural members and/or components." 29 C.F.R. § 1926.751. At the time of the OSHA inspection Vargas and Pacheco each were performing embedded angle work, which is not a steel erection activity, but instead is concrete and masonry construction work covered in Subpart Q of the standards. As described by Pacheco at the hearing, the embedded angle work required him to hold the angle in place for the rebars while the concrete was being poured (Pacheco Trial Depo. 25-26, 37). Such work is defined in Subpart Q as formwork as follows:

> *Formwork* means the total system of support for freshly placed or partially cured concrete, including the mold or sheeting (form) that is in contact with the concrete as well as all supporting members, including *shores, reshores, hardware, braces, and related hardware*.

29 C.F.R. § 1926.700(b)(2) (emphasis added).

The Secretary argues in his brief that said activity constitutes steel erection because the steel angles were "hoisted" by a forklift to the roof where the employees were working and put in place. A forklift is not identified as one of the types of hoisting equipment contemplated by the steel erection standard. Even if it was considered hoisting equipment as argued by the Secretary, Subpart R contemplates that the employee and the hoisting equipment are working in conjunction, as the standard provides that the employee is "working with hoisting equipment" when performing steel erection work. *See* 29 C.F.R. § 1926.751. Pacheco testified that the angles were so light that he was able to lower them on the roof himself (Pacheco Trial Depo. 37). This does not indicate that he was working with hoisting equipment as required by the standard.

The exception for connecting activities was intended to be narrowly construed. *Steel Erection*, 66 Fed. Reg. 5195, 5203 (Jan 18, 2001) (codified at 29 C.F.R. § 1926). Based on the photographic evidence and testimony adduced at the hearing, the undersigned finds that Quinlan's employees were not performing connector work and were not engaged in steel erection activities. They were not placing or connecting structural steel. They were not using hoisting equipment. They were not welding or bolting structural steel. Rather they were engaged in masonry concrete formwork and construction at the time of the inspection, at a height of at least 14.9 feet without fall protection. Therefore the standard cited in Item 2 of Citation No. 1, as

originally cited, is not applicable and is vacated.

In the alternative, the Secretary alleges a violation of the general steel erection standard found at § 1926.760(a)(1) which requires fall protection for any employee engaged in steel erection activities. As set forth above, the employees were engaged in the process of embedding angles, and this activity is concrete masonry work, not steel erection work. Therefore, the standard cited in Item 2 of Citation No. 1, as amended, is not applicable and is vacated.

. **Item 3: Alleged Serious Violation of 29 C.F.R. § 1926.1053(b)(4)**

The citation alleges:

> Ladders were used for purposes other than the purposes for which they were designed:
>
> (a) At the B/Deck on the Dougherty High School construction site on or about February 9, 2012, employees using an unopened 8 foot A-frame portable ladder that was erected on a roof against a vertical metal stud wall, were exposed to fall hazards ranging from about 6 feet to over 14 feet while using the unstable step ladder.

Section 1926.1053(b)(4) provides:

> (b) *Use.* The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:
> (4) Ladders shall be used only for the purpose for which they were designed.

As evidenced by lead man Pacheco's admission, Quinlan's employees used an unopened stepladder to access the upper surfaces in violation of the standard (Pacheco Trial Depo. 44-45). Further, the stepladder was not secured and was unstable (Tr. 94, 153; Exh. C-9, pp. 1-4). Accordingly, the standard was violated. The ladder was used in the performance of construction work involving the placement of embedded angles on the roof of a building on the jobsite. Therefore, applicability of the standard is established. The undersigned also finds knowledge of the violative condition and employee access to the hazardous condition is shown by the fact that lead man Pacheco admits he used the ladder to access the roof (Pacheco Trial Depo. 44-45; Exh. C-9). The Secretary has established a prima facie case regarding § 1926.1053(b)(4).

As shown above, Quinlan may rebut the Secretary's primary case with proof that it has met the requirements for an unpreventable employee misconduct defense. The existence of a work rule is the initial requirement for the unpreventable employee misconduct defense. The undersigned agrees with the Secretary that Quinlan did not have a work rule prohibiting the improper use of ladders as cited. Instead, Quinlan had a rule requiring employees to "use the right ladder for the type of work being performed." (Exh. R-4). It also had a rule providing

"only those stairways, passageways and ladders designed for access to the structure may be used." (Exh. R-4). These rules do not specifically preclude the use of a step ladder in a closed position. Although Quinlan employees signed sheets indicating they had received training on ladder safety on December 30, 2012, and January 5, 2012, those forms do not provide any detail regarding what was discussed on ladder safety and do not reflect any additional rules on ladder use (Exh. C-10). No evidence was adduced at trial to indicate Quinlan had a rule prohibiting the improper use of ladders as occurred here. In order for a work rule to be effective it must be clear and designed to prevent the cited condition. *Beta Constr. Co.,* 16 BNA OSHC at, 1444. The undersigned finds Quinlan's rules on ladder safety are not clear enough to prevent the cited condition. Therefore, Quinlan cannot and has not rebutted the Secretary's primary case. Item 3 is affirmed.

Classification

The Secretary contends that Item 3 is a serious violation of the Act. Under § 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. Bower testified that by using the step ladder in its closed position, an employee could fall and sustain serious injuries (Tr. 102-103). Item 3 is properly cited as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mech. Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Quinlan employed approximately thirty workers at the time of the inspection. OSHA reduced the penalty by 40% due to Quinlan's size (Tr. 104-105). Bowers did not apply reductions for history or good faith because Quinlan did not cooperate during the investigation (Tr. 105). In consideration of the statutory factors and the facts in this case, the undersigned determines the proposed penalty of $4,500.00 is appropriate for Item 1, and therefore assesses a penalty of $4,500.00 for Item 1. Further, based on the statutory factors and the facts in this case,

the undersigned determines the proposed penalty of $3,000.00 is appropriate for Item 3, and therefore assesses a $3,000.00 penalty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

(1) Item 1 of the Citation, alleging a serious violation of § 1926.501(b)(1), is affirmed and a penalty of $4,200.00 is assessed;

(2) Item 2 of the Citation, alleging a serious violation of § 1926.760(b)(3), is vacated and no penalty is assessed;

(3) Item 2 of the Citation, alleging a serious violation of § 1926.760(a)(1), as amended in the alternative, is vacated, and no penalty is assessed; and

(4) Item 3 of the Citation, alleging a serious violation of § 1926.1053(b)(4), is affirmed, and a penalty of $3,000.00 is assessed.

SO ORDERED.

/s/
SHARON D. CALHOUN
Judge

Date: July 22, 2013
Atlanta, Georgia