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. CUSTOM BUILT MARINE CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 11-0977

ON BRIEFS:

John Shortall, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Raymond Corrigan, Vice President, Custom Built Marine Construction, Inc.
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

On March 10, 2011, the Occupational Safety and Health Administration ("OSHA") issued a serious citation to Custom Built Marine Construction, Inc. ("Custom") under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, alleging that the failure of two Custom employees to wear eye protection while operating a jackhammer violated 29 C.F.R. § 1926.102(a)(1), the construction industry standard for eye and face protection equipment.[1] Administrative Law Judge Sharon D. Calhoun vacated the citation item, concluding that the cited standard required only that Custom furnish such protection to its employees. On review, the

[1] The citation also included three other items, one of which was withdrawn by the Secretary, and two of which were affirmed by the judge as other-than-serious. None of these items are at issue on review.

Secretary challenges this interpretation of the standard as contrary to Commission precedent and inconsistent with the standard's purpose of protecting workers from eye and face injury.

For the reasons that follow, we reverse the judge's decision to vacate this citation item, affirm a serious violation of § 1926.102(a)(1), and assess a penalty of $2,400.

BACKGROUND

OSHA inspected a Custom worksite in Stuart, Florida, where the company was renovating a boat ramp. During the inspection, the OSHA compliance officer ("CO") saw a Custom employee using an electric jackhammer to chip away part of a concrete bulkhead while his supervisor stood nearby observing the work. The CO observed pieces of concrete flying into the air while the employee was operating the jackhammer. It is undisputed that neither the employee nor the supervisor was wearing eye protection at the time and that two pairs of protective eyewear—shown to the CO during the inspection—were available onsite. The jackhammer operator testified that "the [Custom] office [was] right around the corner," so he "could have basically got[ten] anything [he] needed had [he] felt unsafe," and the supervisor stated that the workers "could have got[ten] earplugs, safety glasses, pretty much anything [they] wanted."

Following the inspection, OSHA issued Custom a citation alleging a serious violation of § 1926.102(a)(1),[2] because "[e]ye and face protective equipment [were] not used when machines or operations presented potential eye or face injury." Custom conceded that the cited standard applied, but the judge found that the Secretary did not show that Custom failed to comply with the standard's requirements.[3] Specifically, the judge held that "[t]he word 'provide' [in § 1926.102(a)(1)] is not ambiguous and . . . is commonly understood to mean 'furnish' or 'make available.' " Because it was undisputed that two pairs of protective eyewear were available

[2] This standard states that "[e]mployees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents." 29 C.F.R. § 1926.102(a)(1).

[3] "In order to prove a violation . . . the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

onsite, the judge concluded that the company had "provided [such] eyewear as required by the standard."

DISCUSSION

Almost thirty years ago, in *Clarence M. Jones*, 11 BNA OSHC 1529, 1983-84 CCH OSHD ¶ 26,516 (No. 77-3676, 1983), the Commission addressed the issue presented here and held that § 1926.102(a)(1) requires an employer to ensure the use of eye and face protection. That case—which neither the parties nor the judge addressed below—involved a worker who was chipping material with a hammer and chisel without wearing eye protection. *Id.* at 1530, 1983-84 CCH OSHD at p. 33,748. Although the employer had made goggles available at the worksite, it did not require workers to use them in the circumstances at issue. *Id.* at 1531, 1983-84 CCH OSHD at p. 33,749. The Commission affirmed a violation of § 1926.102(a)(1), rejecting the "contention that making such protection available 'on request' constitutes compliance with" the cited standard.[4] *Id.* at 1532, 1983-84 CCH OSHD at p. 33,750.

Indeed, as stated in *Jones*, § 1926.102(a)(1)'s requirement that construction employers ensure the use of eye and face protection is apparent when the standard is read in context with 29 C.F.R. § 1926.28, the personal protective equipment provision set forth in Subpart C—the "General Safety and Health Provisions"—of Part 1926. *Jones*, 11 BNA OSHC at 1532, 1983-84 CCH OSHD at p. 33,750. Paragraph (a) of § 1926.28 states that "[t]he employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions [and] *where this part indicates the need* for using such equipment to reduce the hazards to the employees," and paragraph (b) states that "[r]egulations governing the use . . . of personal protective . . . equipment are described under subpart E of this part." 29 C.F.R. § 1926.28(a)-(b) (emphasis added). In other words, certain personal protective equipment standards in Part 1926, Subpart E, may not explicitly specify that

[4] *Jones* remains good law, although eight years after it was decided, the Commission took a different position in *Contractors Welding of Western New York, Inc.*, 15 BNA OSHC 1249, 1991-93 CCH OSHD ¶ 29,454 (No. 88-1847, 1991). In that case, the Commission held that 29 C.F.R. § 1926.106(a), which states that "[e]mployees . . . shall be provided with . . . life jacket[s]," requires employers only to furnish such jackets, because "the word 'provide' is not ambiguous," and "it means 'make available.' " 15 BNA OSHC at 1250-51. However, the Commission ultimately vacated its *Contractors Welding* decision on remand from the Second Circuit. *See Reich v. Contractors Welding of W. N.Y., Inc.*, 996 F.2d 1409 (2d Cir. 1993); *Contractors Welding of W. N.Y., Inc.*, 16 BNA OSHC 1392, 1991-93 CCH OSHD ¶ 29,784 (No. 88-1847, 1993).

use of such equipment is required, but § 1926.28 makes clear that those standards do impose a use requirement if they "indicate the need for using such equipment to reduce . . . hazards," and if employees are in fact exposed to hazardous conditions. *See Turner Commc'ns Corp. v. OSHRC*, 612 F.2d 941, 944 (5th Cir. 1980) (rejecting employer's claim that § 1926.28 is satisfied when employees wear safety belts despite not using them to tie off, and holding that although the standard utilizes the term "wear[]," it "require[s] the *use* of personal protective equipment" because it "is designed to protect against . . . hazards") (emphasis added).[5] The provision cited here, § 1926.102(a)(1), is one of these standards, as it is contained within Subpart E and indicates the need to use protective equipment by recognizing the "potential [for] eye or face injury from physical, chemical, or radiation agents." 29 C.F.R. § 1926.102(a)(1); *see also* OSHA Interpretation Letter from Director of Construction Russell B. Swanson to Rhoni Lahn (Nov. 17, 2004) ("Section 1926.102(a)(1) (Eye and face protection) indicates 'the need for using' eye protection . . . ."). Thus, when read together with § 1926.28, § 1926.102(a)(1) obligates an employer to ensure the use of such equipment when an employee is exposed to a potential eye hazard. *See Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("[R]egulations are to be read as a whole, with each part or section . . . construed in connection with every other part or section.") (internal quotation marks and citation omitted).

In addition to this explicit link between Subparts C and E, the language of § 1926.102 itself establishes that the standard requires the use of eye protection. Paragraph (a)(3) of § 1926.102 confirms that the standard requires eye protection to be worn in certain circumstances—"[e]mployees whose vision requires the use of corrective lenses in spectacles, *when required by this regulation to wear eye protection*, shall be protected by goggles or spectacles of one of the following types . . . ." 29 C.F.R. § 1926.102(a)(3) (emphasis added). And paragraph (a)(1) specifies what those circumstances are—"when machines or operations present potential eye or face injury from physical, chemical, or radiation agents." 29 C.F.R.

[5] We note that *Turner* is relevant precedent because this case could be appealed to the Eleventh Circuit, given that Custom's offices and the cited worksite are both in Florida, *see Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case."), and Fifth Circuit case law "handed down prior to October 1, 1981," is "binding precedent" in the Eleventh Circuit. *United States v. Dominguez*, 661 F.3d 1051, 1103 n.62 (11th Cir. 2011).

§ 1926.102(a)(1). In short, when read in conjunction with § 1926.28(a) and § 1926.102(a)(3), it is clear that § 1926.102(a)(1) identifies specific circumstances in which eye protection must be used. *See E. Smalis Painting Co*., 22 BNA OSHC 1553, 1580-81, 2011 CCH OSHD ¶ 33,150, p. 55,335 (No. 94-1979, 2009) (interpreting cited provision in context of entire standard and its overall purpose). Thus, we reaffirm the holding in *Jones* that § 1926.102(a)(1) contains a use requirement.

Turning to the alleged violation at issue, we find that Custom failed to comply with § 1926.102(a)(1) because although it had protective eyewear available at its worksite, it left the decision regarding use of this safety equipment up to its employees, who chose in this instance not to wear eye protection despite the potential for injury. *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1299, 1977-78 CCH OSHD ¶ 22,481, p. 27,101 (No. 14249, 1978). As to the remaining elements of the alleged violation, we find that the record evidence establishes both exposure and knowledge.[6] The CO's observation of pieces of concrete flying in the air near the jackhammer operator and his supervisor clearly establishes employee exposure. *See Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993-95 CCH OSHD ¶ 30,303, p. 41,757 (No. 90-2866, 1993) ("The Secretary may prove that employees had access to a hazard by showing that employees . . . while in the course of their assigned working duties . . . have been in a zone of danger.") (internal quotation marks and citation omitted). And the company had knowledge of the cited condition, as it is undisputed that the supervisor observed the operator, who was not using protective eye equipment, and wore none himself. *See Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999) ("[K]nowledge can be imputed to the cited employer through its supervisory employee."). Accordingly, we affirm a violation of § 1926.102(a)(1).[7]

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[6] Because the judge vacated the citation item, she did not rule on these specific elements nor did she address characterization and penalty. However, the record is sufficiently developed for the Commission to make these determinations. *See Lancaster Enters., Inc.*, 19 BNA OSHC 1033, 1036, 2000 CCH OSHD ¶ 32,181, p. 48,634 (No. 97-0771, 2000) (finding that where the record is sufficiently developed, the Commission may address all elements of a violation even though the judge, having vacated the citation, addressed only one element); *Spancrete Ne., Inc.*, 15 BNA OSHC 1020, 1024, 1991-93 CCH OSHD ¶ 29,313, p. 39,358 (No. 86-521, 1991) (finding it inefficient to remand for a penalty determination where the Commission "thoroughly reviewed the record and [is] able to make the necessary determinations").

[7] The judge treated Custom's claim at the hearing that the violations at issue resulted from employee negligence as an assertion of the unpreventable employee misconduct defense, but she

The Secretary characterized this violation as serious and proposed a penalty of $2,400. "[A] violation is serious if there is 'a substantial probability that death or serious physical harm could result' from the violation." *Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1330, 2002-04 CCH OSHD ¶ 32,697, p. 51,645 (No. 97-0469, 2003) (consolidated) (quoting 29 U.S.C. § 666(k)). Here, as the CO testified, the "flying pieces of concrete . . . being chipped off and broken off the existing concrete bulkhead" created a potential for eye injury requiring hospitalization. Accordingly, we find that the violation was properly characterized as serious.

Regarding penalty, "the Commission [must] 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, 2004-09 CCH OSHD ¶ 32,922, p. 53,564 (No. 04-0475, 2007). Two employees were exposed to the hazard at issue, and while the CO testified that both stopped working immediately when he arrived at the site, the potential for serious eye injury existed. Therefore, we consider the gravity of the violation to be high. *See Gen. Motors Corp.*, 22 BNA OSHC 1019, 1048, 2004-09 CCH OSHD ¶ 32,928, p. 53,627 (No. 91-2834E, 2007) (consolidated) (noting that "even momentary exposure" poses a significant risk of serious harm or death). And although the Secretary gave the company no reduction for prior history or good faith, the record reflects that the proposed penalty was reduced by forty percent in consideration of the company's small size. Under these circumstances, we find the proposed penalty of $2,400 to be appropriate.

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found that the employer adduced no evidence in support of the defense and therefore rejected it with regard to the two citation items she affirmed. *See supra* note 1. We have reviewed the record and agree with her finding. Moreover, we note that the affirmative defense was never asserted by Custom in its answer. *See* Commission Rule 34(b)(3), 29 C.F.R. § 2200.34(b)(3) ("The answer shall include all affirmative defenses being asserted.").

ORDER

We affirm Citation 1, Item 2, as serious and assess a penalty of $2,400.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: December 20, 2012

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. Custom Built Marine Construction, Inc., Respondent.	OSHRC Docket No. **11-0977**

Appearances:

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

For Complainant

David Corrigan, Jr., *Pro Se*, Stuart, Florida

For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Custom Built Marine Construction, Inc., (Custom Built Marine) is located in Stuart, Florida, and engages in construction activities. On January 10, 2011, Occupational Safety and Health Administration (OSHA) compliance officer Henry Shpiruk conducted an inspection of Custom Built Marine at a jobsite located at Southwest Ocean Boulevard and Southwest Federal Highway in Stuart, Florida, where Custom Built Marine was engaged in a project to renovate a boat ramp. Based upon Shpiruk's inspection, the Secretary issued one citation to Custom Built Marine on March 10, 2011.

Item 1 of Citation No. 1 alleges a serious violation of § 1926.20(b)(1), for an inadequate safety program. The Secretary proposed a penalty of $2,400.00 for this item. Item 2 of Citation No. 1 alleges a serious violation of § 1926.102(a)(1), for employees failing to use eye and face protective equipment. The Secretary proposed a penalty of $2,400.00 for this item. Item 3 of Citation No. 1 alleges a serious violation of § 1926.106(a), for failing to provide approved life jackets or buoyant work vests. The Secretary proposed a penalty of $4,200.00 for this item. Item 4 of Citation No. 1 alleges a serious violation of § 1926.106(c), for failing to provide ring buoys with at least 90 feet of line. The Secretary proposed a penalty of $4,200.00 for this item.

Custom Built Marine timely contested the citations. The undersigned held a hearing in this matter on August 12, 2011, in West Palm Beach, Florida, pursuant to the Commission's conventional proceedings. Prior to the hearing, the Secretary withdrew item 1 of the Citation and the proposed penalty for that item. The parties filed post-hearing briefs.

For the reasons discussed more fully below, the undersigned vacates item 2 of Citation No. 1, and affirms items 3 and 4 of Citation No. 1 as non-serious. The undersigned assesses penalties of $0 for items 3 and 4 of Citation No. 1, respectively.

Jurisdiction

The parties stipulated that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act (Tr. 11). The parties also stipulated that at all times relevant to this action, Custom Built Marine was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 11).

Background

Custom Built Marine was engaged in renovations of a boat ramp at the time of OSHA's inspection (Tr. 19). The boat ramp project began in November 2010 and was scheduled to be completed

two weeks after the date of the inspection (Tr. 35-36). Approximately fifteen to twenty employees worked for Custom Built Marine; however, only four employees were working at the inspected jobsite on the day of the inspection (Tr. 34, 42, 107). OSHA's inspection was initiated by a self-referral made by Shpiruk as a result of observations he made while driving by the Custom Built Marine jobsite.[8] As he was driving by the jobsite, Shpiruk observed employees not wearing personal flotation devices while working over and near water (Tr. 17). Shpiruk also observed employees not wearing eye protection while working with and in proximity to a jackhammer being used to chip away the concrete bulkhead (Tr. 23, 26, 27, 29; Exhs. C-1, C-2). Shpiruk opened the inspection by conducting an opening conference with Lee Corrigan, whom he understood was in charge of the site (Tr. 18-19). During the inspection, Shpiruk discovered that Custom Built also did not have a ring buoy with at least 90 feet of line every 200 feet (Tr. 46, 54; Exh. C-9). Shpiruk returned to the jobsite the next day and determined that all conditions had been abated (Tr. 36, 44, 45, 48).

Based upon Shpiruk's inspection, the Secretary issued the instant citations to Custom Built Marine on March 10, 2011.

Discussion

[8] The testimony at the hearing revealed Custom Built Marine was confused regarding the connection between the inspection and citations issued by OSHA, and a complaint that also had been filed against Custom Built Marine. Shpiruk testified that an informal complaint was faxed to OSHA on January 13, 2011. The informal complaint was closed without an inspection on January 18, 2011, based on satisfactory information provided by Custom Built Marine to OSHA, in response to OSHA's query. Shpiruk also testified that because the response was satisfactory, no inspection was initiated and no citations were issued (Tr. 122, 124, 126-129). Further, Shpiruk testified that the informal complaint was not connected to the inspection he initiated on January 10, 2011, as he had completed his inspection two days before the informal complaint was filed, and he had no involvement with the informal complaint (Tr. 122, 126, 129). The undersigned credits Shpiruk's testimony that the events were not connected and that the informal complaint did not result in an inspection or the issuance of citations.

The Secretary alleges Custom Built Marine violated OSHA=s standards regarding Personal Protective and Life Saving Equipment, found in Subpart E of Part 1926. The Secretary has the burden of establishing the employer violated the cited standard.

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

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

Citation No. 1

Item 2: Alleged Serious Violation of § 1926.102(a)(1)

The Secretary charges Custom Built Marine with a violation of § 1926.102(a)(1), and alleges in the citation:

> On site of an existing boat ramp under renovation located at SW Ocean Boulevard and SW Federal Highway in Stuart, Florida: An employee working with an electric jack hammer chipping existing concrete and a supervisor standing adjacent to him were not wearing eye protection equipment, on or about January 10, 2010.

(Citation and Notification of Penalty).

Section 1926.102(a)(1) provides:

> (a) *General*. (1) Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

Applicability

The Secretary must establish the cited standard applies to the cited conditions. Custom Built Marine does not dispute applicability. An employee of Custom Built Marine used a jackhammer to chip away at the concrete bulkhead of the boat ramp (Tr. 23, 26, 27, 29; Exhs. C-1, C-2). Shpiruk observed

pieces of concrete flying in the air, which could result in eye injury, while the employee was using the jackhammer (Tr. 29). Employees in proximity to the jackhammer were not wearing protective eye equipment. The standard applies.

Noncompliance with the Terms of the Standard

It also is undisputed the employees working with and in proximity to the operating jackhammer were not wearing protective eye equipment. Stephen Watson was photographed operating the jackhammer while not wearing eye protection (Exh. C-3). He testified that he was wearing sunglasses, not protective safety glasses (Tr. 85; Exh. C-4). Corrigan was photographed observing Watson using the jackhammer (Exhs. C-2, C-3). Corrigan also was not wearing protective eye equipment (Tr. 80-81; Exhs. C-2, C-3, C-9). Custom Built Marine argues that it did not violate the standard because it provided appropriate eye protection, as there were two pairs of protective eyewear onsite available for use (Custom Built Marine Brief, p. 1; Tr. 31, 32). The undersigned agrees.

Shpiruk testified that two pairs of protective eyewear were onsite and were produced to him during the inspection (Tr. 31-32). Further, he testified that only two employees were exposed to the hazard (Tr. 28). The citation was issued because the two exposed employees were not using the protective eye equipment. An agency's interpretation of its standards are entitled to deference when it is reasonable and consistent with the language of the standard. *See Martin v. OSHRC (C.F. & I Steel)*, 499 U.S. 144 (1991). The undersigned finds here that the Secretary's interpretation is unreasonable and not consistent with the language of the standard. The word "provide" is not ambiguous and it is commonly understood to mean "furnish" or "make available". In view of the evidence presented here, Custom Built Marine provided protective eyewear as required by the standard. Accordingly, the undersigned finds that the Secretary has failed to establish that Custom Built Marine failed to comply with the terms of the standard. Item 2 is vacated.

Item 3: Alleged Serious Violation of § 1926.106(a)

The Secretary contends Custom Built Marine violated § 1926.106(a). The citation alleges:

> On site of a boat ramp under renovation located at SW Ocean Boulevard and SW Federal Highway in Stuart, Florida: Employees working over and near water while supervising, chipping concrete and performing carpentry work installing stringers on existing pylons were not wearing Coast Guard approved PFD's (personal flotation devices), on or about January 10, 2011.

(Citation and Notification of Penalty).

Section 1926.106(a) provides:

> Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket or buoyant work vests.

Applicability

Custom Built Marine does not dispute applicability. Shpiruk testified that all four employees of Custom Built Marine were working over or near water without life jackets (Tr. 37, 39). Corrigan and Watson were working over or near water which was estimated to be 3 feet deep (Tr. 37, 39, 42, 44; Exhs. C-2, C-3, C-10). Photographs also show two other employees working over or near water (Exhs. C-1, C-3, C-5). None was wearing U.S. Coast Guard-approved life jackets or buoyant work vests. Although the water was only 3 feet in depth in the area where the employees worked, a danger of drowning existed (for example, if an employee was rendered unconscious due to slipping and hitting his head) (Tr. 38, 40). The standard is applicable.

Noncompliance with the Terms of the Standard

Custom Built Marine does not dispute that employees were not wearing personal floatation devices. It argues, however, that it provided two personal floatation devices onsite for its employees and, therefore, the standard was not violated (Custom Built Marine's Brief, pp. 1-2; Tr. 44). The undersigned disagrees.

The unrebutted evidence this case shows that three of the four employees who were not wearing life jackets were exposed to a hazard of drowning while working over or near water (Tr. 37, 39; Exhs. C-1, C-2, C-3). Shpiruk testified that two life jackets were produced to him during the inspection (Tr. 42-43). Although, Custom Built Marine provided two floatation devices onsite, it did not provide

enough for all of the employees who were exposed to drowning, as required by the standard. The Secretary has established Custom Built Marine failed to comply with the terms of the standard.

Employee Exposure

As an element of the Secretary=s burden of proof, the record must show that employees were exposed or had access to the violative condition. *Walker Towing Corp*., 14 BNA OSHC 2072 (No. 87-1359, 1991). The Secretary contends all four employees were exposed to the hazard of drowning while working over or near water. The evidence shows Watson was operating the jackhammer while being observed by Corrigan (Tr. 23, 26, 27, 29; Exhs. C-2, C-3). The water was 3 feet deep near where they worked (Tr. 39; Exh. C-9). Shpiruk testified that an employee (whom he identified as Jeremy), who was carrying a piece of lumber, was also exposed to the hazard of drowning (Tr. 64; Exhs. C-1). Shpiruk also testified that two employees (including Jeremy), on the ramp depicted in exhibit C-5, were installing stringers (Tr. 41; Exh. C-5). There was no evidence adduced as to whether these employees were exposed to a drowning hazard while installing the stringers. A preponderance of the evidence shows that three employees were exposed or had access to the violative condition. The Secretary has established employees were exposed to a hazard of drowning while working over or near water without approved life jackets or buoyant work vests.

Knowledge

It is the Secretary's burden to adduce sufficient evidence to establish this element of her case. The Secretary must establish actual or constructive knowledge of the violative conditions by Custom Built Marine in order to prove a violation of the standard. In order to show employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known, of a hazardous condition. *Dun Par Engineered Form Co*.,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of, or was responsible for, the violation." *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

The evidence establishes that Corrigan was the supervisor on the jobsite.[9] When asked if he was a supervisor, Corrigan said he was a foreman (Tr. 76). Watson testified that Corrigan was his supervisor on the job (Tr. 86). 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 (Nos. 86-360 and 86-469, 1992). Corrigan was in proximity to the work being performed and observed employees not wearing life jackets. Further, Corrigan was exposed to the hazard and was not wearing a life jacket either. The undersigned finds that Corrigan was a supervisor for purposes of imputing knowledge to Custom Built Marine. Accordingly, the Secretary has met her burden of employer knowledge and has established a prima facie case as to the cited standard.

Item 4: Alleged Serious Violation of § 1926.106(c)

The Secretary issued a citation to Custom Built Marine alleging that it violated § 1926.106(c) as follows:

> On site of a boat ramp under renovation located at SW Ocean Boulevard and SW Federal Highway in Stuart, Florida: Employees working over and near water while supervising, chipping concrete and performing carpentry work installing stringers on existing pylons did not have ring buoys with at least 90 ft. of line provided and readily available for emergency rescue operations, on or about January 10, 2011.

(Citation and Notification of Penalty).

Section 1926.106(a) provides:

> Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

Applicability

Custom Built Marine does not dispute applicability. Corrigan, Watson, and one other employee were working over or near water which was estimated to be 3 feet deep (Tr. 39; Exhs. C-2, C-3, C-9, C-

[9] Custom Built Marine asserts in its Answer that there was no supervisor on the jobsite at the time of the inspection. However, this issue was not briefed by Custom Built Marine. Accordingly, the undersigned deems this issue abandoned. *See Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No 89-2713, 1991). The parties were advised in the Notice of Receipt of Transcript issued September 2, 2011, that issues not briefed would be deemed abandoned.

10). Although the water was only 3 feet in depth in the area where the employees worked, a danger of drowning existed (Tr. 39, 40). The standard is applicable.

Noncompliance with the Terms of the Standard

The Secretary contends that Custom Built Marine failed to have a ring buoy with 90 feet of line readily available for emergency rescue operations. Corrigan admitted at the hearing and during his interview with OSHA, that Custom Built Marine did not have a ring buoy with at least 90 feet of rope every 200 feet (Tr. 46, 54, 81; Exhs. C-9, C-10). In its brief, however, Custom Built Marine argues that a ring buoy was located inside the cabin of the push boat which was with the barge, and that it was positioned well within the 200 feet requirement (Custom Built Marine's Brief, p. 2). There was absolutely no evidence adduced at the hearing to support this contention. The Secretary has established Custom Built Marine failed to comply with the terms of the standard.

Employee Exposure

The Secretary contends all four employees of Custom Built Marine were exposed to the hazard of drowning while working over or near water 3 feet in depth, while observing the work, operating the jackhammer, and carrying supplies (Tr. 23, 26, 27, 29; Exhs. C-2, C-3, C-9). As set forth in the discussion above regarding item 3, a preponderance of the evidence shows that these three employees were exposed or had access to the violative condition. The Secretary has established employees were exposed to a hazard of drowning while working over or near water and no rescue equipment was readily accessible. The Secretary has met this element of her case.

Knowledge

As shown above, the evidence establishes that Corrigan was the supervisor on the jobsite. Corrigan was onsite observing the work being performed (Tr. 76, 86; Exhs. C-2, C-3). Further, Corrigan admitted at the hearing there was no ring buoy onsite (Tr. 46, 54, 81; Exh. C-9). Actual knowledge is established. The Secretary has met her burden of employer knowledge and has established a prima facie case as to the cited standard.

Employee Misconduct (Isolated Incident)

At the conclusion of the hearing, Custom Built Marine asserted the defense of employee misconduct (Tr. 135). In order to establish the affirmative defense of unpreventable employee

misconduct, an employer is required to prove that it has: (1) established work rules designed to prevent the violation; (2) adequately communicated these rules to its employees; (3) taken steps to discover violations; and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997); *Oil Well Serv.,* 15 BNA OSHC 1809, 1816 (No. 87-692, 1992). Also see *Nooter Construction Co.,* 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994). An employer may defend on the basis that the employee's misconduct was unpreventable.

In order to establish the defense, the employer must show that the action of its employee represented a departure from a work rule that the employer has uniformly and effectively communicated and enforced. *Frank Swidzinski Co.,* 9 BNA OSHC 1230, (No. 76-4627, 1981); *Merritt Electric Co.*, 9 BNA OSHC 2088 (No. 77-3772, 1981); *Wander Iron Work*, 8 BNA OSHC 1354 (No. 76-3105, 1980), *Mosser Construction Co.* 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991). Moreover, A[w]hen 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-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

Custom Built Marine did not adduce any evidence at the hearing in support of its defense of employee misconduct. The undersigned finds that Custom Built Marine has not made the requisite showing to rebut the Secretary=s prima facie case.

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 violations, and good faith." *Burkes Mechanical 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 and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

In arriving at the proposed penalty for item 3, Shpiruk rated the severity as high because death could ultimately result; and he rated the probability as greater because two individuals could have been pulled into the water by the concrete as it breaks, while they were working and standing on the uneven bulkhead (Tr. 40). Shpiruk determined item 4 was high severity because of the drowning hazard; and he determined the probability was greater because the ring buoy was not onsite and the employees were

not wearing personal floatation devices while working over or near water (Tr. 47). The undersigned disagrees with these assessments as to the gravity of the violations. The evidence shows that the water was only three feet in depth. Although it is possible that an employee could drown in three feet of water, it is not likely. The employees were not working alone, and were being observed by Corrigan and someone was available for rescue if an employee was to fall in the water. Moreover, Custom Built Marine did have two life jackets onsite. The undersigned views it as a technical violation that they did not have enough life jackets onsite. Further, since the employees were exposed to no more than three feet of water and were working close to land on the boat ramp, and the Secretary did not offer any evidence that the employees could have been swept out to deeper water, the undersigned finds that the lack of a ring buoy for rescue operations also is a technical violation. Therefore, the undersigned finds that items 3 and 4 are other than serious violations.

In calculating the penalty, the Secretary gave Custom Built Marine a 40% penalty reduction in consideration of its small size (Tr. 59-60). However, no history reduction was given because Custom Built Marine had not been inspected in the past five years; and no deduction for good faith was allowed on the basis that OSHA determined Custom Built Marine was not following its safety and health program (Tr. 61). Although the Secretary gave no reduction for good faith, the evidence shows that Custom Built Marine had sufficient protective eye equipment and two personal flotation devices onsite (Tr. 31, 32, 63-64, 81-82; Exh. C-1). This weighs favorably towards good faith. Also, Custom Built Marine cooperated with the investigation, and it stopped work immediately and abated all of the conditions by the next day. This too weighs favorably as to good faith. Considering these facts and the statutory elements, and the technical nature of the violations a penalty of $0 is appropriate for items 3 and 4, respectively.

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 Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.20(b)(1) is withdrawn and no penalty is assessed;

2. Item 2 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.102(a)(1) is vacated, and no penalty is assessed;

3. Item 3 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.106(a) is affirmed as non-serious, and a penalty of $0 is assessed; and

4. Item 4 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.106(c) is affirmed as non-serious, and a penalty of $0 is assessed.

SO ORDERED.

/s/Sharon D. Calhoun

SHARON D. CALHOUN

Judge

Date: November 8, 2011

Atlanta, Georgia