United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

Secretary of Labor, Complainant, v. Lake Building Products, Inc., Respondent.	OSHRC Docket No. 16-1300

APPEARANCES:

Matthew M. Scheff, Esquire
U.S. Department of Labor, Cleveland, Ohio
For the Secretary

Andrew R. Kaake, Esquire
Wood & Lamping, LLP, Cincinnati, Ohio
For the Respondent

BEFORE: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

As Lake Building Products, Inc. (Lake Building or Respondent) was erecting a two-story steel structure at 520 White Pond Road, Akron, Ohio, Occupational Safety and Health Administration (OSHA) Compliance Officer Steven Browning saw two Lake Building employees working without fall protection from the second story of the structure. He commenced a safety inspection of the worksite. As a result of the inspection, on June 27, 2016, OSHA issued a one-item serious citation, a one-item repeat citation, and a notification of penalty

to Lake Building for violation of OSHA's construction steel erection standard (Subpart R). Lake Building filed a timely notice of contest bringing this matter before the Occupational Safety and Health Review Commission (the Commission), pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

The serious citation was severed from the instant case and resolved in a settlement agreement under OSHRC Docket No. 17-1629. The repeat citation, which alleged a violation of the fall protection requirements of the steel erection standard, proceeded to hearing. The hearing was held in Cleveland, Ohio, on October 5-6, 2017.[1] Both parties filed post-hearing briefs.

Issues

Complainant, the Secretary of Labor (Secretary) contends that at the time of the OSHA inspection, Respondent's employees were engaged in steel erection activities, on the structure's upper level, approximately 28 feet above ground. The Secretary contends that Respondent's employees, who wore personal fall arrest harnesses, were not tied off to an anchor point, in violation of the Subpart R fall protection requirements set forth in 29 C.F.R. § 1926.760(a)(1).

In response, Respondent contends that at the time of the inspection, Respondent was using a crane to hoist bundles of metal decking onto the structure's roof. Respondent's employees, located on the structure's upper level, were engaged in landing the metal decking bundles on a structural beam and unhooking the crane's rigging material from the metal decking bundles. Respondent contends that the employees were working as "connectors," as defined in 29 C.F.R. § 1926.751, and, therefore, the employees were covered by the "connector exception" to the Subpart R fall protection requirements set forth in 29 C.F.R, § 1926.760(b).

This case presents the following issues.

1. At the time of the OSHA inspection, did Respondent violate the Subpart R fall protection requirements set forth in 29 C.F.R. § 1926.760(a)(1)?
2. At the time of the OSHA inspection, were Respondent's employees working as "connectors," as defined in 29 C.F.R. § 1926.751, and, therefore, covered by the "connector exception" to the Subpart R fall protection requirements set forth in 29 C.F.R. § 1926.760(b)?

[1] The hearing transcript is amended to reflect the corrections listed on the attached errata sheet.

3. If the fall protection requirements, set forth in 29 C.F.R. § 1926.760(a)(1), were applicable, has Respondent met its burden to prove the greater hazard affirmative defense? [2]

For the reasons discussed below, the repeat citation alleging a violation of 29 C.F.R. § 1926.760(a)(1) is affirmed and a penalty of $11,000.00 is assessed.

Jurisdiction

Based upon the record, I find that at all relevant times Lake Building was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. (Ex. J-1, ¶ 6). I also find that the Commission has jurisdiction over the parties and subject matter in this case.

Findings of Fact

The Inspection

The facts are largely undisputed. On June 6, 2016, Respondent was performing steel erection activities on a partially complete structure located at 540 White Pond Road, Akron, Ohio. Two of Respondent's employees were working with a crane (hoisting equipment) to land metal decking material on the upper level of the structure, approximately 28 feet above ground. (Tr. 30-31; Ex. C-1, pp. 1-16; Ex. J-1, ¶¶ 5.1, 5.2, 5.3).

OSHA Compliance Officer (CO) Steven Browning was in the area when he saw a crane's boom nearby. Finding the worksite, the CO took photos and recorded video of the worksite from a nearby parking lot. (Tr. 27, 30, 52; Ex. C-1, pp. 1-16; Ex. C-2). He saw two employees on the structure's upper level exposed to a fall hazard of approximately 28 feet. (Tr. 30; Ex. J-1 ¶ 5.2). The CO saw that the employees were wearing personal fall arrest harnesses,[3] but they were not tied off to an anchor point. (Tr. 31, 73; Ex. C-1, pp. 1, 2, 13). He saw the employees land a bundle of metal decking onto the structure and unhook the crane's rigging from the bundle after

[2] Respondent President John Pogacnik, initially self-representing Respondent in this proceeding, filed an answer on December 29, 2016, and a more specific answer stating affirmative defenses on March 2, 2017. Thereafter, Respondent retained counsel. Respondent Counsel was advised to promptly review Respondent's answer and more specific answer and file an amended answer, if needed. *See* June 16, 2017 Notice of Rescheduled Hearing. No amended answer was filed. Tr. 50-51.

[3] A personal fall arrest system "consists of an anchorage, connectors, a . . . body harness and may include a lanyard, deceleration device, lifeline, or suitable combinations of these." 29 C.F.R. § 1926.500(b)

it landed. The CO observed no further work related to the decking bundles, such as unbundling or attaching the individual metal decking panels. It appeared to the CO that additional steps in the building process were needed before the decking panels could be connected to the structure. (Tr. 36-38).

The CO entered the worksite and received permission from the general contractor (GC) to inspect the worksite. (Tr. 39). The GC helped the CO measure the height of the structure's upper level at 28 feet, which was verified by the onsite engineering blueprints. (Tr. 41-42). The GC identified Lake Building as the employer of the employees working on the structure's upper level. (Tr. 39). The GC introduced the CO to Lake Building foreman Henry Brettrager. (Tr. 40). The CO recognized Mr. Brettrager as the person who had been standing on the ground next to the building where the employees were working, when the CO recorded video of the worksite. (Tr. 34, 40; Ex. C-2).

Foreman Brettrager told the CO that the two employees working on the structure's upper level were journeyman ironworkers. They had not attached their fall protection to an anchor point because the foreman believed that under the requirements of the steel erection standard, Subpart R, ironworkers did not have to be tied off when performing "connector work" at heights less than 30 feet above ground. (Tr. 41).

The ironworkers came down from the structure's roof and spoke to the CO. Both ironworkers told the CO they carried a "beamer," a fall protection device, that allowed them to anchor their fall arrest harnesses to the structural steel. (Tr. 73-74, 96; *See generally*, Tr. 199-200; Ex. R-4, p. 5).

During the inspection, CO Browning saw no evidence that an exception to the Subpart R fall protection requirements applied to the work performed. He recommended that a citation issue for lack of fall protection. (Tr. 43).

The Steel Erection Process

The multi-story steel erection process, as described in the rulemaking preamble to Subpart R, begins by anchoring a group of two-story columns (vertical members) to a foundation.

> Initially, vertical members, referred to as columns, are *anchored* to the foundation. The columns are then *connected* with solid web beams or steel joists and joist girders to form an open bay. In a multi-story building, the columns are usually two stories high. These structural members are *set* by connectors in

> conjunction with a hoisting device (typically a crane). When the two-story columns are *set in place*, the connector *installs* the header beams at the first level, which forms the first bay. Each floor is typically 12.5 to 15 feet in height. After an exterior bay is formed ("boxing the bay"), the filler beams or joists are *placed* in the bay. The connector then ascends the column to the next level, where the exterior members are *connected* to form a bay, and so on. The floor or roof decking process basically consists of hoisting and *landing* of deck bundles and the *placement* and *securing* of the metal decking panels.

Safety Standards for Steel Erection, Final Rule, 66 Fed. Reg. 5196, 5243 (Jan. 18, 2001) (*Steel Erection Final Rule Preamble*) (emphasis regarding "placing" and "connecting" activities added).

At this worksite, the building's construction was scheduled in two phases— the right side of the building (sequence 100) and the left side of the building (sequence 200). The building was erected starting from the back of the building and working toward the front where the crane was stationed. (Tr. 119). Each floor was approximately 14 feet high. (Tr. 108). Beams were installed, forming a bay, that connected the two back rows of vertical columns. (Tr. 121). Joists were installed between the beams, forming a structural network for that level's decking floor. (Tr. 121). Bundles of decking material were then hoisted onto the beams with a crane. (Tr. 121). This process was repeated for the next level, forming the roof of the structure. (Tr. 122). Lake Building's employees were landing decking bundles on the beams at the structure's roof level when the CO arrived. (Tr. 126-27). Once landed on the structure, the employees unhooked the rigging materials from the decking bundles. (Tr. 37). Each bundle consisted of 25-30 individual metal decking panels. (Tr. 99).

Nothing would be done with these decking bundles until later, after structural components were fully installed. The structural components would be put in place, the ironworkers would "plumb" or "square" the building, stuff all the bolts, and install bridging. (Tr. 67, 101, 103, 128-29). After the building was squared, bolted, and bridged, the individual metal decking panels would be removed from the bundles and connected on each level forming the deck (floor) of the second level and the roof deck.[4] (Tr. 99, 128-29). At this worksite, the

[4] "Q. Would you ever install any portion of the decking before the building was completely erected, bolted and plumbed? A. Not until that portion was up. Otherwise, it doesn't happen." (Tr. 129, testimony of foreman Brettrager).

individual decking panels would be attached to the structure much later, possibly two weeks, after the bundles had been landed on the structure. (Tr. 99).

The Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

Analysis

Citation 2, Item 1 – Alleged repeat violation of 29 C.F.R. § 1926.760(a)(1)

Subpart R steel erection standard 29 C.F.R. § 1926.760(a)(1) states, in part:

> **Fall protection**. *(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 device systems or fall restraint systems.
>
> . . . .
>
> *(a)(3) Connectors* and employees working in controlled decking zones shall be protected from fall hazards as provided in paragraphs (b) and (c) of this section, respectively. 29 C.F.R. § 1926.760(a)(3).

(emphasis added.)

The Secretary alleges that, on or about June 6, 2016, two employees were exposed to fall hazards of approximately 28 feet when Respondent did not ensure proper fall protection was used during steel erection activities including, but not limited to, hoisting and landing metal decking bundles on a structural steel building. Complaint, p. 7.

Respondent contends that the fall protection requirements of 29 C.F.R. § 1926.760(a)(1) did not apply to employees working on the structure's upper level at the time of the OSHA inspection. At that time, Respondent was using a crane to hoist bundles of metal decking onto the structure's roof. Respondent's employees were engaged in landing the metal decking bundles on the structural beam and disconnecting the crane's rigging material from the bundles. Respondent contends that employees were working as "connectors," as defined in 29 C.F.R. §

1926.751, and covered by the "connector exception" to the Subpart R fall protection requirements set forth in 29 C.F.R. § 1926.760(b).[5]

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1926.760(a)(1).

The standard applies.

The principal issue is whether Respondent's two employees working on the upper level of the steel structure, at the time of the OSHA inspection, were engaged in a work activity that meets the definition of connector.[6] The steel erection standard defines "connector" as "an employee who, working with hoisting equipment, is *placing and connecting* structural members and/or components." 29 C.F.R. § 1926.751 (emphasis added). For the reasons set forth below, I find the employees were not "connectors" and the cited standard applies.

Respondent asserts both employees were connectors and, therefore, covered by the connector exception. When working at heights over 15 feet and up to 30 feet above a lower level, the connector exception provides a connector with the option to work without attaching the personal fall arrest system, worn by the connector, to an anchor point. In other words, the connector is provided the option to work without being tied off. Because Respondent seeks the benefit of an exception to the cited standard, it is Respondent's burden to show the exception applies. *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000) *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001) (citations omitted).

The Secretary asserts employees must be engaged in both "placing" and "connecting" structural materials to meet the definition of connector. The Secretary asserts that the Lake

[5] Subpart R standard 29 C.F.R. § 1926.760(b) states:

> *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 (9.1m) above a lower level, whichever is less;
> (2) Have completed connector training in accordance with §1926.761; and
> (3) Be provided, at heights over 15 and up to 30 feet above a lower level, 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 be provided with other means of protection from fall hazards in accordance with paragraph (a)(1) of this section.

[6] The Secretary concedes that if the employees working on the structure's upper level at the time of the inspection are found to be connectors, the requirements of standard 29 C.F.R. § 1926.760(b) were met. (S. Br. 3, n.4).

Building employees, at the time of the OSHA inspection, did not meet the definition of connector because they were not connecting the metal decking panels to the beams and joists of the structure and, further, connecting the decking materials was not the next step in the work process. Rather, the Lake Building employees were simply landing (placing) the bundles of decking material on the structure. (S. Br. 4).

Respondent states that at the time of the OSHA inspection, Respondent was using a crane to hoist metal decking bundles onto the roof of the structure. Respondent asserts that landing the metal decking bundles is a connecting activity, so its employees did meet the definition of connector. (R. Br. 18).

Each party contends that its position is supported by the plain language of the standard and the standard's rulemaking preamble. Additionally, Respondent asserts that Commission case law and the common understanding of the steel erection industry support its position that the activity of landing materials is a connecting activity. (R. Br. 11, 19).

In ascertaining the applicability of the cited steel erection fall protection standard to the work of Lake Building's employees at the inspected worksite, the meaning of the "connector" definition, set forth in the standard, must be determined. When interpreting a standard, the first consideration is the plain text of the standard. "If the meaning of the [regulatory] language is 'sufficiently clear,' the inquiry ends there." *Davey Tree Expert*, 25 BNA OSHC 1933, 1934, 1937 (No. 11-2556, 2016), quoting *Beverly Healthcare-Hillview*, 21 BNA OSHC 1684, 1685 (No. 04-1091, 2006) (consolidated) (internal citation omitted), *aff'd in relevant part*, 541 F.3d 193 (3d Cir. 2008). The regulatory language is considered ambiguous where the meaning is "not free from doubt." *Martin v. OSHRC* (*CF&I*), 499 U.S. 144, 150-51 (1991). Where the regulatory language is ambiguous, the Secretary's interpretation of its own regulations is "entitled to substantial deference" where the interpretation is "consistent with the regulatory language and is otherwise *reasonable*." *Id*. at 150, 156, 158 (emphasis in original). When considering the reasonableness of the Secretary's interpretation, the Commission may consult the regulation's preamble, the promulgation of interpretive rules, and agency enforcement guidelines. *Id.* at 157.

"Where the language of the standard itself is not explicit on the matter in issue," the Commission will look to the standard's legislative history. *Superior Rigging & Erecting Co*., 18 BNA OSHC 2089, 2091 (No. 96-0126, 2000) (*Superior Rigging*). The preamble to the standard provides the "most authoritative evidence of the meaning of the standard." *Id*. Where the

language of the standard is clear and unambiguous, as defined by the legislative history, industry custom and practice is not relevant. *Id.*, 18 BNA OSHC at 2091, *citing Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1117 (No. 84-696, 1987) (*Cleveland*) (internal citation omitted).

When interpreting terms that are disputed, the Commission looks to "the provisions of the whole law, and to its object and policy." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1077 (No. 90-2148, 1995). The Commission applies the rule of statutory construction that "each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." *Morrison-Knudsen Co. / Yonkers Contracting Co*., 16 BNA OSHC 1105, 1108 (No. 88-572, 1993) (citation omitted). *See Davey Tree*, 25 BNA OSHC at 1934. *See generally, General Motors, Delco Chassis Div.*, 17 BNA OSHC 1217, 1220 (No. 91-2973, 1995) (consolidated) (effect must be given to every clause and word in defining a standard's application), *aff'd*, 89 F.3d 313 (6th Cir. 1996).

Text of the standard is clear

I find the plain text and meaning of the standard requires employees to be engaged in both "placing and connecting" structural members and/or components, while hoisting equipment is in use, to meet the definition of connector. Thus, an employee is a "connector" only when all elements of the definition are fulfilled. To determine if the connector exception applies, the activity of the employee at the worksite must be evaluated. Here, employees were only engaged in placing, not connecting, the metal decking bundles. Therefore, the employees were not engaged in the required activities to be connectors and the connector exception did not apply.

There are three key elements to consider when determining whether an employee meets the definition of a "connector."[7] The first is a requirement that the employee be working with hoisting equipment, the second is that the activity must be placing *and* connecting work, and finally, the material must be either a structural member or a structural component. Here, there is no dispute as to the first and third elements; employees were working with hoisting equipment and the material, metal decking, was a structural member.[8] The Respondent disputes that an

[7] Connector is defined as "an employee who, working with hoisting equipment is placing and connecting structural members and/or components." 29 C.F.R. § 1926.751.

[8] 29 C.F.R. § 1926.751 states:

> Structural steel means a steel member, or a member made of a substitute material (such as, but not limited to, fiberglass, aluminum or composite members). These members include, but are not limited to, steel joists, joist girders, purlins,

employee must be engaged in both placing *and* connecting decking material to meet the definition of connector. Instead, the Respondent asserts that placing (landing) the decking material alone is connecting activity.

The plain language of the connector definition requires that an employee must be both placing "and" connecting. Placing materials, alone, is not sufficient. The word "and" cannot be ignored. "Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Lake Cumberland Tr., Inc. v. U.S. E.P.A.*, 954 F.2d 1218, 1222 (6th Cir. 1992). *See Davey Tree*, 25 BNA OSHC at 1934, 1936 (The definition of "logging operations," in standard 1910.266(c), described as "operations associated with felling and moving trees," plainly refers to a process that involves both felling and moving: the word "and" should not be read as the word "or."). In ordinary usage, the conjunction "and" is an additive conjunction; thus, both elements must be satisfied to equal the outcome. Under the ordinary meaning, the standard requires that both activities—"placing and connecting"—be performed.

Respondent disagrees. Instead, Respondent asserts that "and" means "in addition to" or "as well as." In other words, Respondent asserts that the connector exception applies to employees who are either placing or connecting materials. (R. Br. 10-11). To support this assertion, Respondent relies on *Crown Pacific*, 18 BNA OSHC 1568 (No. 97-1606, 1998) (ALJ) (*Crown*) *rev'd, Crown Pacific v. OSHRC*, 197 F.3d 1036, 1038-39 (9th Cir. 1999). I find this case unpersuasive. As an unreviewed administrative law judge decision, *Crown* does not represent Commission precedent.[9] Further, the judge's decision in *Crown* was reversed on appeal by the Ninth Circuit.[10]

> columns, beams, trusses, splices, seats, metal decking, girts, and all bridging, and cold formed metal framing which is integrated with the structural steel framing of a building.

[9] *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (Unreviewed administrative law judge decisions have no precedential value.).

[10] The issue presented in *Crown* was the scope of the general industry standard regarding the servicing of multi-piece and single piece rim wheels used on large vehicles and the applicability of that standard to the cited employer. 29 C.F.R. § 1910.177 *et seq.* The rim wheel serving standard defined "service or servicing*"* to mean "the mounting and demounting of rim wheels, *and related activities* such as inflating, deflating, installing, removing, and handling." 29 C.F.R.

Respondent's contention that the word "and" in the definition of connector should be interpreted to mean "in addition to" or "as well as" changes the word "and" in the cited standard into the word "or," so that an employee need only be placing *or* connecting materials. This approach ignores the ordinary meaning of the word "and" in its additive sense. I find that "placing and connecting" does not mean "placing and/or connecting." *See generally, Am. Bankers Ins. Grp. v. United States,* 408 F.3d 1328, 1332 (11th Cir. 2005) citing *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930) ("More specifically, unless the context dictates otherwise, the word 'and' is presumed to be used in its ordinary sense, that is, conjunctively."). I find unsupported Respondent's assertion, that "and" in the definition of connector is not used in the ordinary sense.

The language of the standard itself shows that OSHA did not intend the connector definition to apply when the activity is *either* placing or connecting. Had that been OSHA's objective, it could have simply used "and/or" in the definition, as it did just two words later, where it specified "structural members and/or components." I find the text of the standard itself is clear: the work activity must be placing and connecting to satisfy the definition of connector.

The Steel Erection Standard Preamble

I find the preamble to the steel erection standard[11] also supports the Secretary's position that both placing and connecting must occur to satisfy the definition of "connector." The

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§ 1910.177(b) (emphasis added). In *Crown*, the judge determined the word "and," appearing before "related activities," was broadly intended to mean "as well as; together with; in addition to" the mounting and demounting of rim wheels. Therefore, the judge determined the cited standard was applicable to all employers covered by Part 1910 engaged in servicing multi-piece wheels, even when the employer was only engaged in "related activities," such as the cited employer, but not engaged in mounting or demounting rim wheels. *Crown,* 18 BNA OSHC at 1569.

On appeal, the Ninth Circuit examined the structure of the regulation and found the judge had impermissibly stretched "the plain and natural meaning of words," when the judge found the standard applicable to employers who were not engaged in the business of mounting and demounting tires but were engaged only in the "related activities." The court found there must be a nexus between the primary regulated activity of mounting and demounting and the incidental "related activities." *Crown Pacific v. OSHRC,* 197 F.3d 1036, 1039 (9th Cir. 1999). The Ninth Circuit found the standard did not apply to the cited employer and reversed the underlying decision. *Id*. *Crown* does not support Respondent's position in this case.

[11] The Steel Erection Final Rule Preamble describes the development of the rule as a process that included negotiated rule making. The process included the establishment of the Steel Erection Negotiated Rulemaking Advisory Committee (SENRAC) composed of representatives from

preamble specifically states the definition of connector was intended to be "as narrow as possible" because it was related to an exception to the fall protection requirements. *Steel Erection Final Rule Preamble*, 66 Fed. Reg. at 5203. Respondent's interpretation is not congruent with the standard's intent to have the definition of connector, and thus the connector exception, narrowly apply.

OSHA's description of a "bay" assembly in the preamble, quoted supra, illustrates that OSHA considered "placing" and "connecting" to be two discrete activities. *See supra, Steel Erection Process* discussing *Steel Erection Final Rule Preamble*. In the preamble, "placing" activity is described using the words "anchored," "set," "set in place," "placed," "landing," and "placement." Likewise, "connecting" activity is described using the words "connected," "installs," "connected," and "securing." The preamble discussion demonstrates that landing the decking material is not the same as connecting that material to the structure. This preamble discussion illustrates that to meet the definition of connector, and thus qualify for the connector exception, placing and connecting, must be done in conjunction with each other either close in time or sequentially (i.e., each structural member is placed and then connected).

Respondent disagrees. Respondent argues that it is not necessary that both placing and connecting occur to satisfy the connector definition. (R. Br. 17). Respondent contends that "the guiding and placing of the structural materials being hoisted by a crane is, by itself, connecting work, irrespective of whether it is to be immediately attached to the structure." (R. Br. 18). Respondent relies on selective quotes from the preamble to support its belief that the presence of hoisting equipment alone is determinative of whether the connector exception applies.[12]

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labor, industry, public interests and government agencies, including OSHA. The final rule was promulgated based on SENRAC negotiations, the record developed during the proposed rule comment period, public hearing, and post-hearing comment period. 66 Fed. Reg. at 5197-98.

[12] Regarding the definition of a connector, Respondent references the following preamble excerpt. (R. Br. 16-17).

> In one SENRAC meeting, a group of connectors, "uniformly stated that they needed to remain unencumbered when they were working with hoisting equipment and some members recounted personal experiences where they were able to escape collapses and incoming steel only because they were not tied off." 66 Fed. Reg. 5246.

I find this preamble excerpt describes the concerns of one commenter during the rulemaking process. It does not represent OSHA's intended meaning of the standard in its final form.

> SENRAC intended to make this definition as narrow as possible, and the Agency believes that the final definition carries out this intention. The definition is very specific; connecting is distinguished from other steel erection activities by the elements in the definition. For example, spreading and securing bar joists by hand would *not be considered connecting, since that work is not done "with hoisting equipment."* Therefore, *an employee is a "connector" only when working with "hoisting equipment."* This includes placing components as they are received from hoisting equipment, and then connecting those components while hoisting equipment is overhead.

Steel Erection Final Rule Preamble at 66 Fed. Reg. at 5203 (emphasis in Respondent's Brief p. 17).

The preamble excerpt above was OSHA's response to a commenter's concern that the connector exception for fall protection, as written in the proposed rule,[13] might be too broad and include too many steel erection activities. In context, the preamble does not support Respondent's contention.

OSHA's preamble discussion quoted above was focused on two points. First, that all the elements in the definition of connector must be applied ("connecting is distinguished from other steel erection activities by the elements in the definition"). And second, emphasizing that hoisting equipment must always be present for the definition of connector to apply ("only when working with "hoisting equipment"). In the above example of spreading and securing bar joists, the elements of placing (spreading) and connecting (securing) were met, but the element of hoisting equipment was not. Therefore, the described work activity did not meet the definition of "connector." In other words, the purpose of this preamble discussion was to emphasize that each element in the definition of "connector" must be satisfied, including the element of hoisting equipment.

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[13] OSHA's position as set forth in the preamble of the *proposed* rule states:

> [r]egardless of job title, when an employee has finished the "connecting" phase and is performing other steel erection activities (such as detailing, bolting-up and decking), the employee would no longer be considered a "connector" for the purposes of the exception to paragraph (a)(1) of this section and would have to be protected from fall hazards in accordance with paragraph (a)(1) or paragraph (c) of this section.

Safety Standards for Steel Erection, Proposed Rule, 63 Fed. Reg. 43452, 43480 (Aug. 13, 1998) (*Steel Erection Proposed Rule Preamble*). The definition of connector in the proposed rule is the same as in the final rule. *Id.* at 43501.

As a broad point, I note that Respondent seems to believe the job title of connector, as used by employers, controls whether the connector exception applies.[14] This is incorrect. In the standard, connector is defined by the work tasks performed, not by an employee's job title. To this point, OSHA acknowledges that, "employers of connectors are *partly* excepted from the general rule." *Steel Erection Final Rule Preamble*, 66 Fed. Reg. at 5245 (emphasis added). Thus, a job title of connector is not determinative.

Respondent's assertion, that the preamble supports a position that OSHA intended the landing of structural members alone to be the same as or included within the activity of connecting, is rejected. Contrary to Respondent's argument, the preamble does not state that the sole activity of landing the structural members is a connecting activity.

Interpretative statements and enforcement guidelines

When considering the reasonableness of the Secretary's interpretation, the Commission may consult the agency's interpretive statements and agency enforcement guidelines. *See CF & I*, 499 U.S. at 157. OSHA's enforcement directive, CPL 02-01-034, "describes OSHA's inspection policy and procedures and provides clarification to ensure uniform enforcement by field enforcement personnel of the steel erection standards for construction." OSHA Instruction, CPL 02-01-034, *Inspection policy and procedures for OSHA's steel erection standards for construction*, March 22, 2002 (*Directive*). The Directive does not address the issue presented in this case: whether employees are connectors, covered by the connector exception to the fall protection requirements in the steel erection standard, when employees are working to land decking bundles alone without also connecting structural members. The Directive is consistent with the Secretary's interpretation that all elements of the connector definition must be satisfied for the fall protection exception to apply.[15]

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[14] Respondent's expert, Steven Rank, testified extensively on his role as member of the SENRAC committee that helped develop the steel erection rule proposed in 1998, that was the basis for the final steel erection standard published in January 2001. Preambles to the proposed and final rules include information about the SENRAC committee's discussions and recommendations. The preambles provide contemporaneous documentation of the rulemaking process and committee recommendations and, therefore, provide a more reliable description of the proceedings than Mr. Rank's memory. (Tr. 176-78, 180-81).

[15] For example, the Directive states that "the process of connecting includes moving on the steel to and from initial and subsequent points at which beam connections are made," while the crane is getting the next beam. Therefore, while engaged in this activity, working above 15 feet, the connector need not be tied off. This query specifically concerns an ironworker engaged in

For the reasons discussed above, I find the Secretary's interpretation of the connector definition in the steel erection standard, Subpart R, to be reasonable. I find that OSHA intended the connector exception to apply narrowly and only when all the elements of the connector definition were met.

Case law is not inconsistent with the Secretary's reasonable interpretation.

Respondent asserts that *Sawyer Steel, Inc.*, 21 BNA OSHC 1196 (No. 04-0429, 2004) (ALJ) (*Sawyer*), has direct application to the instant case.[16] Respondent asserts that in *Sawyer* the judge determined that an ironworker was a "connector" where the ironworker was working directly with a rented crane to guide bundles of angle iron onto structural steel joists, to be put in place later for roofers to lay the decking. (R. Br. 11-12).

Sawyer does not support Respondent's position that the activity in question in the instant case, installing metal decking bundles weeks after the bundles are landed onto a structure, qualifies as an activity to satisfy the definition of "connector." I find the activity engaged in by Lake Builder's ironworkers at the time of the OSHA inspection in this case, is not identical to the work activity described in *Sawyer*. Further, as an unreviewed administrative law judge decision, *Sawyer* does not represent Commission precedent.

In *Sawyer*, three ironworkers were working on structural steel without fall protection. An ironworker was guiding a load of angle iron being hoisted onto a structural steel joist. The ironworker fell to his death because the joist he sat on had been inadequately secured and gave

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placing and connecting structural members, working with hoisting equipment, satisfying all elements of the connector exception. *Directive* at Chapter 4 "Questions and Answers," Question 43. (Tr. 65; R. Br. 17-18; R. Ex. 15, p. 22 of 36).

The Directive states that when all elements of the connector definition are not present, fall protection is required. The Directive states that the connector exception normally will not apply to workers installing horizontal bridging at a height of 20 feet, on a single-story building. Horizontal bridging is not erection bridging and typically workers will not work with hoisting equipment when installing horizontal bridging. Therefore, the workers are required to have fall protection in accordance with Section 1926.760(a)(1*). Id.* at Question 34. (R. Br. 17-18; R. Ex. 15, p. 21 of 36).

The Secretary notes that the Directive states that controlling contractors are not prohibited from imposing stricter requirements that those in standard 1926.760, and, therefore, they can require connectors to tie off when working between 15 and 30 feet. *Id.* at Question 50. (Tr. 312-15; R. Ex. 15, p. 22 of 36).

[16] OSHA cited Sawyer for seven violations of the steel erection standard including a violation of 29 C.F.R. § 1926.760(a)(1), the same standard at issue here.

way when the materials were landed. The two other ironworkers were not injured. In *Sawyer*, the judge found that only one of the three ironworkers qualified as a connector, so the exception for use of fall protection applied only to that ironworker. The other two ironworkers were not connectors and were required to use fall protection. *Sawyer*, 21 BNA OSHC at 1205-06.

The judge considered Subpart R's definition of connector, 29 C.F.R. §1926.751, noting that the ironworker found to be a connector was working directly with hoisting equipment and that the angle iron bundles being hoisted were structural components. The judge stated that "[u]nder this definition, it is determined that [the ironworker] was working as a connector at the time of the accident*." Id.* at 1205. The judge did not comment on the planned timing of the connection of the angle iron to the structure when stating the ironworker met the definition of connector. Further, the facts as set forth in the decision simply stated the bundles of angle iron being landed on the structural steel joists were "to be put in place *later* for roofers to lay the decking." *Id.* at 1198. (emphasis added). The facts did not include information about the site's work plan, so it was unclear when the angle iron would have been connected had an accident not occurred: later that day, as the next step, or at a much later time. I find the general reference to "later" in the facts does not provide the specificity needed to determine when the angle iron would have been connected. I find that *Sawyer* does not support Respondent's position and is not persuasive.[17]

Industry custom and practice is not relevant.

Respondent also asserts the activity of Lake Building's ironworkers at the time of the inspection is considered to be connector work by the steel erection industry. Respondent's assertion, that industry practice is relevant to the definition of connector, is rejected.

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[17] Lake Building was required to comply with the Federal OSHA steel erection standards, set forth in Subpart R, at its inspected worksite in Akron, Ohio. Respondent asserts that CalOSH decisions and interpretative statements provide support for its position the instant case. This assertion is rejected.

California has a state plan for Occupational Safety and Health (CalOSH). CalOSH regulations for steel erection activities are inapplicable here. Respondent's reliance on a California State interpretive letter and a California State Occupational Safety and Health Appeals Board decision to support its position that landing decking materials alone meets the definition of connector is misplaced and unpersuasive. *See* State of California, Department of Industrial Relations, Division of Occupational Safety & Health, January 6, 2005 letter, interpreting the California Code of Regulations (R. Ex. 1); *Anning-Johnson Co.,* Cal/OSHA Docket No. 06-R1D3-1976, Decision After Reconsideration (Jan. 13, 2012), 2012 WL 470134, at *2. (R. Br. 13-14).

Respondent misapprehends the purpose of the connector exception. It was not OSHA's intent to give an exception to the use of fall protection for all steel erection activities between 15 and 30 feet. As discussed above, the intent was a narrow exception. Because the language of the standard is clear and unambiguous, as supported by the rulemaking history, the general understanding and practices of the steel erection industry are not dispositive here. *See Superior Rigging*, 18 BNA OSHC at 2091, citing *Cleveland*, 13 BNA OSHC at 1117.

Respondent asserts that industry practice is exemplified by Iron Workers International Union (IW) training materials for ironworkers, which consider landing decking materials alone to be a connecting activity.[18] (R. Br. 19, 21). Respondent asserts that employees have been trained that landing a bundle of decking material qualifies for the fall protection connector exception. To support its position, Respondent asserts the IW training materials were reviewed by OSHA for accuracy.[19] Respondent asserts these training materials specifically state that landing decking is a connecting activity. These assertions are rejected.

Iron Workers International Union, Local 17, apprentice coordinator Brian Murray admitted the training materials did not state that the landing of decking bundles was considered a connecting activity. He stated this information was conveyed orally by the trainer to employees

[18] At the time of his testimony, Respondent's expert, Steven Rank, had over 25 years of experience in the steel erection industry and was the Executive Director of Safety and Health for the Iron Workers International Union (IW) for North America. His experience included developing IW training materials, working with federal and state regulatory agencies, and industry consensus groups. (Tr. 148-49). Mr. Rank was qualified as an expert in industry standards and safety procedures of the steel erection industry. (Tr. 188).

Mr. Rank was not qualified as an expert regarding the meaning, definition, or interpretation of the Subpart R, steel erection standards. Mr. Rank's stated opinion, regarding the legal issues presented in this case, including whether Respondent's employees at the inspected worksite were engaged in "connecting work" and working as connectors as defined in the steel erection connector definition, is accorded no weight. (Tr. 188, 244-45, 247, 252-53, 257-58, 264). *See Erickson Air-Crane, Inc.*, No. 07-0645, 2012 WL 762001 *3. n.7 (O.S.H.R.C., Mar. 2, 2012) (Commission found judge properly precluded expert testimony regarding legal conclusions); *J.C. Watson Co*., 22 BNA OSHC 1235, 1238 n.3 (No. 05-0175) (consolidated) (same).

[19] Respondent's expert Mr. Rank stated that in December 2000 he presented, and OSHA staff reviewed, the training materials. He stated OSHA voiced no objections to the training materials. (Tr. 197-98). Mr. Rank testified the training materials used by Respondent were developed prior to the January 18, 2001 publication date of the steel erection rule. (Tr. 207).

during training.[20] The training videos and photographs in evidence do not include information about the height at which the employees were working or what steps in the building process would have occurred before and after the action depicted in the videos and photographs.[21] Importantly, the training materials include a disclaimer, stating the training does not represent compliance with OSHA standards.[22] The record evidence reveals no evidence that OSHA approved the training materials.[23]

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[20] Mr. Murray testified that he tells employees during training that landing decking is a connecting activity; however, he admitted this is not stated in the training documents. "It doesn't actually come out and say it word for word, but we teach it in the sequencing of connection process." (Tr. 351). Mr. Murray stated that he knew the training video had some sort of disclaimer regarding compliance with OSHA regulations, but he was unsure what it stated. (Tr. 358-59). Mr. Rank also admitted that neither the training slides nor video in evidence state that landing a decking bundle is considered connecting work. (Tr. 317; R. Exs. 4, 5, 18, 19).

[21] Mr. Rank admitted that in the photographs provided (which show employees landing materials and not using fall protection) there is no way to determine when that decking will be connected. (Tr. 321-22).

[22] Mr. Rank admitted that at the end of the training videos there is a disclaimer the training was not intended to represent compliance with any regulatory standards. The video Notice of Disclaimer states:

> The contents of this video have been prepared solely to provide guidelines and reference material for IW National Training Fund use for the development of erection plans. The text and illustrations contained herein are not intended to be "all inclusive" or construed to imply that no other alternative erection methods, procedures, hazards, or conditions exist. This video is not developed or intended to comply with any federal, state, or local regulatory statutes. Therefore, the IW National Training Fund expressly disclaims any warranties or promises that your company will not experience accidents, delays, or legal actions while following the guidelines or recommendation provided in this video. (Tr. 325-26).

[23] Mr. Rank's recollection of a meeting with OSHA staff many years ago, in December 2000, at which he presented the training materials and heard no objection does not support a finding that OSHA approved the training materials. (Tr. 197-98). Respondent presented no additional evidence to show OSHA approved the training materials or agreed that the materials accurately represented all requirements of the steel erection standard. Further, the training materials include a disclaimer, stating that the training does not represent compliance with OSHA standards. *See generally, Emery Mining Corp.*, 744 F.2d 1411, 1416 (10th Cir. 1984) ("Whatever their position within the agency, the [Mine Safety and Health Administration] officials who approved Emery's [training] plan clearly had no authority to waive the Act's requirements and bind the government to what amounts to an amendment of the statutory language.").

Further, the training videos and power point slides do not state that landing decking bundles is a connecting activity. (R. Exs. 4, 5, 18, 19). Local 17 apprentice coordinator Murray testified this information is orally shared with apprentice and journeymen ironworkers during

Further, the record does not support Lake Building's broad claim that the steel erection industry regards ironworkers engaged in the activity of landing decking bundles alone to be connectors for the purpose of the connector exception.

Respondent claims the industry standard for construction sequencing, and when decking material is staged, demonstrates that the sole activity of landing a decking bundle is a connecting activity step. This claim is rejected. The preamble shows the multi-story steel erection process, including routine construction sequencing, was known at the time the steel erection standard, Subpart R, was promulgated in 2001. *Steel Erection Final Rule Preamble*, 66 Fed. Reg. at 5243. OSHA was aware of the industry's construction sequencing when it established the standard's definition of connector, which requires both "placing and connecting."

Further, the record discloses that not all steel erection companies allowed connectors to not tie off during steel construction activities at heights between 15 and 30 feet. Some companies required one hundred percent tie off by ironworkers at all times, without exception. Other companies required ironworkers to work from aerial lifts rather than to not tie off. (Tr. 47-48, 135, 302-09). In other words, the record discloses standard practice varies, with some steel erection companies ensuring that ironworkers use fall protection when working at heights between 15 and 30 feet.

Employees were not connectors.

For all the reasons set forth above, I find Respondent's employees, working on the structure's upper level at the time of the OSHA inspection, were not connectors as defined by the standard and, therefore, the connector exception did not apply to the work at issue in this case. The requirement at 29 C.F.R. § 1926.760(a)(1), that employers ensure that employees engaged in steel erection activities use fall protection when working at heights 15 feet above ground, applies.

Respondent's employees were exposed to the hazard.

There is no dispute that two of Respondent's employees were working 28 feet above ground without the use of fall protection. (Ex. J-1 ¶¶ 5.2, 5.4). The parties stipulated that

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training. Therefore, the central issue presented in the instant case (whether ironworkers only engaged in landing decking bundles, but not also engaged in the activity of connecting, are covered by the connector exception to the fall protection requirements in the steel erection standard) would not have been presented or considered by OSHA staff reviewing the training videos and slides.

"Respondent's employees were working with hoisting equipment to land decking material on the upper level of the structure." (Ex. J-1, ¶ 5.4). I find employees were exposed to fall hazards over 15 feet.

Respondent did not comply with the requirements of 29 C.F.R. § 1926.760(a)(1).

As discussed above, the two exposed employees were not engaged in a work activity that qualified for the "connector exception" at 29 C.F.R. § 1926.760(b). These employees were required to be protected from falls over 15 feet by "guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems." 29 C.F.R. § 1926.760(a)(1).

Respondent does not dispute that the two employees were not using fall protection while working on the structure's upper level that was 28 feet above ground. Respondent's argument is that the two employees were not required to use fall protection because they were "connectors" and that it would have been a greater hazard for them to use fall protection for this work activity. As set forth above, I find the employees were not working as "connectors" as defined in the cited standard. Further, as discussed below, Respondent's greater hazard defense fails.

I find that Respondent did not comply with the requirements of the cited standard.

Respondent had knowledge of the violative condition.

The Secretary must prove that the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1207 (No. 05-0839, 2010) *aff'd,* 442 F. App'x 570 (D.C. Cir. 2011) (unpublished). A supervisory employee's actual knowledge or constructive knowledge can be imputed to the employer. *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001). Knowledge is directed to the physical conditions that constitute a violation. The Secretary need not show that an employer understood or acknowledged that the physical conditions were hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) *aff'd*, 79 F.3d 1146 (5th Cir. 1996).

Here, Respondent had actual knowledge of the hazardous condition through its onsite foreman. Foreman Brettrager admitted he was at the worksite during the inspection and he is shown in the CO's video. (Tr. 34, 40, 116; Ex. C-2). The employees were working without fall protection in plain view of the foreman. (Tr. 31-32, 34; Ex. C-1, pp. 4, 5, 13, 15, 16). *See Simplex Time Recorder Co. v. Brock*, 766 F.2d 575, 589 (D.C. Cir. 1985) (knowledge found

where the violations cited were "based on physical conditions and on practices . . . readily apparent to anyone who looked and indisputably should have been known to management."). Mr. Brettrager knew the employees were not using fall protection. (Tr. 41, 125).

I find Respondent, through foreman Brettrager, had actual knowledge that employees were working at a height of 28 feet above ground without the use of fall protection.

The greater hazard defense

Respondent asserts its employees were not tied off because it would have been a greater hazard for an employee to be tied off while using a crane to land decking materials. (R. Br. 21, 25). Respondent asserts that an employee's ability to move is limited when tied off, restricting the employee's ability to move out of the way of an incoming load. (R. Br. 25).

Respondent carries the burden of proof for this affirmative defense. *Pitt-Des Moines, Inc.*, 16 BNA OSHC 1429, 1433 (No. 90-1349, 1993); *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994). "To establish the greater hazard defense, an employer must prove that (1) the hazards created by complying with the standard are greater than those of noncompliance, (2) other methods of protecting its employees from the hazards are not available, and (3) a variance is not available or that application for a variance is inappropriate." *Spancrete Northeast, Inc*., 16 BNA OSHC 1616, 1618 (No. 90-1726, 1994); *see also, Dole v. Williams Enters., Inc.*, 876 F.2d 186, 188 (D.C. Cir. 1989). Respondent must prove all three elements to prevail in its greater hazard defense. *See generally, Altor, Inc.*, 23 BNA OSHC 1458, 1470 (No. 99-0958, 2011) (consolidated), *aff'd*, 498 F. App'x. 145 (3d Cir. 2012) (unpublished); *Spancrete Northeast*, 16 BNA OSHC at 1618; *Dole v. Williams Enters.*, 876 F.2d at 188. "Before an employer elects to ignore the requirements of a standard because it believes that compliance creates a greater hazard, the employer must explore all possible alternatives and is not limited to those methods of protection listed in the standard." *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1159-60 (No. 90-1620, 1993) (consolidated).

The Commission has held that when an employer has not introduced evidence on the element of whether a variance was available or inappropriate, it is unnecessary to evaluate the other two required elements of the defense. *Altor, Inc.*, 23 BNA OSHC at 1470; *Spancrete Northeast*, 16 BNA OSHC at 1618. In this case, the affirmative defense fails because Respondent did not request a variance from the requirements of the cited standard. Further,

Respondent did not show that using fall protection created a greater hazard than its lack of use and did not demonstrate that other means of protecting its employees were not available.

Respondent did not prove the hazards of compliance were greater than non-compliance.

The cited standard requires the use of fall protection when employees are working 15 feet above a lower surface. 29 C.F.R. § 1926.7601(a)(1). There is no dispute that a fall from over 15 feet can result in serious injury or death. Respondent did not prove that the use of fall protection presented a greater hazard than not using fall protection.

Respondent's expert Steven Rank, local union apprentice coordinator Mr. Murray, and foreman Brettrager each stated the belief that it was safer for an ironworker, working on a steel structure with hoisting equipment, to work without being tied off to an anchor point, so that the employee may quickly move out of the way of an incoming load. However, Respondent's witnesses did not present evidence to support this belief. An employer cannot simply substitute its own judgement for the requirements of the standard. *See C.E.M. Plumbing, Inc.*, 17 BNA OSHC 2080, 2082 (No. 95-0676, 1997), citing *Western Waterproofing Co. v. Marshall*, 576 F.2d 139, 143 (8th Cir. 1978).

Respondent's expert, Mr. Rank, testified that the risk of being hit by an incoming load increases when an employee is tied off. (Tr. 296-97). However, Mr. Rank had no data or other evidence to demonstrate that an employee was hit by an incoming load more often, or was more seriously injured, when that employee was tied off.[24] (Tr. 301). Further, Mr. Rank acknowledged that it was not clear whether the hazard of being hit by an incoming load was greater than the hazard from falling 15 to 30 feet to the ground: "it's tough to pick one over the other." (Tr. 310). Mr. Rank's testimony does not show that being tied off presents a greater hazard.

Brian Murray is the apprentice coordinator for Local 17, the local chapter of the Iron Workers International Union. (Tr. 342-43). In this role, Mr. Murray oversees all the training for

[24] Mr. Rank admitted that the Iron Workers International Union incident reports he reviewed had shown accidents both when an employee fell to the ground because he was not tied off and when an employee was hit by an incoming load while tied off. (Tr. 299). Mr. Rank heard of an accident where an employee was knocked off the iron when landing a bundle of decking because the crane hit the post where the employee had tied off. That ironworker was not a union member; therefore, Mr. Rank did not know the extent of that employee's injuries. He simply heard about the accident, possibly through a blog. Mr. Rank did not know of any other employees injured because they were tied off while landing decking. (Tr. 310-12).

the local union ironworkers, including fall protection training. (Tr. 342-43). His experience as an ironworker includes both connecting work and landing decking material. (Tr. 348). Mr. Murray testified that he generally preferred to not tie off when landing materials on a structure. (Tr. 348, 353). He testified that the personal fall arrest system lifeline is a tripping hazard. If he trips over his lifeline, he may fall. Mr. Murray testified that if the decking is caught by the wind it is difficult to get out of the way. Mr. Murray also stated that he would rather have the option to jump out of the way of an incoming load than to be hit by the load and fall. Mr. Murray testified that if he is not tied off and begins to fall, he has the chance to help himself by jumping onto a nearby beam instead of falling. (Tr. 348-49, 354-55). I find Mr. Murray's testimony does not show that falling to the ground is less of a hazard than being hit by an incoming load.

Foreman Brettrager testified that it was unsafe to be tied off when landing a load on the structure because using fall protection limited an employee's ability to get out of the way of a load. (Tr. 131-32, 137-38). He did not present any information to support his belief.

I find the beliefs of Mr. Rank, Mr. Murray, and Mr. Brettrager do not demonstrate that being tied off presents a greater hazard to an employee than falling to the ground.

Respondent also asserts that the steel erection standard preamble supports its position that it is a greater hazard to be tied off when landing decking materials. (R. Br. 25). Respondent cites a preamble excerpt to support this position: "The Committee believes that under certain conditions, the connector is at greater risk if he/she is tied off." (R. Br. 25 citing *Steel Erection Final Rule Preamble*, 66 Fed. Reg. at 5246). Respondent misconstrues this preamble excerpt.

This excerpt specifically applies to an employee that is a "connector" as defined in the standard. *See* 29 C.F.R. § 1926.751. An employee's discretion to not use fall protection, in other words to not "tie off," applies only when the employee has satisfied the definition of connector.[25] This preamble excerpt does not apply to all employees, it only applies to a connector. This excerpt demonstrates the importance of the connector definition.

Further, when the cited standard was promulgated OSHA was aware of the risks related to the use of fall protection when loads are hoisted onto a structure.[26] In the preamble, OSHA

[25] A connector's use of fall protection must comply with the requirements at 29 C.F.R. § 1926.760(b).

[26] In its final rule, OSHA states that it added requirements to the new steel erection standard to address concerns about the hazards of being hit by the load and structural collapse while tied off. 66 Fed. Reg. at 5246-47.

highlighted a comment submitted by an employer that had "two employees who were hit by incoming loads: the one who was tied off was hit and suffered a broken arm. The one who was not tied off was knocked off of a beam at the exterior of a building and was killed." *Steel Erection Final Rule Preamble*, 66 Fed. Reg. at 5246. This demonstrates that OSHA promulgated the definition of connector, and the narrow connector exception at issue here, after consideration of both hazards. Here, Respondent has not asserted a hazard that was not already considered and embodied in the requirements of the cited standard.

Respondent's greater hazard defense fails because Respondent did not prove that using fall protection created a greater hazard than its lack of use.

Respondent did not determine that other fall protection methods were not available.

Respondent did not demonstrate why another means to protect employees from falls was not available. Respondent simply asserted that an employee could not be safely tied off while landing decking materials. Respondent did not address why safety net systems, one of the five fall protection methods listed in the standard, could not have been used at this worksite. Respondent's expert Mr. Rank simply stated that it was difficult to install a safety net system underneath bridges over water. However, Mr. Rank's comment is unrelated to this worksite, which was not a bridge nor over water. (Tr. 331).

Respondent did not explain why various attachment points or lifeline systems could not have been used at this worksite. Foreman Brettrager testified about various ways fall protection could be implemented during steel erection. (Tr. 132, 135, 138-39, 142-43). Mr. Brettrager testified that when using an eleven-foot retractable lifeline, the ironworker cannot reach the center of the bundle to disconnect the rigging. (Tr. 132). Mr. Brettrager admitted that employees could tie off to a horizontal lifeline, which could be 20 to 30 feet long. He did not specify whether a horizontal lifeline could have been used as an attachment point for employees landing decking. He did not explain why use of a horizontal lifeline would not suffice to disconnect rigging. (Tr. 138-39, 142-43). Foreman Brettrager explained that when attached to an eleven-foot retractable lifeline, the ironworker cannot move from one bundle to the next bundle being landed. However, he did not indicate whether multiple horizontal lifelines could be used on a structure to facilitate movement. (Tr. 142).

Further, foreman Brettrager admitted that when he worked at a previous employer, the employees, when working at heights up to 30 feet above ground, generally used aerial lifts

instead of working on the structure without fall protection. (Tr. 135). Nonetheless, Respondent did not present credible evidence as to why an aerial lift could not have been used here rather than having employees working on the structure without fall protection 28 feet above ground.[27] In fact, present on the inspected worksite, were two JLG telescopic man lifts. (Tr. 111; Ex. C-1, pp. 15-17).

Finally, Respondent's expert Mr. Rank admitted that he knew that some steel erection companies require all employees to always use fall protection by tying off when working at heights greater than six feet, which is a more stringent requirement than the cited standard. [28] (Tr. 305-09). When union ironworkers work for these companies, they comply with the stricter fall protection requirements. (Tr. 307-09). Mr. Rank did not explain why the fall protection practices used at those companies could not be used at the inspected worksite when working at heights above 15 feet.

Respondent's greater hazard defense fails because Respondent did not prove that alternative means of protecting employees from fall hazards were not available.

Respondent did not apply for a variance.

Respondent did not apply for a variance. Respondent's president Mr. Pogacnik acknowledged it was the usual practice of Respondent's employees to not tie off when landing decking bundles on a structure at a height between 15 and 30 feet above the ground. (Tr. 101-02). Lake Building had not applied for a variance because Mr. Pogacnik believed Lake Building's usual practice complied with the standard. (Tr. 101-03). As discussed above, this belief is incorrect. Respondent's greater hazard defense fails because it did not apply for a variance.

Respondent's greater hazard affirmative defense fails because Respondent did not show that using fall protection created a greater hazard than its lack of use, Respondent did not demonstrate that other means of protecting its employees were not available, and Respondent did not request a variance from the cited standard's requirements.

Respondent had fair notice of the standard's requirements.

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[27] Facts disclosed in prior decisions reveal that ironworkers who had been instructed to work from aerial lifts, but neglected to do so, suffered fatal falls. *See Sawyer*, 21 OSHC at 1193; *Fastrack Erectors* Tr. 302-04.

[28] These companies include Ben Hur Construction, Turner Construction, and Gilbane Building Company. (Tr. 305-09. *See also* Tr. 47-48.)

Respondent asserts that the Secretary's position, that both placing and connecting must occur to satisfy the definition of connector, is set forth for the first time in this case. Respondent argues this is a significant change in the Secretary's position and thus it had no fair notice of this requirement. (R. Br. 23).

Respondent's argument is ill-founded. The Secretary's position is not new. The text of the standard sets forth the elements required to be considered a connector. The plain language of the standard, the Steel Erection Final Rule Preamble and the OSHA's Instruction Directive, CPL-02-01-034, regarding OSHA's construction steel erection standards, are consistent with the Secretary's position in this case that both placing and connecting must occur to satisfy the definition of connector.[29] The Secretary's position regarding the very narrow application of the connector exception, when all elements of the connector definition are present, was set forth in the preamble and the cited standard when it was published on January 18, 2001.

I find the citation at issue here does not advance a new interpretation of the standard. Respondent's argument, that it lacked fair notice, is rejected.

Repeat Characterization

When the Secretary alleges a repeated violation, the Secretary has the burden of establishing the violations were substantially similar. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, (No. 16183, 1979). A prima facie case of substantial similarity is made by showing the prior and current violations were a failure to comply with the same standard; then "the burden shifts to the employer to rebut that showing." *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994), c*iting Potlatch*, 7 BNA OSHC at 1063. Where the prior and current citations involve different standards, "the burden remains the Secretary's to show substantial similarity"

[29] When considering whether an Employer was deprived of fair notice of the standard's applicability, the Commission and Courts have considered the "inartful drafting of the standard," the undisputed "common understanding and commercial practice" relative to the standard's applicability to the worksite / machinery, the "confirmation of industry practice by the pattern of administrative enforcement" regarding the standard's inapplicability to the worksite / machinery in question, and the adequacy of the Employer's compliance method. *See Miami Indus., Inc.*, 15 BNA OSHC 1258, 1261 (No. 88-671, 1991), *aff'd in relevant part*, 983 F.2d 1067 (6th Cir. 1992) (unpublished) (due to the general nature of the machine guarding standard the statements and actions of OSHA personnel can affect an employer's notice of its compliance obligations pursuant to the standard); *Diebold, Inc. v. Marshall* 585 F.2d 1327, 1336 (6th Cir. 1978) (noting the non-specificity of the general machine guarding standard, and the inartful drafting of the power press guarding standard).

of the violations. *Id.* Evidence that both the prior (antecedent) and present violations involve similar hazards is relevant to the determination of substantial similarity. *Id.*

Here, the Secretary alleged a repeat violation of 29 C.F.R. § 1926.760(a)(1) based on two prior citations. Both prior citations were themselves repeat violations of the steel erection standard fall protection requirements. Neither prior citation was contested by Lake Building. Both prior citations became Commission final orders prior to the date of the inspection giving rise to the present repeat citation.

Lake Building received repeat citation 1, item 1, in OSHA inspection no. 648478, for the alleged violation of 29 C.F.R. § 1926.760(a)(1), when "[o]n or about September 20, 2012, during steel erection activities[,] including but not limited to installing 4 X 4 bracing on a parapet wall on a flat roof approximately 17 feet high, the employer did not ensure all employees on the roof were using a fall protection system/device." (Ex. C-4, p. 6. Tr. 89-91.). This repeat citation, by order of default, became a final order of the Commission on July 8, 2013. (Ex. C-4, C-6). The OSHA violation worksheet for inspection no. 648478 identifies Henry Brettrager as Lake Building's on-site foreman, working without fall protection, at the time the violative conduct was cited. (Ex. C-5, pp. 2-6).

Lake Building received repeat citation 2, item 1, in OSHA inspection no. 982585, for the alleged violation of 29 C.F.R. § 1926.760(b)(3),[30] when "[o]n or about June 20, 2014, the employer did not ensure an employee was protected from fall hazards while working on the top of the 8-inch masonry wall. The employee was assisting in connecting bar joist and did not have the ability to tie off exposing the employee to a fall distance of approximately 22.00 feet on the south side of the commercial structure." (Ex. C-7, p. 7. Tr. 91, 95). This citation was resolved in an informal settlement agreement between OSHA and Lake Building, signed on September 12, 2014. (Ex. C-7, C-9). As part of the informal settlement agreement, this repeat citation became a Commission final order.

[30] Subpart R, steel erection standard 29 C.F.R. § 1926.760(b)(3) states,

> (b) Connectors. Each connector shall: . . . (3) Be provided, at heights over 15 and up to 30 feet above a lower level, 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 be provided with other means of protection from fall hazards in accordance with paragraph (a)(1) of this section.

I find the Secretary has shown each of the two prior citations are substantially similar to the citation in the instant case. Both prior citations are related to fall protection for employees engaged in steel erection activities between 15 and 30 feet. Further, both citations are for subsections of the same steel erection fall protection standard. The citation, related to OSHA inspection no. 648478, that became a Commission final order in 2013, is for the same subsection of the steel erection fall protection standard. That citation was for Lake Building's failure to ensure its employees were protected from fall hazards by ensuring the use of fall arrest systems, which is the same violation cited in the present case. *See Lake Erie Constr. Co*., 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005) (repeat violation affirmed where the prior and present violations concerned the same standard and the same hazard, falls of more than 20 feet, where the employer failed to ensure that employees used appropriate fall protection). In post-hearing briefing, Respondent did not present an argument regarding the repeat classification of the citation. The repeat characterization is affirmed.

I also find the violation was "serious" in nature. Under §17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. 29 U.S.C. § 666(k). Respondent's employees were at risk of falling 28 feet onto compacted soil or concrete footings, which could result in serious injuries or death. (Tr. 41-42, 44-45).

Penalty

The maximum penalty for a repeat violation is $70,000.[31] *See* § 17(a) of the Act. Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, that the gravity of the violation, the employer's good faith, and its prior history of violations. Gravity is generally the primary factor in the penalty assessment. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). Other factors to consider when assessing the penalty for a repeat violation are "an employer's attitude (such as his flouting of the Act), commonality of supervisory control over the

[31] I note that OSHA's statutory maximum penalties were increased for violations that occurred after November 2, 2015, pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). 81 Fed. Reg. 43430 (July 1, 2016). This increase did not apply to penalties assessed prior to August 1, 2016. Here the penalty was assessed when OSHA issued the citation to Respondent on June 27, 2016. Therefore, a statutory maximum of $70,000 applies for a repeat citation.

violative condition, the geographical proximity of the violations, the time lapse between the violations, and the number of prior violations." *Potlatch Corp.*, 7 BNA OSHC at 1064.

The proposed penalty was based on a sixty percent reduction for the size of the employer. (Tr. 44). The violation's gravity was assessed as moderate, based on a rating of high severity and lesser probability. (Tr. 44-45; Ex. R-3, pp. 27-28). No reduction for good faith was applied due to the repeat nature of the violation. (Tr. 44-45). The penalty was increased by ten percent because of affirmed repeat citations in the preceding five years. (Ex. R-3, pp. 15, 22). I find the proposed penalty is appropriate as it considers all the necessary statutory criteria. The proposed penalty of $11,000 is affirmed.

In summary

1. At the time of the OSHA inspection, Respondent violated the Subpart R fall protection requirements set forth in 29 C.F.R. § 1926.760(a)(1).
2. At the time of the OSHA inspection, Respondent's employees were not working as "connectors," as defined in 29 C.F.R. § 1926.751, and, therefore, were not covered by the "connector exception" to the Subpart R fall protection requirements set forth in 29 C.F.R. § 1926.760(b).
3. Respondent did not meet its burden to prove the greater hazard affirmative defense, regarding the applicability of the fall protection requirements, set forth in 29 C.F.R. § 1926.760(a)(1), to Respondent's employees at the inspected worksite.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made in this decision. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1, was severed from the instant case and was resolved under OSHRC Docket No. 17-1629.

2. Citation 2, Item 1, for a violation of 29 C.F.R. § 1926.760(a)(1) is AFFIRMED as Repeat and a total penalty of $11,000 is ASSESSED.

/s/

Carol A. Baumerich
Judge, OSHRC

Date: December 13, 2018
Washington, D.C.

Lake Building Products, Inc.
#16-1300
Hearing Transcript Errata Sheet

Page	Line	Error	Correction
22	14	Carruth	Scheff
50	25	new	Review
56	24	SENRAC	SENRAC's
57	1	need	needed
57	2	them	this
57	21	wherein	where, in
57	22	discretion they	discretion, they
57	22	It's	It is
95	6	AAD	AVD
117	4	Wake	White
139	8	leach	leash
153	24	instruction sequencing	construction sequencing
154	16, 17	A-1013	A10.13
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175	7	Carhartts	lanyards
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264	22	subcite	page cite
267	19	metal deck bundles within a multi-story steel	metal decking bundles within the multistory steel
267	20	connect the beams	connecting beams
267	22	of a connector, because	of Connector work because
302	20	Fast Track Erectors	Fastrack Erectors
304	20	Fast Track Erectors	Fastrack Erectors
310	4	Fast Track Erectors	Fastrack Erectors
313	10, 24	Question 15	Question 50
314	1	Fifteen.	Fifty.
325	12	ILU	IW
325	17	demonstrations	illustrations
325	19	methods or procedures	methods, procedures
325	21	imply	comply
325	23	ILW	IW
328	9	derived	arrived
350	20	decking	packing