Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. GEORGE WEIS COMPANY, and its successors, Respondent.	OSHRC Docket No. 19-1738

Appearances:

Dana Hague, Esq., Department of Labor, Office of Solicitor, Kansas City, Missouri
For Complainant

Frank Simek, Safety Director, George Weis Company, Millstadt, Illinois
For Respondent

Before: Judge Christopher D. Helms – U. S. Administrative Law Judge

DECISION AND ORDER

Two of Respondent's employees were installing soffits on the sundeck of the Holiday Inn hotel in Creve Coeur, Missouri. The foreman was in the basket of an aerial lift, and his co-worker was handing the materials and tools over the edge of the sundeck onto the aerial lift. After a couple of hours, the employee on the sundeck grabbed the mid-rail of the guardrail system protecting the edge of the sundeck and fell through both the top- and mid-rail onto the aerial lift stationed just below the edge of the sundeck. As a result of its investigation, the Occupational Safety and Health Administration ("OSHA") determined Respondent failed to ensure the guardrail could withstand 200 pounds of force in violation of 29 C.F.R. § 1926.502(b)(3).

Complainant contends the proof of this violation is fairly simple: a 200-pound man placed his weight on the mid-rail of a wire-rope guardrail system, which collapsed and caused the man to tumble over the edge. Complainant asserts these facts, coupled with its claim that Respondent was obligated to ensure the guardrail met the capacity requirement through a proper inspection, were sufficient to establish its *prima facie* case. Respondent, on the other hand, contends the Citation and Notification of Penalty should be vacated because: (1) Complainant failed to cite the proper standard, (2) the employee likely applied more than 200 pounds of force to the mid-rail, and (3) its employees performed adequate testing of the guardrail before work began. While the Court agrees with the result urged by Respondent, it does so for slightly different reasons. As discussed further below, the Court finds Complainant failed to produce competent proof the terms of the standard were violated. As such, the Citation and its associated penalty will be vacated.

I. PROCEDURAL HISTORY

As noted above, this case commenced with one of Respondent's employees falling off the edge of a sundeck at a hotel under construction. Complainant was notified of the accident and sent Compliance Safety and Health Officer ("CSHO") Robert Robles to conduct an inspection approximately ten days later. While at the worksite, CSHO Robles interviewed representatives of the general contractor and Respondent. CSHO Robles also interviewed the injured employee, who was still in rehabilitation at the hospital as a result of the injuries he suffered.

Based on his inspection, CSHO Robles recommended, and Complainant issued, a two-item Citation and Notification of Penalty. Respondent timely filed its Notice of Contest. Upon filing the Complaint, Complainant stated, "Complainant hereby amends the Citation to delete Citation 1, Item 1 in its entirety. Citation 1, Item 2 remains as originally issued." *See* Complaint at 2. Thus,

the only remaining item before the Court is a one-item, serious Citation, in which Complainant alleges a violation of 29 C.F.R. § 1926.502(b)(3) and proposes a penalty of $6,630.

A trial was held on October 29, 2020 via WebEx. The following individuals testified: (1) [redacted], an employee of Respondent; (2) CSHO Robert Robles; (3) William McDonald, area director for the St. Louis OSHA Area Office; (4) Barry Schuhardt, crew foreman for Respondent; and (5) Frank Simek, Respondent's Safety Director and Project Manager. After the trial concluded, both parties timely filed post-trial briefs, which were considered by the Court in reaching its decision.

II. STIPULATIONS AND JURISDICTION

The parties stipulated to numerous matters, including the jurisdiction of this Court over both the proceedings and the parties before it. *See* Joint Stipulation Statement at ¶¶ 1, 2. The parties submitted the Joint Stipulation Statement to the Court prior to the trial in this matter and read the stipulations into the record. (Tr. 10-13). Rather than reproduce all 27 individual stipulations, the Court shall incorporate by reference the Joint Stipulations filed on October 15, 2020.

III. FACTUAL BACKGROUND

Respondent is a family-owned company that specializes in drywall, ceilings, and plaster. On August 5, 2019, the date of the incident leading to this case, Respondent had a two-person crew installing soffits underneath a sun deck. (Stip. No. 9). The sun deck was part of a larger hotel construction project in Creve Coeur, Missouri, which was overseen by C. Rallo Contracting Company, Inc., the general contractor. (Stip. Nos. 5, 6). Respondent worked as a subcontractor on the project for over two years by the time this incident occurred. (Stip. No. 7).

Respondent's crew included Barry Schuhardt, the foreman, and [redacted], his subordinate. (Stip. No. 8). Schuhardt installed the soffits from the bucket of an aerial lift, which was located just below the sun deck. (Stip. Nos. 9, 13). [redacted] sat on his knees next to the edge of the sun deck, just inside the wire rope guardrails, and handed materials to Schuhardt. (Stip. No. 14). At some point during this process, [redacted] needed to get up. [redacted] testified he grabbed the mid-rail and pushed down in order to support himself. (Tr. 36-37). While the rail felt solid when he first grabbed it, [redacted] said the rail gave way as he placed his weight on it. (Tr. 38). As the rail gave way, [redacted] fell headfirst through both the mid- and top-rail onto Schuhardt's aerial lift. (Stip. Nos. 15, 16; Tr. 37-38). [redacted] suffered serious injuries, which, as of the date of the hearing, have prevented him from returning to work. (Tr. 25). Subsequent inspection of the guardrails where [redacted] fell showed the c-clamps, which allow the wire ropes to loop around the stanchions and clamp back on themselves, had not been adequately tightened. (Tr. 66-67, 96; Ex. C-5 at 9-16). According to CSHO Robles, a contractor removed the guardrails from the sun deck in order to deliver materials and apparently failed to reset the c-clamps properly. (Tr. 65-66).

Both Schuhardt and [redacted] testified they visually and physically examined the top rail and determined it was safe. (Tr. 52-53, 150-51; *see also* Ex. R-1). [redacted] stated he grabbed and shook the rail, and there were no visible sags in the cable. (Tr. 39, 53). Schuhardt testified he and [redacted] walked the perimeter, "grabbed the cables", and "pull[ed] on them". (Tr. 149, 151). Though, Schuhardt said he did not "remember messing with the mid-rail." (Tr. 148). Their testimony contrasts with the statements they purportedly gave to CSHO Robles, who testified neither Schuhardt nor [redacted] said they had performed a physical examination of the guardrail. (Tr. 85). According to Robles, he asked how Schuhardt performed his inspection, and Schuhardt said he had visually inspected the guardrail; however, Schuhardt did not inform him of any

physical testing performed on it. (Tr. 85-86). CSHO Robles also testified there was no evidence the railing had been reinspected by the General Contractor, C. Rallo Contracting Company, Inc., since it had been removed to accommodate a delivery of materials. (Tr. 73). Moreover, documentary evidence demonstrates Respondent did not reinspect the guardrails once they were reinstalled, as Schuhardt was ultimately disciplined for failing to perform a proper inspection. (Ex. C-14).

In response to the accident, OSHA initiated an inspection, which took place ten days after [redacted] fell through the guardrail. (Tr. 61-62). During his inspection, CSHO Robles interviewed Frank Simek, Schuhardt, and [redacted], who was rehabbing from his injuries. Due to the amount of time that had passed since the incident, CSHO Robles was not able to observe the guardrail in the condition it was in at the time of the accident, though he was able to observe the sun deck and the rail at least as it appeared prior to the accident. (Tr. 62-63). Based on his interviews and observations, CSHO Robles recommended, and Complainant issued, the following Citation and Notification of Penalty, which alleges Respondent violated 29 C.F.R. § 1926.502(b)(3) when it failed to ensure the guardrail could withstand a force of at least 200 pounds.

IV. BURDEN OF PROOF AND LAW APPLICABLE TO 5(a)(2) VIOLATION

To establish a *prima facie* violation of a specific standard promulgated under section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq*. ("Act"), the Secretary must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

The Secretary must establish his *prima facie* case by preponderance of the evidence. *See Hartford Roofing Co*., 17 BNA OSHC 1361 (No. 92-3855, 1995).

"Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014).

V. ANALYSIS

A. Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 CFR 1926.502(b)(3): Guardrail systems were not capable of withstanding, without failure, a force of at least 200 pounds (890 N) applied within 2 inches (5.1 cm) of the top edge, in any outward or downward direction, at any point along the top edge:
>
> JOB SITE: 1030 Woodcrest Terrace, Creve Coeur, MO, 63141, on or about 8/5/2019, the employer failed to ensure the guardrail systems were capable of withstanding, without failure, a force of at least 200 pounds (890 N) applied within 2 inches (5.1 cm) of the top edge, in any outward or downward direction, at any point along the top edge. The workers were exposed to a fall hazard.

See Citation and Notification of Penalty at 7.

1. The Standard Applied

According to 29 C.F.R. § 1926.500(a), "This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926."[1] Respondent was clearly engaged in construction work at the time of the accident and, based on the measurements taken by CSHO Robles, the sun deck was more than 6 feet above the ground. Thus, not only is

1. There is an exception to this rule for making inspections and assessments "prior to the actual start of construction work or after all construction work has been completed." 29 C.F.R. § 1926.501(a)(1). Respondent has not argued the fall protection standard as a whole does not apply, nor do the facts of this case support application of the exception. Work had been ongoing at the hotel for a long time at this point, and there was no indication it had been completed.

Respondent generally covered by the construction standards under part 1926, but it also had an obligation to protect its employees "from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." *See* 29 C.F.R. § 1926.501(b)(1). That obligation is, in turn, governed by § 1926.502, which provides the criteria for fall protection systems. *See id.* § 1926.501(a)(1). Because Respondent was obligated to have fall protection, it was likewise obligated to ensure its compliance with § 1926.502.

Respondent asserts § 1926.502(b)(3) is not the appropriate standard because [redacted] grabbed the mid-rail to support himself, and the mid-rail's requirements are governed by § 1926.502(b)(5). While this argument has appeal when viewed in isolation, it also disregards how [redacted] fell. When [redacted] fell, both the mid-rail and top-rail collapsed. Though [redacted] could not testify as to how, exactly, he fell, it stands to reason [redacted] fell into the top-rail as he fell over the edge. Because both rails failed, the standards governing the requirements for each rail are at issue. Further, irrespective of which rail [redacted] grabbed, the minimum capacity requirements for either rail are applicable to a workplace and employer engaged in work requiring the use of fall protection, such as guardrails. Thus, the Court finds the standard applies.

2. Respondent Knew or Could Have Known of the Hazardous Condition

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of an employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Complainant contends it proved Respondent had constructive knowledge of the condition because the evidence shows Respondent failed to perform an adequate inspection of the guardrail prior to working adjacent to it. In support of its claim, Complainant introduced testimony from CSHO Robles, who interviewed [redacted] and Schuhardt after the inspection. According to CSHO Robles, he asked [redacted] and Schuhardt how they inspected the guardrail, to which they responded they had done a visual examination. (Tr. 85, 102). Respondent argues it had no reason to know the guardrail was noncompliant because both [redacted] and Schuhardt testified they performed visual and physical examinations on the guardrail, including grabbing, pushing, and pulling on the top rail. Ultimately, the Court credits the testimony of CSHO Robles, as well as other documentary evidence, over the testimony of [redacted] and Schuhardt and finds Respondent could have known of a violative condition with the exercise of reasonable diligence.[2]

"[A]n employer has a general obligation to inspect its workplace for hazards." *Hamilton Fixture*, 16 BNA OSHC 1073, 1993 WL 127949 at *16 (No. 88-1720, 1993) (citing *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980)). The scope of that obligation "requires a *careful and critical examination* and is not satisfied by a mere opportunity to view equipment." *Austin Comm. v. OSHRC*, 610 F.2d 200, 202 (5th Cir. 1979) (emphasis added). Some factors to assess whether an employer has exercised reasonable diligence include an employer's "obligation to inspect the work area, to anticipate hazards to which employees may

2. The Court would like to make a quick note about its conclusion. Although the Court ultimately finds Complainant failed to prove a violation of the standard because it did not proffer competent evidence on the topic of whether the terms of the standard were violated, the Court nonetheless wishes to address the question of knowledge for a couple of reasons. First, while Respondent failed to perform an adequate inspection, such is not persuasive evidence the cited standard has been violated. Second, while the Court recognizes a violative condition is a prerequisite for finding Respondent should have been aware of it, the Court nonetheless wishes to illustrate that, but for Complainant's failure of proof on that element, the remaining elements of the violation had been established. Thus, to the extent the Court finds Respondent could have been aware of the violative condition with the exercise of reasonable diligence, it is doing so with the caveat that Complainant ultimately failed to provide adequate evidence to support the existence of a violation.

be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981).

In order to decide whether Respondent complied with its obligation to perform a reasonably diligent examination of its workplace, the Court must determine whose version of the facts is more credible. As noted above, CSHO Robles testified neither [redacted] nor Schuhardt told him they performed anything more than a visual examination of the guardrail. At trial, however, [redacted] and Schuhardt stated they observed, grabbed, pushed, pulled, and shook the guardrail to ensure its stability. The Court finds the testimony of CSHO Robles more credible. In addition to having taken contemporaneous notes of his conversations with [redacted] and Schuhardt, CSHO Robles also acquired a disciplinary notice Respondent issued to Schuhardt for his "failure to check the one guardrail that was not installed properly (by others) and capable of withstanding required force." (Tr. 85, Ex. C-14). Although Respondent attempted to disclaim the validity of the disciplinary notice by arguing it was issued in haste and without all necessary facts, the Court finds this line of argument unconvincing. Determining whether Schuhardt or [redacted] conducted an adequate inspection of the guardrail is not a complicated investigation into the root cause of the accident, nor is the Court convinced that a decision rendered within a month or two after the fact is tainted by haste. (Tr. 166-67). It should also be noted Schuhardt admitted in court he did not perform a thorough inspection of the entire guardrail system, when he testified, "I don't remember messing with the midrail." (Tr. 148). This, in addition to the foregoing, cuts against Respondent's claim that [redacted] and Schuhardt performed the type of examination they claimed to have performed.

Even with that resolved, the Court must nevertheless ascertain what a reasonable inspection looked like under the circumstances. The standard, as noted above, is whether Respondent could have known, with the exercise of reasonable diligence, of the violative

condition. The Court finds the nature and location of the work warranted a more searching examination than even what Schuhardt and [redacted] claim to have performed. *See Austin Comm. v. OSHRC*, 610 F.2d at 202 (reasonable diligence requires a "careful and critical examination"); *Frank Swidzinski Co.*, 9 BNA OSHC at 1233 (factors include obligation to inspect, anticipating hazards, and preventative measures taken). [redacted] was working adjacent to the edge of the sundeck, which was 26 feet above the ground, and handing material over the edge to Schuhardt, who was working from an aerial lift. [redacted] was not only exposed to the hazard, but he did not utilize any additional form of fall protection, which means he relied solely on the guardrail to protect him from falling. Due to the location of the work, the potential gravity of injury, and the lack of any additional form of fall protection, Respondent had an obligation to ensure the guardrail would perform as required under § 1926.502(b), including whether it would support the minimum level of required force.

Even if the Court were to accept the testimony of [redacted] and Schuhardt that they performed a physical manipulation of the top rail to ensure its stability, the Court would nonetheless find the inspection was inadequate. There was simply no way for [redacted] or Schuhardt to ascertain whether the cable met the minimum force requirements by tugging and pulling on the wire rope guardrail, because there is no way to know whether the force they were applying was equivalent to 200 pounds. Regardless of whether Respondent had the appropriate tools to perform such an examination, the obligation existed nevertheless. As such, it was incumbent on Respondent to either get tools to perform a proper inspection or inquire with the contractor responsible for the guardrail's construction to ensure compliance with the standard.

Based on the foregoing, the Court finds Complainant proved Respondent could have known of the existence of the hazard had it exercised reasonable diligence.

3. Respondent's Employees Were Exposed to the Hazard

This element is not in dispute, nor could it be. [redacted] was working next to the guardrail for a period of approximately two hours on the morning of the accident. (Tr. 134). [redacted] ultimately grabbed the guardrail to support himself as he stood up and fell over the edge. *See S & G Packaging Co., L.L.C.*, 19 BNA OSHC 1503 (No. 98-1107, 2001) (holding injuries establish actual exposure to the hazard). Accordingly, the Court finds [redacted] was exposed to the hazard.

4. Complainant Failed to Show Respondent Violated the Terms of the Standard

More often than not, proof of whether the terms of the standard were violated is a perfunctory exercise. In this matter, however, it is the crux of the case. Complainant asks the Court to hold Respondent liable for violating 29 C.F.R. § 1926.502(b)(3) because: (1) Respondent failed to perform an adequate inspection of the guardrail, and (2) the guardrail collapsed. Respondent, on the other hand, argues Complainant failed to prove how much force [redacted] applied to the guardrail when he stood up and fell, which means Complainant cannot credibly assert the terms of the standard were violated.[3] *See Resp't Br.* at 7-8. As noted earlier, the Court agrees with Respondent.

Ultimately, the question being asked is whether Respondent can be held liable for violating the standard without concrete evidence showing the terms of the standard were not met. Here is what the proffered evidence shows: the guardrail collapsed when [redacted] grabbed the mid-rail and fell through the top-rail, [redacted] weighed approximately 200 pounds[4] at the time of the accident, the guardrail was recently reinstalled, and Respondent performed an inadequate

3. The remainder of Respondent's argument—that the amount of force [redacted] exerted on the rail was in excess of the regulatory minimum—is not based on credible evidence, but conjecture.

4. [redacted] testified that he weighed 200 to 210 pounds at the time of the incident. (Tr. 50).

inspection of the guardrail in light of the work it was performing. There is no evidence of the following: (1) the capacity of the guardrail at full strength, (2) the force imparted by a 200- to 210-pound man as he pushes down on the rail to stand up, and (3) the force imparted by a 200- to 210-pound man falling over into an adjacent rail. Based on the evidence, Complainant seeks to hold Respondent liable for the violation because the fall itself was sufficient to establish a violation, and because Respondent failed to perform an inspection capable of revealing whether the guardrail could withstand the minimum amount of force required by the standard. The Court shall address each argument in turn.

The fact that the guardrail collapsed is certainly some evidence of *a* violation, but it is not necessarily evidence of this violation, nor is it a sufficient basis to reach that conclusion. Even if we add to that evidence the fact that [redacted] weighs 200 to 210 pounds and used the guardrail in an expected manner, we still do not know how much force was applied because weight and force are not equivalent measures. *See, e.g.*, *Gutknecht Constr.*, 1996 WL 460161 at *4 (No. 95-0956, 1996). Attempting to show such evidence is sufficient to establish a violation, Complainant cites to *Gutknecht Construction* and *Bianchi Trison Corp.* Neither case, however, stands for the proposition urged by Complainant.

In *Gutknecht Construction*, the employer was cited for a violation of 29 C.F.R. § 1926.501(b)(1). During the course of the workday prior to the accident, a supervisor identified an open elevator shaft. *Id.* at *2. His subordinate placed a four-foot by eight-foot sheet of particle board over the opening and promised to guard it properly the next morning but never did. *Id.* The following day, another employee dismantling scaffold dropped a piece of scaffolding, which fell towards the employee who set up the particle board. *Id.* As the scaffold fell, the employee below ran towards the elevator shaft and crashed through the particle board and fell down the elevator

shaft to the ground 40 feet below. *Id.* Presented with these facts, the ALJ determined the employer violated 1926.501(b)(1).

In *Gutknecht*, the Secretary argued the guardrail could not be an adequate guardrail system because it failed in its primary purpose: to "prevent employees from falling to lower levels." *See id.* (citing 29 C.F.R. § 1926.500(b). Thus, Complainant argued Respondent had violated 1926.501(b)(1). The ALJ thought Complainant's interpretation was too restrictive as a general proposition but determined it was appropriate in the context of the case before him: "However, in this instance, the fact that the worker's impact on the particleboard broke it argues strongly in support of the Secretary's position. Clearly, the standard is intended to preclude this sort of event. The failure of the particleboard "guardrail" constitutes evidence that it did not comply with § 1926.502(b)(3)." *Id.* at *3. Ultimately, the ALJ concluded the failure of the particle board to comply with the criteria under 1926.502(b), and the fact that it failed to protect an individual from the specific hazard it was intended to prevent, was sufficient to establish a violation of § 1926.501(b)(1).

There are four reasons why the Court is unconvinced by the foregoing. First, it is not a precedential decision of the Commission. This Court may use the decisions of other ALJs as persuasive precedent, but it is not bound to follow those decisions.[5] Second, the ALJ was not attempting to answer whether § 1926.502(b)(3) was violated but was instead focused on the principal fall protection standard, § 1926.501(b)(1). In that respect, any and all failures under § 1926.502(b), which contain the criteria for installing an adequate guardrail, would be sufficient to establish a violation under § 1926.501(b)(1). The *Gutknecht* decision states the failure of the

5. This is particularly so in the case of the ALJ's decision in *Gutknecht*, which was set aside by the Commission after the parties submitted a settlement agreement that disposed of the case. *See Gutknecht*, 1997 WL 411317 (No. 95-0956).

particle board guardrail "constitutes evidence [employer] did not comply with § 1926.502(b)(3)." *Id.* This conclusion seems to conflate the evidence necessary to show whether a guardrail was designed to prevent employees from falling to lower levels with the evidence required to illustrate compliance with the specific requirements of (b)(3). Further, while someone falling through the railing was "some evidence" of a violation, the presence of "some evidence" does not mean it is sufficient to prove noncompliance with a specific set of requirements. Third, the Court is concerned about how the *Gutknecht* decision allocates the respective burdens of proof with respect to whether the guardrail was compliant. The employer pointed out the Secretary failed to perform any tests illustrating the particle board was insufficient to meet the terms of § 1926.502(b)(3) and performed tests of its own—using a 200-pound employee—to illustrate the board was, in fact, sufficient. The ALJ determined the employer performed unscientific tests that equated weight with force and "did not constitute credible evidence of compliance with § 1926.502(b)(3)." *Gutknecht*, 1996 WL 460161 at *4. While this Court more or less agrees with that conclusion, the manner in which it is stated implies a higher burden on the employer to prove compliance with § 1926.502(b)(3) than what was required of the Secretary in its attempt to establish noncompliance. While this Court agrees the evidence presented by the employer in *Gutknecht* was not sufficient or persuasive to establish compliance with § 1926.502(b)(3), the Court finds it was no less persuasive or competent than the evidence introduced by the Secretary. Finally, this Court is not confronted with a slapdash, band-aid fix like a piece of particle board resting over an opening to an elevator shaft, which violates any number of the criteria for guardrails under § 1926.502(b), but is instead concerned with the quality of the evidence used to support finding a violation of a specific, individual requirement.

In *Bianchi-Trison Corp.*, also an ALJ decision, the court was presented with mounds of evidence the guardrails in question were not sufficient to withstand even hand-pressure. *See Bianchi-Trison Corp.*, 20 BNA OSHC 1801 (No. 01-1367 et al., 2004) (ALJ), *aff'd on other grounds*, 409 F.3d 196. The various guardrails were (1) made of split wood and nails, not secured to the floor, and could be moved a foot in either direction by hand; (2) made of caution tape wrapped around rebar and concrete blocks; and (3) garbage cans with sticks and caution tape. In each case, the 'guardrail' used was patently insufficient to support weight of any kind, considering it was either made from caution tape or could be moved with little to no force exerted on it. *Id.* While no evidence was presented on the specific capacity of the individual guardrails, there was ample evidence to support a reasonable inference the guardrails in question fell woefully short of the requirement imposed by § 1926.502(b)(3).

As regards the inspection, which the Court addressed earlier, the question about whether Respondent should have known about a hazardous condition is uncomplicated. Respondent's crew was working adjacent to a fall hazard 26 feet above the ground. Although there was existing protection, it was incumbent upon Respondent to ensure it was adequate. The question Complainant's argument invites is whether Respondent's failure to perform an adequate inspection is evidence that supports a finding the guardrail did not comply with § 1926.502(b)(3).

If the behavior targeted by Complainant is Respondent's failure to conduct an adequate inspection of the guardrail, then the standard cited is not the route to hold Respondent liable. Although Respondent's failure to conduct an adequate inspection suffices to prove knowledge, it is not persuasive evidence Respondent failed to comply with the standard. If Complainant's position is taken to its logical conclusion, Complainant could presumably cite any of the § 1926.502(b) requirements if an employer failed to perform a proper inspection. The Court, of

course, understands a piece of evidence is not monolithic and can be used in support of multiple propositions either individually or in combination with other evidence. However, in this case, whether Respondent performed an adequate inspection only addresses whether Respondent could have known whether the violative condition existed not whether the condition, in fact, existed. Irrespective of whether Respondent knew or should have known it, the guardrail either was or was not capable of withstanding the force of 200 pounds applied within two inches. The failure to perform an adequate inspection does not make that more or less true.

While this is clearly the type of accident the standard is designed to prevent, the Court refuses the invitation to conclude the guardrail was noncompliant simply because it collapsed and Respondent failed to be reasonably diligent in its inspection. The requirements of the standard are simple and the path to proving a violation of that standard is equally so. Complainant failed to provide the Court with competent evidence that, at the time of the accident, the guardrail was incapable of withstanding the level of force specified in 1926.502(b)(3) or that the force [redacted] applied to the rail was incapable of superseding the minimum capacity. Instead, Complainant asks the Court to premise its conclusion on a large stack of inferences and non-precedential case law that does not support the proposition for which Complainant cites it. Absent evidence regarding the capacity of the railing or the force applied by [redacted], the Court finds Complainant failed to meet its burden to prove the terms of the cited standard were violated.

VI. Conclusion

This case highlights the importance of Complainant's burden of proof and the distinction between Complainant failing to prove a violation and whether a violation, in fact, existed. The Court was not presented with adequate evidence to find the terms of the standard were violated. Indeed, it seemed even Complainant recognized its folly when it attempted to "prove" the terms

of the standard were violated by relying on comments in the Federal Register describing 200 pounds of force as "enormous" to illustrate why [redacted] did not impose that amount of force on the rail. *See Compl't Br.* at 17 (citing Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672, 40698 (August 9, 1994)). Without some illustration of what "enormous" means, the Court cannot simply infer [redacted]'s actions failed to qualify. Instead, Complainant could have simply showed the amount of force applied to the mid-rail by [redacted] in the act of standing up (or, in the case of the top-rail, the amount of force applied to it from him falling into it) would not have exceeded the minimum force requirement of the standard. Further, while Respondent may not have performed an adequate inspection of the guardrail, this evidence merely shows Respondent could have known of the hazardous condition. Proof of Respondent's ability to know of a hazardous condition, however, should not be equated with proof the rail was not compliant with (b)(3).

Ultimately, the proof required to establish a violation is commensurate with the level of specificity inherent to the standard. In this case, the cited standard indicates a guardrail must be capable of supporting a minimum level of force, which is 200 pounds. Nobody testified, nor was anyone capable of testifying, the amount of force applied by [redacted] was sufficient to overcome a compliant guardrail. Considering what happened when [redacted] leaned on the mid-rail, it is probable the rail was incapable of meeting the minimum capacity requirements. But, not knowing whether the guardrail was compliant and having an accident occur, are not sufficient bases upon which to conclude the specific terms of the standard were violated. Unlike the other cases cited by Complainant, there were no objective and patently obvious reasons to indicate this guardrail was incapable of supporting the requisite force. Either the guardrail could hold the required force, or it could not. Proof of its inability to do so did not require observing the accident itself, but merely

testimony or documentary evidence indicating a man of [redacted]'s height and weight, performing the activities engaged in at the time of the accident, would not impose more than 200 pounds of force. Such evidence would have provided a rational basis upon which to conclude the guardrail was incapable of supporting someone imposing less than 200 pounds of force and, therefore, was not compliant with 1926.502(b)(3). The Court did not have that or any other evidence, as in the cases of *Gutknecht* or *Bianchi-Trison*, to reach the conclusion urged by Complainant.

The Court takes great pains to describe these facts here and throughout this decision to illustrate two points: (1) Complainant failed to make its case, and (2) Complainant's failure to make its case does not mean Respondent acted properly under the circumstances. Respondent failed to take appropriate steps to ensure its employees were not exposed to hazardous conditions, including conducting a proper examination of fall protection equipment on a day where exposure to that hazard was imminent and persistent. Nevertheless, because Complainant failed to prove it, the Citation item is hereby VACATED.

ORDER

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

1. Citation 1, Item 2 is VACATED.

SO ORDERED.

/s/ Christopher D. Helms
Christopher D. Helms
Judge, OSHRC

Date: March 16, 2021
Denver, Colorado