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. ELMER W. DAVIS, INC., Respondent.	IN SIMPLIFIED PROCEEDINGS UNDER 29 C.F.R. § 2200.200 *et seq.* Docket No. 22-1210

DECISION AND ORDER

APPEARANCES:

For the Complainant:

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U.S. Department of Labor
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For the Respondent:

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BEFORE: William S. Coleman
Administrative Law Judge

The Respondent, Elmer W. Davis, Inc. (EWD), is a commercial roofing company based in Rochester, New York. On April 4, 2022, an EWD crew was replacing the flat roof of a four-story municipal building in the Village of Newark, New York. A compliance safety and health officer (CO) for the U.S. Occupational Safety and Health Administration (OSHA) was driving near the municipal building and noticed a worker standing at the edge of its roof without any apparent fall

protection and signaling to the operator of a crane that was hoisting materials onto the roof. The CO stopped driving and from a parking lot about 200 feet away he continued observing the worker at the roof's edge. The CO then drove to a second parking lot about 500 feet from the building, where he then observed three other workers on the 8x10-foot roof of a bulkhead, which was about ten feet higher than the surface of the main roof, also lacking any apparent fall protection. After obtaining authorization to commence an inspection and investigation, the CO went onto the municipal building's roof where the EWD crew was working, when he noticed that a portable ladder the three employees on the bulkhead roof had used to access the roof was extended less than three feet beyond where the ladder rested against the bulkhead's parapet wall.

After the CO completed the inspection and investigation, OSHA issued to EWD a Citation and Notification of Penalty (Citation), that alleged three serious violations of OSHA's construction industry standards codified at 29 C.F.R. Part 1926.

Citation item 1 pertained to the employee who had been signaling the crane operator and alleged a violation of the standard that prescribes permissible forms of fall protection for employees in hoist areas [§ 1926.501(b)(3)]. Citation item 2 pertained to the three employees on the bulkhead roof and alleged a violation of the standard that prescribes permissible means of fall protection for employees engaged in roofing work on low-slope roofs [§ 1926.501(b)(10)]. Citation item 3 pertained to the employees who had used the portable ladder to access the bulkhead roof and alleged a violation of the standard requiring that the side rails of such ladders extend at least three feet above the upper landing surface (or if not extended at least that distance, requiring that the ladder "be secured at its top to a rigid support … and a grasping device be provided to assist employees in mounting and dismounting the ladder") [§ 1926.1053(b)(1)].

The Citation proposed penalties totaling $26,106 for the three alleged violations.

EWD timely contested the Citation and thereby brought the matter before the independent Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (Act). 29 U.S.C. § 659(c). The matter was assigned to the undersigned Commission judge for adjudication under the Commission's rules for Simplified Proceedings. 29 C.F.R. §§ 2200.200–211.[1] An evidentiary hearing was held in Rochester, New York, on March 30-31, 2023. Post-hearing briefing was completed on August 18, 2023.

The most substantial issues for decision are:

- Did the CO's entry onto, and activities on, the municipal building's rooftop on April 4, 2022, violate EWD's constitutional protection against unreasonable searches and seizures?

  Decision: No.

- Did the Secretary prove by a preponderance of the evidence that an employee had bypassed modular guardrails in a hoist area while signaling to a crane operator on the ground? [Citation Item 1 -- § 1926.501(b)(3)]

  Decision: Yes. The Secretary proved conduct that violated § 1926.501(b)(3).

- Did the Secretary prove by a preponderance of the evidence that EWD had constructive knowledge that the employee had bypassed the modular guardrail to guide the crane operator on the ground?

  Decision: Yes. The Secretary proved both (1) that EWD's foreman had constructive knowledge imputable to EWD of the employee's violative conduct in the hoist area, and (2) that EWD had constructive knowledge because its safety program was inadequate.

[1] Neither a complaint nor an answer is filed in Simplified Proceedings. 29 C.F.R. § 2200.205(a). In conformance with a scheduling order, EWD filed a statement that set forth asserted affirmative defenses.

- Is the Secretary collaterally estopped from challenging EWD's unforeseeable employee misconduct (UEM) defense to the violation of § 1926.501(b)(3) on the ground that EWD had successfully interposed the UEM defense in a prior Commission proceeding involving a fall protection violation that had occurred about a year earlier?

  Decision: No. The elements of collateral estoppel are not present.

- Did EWD prove by a preponderance of the evidence that the violation of § 1926.501(b)(3) was the product of UEM?

  Decision: No. The affirmative defense of UEM was not proven.

- Did the Secretary prove by a preponderance of the evidence that employees on the low-slope bulkhead roof were not protected from falling by a compliant safety monitoring system? [Citation Item 2 -- § 1926.501(b)(10)]

  Decision: No. The evidence is insufficient to establish that EWD was non-compliant with § 1926.501(b)(10).

- Did the Secretary prove by a preponderance of the evidence that employees accessed the bulkhead roof with a portable ladder whose side rails did not extend 3 feet above the upper landing surface? [Citation Item 3 -- § 1926.1053(b)(1)]

  Decision: Yes. The Secretary proved the alleged violation of § 1926.1053(b)(1).

For the reasons set forth below, Citation Items 1 and 3 are AFFIRMED, Citation Item 2 is VACATED, and penalties totaling $16,782 are ASSESSED.

FINDINGS OF FACT

Except where the following numbered paragraphs indicate that the evidence was insufficient to establish a certain fact or indicate that there was no evidence bearing on a matter of fact, the following facts were established by at least a preponderance of the evidence.

1. Elmer W. Davis, Inc. ("EWD"), is a commercial roofing company engaged in construction work and based in Rochester, New York. (Tr. 11; 321; J. Pre-Hr'g Stmt. ¶ d). EWD uses materials and supplies that originate from outside the state of New York. (Tr. 11). EWD employs more than 250 employees and is engaged in a business affecting interstate commerce. (J. Pre-Hr'g Stmt. ¶ d; Ex. C-14 at 1; Tr. 187).

The Roofing Project and Worksite

2. On April 4, 2022, EWD assigned a crew of 11 employees to replace the flat roof of a municipal building located at 100 E. Miller Street in the Village of Newark, New York. (Tr. 11, 143, 454; Ex. C-14 at 3). The next lower level from the roof was ground level, about 40 feet below. (Tr. 11, 154, 325). The roof's footprint was about 60 by 100 feet. (Tr. 41, 74, 92; Exs. C-15 at 1, & C-17). A parapet ran around the perimeter of the roof and was about 28 inches high and 15 inches wide. (Tr. 173–74, 451; Ex. C-15 at 9).

3. In addition to replacing the building's main roof, the project also entailed the replacement of a separate roof that covered a stairwell to the main roof (the "bulkhead roof"). The bulkhead roof had a minimal pitch and constituted a "low-slope roof" as defined by 29 C.F.R. § 1926.501(b). (Tr. 92). The bulkhead roof's footprint was approximately eight by ten feet, and the surface of the roof was about ten feet higher than the main roof. (Tr. 92, 258; Exs. C-15 at 1, C-17). The bulkhead roof had a parapet that was 14 inches wide and that rose about 17 inches higher than the roof surface. (Tr. 120–23, 125–26; Exs. C-15 at 10, C-31). The next lower level

on the bulkhead roof's west side was the main roof, and the next lower level for the other sides was ground level. (Tr. 11–12, 73, 325; Ex. R-15 at 1).

4. Prior to April 4, another EWD team had erected guardrails around the perimeter of the main roof. (Tr. 155–56; 375–77). Most of the perimeter guardrails were clamped to the parapet so that the top rail was directly over the outer edge of the parapet. (Tr. 371, 376, 399–400; Exs. C-2 & C-6). But about a 25- to 30-foot-long segment of the guardrail protecting the west edge was comprised of three freestanding modular rails, each appearing to be between 8 and 10 feet in length. (Tr. 211, 371; Exs. C-2 & C-6).

5. The vertical posts of the modular guardrails were inserted into 100-pound baseplates that sat on the roof surface. (Tr. 211, 399–400; Ex. C-6). The design of the baseplates was such that the vertical posts of adjacent modular guardrails would be inserted side by side into the same baseplate, and there would be a gap in between the vertical posts of the adjacent guardrails. (Tr. 295, 406; Exs. C-6 & R-15). This gap was approximately seven inches at the baseplate and slightly wider at the top where the adjacent vertical posts curved away from each other to form the horizontal top rails. (Tr. 451; Exs. C-6 & R-15).

6. The design of the baseplates was further such that when the baseplates were positioned as near as possible to the parapet wall, there would be a space of about one foot between the guardrail and the inside face of the parapet wall. (Tr. 295, 406, 451-52; Exs. C-6 and R-15). Consequently, given the parapet's fifteen-inch width, the horizontal distance from the top rails of the modular guardrails to the outer edge of the parapet was at least 27 inches. (Tr. 451-52).

The Hoisting Operation

7. EWD used a crane set up in the parking lot on the west side of the building to hoist roofing materials onto the roof. (Tr. 49, 128, 323, 346–48; Exs. C-3, C-14 at 3).

8. The crane operator had no view of the landing area on the roof. (Tr. 150–51). To guide the crane operator in landing a load on the roof, an EWD employee stood near the west edge of the roof and gave hand signals to the crane operator below. (Tr. 355–56, 361–62).

9. Gabriel Calas-Alvarez was one of the EWD employees working on the main roof on April 4. At around 2 p.m., Calas-Alvarez directed the crane operator with hand signals while breaching the one-foot-wide space that was in between the modular guardrail and the parapet wall. (Tr. 37, 39, 42–44, 148, 354–55; Exs. C-1, C-2, C-12, C-13). Calas-Alvarez had stepped through the approximate seven-inch gap between the vertical members of two adjacent modular guardrails to stand beyond the guardrails to signal the crane operator in landing a load onto the main roof. (Tr. 39–40; Ex. C-1). Calas-Alvarez was not using a personal fall protection system while in this position. Calas-Alvarez was positioned beyond the modular guardrails for at least the three minute period that the CO observed him from street level. (Tr. 227-31, 310; Exs. C-2, C-3). After the load was successfully landed on the roof, Calas-Alvarez slid back through the gap to return to a position completely behind the guardrails. (Tr. 310).

10. The EWD employee who was the designated foreman of the installation crew on April 4, 2022, (referred herein throughout as "Foreman"), is a fifteen-year employee of EWD, with the most recent five years as an EWD foreman. (Tr. 11, 321-22, 376). The Foreman describes himself to be a "working foreman," so that in addition to performing his supervisory duties at worksites, he customarily performs roofing work itself. (Tr. 321–22, 361).

11. As Calas-Alvarez guided the crane operator from a position near the northern end of the roof's west edge, the Foreman was working near the southern end of the roof's west edge, less than 100 feet away. (Tr. 98–99; 170-71; Ex. C-17).

12. Four-foot-high bundles of 4x8-foot insulation board were staged on the roof and placed as close as 10 feet from the roof's west side. (Tr. 171, 350). From street level, none of the bundled insulation boards were visible. (Tr. 174–75, 366–67; Ex. C-12). The bundles of insulation board were *not* "double-stacked" on the roof to create eight-foot-high stacks. The four-foot-high bundles of 4x8-foot insulation board on the roof were not so high that they would have obstructed the Foreman's sightline from his position on the southern end of the roof's west edge to where Calas-Alvarez was signaling the crane operator at the northern end of the roof's west edge. (Tr. 171).

13. There is no direct evidence that the Foreman observed Calas-Alvarez directing the crane operator with hand signals, and the preponderance of the circumstantial evidence is insufficient to controvert the Foreman's sworn testimony that he did not. (Tr. 165, 242–43, 356).

14. The Foreman, in the exercise of reasonable diligence, should have known that Calas-Alvarez was signaling the crane from a position beyond the modular guardrails.

The Bulkhead Roof

15. From a parking lot located about 500 feet from the roof, the CO observed three EWD employees—Carlos Calas, Quasar Pulliuam, and Chance Karst—on the approximately 8x10-foot bulkhead roof.[2] (Tr. 141, 453–55; Exs. C-7, C-8 & C-9; *see* J. Pre-Hr'g Stmt. ¶ b). None of the three employees were protected from falling by a guardrail system, a safety net system, or by personal fall arrest systems. (Tr. 72–73).

16. Karst had been trained in the duties of a safety monitor, and he had been identified to act as a safety monitor for Calas and Pulliuam during the time that the CO observed them from street level about 500 feet away. (Tr. 141, 303, 436–37).

[2] In the hearing transcript, Pulliuam's surname is spelled "Pulliam." (Tr. 454).

17. The evidence is insufficient to establish by a preponderance that Karst (a) failed to keep the two monitored employees within visual sighting distance, (b) failed to maintain a position on the bulkhead roof that would enable him to recognize when either Calas or Pulliuam were unaware of a fall hazard or were acting in an unsafe manner, or (c) had been assigned responsibilities or had undertaken any tasks or activities that reasonably could have taken his attention away from his monitoring responsibilities.

The 16-foot Extension Ladder

18. At least three EWD employees used a 16-foot extension ladder to access the bulkhead roof on April 4. (Tr. 103, 109, 135, 344; Exs. C-4, C-23; J. Pre-Hr'g Stmt. ¶ c). The ladder was set up so that it was leaning against the top edge of the bulkhead's 14-inch-wide parapet. The ladder was fully extended but was long enough to extend only about 19 inches beyond the point where it contacted the parapet. (Tr. 114-15. 127, 341, 483; Exs. C-2, C-4 & R-20; J. Pre-Hr'g Stmt. ¶ d). EWD did not secure the ladder at its top to a rigid support that would not deflect and did not provide a grasping device to assist employees in mounting and dismounting the ladder. (Tr. 341–42; Exs. C-4, C-5).

19. In dismounting the ladder onto the bulkhead roof, a worker would not reasonably step directly from the ladder to the roof without first stepping onto the parapet and then stepping down to the roof 17 inches below. (Tr. 120–22; Ex. C-15 at 10). Similarly, when mounting the ladder from the bulkhead roof, a worker would not reasonably mount the ladder without first stepping onto the top of the parapet.

20. The Foreman inspected the extension ladder and permitted employees to use it even though he reasonably should have recognized (a) the ladder's side rails extended less than three feet beyond the top of the parapet, and (b) the ladder was not secured at its top to a rigid support

that would not deflect and there was no grasping device to assist employees in mounting and dismounting the ladder. (Tr. 341).

EWD's Health and Safety Program

21. EWD has adopted a comprehensive written Corporate Safety Program that includes a provision addressing the use of guardrails and personal fall arrest equipment during hoisting operations. (Tr. 390–91, 393; Ex. R-2 at 68). EWD communicates the policies in its safety program to employees through field training. (Tr. 471).

22. EWD annually provides safety training to all employees on common hazards to which roofers are exposed. (Tr. 391). The annual safety training takes about an hour to complete, and the topics covered include fall protection, the use of ladders, rigging, and signaling to crane operators. (Tr. 327, 391). EWD also provides safety reminders throughout the year through toolbox talks. (Tr. 378, 396).

23. EWD's Corporate Safety Program includes a progressive disciplinary policy for violations of safety rules. (Tr. 394; Ex. R-2 at 33). The disciplinary policy prescribes sanctions for safety rule violations as follows: verbal warning for a first violation; written warning for a second violation; a written warning and five-day suspension for a third violation; and "immediate termination" for a fourth violation. (Tr. 394; Ex. R-2 at 33). Fall protection violations are treated differently, with the sanction for a first violation being "immediate suspension for a minimum of a 1 week period." (Ex. R-2 at 33). The policy expressly recognizes that EWD retains discretion to vary from the prescribed sanctions, providing as follows: "EWD retains the right to modify or augment the normal and customary disciplinary process based on the totality of the misconduct." (Tr. 394; Ex. R-2 at 33).

24. All employee disciplinary actions are centralized in EWD's safety department and its Corporate Safety Director, Mr. Timothy Crumb. (Tr. 395). Crumb expects EWD foremen to

contact him when they have a problem with an employee complying with a safety rule, and upon receiving such a report, Crumb may travel to the worksite to observe and address the reported safety problem. (Tr. 395). Consistent with the written progressive discipline policy, Crumb exercises discretion under the safety program to vary from the policy's prescribed sanctions as he may determine is appropriate to the circumstances. (Tr. 394-96).

25. The Foreman was in charge of safety at the worksite on April 4 and was responsible for ensuring employees complied with EWD safety rules and OSHA standards. (Tr. 325–26). The Foreman was aware that EWD had a written safety program, although he did not recall having ever read it. (Tr. 335–37). The Foreman did not know whether EWD's disciplinary policy provided for progressive discipline. (Tr. 336–37). In the five years that he has been a foreman for EWD, the Foreman has not imposed any discipline under the disciplinary policy, and he has never referred an employee to Crumb for disciplinary action for a safety violation. (Tr. 338–40). Rather, when the Foreman observes a safety violation, his practice is to speak to the employee and make an on-the-spot correction. (Tr. 338–39).

26. EWD has disciplined some employees for violations of safety rules, but EWD has never imposed any discipline on any employee for having violated a safety rule that occurred under the Foreman's supervision. (Tr. 338-40, 396).

27. EWD did not adequately communicate its safety program to all its supervisory employees. (Tr. 130–31, 331–32, 341, 434; Ex. C-36 at 3).

DISCUSSION

The Commission obtained jurisdiction upon the Secretary's forwarding to the Commission EWD's timely notice of contest. 29 U.S.C. § 659(c); 29 C.F.R. § 1903.17(a). EWD is an "employer" as defined in the Act and accordingly is subject to its compliance provisions. 29 U.S.C. §§ 652(5), 654(a); (Findings of Fact ¶ 1; Tr. 11).

Compliance with Fourth Amendment

The CO accessed the roof two times. The first was on April 4, when EWD's Safety Director Crumb was not present, and the second was two days later when Crumb was present and expressly consented to the inspection. EWD argues that the CO's entry and presence on the rooftop on April 4, and the inspection activities he performed while on the rooftop that day, violated EWD's Fourth Amendment protection against unreasonable searches and seizures.[3] EWD does not contend that the CO's activities before or after having been on the rooftop on April 4 was violative of the Fourth Amendment.

As the CO drove by the worksite on April 4, he observed the EWD employee standing near the edge of the roof and hand-signaling to the crane operator on the ground who was hoisting roofing materials to the rooftop. The CO stopped in a parking lot about 200 feet from the building and observed the hoisting operation for about five minutes, taking some photographs and a video of the signaling employee. He then drove to a second parking lot about 500 feet from the building to get a different view, where he noticed for the first time the three workers on the approximate 8x10-foot bulkhead roof.

The CO then obtained authorization from his supervisor to begin an investigation. The CO had grown up in Newark and was familiar with the village's municipal building, which houses city offices, school offices, court offices, and the police department. (Tr. 75, 198). The CO walked into the building and up an open stairwell to a door that opened onto the roof. (Tr. 75, 199). The door to the roof had a combination keypad on it but was unlocked, and the CO opened it and

[3] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

walked out onto the roof. (Tr. 289-90; Ex. R-8). The CO was wearing an OSHA hard hat, and he asked to be directed to the person in charge. (Tr. 75, 92). Someone identified the Foreman to the CO. The CO noticed that the Foreman was conversing with an individual whom the CO recognized to be the village engineer for the Village of Newark. (T. 95-96, 98-99). There is no evidence that the CO had any interaction with the village engineer, and there is similarly no evidence that the village engineer voiced any objection to the CO having walked onto the roof.

The CO presented his credentials to the Foreman and informed the Foreman that he believed he had observed two fall protection violations (one in the hoist area and the other on the bulkhead roof). (Tr. 105). The Foreman responded that he did not know anything about these things and that the CO would have to talk to EWD's Safety Director, Mr. Crumb, who was not then present at the worksite. (Tr. 105). The Foreman then telephoned Crumb, which led ultimately to the CO speaking with Crumb over the telephone while remaining on the rooftop. (Tr. 105-06). That telephone conversation started at about 2:24 p.m. Crumb told the CO that he was not available to travel to the worksite that afternoon and that he did not agree to the inspection and investigation going forward that day. In response, the CO indicated to Crumb that he would not continue the inspection and investigation and that he would not interview any EWD employees. Crumb and the CO agreed to meet on the roof two days later for the CO to conduct the inspection and interview employees with EWD's consent.

During the time that the CO was on the roof on April 4, neither the Foreman nor Crumb asked that he exit the rooftop. (Tr. 107, 368). There is no evidence that the Village of Newark (the owner/operator of the municipal building) had granted EWD exclusive access to the roof or had empowered EWD to exclude others.

After the CO's phone conversation with Crumb ended, but before the CO exited the roof, he photographed the modular guardrails (Ex. C-6) that were in the vicinity of the hoist area where Calas-Alvarez had been standing and hand-signaling the crane operator. (Tr. 211-12; Ex. C-6). The CO also took a photograph of the Foreman standing at the foot of the ladder to the bulkhead roof, which led the CO to warn the Foreman that the ladder was not safe because its siderails did not extend at least three feet above the parapet. (Tr. 114-15, 209-10; Ex. C-5). The Foreman told the CO that the ladder was fully extended and that it was the only ladder at the worksite. (T. 114-15). Sometime after this verbal exchange with the Foreman, the CO exited the rooftop.

Two days later, as Crumb and the CO had agreed, the CO returned to the roof and met with Crumb, took more photographs, and conducted some employee interviews.

"[T]he Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of *private commercial property*." *Donovan v. Dewey*, 452 U.S. 594, 598 (1981) (emphasis added) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (holding that administrative inspections conducted pursuant to the OSH Act are subject to the Fourth Amendment's warrant requirement)). "[T]he Fourth Amendment only protects against intrusions into areas where an employer has a reasonable expectation of privacy," and so "it does not require a warrant for a nonconsensual inspection of a workplace to the extent the workplace is open to the public." *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1617 (No. 89-2019, 1992).

The CO's access of the building's roof through an unlocked door was not violative of the Fourth Amendment because EWD had no reasonable expectation of privacy respecting its activities and presence in the open areas of the rooftop. *See Bethlehem Steel Corp. v. OSHRC*, 540 F.2d 157, 158–59, n. 5 (3d Cir. 1976) (an employer working on a U.S. Navy ship was "on Government property and … would have no standing to raise" the asserted Fourth Amendment

issue), citing *Bloomfield Mech. Contracting, Inc. v. OSHRC,* 519 F.2d 1257, 1263 (3d Cir. 1975) (contractor performing work at an apartment complex lacked standing to challenge constitutionality of the OSHA inspection "since any expectation of privacy at the [apartment] site was that of the owner"); *Tri-State Steel Constr., Inc. v. OSHRC*, 26 F.3d 173, 176–77 (D.C. Cir. 1994) (holding that where construction contract documents gave governmental inspectors right to enter a highway construction site without further consent, subcontractors had no reasonable expectation of privacy in the open areas of the construction site).

Once the CO was on the rooftop, the Foreman never asked him to exit the rooftop. Rather, the Foreman arranged for the CO to speak by telephone with EWD's safety director Crumb. Even if EWD had a reasonable expectation of privacy in the open areas on the roof and thus the constitutional right to require the CO to obtain a warrant to be present on the roof, the Foreman never informed the CO that he was exercising any such right, and thus the Foreman effectively consented to the CO remaining on the roof and observing the worksite both before and during the CO's subsequent telephone conversation with Crumb. *See Ackermann Enters., Inc.*, 10 BNA OSHC 1709, 1712 (No. 80–4971, 1982) (holding that CO could properly observe activities and objects at a worksite where an employee had assented to CO's request to stay at the worksite while waiting for the arrival of the owner or a supervisor); *see also Lakeland Enters. of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 745 (7th Cir. 2005) (indicating that employer effectively consented to OSHA inspection where employees "acquiesced and cooperated in the inspection").

Similarly, even if EWD had a reasonable expectation of privacy in the open areas of the roof, the CO's actions after Crumb informed him that EWD was not consenting to the conduct of the inspection that day were reasonable. The two photographs that the CO took following that telephone conversation but before he exited the roof merely documented what he was then seeing

with his own eyes as he departed the rooftop. Those two photographs are simply cumulative to his testimonial evidence of what he had observed while present on the roof before Crumb informed him that EWD was not consenting to the conduct of an inspection that day. Indeed, the photographic image of the ladder leaning against the bulkhead's parapet that one photograph from the rooftop captured (Ex. C-5), was also captured by a photograph taken from the ground (whose admission EWD does not challenge) and further by a second photograph the CO took before speaking with Crumb on the phone. (Tr. 59; Exs. C-4, R-12 at 8; J. Pre-Hr'g Stmt. at ¶ c.14). The CO's dialogue with the Foreman about the ladder being set up in an unsafe manner was reasonable and consistent with the CO's obligation as a compliance officer to promote workplace safety and forestall violative practices. *See Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) ("One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury").

Since no official of the Village of Newark objected to the CO's presence on the roof, the CO could have opted to remain on the open areas of the roof to observe activities and objects without violating EWD's Fourth Amendment rights, but he nevertheless substantially honored Crumb's request to suspend the inspection and investigation until two days later when Crumb would be present and the CO would first interview EWD employees at the worksite.

A preponderance of the evidence demonstrates that the CO did not violate EWD's Fourth Amendment rights either by accessing the roof on April 4, 2022, or by his activities while on the roof that day.

Citation Items

The Secretary alleges that EWD violated three workplace safety standards promulgated pursuant to section 6(b) of the Act. 29 U.S.C. § 655(b). To prove a violation of such a standard, the Secretary must establish by a preponderance of the evidence that: (1) the cited standard applies,

(2) the requirements of the standard were not met, (3) an employee was exposed, or had access to, the violative condition, and (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition. *Donahue Indus. Inc.*, 20 BNA OSHC 1346, 1348 (No. 99-0191, 2003); *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982); *D.A. Collins Constr. Co. v. Sec'y of Lab.*, 117 F.3d 691, 694 (2d. Cir. 1997); *Am. Wrecking Corp. v. Sec'y of Lab.*, 351 F.3d 1254, 1261 (D.C. Cir. 2003).[4]

Fall Protection in Hoist Area
[*Citation Item 1— § 1926.501(b)(3)*]

Standard Applies

Citation Item 1 alleges a violation of § 1926.501(b)(3), which is contained in Subpart M of the Secretary's Safety and Health Regulations for Construction. 29 C.F.R. §§ 1926.500–503. Subpart M "sets forth requirements and criteria for fall protection in construction workplaces covered" under Part 1926. § 1926.500(a)(1). Section 1926.501(b)(1) requires generally that "[e]ach employee on a walking/working surface … with an unprotected side or edge which is 6 feet … or more above a lower level shall be protected from falling by the use of" specified fall protection systems. The term "*[u]nprotected sides and edges* means any side or edge of a walking/working surface … where there is no wall or guardrail system at least 39 inches … high." § 1926.500(b). Here, with the main roof's parapet being less than 39 inches high, employees were required to be protected from falling from the roof's unprotected edge. The cited standard, § 1926.501(b)(3), requires that "[e]ach employee in a hoist area shall be protected from falling 6

[4] The Commission generally applies precedent of the circuit courts to which the parties may appeal. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, both parties could seek review in the Second Circuit, and EWD could seek review also in the D.C. Circuit. 29 U.S.C. § 660(a) & (b).

feet … or more to lower levels by guardrail systems or personal fall arrest systems." Although "hoist area" is not a defined term, in promulgating the standard the Secretary emphasized that it was designed to cover employees "taking part in the actual hoisting operation." Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672, 40685 (Aug. 9, 1994) (to be codified at 29 C.F.R. pt. 1926, subpt. M); *see also S. Pan. Servs. Co.*, 21 BNA OSHC 1274, 1281 (No. 99-0933, 2005) (Commissioner Rogers concluding that § 1926.501(b)(3) applies to employees taking part in a hoisting operation).

The worksite at 100 E. Miller Street was a construction site covered by the provisions of Subpart M, and Calas-Alvarez was taking part in the hoisting operation by signaling to the crane operator from the roof's edge. Accordingly, § 1926.501(b)(3) applies. EWD does not contend otherwise.

Noncompliance with Standard

Section 1926.501(b)(3) provides two options to protect employees from falling from an unprotected edge in hoist areas: guardrail systems or personal fall arrest systems. In full, the standard provides:

> *Hoist areas.* Each employee in a hoist area shall be protected from falling 6 feet (1.8 m) or more to lower levels by guardrail systems or personal fall arrest systems. If guardrail systems, [or chain, gate, or guardrail] or portions thereof, are removed to facilitate the hoisting operation (e.g., during landing of materials), and an employee must lean through the access opening or out over the edge of the access opening (to receive or guide equipment and materials, for example), that employee shall be protected from fall hazards by a personal fall arrest system.

29 C.F.R. § 1926.501(b)(3).

EWD elected to protect employees from falling from the roof's unprotected edge by installing a guardrail system around the roof's perimeter. EWD argues that the photographic

evidence shows that Calas-Alvarez was not positioned within the one-foot-wide space that existed between the modular guardrails and the parapet while he was signaling to the crane operator. (Resp't Br. at 23). In support, EWD points to a photograph the CO took from a parking lot 200 feet from the building and contends that, when that digital photograph is magnified, the modular guardrail is visible in front of Calas-Alvarez and thus shows that he "was standing next to it (and not in front of it as the Secretary alleges)." (Resp't Br. at 2, 6, 22–23; Exs. C-2, R-17).

EWD's focus on this single photograph ignores a photograph that the CO took about a minute earlier and a 10-second video recording that the CO made prior to the photograph on which EWD relies. (Exs. C-1, C-12; J. Pre-Hr'g Stmt. at ¶ c.11 & 22). Both the photograph in Exhibit C-1 and the video in Exhibit C-12 provide clearer evidence of Calas-Alvarez's positioning beyond the modular guardrails. In Exhibit C-2 (as magnified in Exhibit R-17), taken at 2:03 p.m., the modular guardrail's curve appears next to Calas-Alvarez's thigh, but due to the angle of the photograph it is inconclusive as to whether it depicts Calas-Alvarez situated partially behind one of the adjacent modular guardrails or standing in between the vertical posts of adjacent modular guardrails. (Exs. C-2 & R-17). In contrast, in the photograph taken one minute earlier at Exhibit C-1, the guardrail's curve is not visible when the digital photograph is similarly magnified. (Ex. C-1). In that earlier taken photograph, Calas-Alvarez's right arm is raised to give hand signals to the crane operator below. (Ex. C-1). In the images on which EWD relies, Calas-Alvarez's right arm is lowered, and he is no longer signaling to the crane below as he is faced toward the landing area for the crane's load. (Exs. C-2, R-17).

The 10-second video at Exhibit C-12 was recorded in between the time that the photographs in Exhibits C-1 and C-2 were taken. (J. Pre-Hr'g Stmt. at ¶¶ c.11, 12 & 22). In the video, Calas-Alvarez's body appears to be beyond the guardrails while he is hand signaling the

crane operator. (Ex. C-12). At the end of the video, the ropes that are supporting the crane's load go slack, indicating the load has landed on the roof. Calas-Alvarez then signals the crane operator to stop lowering, and he appears to begin shifting away from the parapet wall. (Ex. C-12).

When the CO traveled to a second parking lot a few minutes after he recorded the video, the load was no longer attached to the crane and Calas-Alvarez was no longer positioned near the modular guardrails. (Tr. 57, 310; Ex. C-3).

The whole of the photographic and video evidence is corroborative of the CO's testimony that, even from 200 feet away, he had no difficulty seeing with his naked eye that Calas-Alvarez was positioned in the space between the modular guardrails and the parapet. (Tr. 35, 40–41, 215–18, 223-25).

The whole of the photographic, video, and testimonial evidence establishes by a preponderance that Calas-Alvarez bypassed the modular guardrail system by slipping in between the seven-inch gap between the vertical posts of adjacent modular guardrails and that he breached the one-foot-wide space between the guardrails and the parapet. (Tr. 438, 447, 451–52).

Additional circumstantial evidence suggests that Calas-Alvarez bypassed the modular guardrails so that he could maintain visual contact with the crane operator while signaling him. EWD's safety policy requires signalers to be "in visual contact with the crane and crane operator at all times," and provides further that where such visual contact is not possible the signaler and crane operator should maintain uninterrupted radio contact. (Ex. R-2 at 78). [Calas-Alvarez and the crane operator were not in contact by radio or cell phone. (Tr. 355).] After Crumb had viewed the CO's photographs of Calas-Alvarez signaling the crane operator, Crumb "retrained" or "coached" Calas-Alvarez that "a better place to stand" while signaling would have been from behind fixed guardrails that were set up to the immediate south of the three modular guardrails and

that were clamped onto the parapet such that their top rails were directly over the outer edge of the parapet. Crumb believed that "[i]t's much easier [for Calas-Alvarez] to put his arm further over the guardrail from the clamp-on ones than the [modular guardrails with their] heavy bases and rails." (Tr. 438, 447-48). A reasonable inference from Crumb's testimony is that it would have been difficult if not impossible for Calas-Alvarez to establish visual contact with the crane operator and to signal him from a position behind the top rail of the modular guardrails, which were set back 27 inches from the parapet's outer edge. (Tr. 451–52).

Moreover, there is no testimonial evidence contradicting the evidence that Calas-Alvarez bypassed the modular guardrail. The Foreman testified that he was not watching the hoisting operation, and neither party called Calas-Alvarez or the crane operator to testify about where Calas-Alvarez had been standing when he was signaling the crane operator. The whole of the photographic and video evidence, coupled with the CO's testimony and the circumstantial evidence, establishes by a preponderance that during the hoisting operation Calas-Alvarez positioned himself beyond adjacent modular guardrails without being protected by a personal fall arrest system, and thereby was not in compliance with the requirements of § 1926.501(b)(3).

Employee Exposure or Access to the Violative Condition

Calas-Alvarez was exposed to falling 40 feet from the roof's unprotected edge while standing beyond the modular guardrails. Calas-Alvarez was exposed to the violative condition upon bypassing the modular guardrails.

Employer Knowledge

"The fourth element, the knowledge requirement, may be satisfied by proof either that the employer actually knew, or with the exercise of reasonable diligence, could have known of the presence of the violative condition." *N.Y. State Elec. & Gas Corp. v. Sec'y of Lab.*, 88 F.3d 98, 105 (2d Cir. 1996) (citing *Dover Elevator Co.*, 16 BNA OSHC 1281, 1288 (No. 91-862, 1993)).

"The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer." *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994).

Actual Knowledge

The Foreman testified that he did not see Calas-Alvarez signaling the crane operator (Tr. 356-57), and there is no direct evidence that controverts this testimony. (*See* Tr. 238, 242–43).

The circumstantial evidence that would support the inference that the Foreman saw Calas-Alvarez signaling is insufficient to establish such an inference by a preponderance of the evidence. In the CO's view, the Foreman had to have known that material was being hoisted to the roof because the hoisting operation would have been in plain sight of everyone on the relatively small roof, and further because the hoisting operation was a critical event about which the CO believed any foreman would be obliged to oversee. (Tr. 238–39).

In contrast, the Foreman testified that while he knew that there would be hoisting operations on April 4 and thus knew that some employee would have to signal the crane operator during hoists, he did not believe that he was obliged to observe or actively oversee hoists. (Tr. 346, 354, 360, 364–65). The Foreman had authorized all the crew members to act as a signaler for crane operators (Tr. 377; Ex. R-2 at 78), and he testified pointedly that he had not actively supervised employees during the hoist at issue, explaining that he "felt confident in … the guys on the roof with me" and explaining further that the crew was comprised of "journeyman that had that many years of doing what they're doing." (Tr. 364).

In view of the certainty with which the Foreman testified he had not observed the hoist, the CO's testimony on what he believed the Foreman ought to have been doing during the hoist is insufficient to establish by a preponderance what the Foreman was actually did. Thus, the whole

of the evidence is insufficient to establish by a preponderance that the Foreman had actual knowledge of the violative conduct.

The Foreman also testified that even if he had been looking in the direction of Calas-Alvarez during the hoisting operation, that he would not have been able to see him because his sightline toward Calas-Alvarez was obstructed by eight-foot-high stacks of insulation board. The Foreman testified that four-foot-high bundles of 4x8-foot insulation board were staged on the roof and had been double-stacked so that the stacks were eight feet high. The Foreman testified that as many as ten of these eight-foot-high stacks of insulation board were standing roughly ten feet from the western edge of the roof, in between Calas-Alvarez (who was north of where the boards were purportedly stacked) and himself (who was south of where the boards were purportedly stacked). (Tr. 350-54, 382; Ex. C-17).

This testimony of the Foreman is not credited because it is unsupported by any other testimonial or photographic evidence. Rather, this testimony of the Foreman is convincingly controverted by positive evidence that establishes by a preponderance that there were no eight-foot-high stacks of insulation board on the roof at the time of the hoist. The CO accessed the rooftop on April 4 mere minutes after having observed the hoisting operation from street level, and once he was on the roof he observed no material stacked high enough to obstruct any sightlines on the roof. (Tr. 171-72). Consistent with that testimony, none of the photographic or video evidence from April 4 shows the presence of material stacked eight feet high. Rather, the only photograph depicting bundles of insulation board on the roof is Exhibit C-5, which shows the corner of a single four-foot-high bundle of insulation board situated nearer to the eastern edge of the roof than to the western edge. Moreover, none of the photographs that the CO took from street level showed any stacked insulation board visible above the main roof's 28-inch-high parapet.

(Exs. C-1, C-2, C-12). Further, when the CO spoke with the Foreman two days later, on April 6, the Foreman did not mention that there had been any material blocking his view in the direction of where Calas-Alvarez was signaling the crane operator. (Tr. 165, 369; Ex. C-27 at 12).

This positive evidence that there were no eight-foot-high stacks on insulation board on the roof at the time of the hoist on April 4 is far more reliable and credible than the Foreman's testimony that eight-foot-high stacks of insulation board blocked his view of Calas-Alavarez. The Foreman's testimony about the eight-foot-high stacks of insulation board is not credited and is given no weight.

Constructive Knowledge

Constructive knowledge may be established in two distinct ways: (1) by imputing to the employer a supervisory agent's constructive knowledge of a violative condition, or (2) by establishing that the employer failed to implement an adequate safety program, the rationale for the second way being that "in the absence of such a program … the misconduct was reasonably foreseeable." *ComTran Grp., Inc. v. U.S. Dep't of Lab.*, 722 F.3d 1304, 1308 (11th Cir. 2013); *Mastec N. Am., Inc.*, No. 15-1574, 2021 WL 2311875, at *2 (OSHRC, Mar. 2, 2021); *N.Y. State Elec. & Gas*, 88 F.3d at 105–06 (citations omitted). Here, the Secretary proved constructive knowledge of Calas-Alvarez's violative conduct in both manners, as described below.

The Foreman's Constructive Knowledge

Supervisory personnel may be deemed to have constructive knowledge of a violative condition that may be imputed to their employer if they "could have discovered and eliminated the hazard with the exercise of reasonable diligence." *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992); *Clarence M. Jones,* 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983) (finding that in the exercise of reasonable diligence a foreman could have known of the violative condition and thus had constructive knowledge of that condition); *ComTran Grp.,* 722 F.3d at

1308 (stating that constructive knowledge may be shown "where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have").

The determination of whether supervisory personnel exercised reasonable diligence "involves several factors, including an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Pride Oil Well Serv.*, 15 BNA OSHC at 1814; *see also Stahl Roofing Inc.*, 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003) (consolidated) (articulating the reasonable diligence inquiry as including "the employer's obligation to have adequate work rules and training programs" and "to adequately supervise employees"). Supervisory personnel have been found to have constructive knowledge of a violative condition based upon "the conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area." *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996).

"Where a cited condition is 'readily apparent to anyone who looked,' employers have been found to have constructive knowledge." *A.L. Baumgartner Constr. Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (internal citations omitted). "Whether a condition is readily observable and how long it existed are relevant in determining whether the condition would have been discovered with the exercise of reasonable diligence." *Mastec N. Am.,* 2021 WL 2311875, at *4. The Secretary must present sufficient "evidence to show that the condition was present for a long enough time that the employer should have known about it." *LJC Dismantling Corp*., 24 BNA OSHC 1478, 1481 (No. 08-1318, 2014) (determining that supervisors were not proven to have constructive knowledge of a violative condition that was in plain view where there was no evidence that the condition had been present when supervisory personnel were in the area); *see also Simplex*

Time Recorder Co. v. Brock, 766 F.2d 575, 589 (D.C. Cir. 1985) (finding knowledge 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").

As discussed above, the Foreman's testimony that the hoisting operation was not plainly visible to him because his sightline was obstructed by eight-foot-high stacks of insulation board is not credited. Rather, the reliable and credible testimonial and photographic evidence established by a preponderance that there were no obstructions to the Foreman's sight line toward Calas-Alvarez at the time of the hoist. (Findings of Fact ¶ 12).

The CO first noticed Calas-Alvarez standing outside of the modular guardrails from about 400 feet away while he was behind the wheel of a motor vehicle stopped at a traffic signal. Moments later, after the CO had moved the vehicle to a parking lot about 200 feet away, the CO continued to observe the EWD employee signaling the crane operator from a position in front of the modular guardrails. (Tr. 35, 224). In the CO's view, any foreman that is "on the roof that size" during a hoisting operation and does not see the hoist while it is going on is "not paying attention." (Tr. 238). When asked what the Foreman should have been paying attention to during the hoisting operation, the CO responded: "I would assume everybody would be [paying attention] when there's materials being lifted onto a roof. All employees would generally be aware. They should be aware." (Tr. 238). The CO further testified that on such a small roof the Foreman should have been able to see the employee signaling to the crane operator, asserting that any foreman "would want to make sure that the load gets there safe and secure, and doesn't fall, and … would want everyone to be aware of it." (Tr. 242).

The Foreman testified differently. While acknowledging that hoisting operations can be dangerous and present a variety of hazards, the Foreman testified that he did not believe he was

obliged to oversee the activity. Rather he indicated that the way "we do it on the roof" is that he (the Foreman) does not tell the crew members what to do but rather the crew members act without him prompting or directing any particular crew member to be the signaler for the crane operator or to receive the load onto the roof. (T. 361-62). The Foreman testified further that with respect to the hoist operation on April 4, that he did not check to see that the hoist was proceeding safely and that it did not occur to him to do so, noting that the crew was comprised of "journeymen" in whom he was confident would properly perform hoisting operations. (Tr. 364).

In view of the three-minute duration of the hoisting operation, it is a close question whether the Foreman, in the exercise of reasonable diligence proportionate to the level of danger posed by the hoisting operation, should have seen Calas-Alvarez bypassing the modular guardrails. But the greater weight of the evidence tips slightly in support of this conclusion, in view of the Foreman's proximity to the violative conduct that was in plain sight and readily visible even from street level hundreds of feet away. *Cf. N.Y. State Elec. & Gas Corp.,* 17 BNA OSHC 1129, 1132–33 (No. 91-2897, 1995) (finding constructive knowledge where violative conditions "were in open view and easily detectible" notwithstanding the absence of evidence of how long the conditions lasted or what the alleged supervisor was doing at the time), *aff'd in relevant part*, 88 F.3d 98, 109–10 (2d Cir. 1995).

As EWD's supervisory agent, the Foreman's constructive knowledge of the violative conduct is imputed to EWD. *N.Y. State Elec. & Gas*, 88 F.3d at 105.

EWD's Constructive Knowledge
Based on Inadequate Safety Program

As indicated earlier, a second and distinct way for the Secretary to prove that an employer has constructive knowledge of a violative condition is to demonstrate that the employer's safety program was inadequate. *See also PSP Monotech Indus.*, 22 BNA OSHC 1303, 1306 (No. 06-

1201, 2008) ("When actual knowledge is lacking, the Secretary may prove constructive knowledge by showing that the employer failed to establish an adequate program to promote compliance with safety standards"); *Summit Contracting Grp., Inc.*, No. 18-1451, 2022 WL 1572848, at *7 n.13 (OSHRC, May 10, 2022) ("[A] theory of constructive knowledge based on an employer's inadequate safety program is well-established in Commission precedent"); *N.Y. State Elec. & Gas Corp.*, 88 F.3d at 105–06 ("[C]onstructive knowledge may be predicated on an employer's failure to establish an adequate program to promote compliance with safety standards").

"In determining whether a safety program is adequate, the Commission considers whether the employer has established [work rules] designed to prevent the hazards from occurring, has adequately communicated the [work rules] to the employees, has taken steps to discover noncompliance with the rules, and has effectively enforced the rules in the event of noncompliance." *PSP Monotech Indus.*, 22 BNA OSHC at 1306 (quoting *Inland Steel Co.*, 12 BNA OSHC 1968, 1976 (No. 79-3286, 1986)).

The Secretary presented *prima facie* evidence in her case-in-chief to establish that EWD failed to adequately implement its safety program. In the five years that the Foreman has been an EWD foreman, he has never referred an employee subject to his supervision for disciplinary action for a violation of safety rules. Rather, he testified in the Secretary's case-in-chief that when he observes violative conduct his practice is to speak to the offending employee and make an on-the-spot correction. (Tr. 338-40). It is evident, therefore, that no EWD employee has been disciplined for safety violations that occurred while working under the Foreman's supervision. Given the absence of any disciplinary action having ever been taken for violations that occur under the Foreman's supervision, employees would soon realize that safety violations that are known only to the Foreman would never lead to disciplinary action. This may explain why Calas-Alvarez so

carelessly bypassed the modular guardrail system, even though he could have avoided the violation by simply taking a few steps to the south to signal the crane operator from behind the fixed guardrails clamped onto the parapet (which is precisely what EWD's safety director later told Calas-Alvarez he could/should have done).

EWD must have recognized, or at the very least should have recognized, that unlike other EWD foreman, the Foreman had never initiated any disciplinary actions for any employee under his supervision. Such disparate implementation EWD's progressive discipline policy among the EWD foremen constitutes a serious inadequacy of EWD's safety program, at least with respect to employees on the Foreman's work crews.

EWD's separate violation of the portable ladder standard here, discussed in greater detail below, further indicates the company's safety program was inadequate with respect to the Foreman's crew. The Foreman inspected the portable ladder when it was set up and approved the ladder's use despite its side rails obviously extending less than three feet beyond the bulkhead roof's parapet. (*E.g.*, Ex. R-2 at 17; Ex. C-36 at 3). But the Foreman allowed his crew to use the non-compliant ladder, apparently because there was no other ladder at the worksite that was long enough to extend at least three feet beyond the bulkhead's parapet. Such flagrant failure of supervisory personnel to enforce well-known safety requirements is manifestly indicative of an inadequate safety program. *See Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991) ("A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax," because "it is the supervisor's duty to protect the safety of employees under his supervision"), *aff'd*, 978 F.2d 744 (D.C. Cir. 1992) (unpublished).

For these reasons, the preponderance of the evidence presented in the Secretary's case-in-chief established that EWD's implementation of its safety program was inadequate, so that EWD should be charged with constructive knowledge of Calas-Alvarez's violative conduct.

Unforeseeable Employee Misconduct & Collateral Estoppel

EWD argues in the alternative that Citation Item 1 should be vacated because it proved the affirmative defense of unforeseeable employee misconduct (UEM). (Resp't Br. at 24–27). EWD argues further that the Secretary should be collaterally estopped from contesting its UEM defense because in a prior adjudication before the Commission, EWD had succeeded in proving the UEM defense to a fall protection violation that had occurred about a year before the fall protection violation proven here. *Elmer W. Davis, Inc.*, No. 21-1021, 2023 WL 2719039 (OSHRC ALJ, Feb. 21, 2023).

To establish UEM, an employer must prove by a preponderance of the evidence: "(1) it established work rules to prevent the violation; (2) these rules were adequately communicated to the employees; (3) it took steps to discover violations; and (4) it effectively enforced the rules when infractions were discovered." *D.A. Collins Constr.*, 117 F.3d at 695. With respect to effective enforcement of work rules, simply having a progressive disciplinary program is not enough; an employer must follow the disciplinary program for its enforcement to be effective. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003); *see Stahl Roofing, Inc.*, 19 BNA OSHC at 2182 (finding effective enforcement through progressive discipline program that included oral and then written reprimands, docking of pay, and then termination, but also allowed for flexibility for prescribed punishments).

As discussed above, prima facie evidence was presented in the Secretary's case-in-chief that EWD had constructive knowledge of the violation by dint of its safety program being

inadequate. That evidence similarly constituted prima facie evidence sufficient to defeat EWD's UEM defense. *See PSP Monotech Indus.*, 22 BNA OSHC 1303, 1306, n.4 (noting "that the Secretary's burden of proving constructive knowledge and [the employer's] burden of showing unpreventable employee misconduct rest upon an overlapping issue—whether [the employer] had an adequate safety program"); *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010) (noting the Commission considers the same factors in evaluating an employer's constructive knowledge and the UEM defense), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished); *N.Y. State Elec. & Gas Corp.*, 88 F.3d at 107 (noting that when the Secretary's proof of an employer's constructive "knowledge is based on shortcomings in the employer's safety policy, one issue raised in the *prima facie* case—the adequacy of the policy—is the same question that would arise if the employer were to raise the defense of unpreventable misconduct"). The evidence that EWD presented in its case-in-chief in support of its UEM defense failed to rebut the prima facie evidence presented in the Secretary's case-in-chief case that EWD had constructive knowledge of the violation because its safety program was inadequate.

Although EWD presented in evidence some disciplinary records in support of its UEM defense, there is no indication in the documentary or testimonial evidence that those disciplinary records pertain to any violations that occurred under the Foreman's supervision. Because the only evidence about the Foreman's disciplinary practices is that he had never disciplined an employee for a safety violation, EWD's evidence did not overcome the reasonable inference established by evidence presented in the Secretary's case-in-chief that Calas-Alvarez and the other employees the Foreman regularly supervised had no cause to be concerned that they would be disciplined for any safety violation about which only the Foreman was aware.

In addition, the Foreman demonstrated a lack of familiarity with both OSHA's minimum requirements for safety monitoring systems and EWD's stricter rule governing safety monitoring systems (under which EWD prohibits a safety monitor from engaging in any activity other than to observe the monitored employees). (Tr. 434; Ex. R-4 at 53 & 55). In a written test that EWD administered to the Foreman in connection with some safety training about seven weeks prior to April 4, 2022, the Foreman gave an incorrect answer of "false" to the following true/false question: "The safety monitor may not engage in any other activities that might take their attention." (Ex. C-36 at 3). The Foreman's apparent failure to comprehend a safety rule that the Foreman's crews must routinely implement substantially undermines EWD's assertion that EWD adequately communicated its work rules.

The evidence is further insufficient to establish that EWD took adequate steps to discover violations. EWD presented in evidence some "Safety Inspection Checklists" that documented safety inspections that Crumb had conducted of EWD worksites. (See Ex. R-19). Only one of those inspection checklists involved the inspection of a worksite where the Foreman was the identified foreman, and that inspection had been conducted nearly three years before the events here. (Ex. R-19 at 215). This piece of evidence is corroborative of the evidence presented in the Secretary's case-in-chief that supports the determination that EWD's safety program was inadequate in the steps EWD has taken to supervise and discover noncompliance with the safety rules. *Cf. Stahl Roofing Inc.*, 19 BNA OSHC at 2182 (finding supervision adequate where safety manager visited ten to fifteen worksites a week and the safety director made unannounced visits to worksites).

The entirety of the evidence is insufficient to establish by a preponderance that EWD adequately communicated its work rules, adequately took steps to discover violations, or

effectively enforced work rules when infractions were discovered, and so EWD has failed to establish the affirmative defense of unforeseeable employee misconduct.

For similar reasons, EWD's assertion of collateral estoppel, or issue preclusion, also fails. The elements of collateral estoppel are set forth in *Bear, Stearns & Co., Inc. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91 (2d Cir. 2005):

> Collateral estoppel is permissible as to a given issue if (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

"Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. U.S.*, 440 U.S. 147, 153 (1979) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979)). The Commission and courts have recognized that the doctrine of issue preclusion "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Comm'r v. Sunnen*, 333 U.S. 591, 599–600 (1948) (citing *Tait v. W. Md. Ry. Co.*, 289 U.S. 620, 624 (1933); *Cont'l Can Co.*, 6 BNA OSHC 1184, 1187 (No. 7855, 1977) (consolidated) (recognizing defense of collateral estoppel), *dismissed in part on other grounds*, 6 BNA OSHC 2114 (1978).

The prior adjudication that EWD asserts is preclusive arose out of a fall protection violation that occurred nearly a year before the fall protection violation here and that involved a two-person EWD crew that was repairing the flat roof of a one-story building. *Elmer W. Davis, Inc.*, 2023 WL 2719039. Because the violation here involves the application of a different fall protection standard, involves events occurring nearly a year later, and involves the actions of different

employees, the UEM defense adjudicated in the prior proceeding is not identical to the defense interposed to the hoist area fall protection violation here. While the evidentiary record in the prior adjudication established that EWD had adequately communicated and enforced its safety program with respect to the violative conduct of that two-person crew, as discussed above, EWD failed to do so here nearly a year later with a larger work crew engaged in a much more complex project.

Moreover, a prior adjudication should not be given preclusive effect if it would work an unfairness. *See Bear, Stearns*, 409 F.3d at 91 (citing *Parklane Hosiery Co. v. Shore*); *see also PenneCom B.V. v. Merrill Lynch & Co.*, 372 F.3d 488, 493 (2d Cir. 2004) ("[C]ollateral estoppel is an equitable doctrine—not a matter of absolute right. Its invocation is influenced by considerations of fairness in the individual case."). To preclude the Secretary in subsequent cases from challenging the adequacy of EWD's safety program based upon EWD having successfully interposed the UEM defense in connection with a prior violation would vitiate a substantial incentive for EWD to maintain an adequate safety program. Such a result would offend public policy and therefore weighs heavily against giving the prior UEM adjudication preclusive effect in any subsequent proceedings.

For the foregoing reasons, Citation Item 1, alleging a violation of § 1926.501(b)(3), is affirmed.

Fall Protection for Roofing Work on Low-slope Roof
[*Citation Item 2 -- § 1926.501(b)(10)*]

Standard Applies

Item 2 alleges a violation of § 1926.501(b)(10), which like the hoisting area standard is also contained in Subpart M of 29 C.F.R. Part 1926. 29 C.F.R. §§ 1926.500–503. Section 1926.501(b)(10) provides:

> *Roofing work on Low-slope roofs*. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing

> activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet … or less in width …, the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

"Roofing work" is defined as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work." § 1926.500(b). A "low-slope roof" is defined as "a roof having a slope of less than or equal to 4 in 12 (vertical to horizontal)." *Id.*

The employees on the bulkhead roof were engaged in roofing work on a low-slope roof with unprotected sides or edges more than six feet above its lower levels. (Findings of Fact ¶¶ 3 & 15). Section 1926.501(b)(10) applies to their work. EWD does not contend otherwise.

Non-compliance Not Proven

As noted, the bulkhead roof was not equipped with a guardrail system or a safety net system, and the EWD employees were not utilizing personal fall arrest systems. Instead, EWD opted to provide fall protection on the bulkhead roof by utilizing a safety monitoring system alone, which was a permissible option under the cited standard because the roof was less than 50 feet wide.

Section 1926.501(a)(1) provides that "[a]ll fall protection required by [§ 1926.501] shall conform to the criteria set forth in § 1926.502." Section 1926.502(h)(1)(i)–(v) in turn includes the following requirements for a safety monitoring system:

> (1) The employer shall designate a competent person to monitor the safety of other employees and the employer shall ensure that the safety monitor complies with the following requirements:
>
> (i) The safety monitor shall be competent to recognize fall hazards;
>
> (ii) The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner;
>
> (iii) The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored;
>
> (iv) The safety monitor shall be close enough to communicate orally with the employee; and
>
> (v) The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

The Secretary argues that EWD did not designate any employee to act as a safety monitor on the bulkhead roof on April 4 in accordance with § 1926.502(h)(1). (Sec'y Br. at 27). Alternatively, the Secretary asserts that the putative safety monitor, Karst, did not satisfy the requirements of subparagraph (h)(1)(iii) because he had his back to the other employees on the bulkhead roof and therefore was not "within visual sighting distance" of them. (*Id.* at 27–29).

The alleged violation pertains only to the conduct that the CO observed from street level on April 4, before he accessed the roof. The CO testified that he perceived none of the three workers on the bulkhead to be performing all the functions of a safety monitor required by § 1926.502(h)(1) (Tr. 61), although he later noted in a "violation worksheet" that "a safety monitor was present" but had been observed "standing and looking away from the employees." (Ex. R-13 at 14–15). A preponderance of the evidence establishes that Karst had been designated to act as

safety monitor for the other two employees on the bulkhead when the CO was observing the EWD crew from a parking lot.[5]

The Secretary's contention that the designated safety monitor did not keep the two monitored employees "within visual sighting distance" as required by § 1926.502(h)(1)(iii) is not supported by a preponderance of the evidence. The Secretary may demonstrate non-compliance with that requirement by showing that a designated safety monitor was unable to see the monitored employees. *See Pete Miller, Inc.*, 19 BNA OSHC 1257 (No. 99-0947, 2000). In considering a prior safety monitoring standard, the Commission noted that "the phrase 'visual sighting distance' does not require that the employees be under the actual visual observation of the monitor at all times." *Beta Constr. Co.*, 16 BNA OSHC 1435, 1444 (No. 91-102, 1993) *aff'd*, 52 F.3d 1122 (D.C. Cir. 1995) (unpublished).[6] Rather, the phrase means the safety monitor "must be close enough to see the employees." *Id.*

The Secretary, citing several decisions by Commission judges, asserts that the visual sighting requirement of § 1926.502(h)(1)(iii) is violated when a safety monitor turns away from the monitored employees. In the cases cited, however, the safety monitors in violation were

[5] The CO did not learn until two months before the hearing that Karst was the individual who was the putative safety monitor the CO had observed from street level on April 4. (Tr. 131, 141–44, 303, 350; *see* Ex. C-14 (email from Safety Director Crumb providing the CO with the names of employees at worksite on April 4, but erroneously omitting Karst's name).) Consequently, the CO did not seek to interview Karst on April 6 as part of his investigation, although he did interview the two employees whom Karst had been responsible for monitoring. (Tr. 131).

[6] When OSHA promulgated the current Subpart M in 1994, the agency noted that the provisions of § 1926.502(h) relevant here effectively restated the provisions the Commission considered in *Beta Construction*. Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. at 40714. OSHA commented that under the current standard a safety monitor "may have additional supervisory or non-supervisory responsibilities, provided that the monitor's other responsibilities do not interfere with the monitoring function." *Id.*

engaged in other responsibilities that interfered with their monitoring and were unable to see the monitored employees. *Compare Latite Roofing & Sheet Metal LLC*, 23 BNA OSHC 1368 (No. 09-1074, 2010) (ALJ) (safety monitor worked alone on opposite side of roof ridge at least 40 feet from other employees, who were spread 120 feet apart); *James Rutledge d/b/a Rutledge Roofing*, 26 BNA OSHC 1121, 1126 (No. 14-1665, 2016) (ALJ) (safety monitor worked separately from monitored employee and left roof while other employee continued working); *Holland Roofing of Columbus*, 19 BNA OSHC 2125, 2127 (No. 01-1629, 2002) (ALJ) (monitor was on separate story of roof speaking on cellphone with back turned to monitored employees); *see also Upstate Roofing, Inc.*, 19 BNA OSHC 2084 (No. 00-0336, 2002) (ALJ) (monitor also tasked with installing insulation did not see monitored employee back off roof); *New England Roofing & Sheet Metal Co.*, 16 BNA OSHC 2061 (No. 93-1833, 1994) (ALJ) (use of safety monitor alone not permitted on roof more than 50 feet wide). These cases do not support a finding that the safety monitor here was failing to meet the requirements of the cited standard.

Here, the CO perceived that Karst had his back turned to the two monitored employees, but he conceded on cross-examination that he could not tell whether Karst was watching or communicating with the other workers, or even what tasks the other workers were performing:

> Q. Okay. Do you know if, at that point, the person in the yellow jacket is giving a safety warning to the person immediately to the right of him?
> A. I do not have any idea.
> Q. Do you know if they're communicating?
> A. No, I don't.
> Q. Do you know if there's a concern right there about a safety issue?
> A. Well, there's still the gentleman on the back side.
> Q. Well, let me ask you this: If there was a safety issue, and there's two workers on different sides of the surface, would it be okay for the monitor to go over, turn their back on the other worker,

and give a warning to the person who's in jeopardy, and for one split second, turn their back to the other person?

A. Perhaps briefly, yes.

Q. So at least with the worker to the right of the person in the yellow jacket, you don't know what's going on at that point; right?

A. I do not.

Q. The other worker to the left, do you know what's going on at that point?

A. I do not know what he's doing, no.

(Tr. 251–52; Ex. C-3). The CO, who was observing the three workers from parking lot about 500 feet away, was able to state only generally the direction in which he perceived Karst to have been facing. (Tr. 248). Four photographs of the employees on the bulkhead that the CO took from that parking lot are in evidence. (Tr. 49, 58, 68, 70; Exs. C-3, C-7, C-8, C-9). In the first photograph, Karst appears to be looking down toward the main roof, but he is also facing generally in the direction of another employee. (Tr. 255; Ex. C-3). In the next photograph, taken about one minute later, Karst has shifted and appears to be looking in the opposite direction, to the northwest. (Tr. 254, 257; Ex. C-7). In the third photo, taken about two minutes after the second photo, Karst appears to be looking toward the crane on the west side of the building. (Tr. 268; Ex. C-8). In the fourth photograph, taken less than one minute after the third photograph, Karst appears crouched down, looking at something on the bulkhead roof. (Tr. 71; Ex. C-9). The CO took these four photographs between 2:05 and 2:08 p.m. (Tr. 49, 58, 126, 129; J. Pre-Hr'g Stmt. ¶ c). These photographs are essentially snapshots of Karst's activity over a period of less than four minutes.

Karst was most certainly within visual siting distance of the two employees that he was monitoring on the 8x10-foot roof, as § 1926.502(h)(1)(iii) requires. And the photographs do not definitively show that Karst broke visual contact with either of the employees, or that if he did that such a break was any more than an instant or two as all three employees on the bulkhead shifted

and moved about on the relatively tiny 8x10-foot surface while having to mind the roof's unprotected sides. There is no indication that the CO's interviews of the two monitored employees yielded any evidence that Karst had failed to properly discharge the responsibilities of a safety monitor as prescribed by § 1926.502(h). The photographic evidence is at best inconclusive on whether Karst's position and movement while acting as safety monitor either took or could have taken his attention from the essential "monitoring function" of "recogniz[ing] fall hazards" and "warn[ing] the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner." 29 C.F.R.§ 1926.502(h)(1)(i), (ii) & (v).

For these reasons, the evidence supporting the Secretary's claim that no employee on the bulkhead was performing in the requisite manner for there to be a compliant safety monitoring system is not preponderant. The Secretary having failed to establish the violation of § 1926.501(b)(10), Citation Item 2, must be vacated.

Portable Ladder Violation

[*Citation Item 3 -- § 1926.1053(b)(1)*]

Standard Applies

Citation Item 3 alleges a violation of § 1926.1053(b)(1), which is contained within Subpart X of the Secretary's construction industry standards. Subpart X "applies to all stairways and ladders used in construction … workplaces covered under 29 CFR part 1926." § 1926.1050(a). Section 1926.1053(b) applies "to the use of all ladders . . . except as otherwise indicated."

As previously noted, the worksite here was a construction site. EWD's employees were using the portable ladder to access the bulkhead roof. Section 1926.1050(b)(1) therefore applies, and EWD does not argue to the contrary.

Non-compliance with Standard

In full, § 1026.1053(b) provides:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

It is undisputed that the ladder was not secured at its top nor was a grasping device provided, and so in order to comply with the standard the ladder's side rails had to "extend at least three feet above the upper landing surface to which the ladder is used to gain access." The Secretary asserts that the ladder did not extend three feet above either the parapet wall or the bulkhead roof itself, which was 16 to 17 inches lower than the parapet. (Sec'y Br. at 35–36). EWD acknowledges that the ladder did not extend three feet above the parapet but contends that the bulkhead roof constituted the "upper landing surface" within the meaning of the standard so that the distance that the side rails extended above the parapet is immaterial. (Resp't Br. at 29–30). EWD argues that the side rails did extend at least three feet above the surface of the bulkhead roof and so the ladder was set up in conformance with the standard. (*Id.*).

EMD's contention that the bulkhead roof, not the parapet, constituted the landing surface for employees using the ladder to access the bulkhead roof is rejected. The CO reliably testified, consistent with the photographic evidence, that workers would not be able to move directly onto the bulkhead roof from the ladder's fourth rung (which was the highest rung that was at least three feet from the top of the side rails) to the bulkhead roof, without first stepping onto the fourteen inch wide parapet, and further that employees would likely have difficulty stepping from the fourth

rung onto the parapet.[7] (Tr. 120-21; Ex. C-4; Ex. R-20 (showing measurement of ladder's rungs)).[8] The CO reliably testified further that a worker who ascended to the third or second rung from the top of the ladder in an effort to step directly from the ladder to the bulkhead roof (i.e., not to step first on the parapet) would not have anything easy to grab onto, making such a dismount ungainly. (Tr. 121).

The cited standard does not define "upper landing surface" or address whether a parapet may be considered the landing surface. A similar provision governing the use of fixed ladders in construction, however, specifies that the parapet and not the roof is considered the access level unless the parapet is cut to permit passage through it. § 1926.1053(a)(24) ("For a parapet ladder, the access level shall be the roof if the parapet is cut to permit passage through the parapet; if the parapet is continuous, the access level shall be the top of the parapet."). The structure of this parallel provision recognizes the inherent danger of workers stretching from a ladder and stepping over, not onto, a parapet. That same concern supports the Secretary's contention here that the parapet was the upper landing surface beyond which EWD's ladder had to extend at least three feet to comply with the cited standard. *See Morrison-Knudson Co.*, 16 BNA OSHC 1105, 1108, 111112 (No. 88-572, 1993) ("The well-established rule of statutory construction is that 'each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.'") (quoting 2A Sutherland Statutory Construction § 46.05 (5th ed. 1992)).

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[7] The distance from the ladder's next to last rung to the top of the ladder was approximately 19 inches, and the rungs were spaced about 12 inches apart. (Tr. 482–83; Ex. R-20). Crumb measured those distances on a ladder that he believed was identical to the one at the worksite on April 4, 2022. (Tr. 476).

[8] EWD provided a photograph depicting the stairwell parapet's measured height, but due to the angle of the photograph it is unclear whether the measurement shows the parapet to be 16 or 17 inches high. (Tr. 123–24; Ex. C-31; *see* Ex. C-15 at 9–10 (showing design specifications for roof in place)).

Even EWD's safety policy recognizes the parapet here to constitute the upper landing surface within the meaning of the cited standard. EWD's written policy provides that a ladder "must extend three (3) feet above the roof edge, or parapet wall, which the ladder is being placed against." (Tr. 459–60; Ex. R-2 at 17). This interpretation of the cited standard set forth in EWD's own policy is the only reasonable interpretation of the cited standard.

For these reasons, the bulkhead's parapet constituted the upper landing surface for EWD's employees accessing the stairwell roof by use of the portable ladder. EWD failed to comply with § 1926.1053(b)(1) because the side rails of the ladder extended less than three feet above the parapet.

Employee Exposure or Access

Three EWD employees used the cited extension ladder to access the bulkhead roof on April 4, 2022. (Findings of Fact ¶ 18). The Secretary has demonstrated that the employees were exposed to violative conditions.

Employer Knowledge

EWD's onsite foreman inspected the extension ladder after it was set up in a non-compliant manner on April 4, but he nonetheless allowed employees to use it to access the bulkhead roof. (Findings of Fact ¶ 20). The Foreman thus had actual knowledge of the violative condition. As EWD's supervisory agent, the Foreman's actual knowledge is imputed to EWD. *N.Y. State Elec. & Gas*, 88 F.3d at 105.

The Secretary has proven all elements of the alleged violation of § 1926.1053(b)(1).[9]

[9] EWD indicated before hearing that it planned to assert the affirmative defense of UEM as to all alleged violations. (Resp't Mot. To Present Affirmative Defenses). In its post-hearing brief, however, EWD does not argue UEM as a defense to Citation Item 3.

Classifications and Penalties

Serious Classifications

The Secretary alleges that the two proven violations were "serious." Under section 17(k) of the Act, a violation is serious if "there is a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). To prove that a violation is serious, "the Secretary need not establish that an accident is likely to occur," but rather "that an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Flintco, Inc.*, 16 BNA OSHC 1404, 1405–06 (No. 92-1396, 1993) (citation omitted).

The CO and the Foreman testified that falling 40 feet from the main roof would likely be fatal. (Tr. 42, 180, 359). The CO similarly testified that falling from the 16-foot ladder could result in broken bones or even death. (Tr. 74, 184). A preponderance of the evidence demonstrates that "death or serious physical harm could result" from the violative conditions established here, and therefore both proven violations are correctly classified as serious. *See Flintco*, 16 BNA OSHC at 1405–06.

Penalties

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits"), *aff'd*, 73 F.3d 1466 (8th Cir. 1996).

Section 17(j) of the Act requires the Commission, in assessing an appropriate penalty, to give "due consideration" to the "gravity of the violation," the "size of the business of the

employer," the "good faith of the employer," and the employer's "history of previous violations."[10] 29 U.S.C. § 666(j). Of these factors, gravity is the principal factor "and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

For the hoisting area fall protection violation, one employee was exposed to a potentially fatal fall when he bypassed the modular guardrail system. The Secretary assessed the severity of the violation as "high" because the resulting fall hazard posed a risk of death or permanent injury. (Tr. 181). Because the violative condition existed for only a matter of a few minutes, however, the Secretary assessed the probability of an accident as "lesser," and so determined that the overall gravity of the violation to have been "moderate." (Tr. 181–82). EWD makes no argument challenging the Secretary's gravity assessment. The undersigned concurs in and adopts the Secretary's gravity assessment and the proposed penalty of $9,324 for the hoist area violation.

For the ladder violation, three employees were exposed to a potential fall of up to 11 feet, which could result in broken bones or even death. (Tr. 75, 184). The Secretary assessed the severity of the violation as "medium" because of the potential for a serious injury. (Tr. 185). Because the side rails of the ladder did extend above the bulkhead's parapet but extended less than the required three feet, the Secretary assessed the probability of an accident as "lesser" and the

[10] The Secretary made two offsetting errors in calculating the proposed penalties in accord with her protocol for applying the section 17(j) penalty factors. First, the Secretary erroneously applied a 10% reduction in gravity-based penalty for the employer size factor because she incorrectly concluded that EWD employed fewer than 250 employees. (Tr. 186–87; Ex. C-14 at 1). Second, the Secretary erroneously failed to apply a 10% penalty reduction for the history of violations, which under the Secretary's protocol should have been applied under the circumstances. (Tr. 190–91). Those two errors offset. Although the Commission is not bound to apply the Secretary's protocol for calculating proposed penalties, the undersigned nevertheless concurs in and adopts her consideration of the employer's size, history of violations, and good faith, as described at the hearing. (Tr. 182–91).

overall gravity level to be "moderate." (Tr. 185). EWD makes no argument challenging the Secretary's gravity assessment. The undersigned concurs in and adopts that assessment and the proposed penalty of $7,458 for the ladder violation.

ORDER

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

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(3) is AFFIRMED, and a penalty of $9,324 is ASSESSED.

2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.501(b)(10) is VACATED.

3. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(1) is AFFIRMED, and a penalty of $7,458 is ASSESSED.

SO ORDERED.

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

Dated: September 30, 2024