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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SAFWAY SCAFFOLDING d/b/a SAFWAY SERVICES, LP (Named as SAFWAY SCAFFOLDING, d/b/a SAFWAY SERVICES , LP), Respondent.	OSHRC DOCKET NO. 12-1349

Appearances:

Rose Darling, Esq. and Susan Gillett Kumli, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California
For Complainant

Lisa Prince, Esq., Walter & Prince, LLP, Healdsburg, California
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Safway Scaffolding ("Respondent") worksite in Moffett Field, Mountain View, California on March 26, 2012. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging four serious and two other-than-serious violations of the Act. Respondent timely contested the Citation, and a trial was held on March 7–8, 2013 in San Francisco, California. Both parties filed post-trial briefs.

II. Jurisdiction

The parties have stipulated that the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). (Ex. J-1). Further, Respondent also stipulated that, at all times relevant to this matter, it was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

III. Stipulations

The parties submitted Joint Stipulations to the Court (Ex. J-1), which are set forth below:

1. The Occupational Safety and Health Review Commission ("OSHRC") has jurisdiction of this matter pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 561 *et seq.*, as amended (the "Act").

2. At all relevant times, Respondent was engaged in business with a principal office and place of business located at 231 Houret Drive, Milpitas, California 95035.

3. At all relevant times, Respondent was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5), as amended.

4. At all relevant times, [redacted] was employed by Respondent as a Laborer.

5. At all relevant times, Respondent was engaged in erecting and dismantling scaffolding at a worksite and place of employment located at Hangar One, Moffett Field, Mountain View, California 94035 (hereinafter the "jobsite").

6. Respondent's work at the jobsite was performed pursuant to a contract between Respondent and Nuprecon LP, which in turn had a contract with AMEC Environmental & Infrastructure, Inc. AMEC was the prime contractor hired by the United States Navy to remediate Hangar One at the jobsite.

7. On or about February 29, 2012, Respondent's employee [redacted] was injured when he fell approximately 21 feet from a scaffold located at the jobsite.

8. On March 26, 2012, a Compliance Safety and Health Officer from the Occupational Safety and Health Administration inspected Respondent's jobsite.

9. On June 4, 2012, OSHA issued to Respondent Citation 1, with Items 1, 2, 3a and 3b, together with proposed penalties totaling $21,000.00, and Citation 2, Items 1 and 2, together with proposed penalties totaling $2,000.00, pursuant to Section 9(a) of the Act, 29 U.S.C. § 658(a).

10. Citation Number 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.451(e)(1), which provides that "[w]hen scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used." OSHA proposed a penalty of $7,000 for this violation.

11. Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.451(f)(7), which provides that "[s]caffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling and alteration. Such activities shall be performed only by experienced and trained employees selected for such work by the competent person." OSHA proposed a penalty of $7,000 for this violation.

12. Citation 1, Item 3a alleges a serious violation of 29 C.F.R. § 1926.503(a)(1), which provides that the "[e]mployer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards." OSHA proposed a penalty of $7,000 for this violation.

13. Citation 1, Item 3b alleges a serious violation of 29 C.F.R. § 1926.503(b)(1), which provides that the "[e]mployer shall verify compliance with [29 C.F.R. 1926.503(a)(1)] by preparing a written training certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of training, and the signature of the person conducting the training or the signature of the employer." OSHA did not propose a penalty for this violation.

14. Citation 2, Item 1, alleges a serious violation of 29 C.F.R. § 1904.7(b)(3), which provides that an [sic] "[w]hen an injury or illness involves one or more days away from work, [he employer] [sic] must record the injury or illness on the OSHA 300 log with a check mark in the space for cases involving days away from work and an entry of the number of calendar days away from work in the number of days column. . . . The employer must count the number of calendar days the employee was unable to work as a result of the injury or illness regardless of whether or not the employee was scheduled to work on those day(s). Weekend days, holidays, vacation days, or other days off are included in the total number of days recorded if the employee would not have been able to work on those days because of a work-related illness or injury." OSHA proposed a penalty of $1,000 for this violation.

15. Citation 2, Item 2 alleges a serious violation of 29 C.F.R. § 1904.40(a), which provides that when an authorized government representative asks for the records an employer keeps under Part 1904, the employer must provide copies of the records within four (4) business hours. OSHA proposed a penalty of $1,000 for this violation.

16. On June 28, 2012, OSHA received Respondent's Notice of Intent to Contest the Citation and Proposed Penalties pursuant to the Act, and this notice was duly transmitted to OSHRC.

17. The Secretary filed a Complaint against Respondent on July 13, 2012.

18. Respondent filed an Answer to the Complaint on July 26, 2012.

19. As a result of the Parties' negotiations in or around January 2013, the Secretary agrees to vacate Citation 2, Item 2.

IV. Settled Citations

As noted in Stipulation No. 19, the Secretary agreed to vacate Citation 2, Item 2. Accordingly, Citation 2, Item 2 shall be VACATED and no penalty shall be assessed.

V. Findings of Fact[1]

Respondent is a scaffolding subcontractor located in Milpitas, California. (Ex. J-1). Respondent was hired to design, erect, and dismantle scaffolding at Hangar One, Moffett Field, California as part of a remediation project for the United States Navy. (Ex. J-1). Hangar One is a national landmark that measures 200 feet high, 1,300 feet long, and over 300 feet wide. (Tr. 274). The Hangar One project was the largest project that Respondent had ever undertaken. (Tr. 274, 282). According to Respondent's project manager, Brett Yeager, the design of the scaffolding alone took close to two years. (Tr. 273–74).

During the project, Respondent had anywhere from 25–30 employees working in phases to dismantle and erect scaffolding. (Tr. 42, 291–92, 303). The employees were broken up into four or five crews consisting of approximately five or six employees. (Tr. 42–43). Each of these crews was supervised by a Crew/Team Leader, who provided instructions to the crew members and took action to correct safety hazards. (Tr. 43, 310, 312, 356, 367, 378). All of the crews, in turn, were supervised by Sam Longfellow, Respondent's project coordinator assigned to the Hangar One project, and foremen Jose Franco and Joe Horiuchi. (Tr. 339, 350, 353, 361, 363). Due to the immense scope of the project, Brett Yeager stated that Safway's managers "can't be in all places at all times and that's why [they] rely on the experience of a leadman." (Tr. 310).

1. This section does not constitute the entirety of the Court's Findings of Fact. The facts contained in this section apply generally to each of the citations discussed in Section VII, Conclusions of Law. To the extent that additional facts are needed to address a particular citation, such facts will be discussed in Section VII.

Access to the various portions of the scaffold structure was provided by a series of stairs, elevators, and ladders. (Tr. 284). Users[2] of the scaffold utilized these access points to access both the lower levels of the scaffold and the upper levels, which are referred to as "suspended decking" or "quick deck". Although Respondent's employees used the provided access points, it was discovered that, at levels below 65 feet, there were no working platforms that allowed for employees to effectively travel horizontally towards the stair towers and ladders during dismantle. (Tr. 290–91). In conjunction with the Navy and the Resident Officer in Charge of Construction, Respondent determined that climbing vertically down the engineered scaffold components, with 100% tie-off, was safer than having employees traverse unplanked scaffolding in order to access ladders and stairs. (Tr. 293). According to Brett Yeager, this method was only used in order to avoid excessive horizontal movement on the scaffold components and, even then, only by Respondent's carpenters.[3] (Tr. 293–94).

In addition to the carpenters erecting and dismantling the scaffold structure, Respondent also had a ground crew that was responsible for moving material from one place to another to facilitate the erection and dismantle of the scaffold structure. (Tr. 304). According to Brett Yeager, laborers on the ground crew were only permitted to move material on the ground or on areas of the scaffold that were fully planked and guarded. (Tr. 304).

In October of 2011, Respondent hired [redacted] as a warehouseman and ground crew laborer. (Tr. 36–37). At the time he was hired, [redacted] was required to attend Respondent's safety orientation and training, which was conducted by Respondent's superintendent, Phil Otterson. (Tr. 37, 216–19). Among the topics covered were "Erector 101", "New-Hire Orientation", "Safety First Handbook" review, and "Jobsite 101" training. (Tr. 86–89, 216, Ex.

2. The Court uses the term "users" to distinguish workers engaged in the work of remediation from Respondent's employees, who were solely performing erection and dismantle of the scaffolding structure. (284, 289).
3. Scaffold erectors and dismantlers are referred to as "carpenters."

R-4, R-6, R-7, R-8, R-10). [redacted] did not receive training on how to erect or dismantle scaffolding because Respondent required employees in his position to complete a six-month probationary period, obtain a recommendation to the scaffold carpenters' union, and receive additional training in erecting or dismantling scaffolding before being permitted to perform the job of a carpenter. (Tr. 225–26). During his training, [redacted] was told that he was assigned to ground crew duties and that he was only allowed to be on the scaffolding when it was fully planked and railed. (Tr. 37, 91, 95).

In January 2012, [redacted] was assigned to work on the Hangar One project. (Tr. 40, 92). According to Longfellow, [redacted] and other employees that were new to the jobsite attended a safety meeting that covered site-specific hazards and fall protection. (Tr. 341–42, Ex. R-1, R-2). [redacted] was not provided with a harness or lanyard, and it was reiterated to him that his job duties would be restricted to the ground and fully planked and railed sections of the scaffold structure. (Tr. 91, 92, 95, 222, 348–49).

On the day of the incident giving rise to the OSHA inspection at issue, Respondent conducted a safety meeting, which included a discussion of slips, trips, and falls in the workplace. (Tr. 349–50, Ex. R-17). After the meeting, the crews divided up and began work in their respective areas of responsibility. All employees wore Tyvek suits for protection; however, [redacted] wore a blue Tyvek suit because he is a large man, weighing 300 pounds. (Tr. 46–47, 68). [redacted] was assigned to work on a crew with four other employees, including Crew Leader Jose "Jesse" Mendoza. For the first part of the morning, [redacted] carried out his duties as a labor/material handler, conducting his work on a fully planked and railed portion of the scaffold. (Tr. 48–50, Ex. J-1).

At some point in the middle of the morning, Mendoza discovered that his crew was an employee short and needed additional help to dismantle the scaffolding. (Tr. 51–56). [redacted]

told Mendoza that he had a harness and lanyard[4] and that he was ready to "get on the scaffold and finish this job." (Tr. 51–52). Mendoza "thought about it for a second" and then told [redacted] to "[p]ut your harness on and let's go." (Tr. 52). Over the course of the next 90 minutes, [redacted] assisted in the dismantling of the scaffolding from a height of 65–70 feet down to approximately 25–30 feet above the hangar floor. (Tr. 56–57, 59–60). During this process, [redacted] would descend the scaffolding by climbing down the scaffold structure itself, also known as "climbing down the legs", which he observed other Safway employees doing during the dismantle process. (Tr. 61–62). As [redacted] was climbing the legs, he incorrectly tied off to a horizontal bar, which dislodged, and he fell 21 feet to the ground. (Tr. 61–62). At the time of [redacted]'s fall, Longfellow was in the southern portion of the hangar, approximately 100 yards away. (Tr. 357). He testified that he had not seen [redacted] working in a restricted area and that, from where he was standing, he was unable to tell employees apart from one another without binoculars. (Tr. 377).

After his fall, [redacted] was taken to the hospital, where he was treated and released that night. (Tr. 74). As a result of the accident, [redacted] experienced severe pain in his ribs and leg, as well as bruising and lacerations on his eye and leg. (Tr. 74–75). [redacted] went to the jobsite the next day, made a report of the incident, and had the onsite employee clinic doctor examine him. (Tr. 76–77, 252–53). [redacted] was suspended for a week for "working in an area that he wasn't allowed." (Tr. 254, 259, Ex. R-18). Upon returning to work, [redacted] was placed on restricted work duties. (Ex. R-19). Shortly thereafter, Respondent recommended [redacted] for admission into the scaffold carpenters' union. (Tr. 82–83). [redacted] worked for Respondent for a few more months and then left the company. (Tr. 83, 102).

4. [redacted] testified that Longfellow had provided him with a Lanyard approximately one month before the accident and that he had borrowed a harness from another Safway employee. (Tr. 95–97). According to Wesley Baker, the harness worn by [redacted] was not purchased by Respondent and did not comply with its requirements. (Tr. 410–11).

The foregoing prompted a complaint referral to OSHA, and an inspection was conducted on March 26, 2012 by Compliance Safety and Health Officer ("CSHO") Lisa Trecartin. On June 4, 2012, following the inspection, OSHA issued the Citation.

VI. Controlling Case Law

To establish a *prima facie* violation of Section 5(a)(2) of the Act, Complainant 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 employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

VII. Conclusions of Law

A. <u>Citation 1, Item 1</u>

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

> 29 CFR 1926.451(e)(1): When scaffold platforms were more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold,

> structure, personnel hoist, or similar surface was not used. Crossbraces were used as a means of access:
>
> > (a) Hangar 1 Project, Moffett Field – On 2/29/12, a laborer descending Systems scaffolding on the north side of the hangar, climbed vertically downward on the components instead of using an approved access route such as a ladder. The laborer fell approximately 21', his fall being broken by a horizontal runner 7' above grade before landing on the hangar's concrete floor.

The cited standard provides:

> When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

29 C.F.R. § 1926.451(e)(1).

The first step in ascertaining whether Complainant has proved its *prima facie* case is to determine whether the cited standard applies to the condition. In *Cincinnati Gas & Electric Co.*, the Commission stated that "[s]ection 1910.5(c)(1) provides that a specific standard preempts a general one only if 'a condition, practice, means, methods, operation, or process' is already dealt with by the specific standard." 21 BNA OSHC 1057, 1058 (No. 01-0711, 2005) (citing *L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 669 (D.C. Cir. 1982); *McNally Constr. & Tunneling Co.*, 16 BNA OSHC 1879, 1880 (No. 90-2337, 1994), *aff'd without pub. op.*, 71 F.3d 208 (6th Cir. 1995)). A general standard is not preempted by a specific standard when it provides meaningful protection to employees beyond that afforded by the more specific standard. *Bratton Corp.*, 14 BNA OSHC 1893, 1896.

The standard cited by Complainant, 29 C.F.R. § 1926.451(e)(1), is prefaced with an application paragraph, which states, "This paragraph applies to scaffold access for all employees. Access requirements for employees erecting or dismantling supported scaffolds are *specifically*

addressed in paragraph (e)(9) of this section." 29 C.F.R. § 1926.451(e) (emphasis added). In other words, there are requirements that apply generally to all employees accessing a scaffold, i.e., the individuals working on the structure to which the scaffold is attached; however, there are also requirements that are specific to employees that are erecting or dismantling the scaffold. *See* 61 Fed. Reg. 46026, 46058 (1996) ("Paragraph (e)(9) of the final rule sets access requirements for employees erecting or dismantling supported scaffolds."); *see also Brand Scaffold Rental and Erection, Inc.*, 19 BNA OSHC 1741 at *6 (No. 00-1668, 2001) (ALJ Bober) ("[I]t is clear that [29 C.F.R. § 1926.451(e)(1)] does not apply to '[a]ccess requirements for employees erecting or dismantling supported scaffolds.'"). *See also Solis v. Summit Contractors*, 558 F.3d 815, 823 (8th Cir. 2009) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.")) A "supported scaffold" is "one or more platforms supported by outrigger beams, brackets, poles, legs, uprights, posts, frames, or similar rigid support." 29 C.F.R. § 1926.450(b).

There is no dispute Respondent's employees were engaged in the erection and dismantling of the scaffold structure inside Hangar One. Further, the Court finds that the scaffold system in the Hangar One was a "supported scaffold" as that term is used in the regulations. According to Section 1926.450(b), a platform is "a work surface elevated above lower levels" that can be constructed using "wood planks or fabricated planks, decks or platforms." The Hangar One scaffold system contained a series of platforms at various levels, all of which were supported by outriggers, brackets, poles, legs, posts, and similar rigid support. (Ex. R-1, R-3, R-21, R-22). Although Respondent's scaffolding was specifically referred to as "systems scaffolding", the Court sees no meaningful distinction between the two types of scaffolding insofar as Section 1926.451(e) is concerned. Section 1926.450(b) defines a system

scaffold as "consisting of posts with fixed connection points that accept runners, bearers, and diagonals that can be interconnected at predetermined levels." There is nothing to suggest that a system scaffold cannot be a supported scaffold; in fact, a system of posts with fixed connection points that can be interconnected at predetermined levels falls within the definition of a supported scaffold, which requires a system of rigid support to support a platform.

Based on the foregoing, the Court finds that, by its very terms, 29 C.F.R. § 1926.451(e)(9) preempts the application of 29 C.F.R. § 1926.451(e)(1) to the facts presented here because it specifically addresses the condition, practice, means, method, operation, or process of accessing a supported platform, and, hence, provides the most meaningful protection. In particular, subparagraph (e)(9) provides more meaningful protection because it allows for the consideration of feasibility and greater hazard. As applied to this case, Respondent could (and did) make a determination that, in certain locations on the scaffolding, access to the stairways, ladders, and towers would expose employees to a greater hazard and, therefore, made the determination to allow carpenters to descend the scaffolding itself using 100% tie-off. (Tr. 292–94). Subparagraph (e)(1), cited by Complainant, does not allow for such considerations that are specific to the process of erection and dismantle. Complainant failed to prove the applicability of the cited standard.[5] Accordingly, Citation 1, Item 1 shall be VACATED.

B. <u>Citation 1, Item 2</u>

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

> 29 CFR 1926.451(f)(7): Scaffolds were not erected, moved, dismantled, or altered, by trained and experienced employees under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. Such activities were not performed only by experienced or trained employees selected for such work by the competent person:

5. Complainant did not address the preemption issue in his brief.

> (a) Hangar 1 Project, Moffett Field – On 2/29/12, an untrained, laborer was dismantling Systems scaffolding prior to losing his balance and falling approximately 21'. His fall was broken by a horizontal runner 7' above grade before landing on the hangar's concrete floor.

The cited standard provides:

> Scaffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. Such activities shall be performed only by experienced and trained employees selected for such work by the competent person.

29 C.F.R. § 1926.451(f)(7).

The cited standard is composed of two requirements: (1) scaffold erection and dismantling can only occur under the supervision of a competent person; and (2) scaffold erection and dismantling shall be performed only by experienced and trained employees. 29 C.F.R. § 1926.451(f)(7). Complainant has only alleged that Respondent failed to ensure that the erection and dismantling of the scaffolding was performed by experienced and trained employees.

First, the Court finds that the standard applies to the conditions at Hangar One. Respondent was engaged in the erection and dismantling of scaffolding, which, in turn, required it to have a competent person supervising the work and experienced and trained employees performing the work. Second, the Court finds that the terms of the standard were violated. [redacted], by his own admission, did not have experience or training in the erection and dismantling of scaffolding; rather, he was limited to the role of laborer and materials handler. (Tr. 37–40). Nevertheless, for approximately 90 minutes on the morning of February 29, 2012, [redacted] was dismantling scaffold at Hangar One. (Tr. 59). For these reasons, and those mentioned above in Section V of this Decision, the Court also finds that [redacted] was exposed to the hazard of falling from the scaffold due to lack of experience and training.

The Court also finds that Respondent had knowledge of the hazardous condition/practice. In order to establish knowledge, Complainant must show that employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991). The determination as to whether an employer has been reasonably diligent is a question of fact that involves "a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Precision Concrete Constr.*, 19 BNA OSHC 1404 at *4 (No. 99-0707, 2001). As a general rule, knowledge on behalf of a supervisor or foreman can be imputed to the employer. *See Revoli Const. Co.*, 19 BNA OSHC 1682 (No. 00-0315, 2001) (holding that actions and knowledge of supervisory personnel are generally imputed to their employers). In that regard, it is the substance of the employee's job function, as opposed to the formal title, which is determinative. *See Am. Eng'g. & Dev. Corp.*, 23 BNA OSHC 2093 (No. 10-0359, 2012) (holding that temporary delegation of authority over other employees constitutes supervision for the purposes of imputing knowledge); *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979), *aff'g* 7 BNA OSHC 1343 (holding that a "working foreman", although not a full-time supervisor, was a supervisor at the time of the alleged violation).

There is no dispute that Samuel Longfellow, Respondent's project coordinator, and foremen Jose Franco and Joe Horiuchi were supervisors for the purposes of imputing knowledge. However, Respondent disputes that Mendoza, [redacted]'s Crew Leader, was a supervisor. Specifically, Respondent contends that because Mendoza did not have the power to hire, fire, or participate in the discipline of employees, he was not a supervisor. (Tr. 356). *But see Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003) (holding that ability to hire or

fire is not the *sine qua non* of supervisory status). The Court disagrees. As noted above, Brett Yeager testified that, due to the scope and scale of the project, Respondent "rel[ied] on the experience of the lead man." (Tr. 310). Specifically, both Longfellow and Brett Yeager testified that lead men, such as Mendoza: (1) direct crews working in various areas of the scaffolding; (2) "take charge" of each crew and direct their particular project or scope of work; (3) recommend disciplinary action to their respective foremen; and (4) are relied upon to ensure that their respective project is being done correctly and safely. (Tr. 308, 310, 356, 367, 378). Based on these facts, the Court finds that Mendoza, along with Longfellow, Horiuchi, and Franco, was a supervisor for the purposes of imputing knowledge.

The Court finds that Respondent had both actual and constructive knowledge of the violation. With respect to Mendoza, he was the lead man directly overseeing the work performed by [redacted]. (Tr. 355). Further, it was Mendoza who, after some hesitation, allowed [redacted] to strap on a harness and perform the work of dismantling even though he knew that [redacted] was not properly trained or experienced. (Tr. 54–55). With respect to Longfellow, the Court finds that Respondent had constructive knowledge of the violation. According to Longfellow, he devoted 80% of his time to direct oversight of the project at Hangar One. Among his responsibilities was the duty to ensure the safety of the scaffold workers. (Tr. 339). As noted above in Section V, [redacted] dismantled scaffolding for approximately 90 minutes as his crew worked downward from a height of 65–70 feet down to a height of approximately 25 feet. During that time, [redacted], a 300-pound man, was one of the only workers wearing a blue Tyvek suit. (Tr. 47). Longfellow testified that he was approximately 100 yards away from [redacted] at the time of the accident and, depending on his location, would not have been able to see him without the use of binoculars. (Tr. 377). While the Court credits Longfellow's testimony insofar as he did not have direct knowledge of the situation, the Court

finds that, with the exercise of reasonable diligence, Longfellow could have known that [redacted] was performing dismantling work without the requisite training or experience.[6] An employer's obligation to inspect its workplace for hazards "requires a careful and critical examination, and is not satisfied by a mere opportunity to view equipment." *Hamilton Fixture*, 16 BNA OSHC 1079, 1087 (No. 88-1720, 1993) (citation omitted), *aff'd without published opinion*, 28 F.3d 213 (6th Cir. 1994). *See N & N Contractors, Inc. v. OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001) (employer has constructive knowledge of a violation if employer fails to use reasonable diligence to discern the presence of a violative condition). Not only did [redacted] stand out because of his physical appearance, but he was engaged in a prohibited activity for almost an hour-and-a-half without any notice from either Longfellow or Franco, who was the foreman in charge of the lower level scaffolding crews.

The Court also finds that the violation was serious. [redacted] was performing very specialized work at heights of up to 70 feet above the ground. Without the proper training in fall protection and erection and dismantling, [redacted] was exposed to falls that could (and, in [redacted]'s case, did) result in serious injuries up to and including death.

Based on the foregoing, the Court finds that Complainant has proved its *prima facie* case with respect to Citation 1, Item 2. However, because Respondent has asserted the defense of unpreventable employee misconduct, the Court will continue its discussion of this citation item in Section VIII, *infra*.

C. <u>Citation 1, Item 3(a)</u>

Complainant alleged a serious violation of the Act in Citation 1, Item 3(a) as follows:

> 29 CFR 1926.503(a)(1): The employer did not provide a training program for each employee potentially exposed to fall hazards to enable each employee to

6. The same could also be said of Franco, who was the foreman in charge of the Mendoza's crew. Horiuchi, on the other hand, was responsible for the suspended scaffolding and was not expected to oversee the crews working on the lower level scaffolding.

recognize the hazards of falling and the procedures to be followed in order to minimize these hazards:

> (a) Hangar 1 Project, Moffett Field – On 2/29/12, a laborer dismantling Systems scaffolding was required to wear fall protection. After losing his balance he fell approximately 21', his fall being broken by a horizontal runner 7' above grade, and then landing on the hangar's concrete floor. The laborer did not receive the required fall protection training.

The cited standard provides:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

29 C.F.R. § 1926.503(a)(1).

In order to prove noncompliance with a training standard, Complainant must prove that "the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993). "If the employer rebuts the allegation of a training violation 'by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided.'" *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2126–27 (No. 96-0606, 2000) (citing *AMSCO*, 18 BNA OSHC 1082, 1086 (No. 91-2494, 1997); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2176–77 (No. 90-1747, 1994)).

Complainant contends that Respondent did not provide [redacted] with adequate fall protection training. Specifically, Complainant points out that [redacted] testified that he did not recall receiving any specific fall protection training, nor did he receive training on the fall hazards associated with working in areas of the scaffold that were not planked and railed.[7] (Tr. 90, 111). As to the training that [redacted] did receive, Complainant characterized it as

7. Although Phil Otterson and Brett Yeager provided conflicting testimony as to whether laborers, such as [redacted], were allowed to work on the scaffold, the Court finds that the weight of the evidence suggests that laborers were allowed to work on the scaffolding, albeit only in those locations that were fully planked and railed. (Tr. 95, 224–25, 230–31).

perfunctory and insufficiently specific to provide [redacted] with the tools and knowledge necessary to protect himself while working on the scaffolding. In support of this, Complainant notes that [redacted] signed two documents indicating (1) that he had received a harness and lanyard, and (2) that he acknowledged he had been trained to identify and take the maximum opportunity to tie-off, even though he did not receive a harness or lanyard, nor did he receive fall protection training related to tying-off or erection and dismantle of the scaffold.[8] (Tr. 111–12, 115–16, 240–41, Ex. R-11, R-14). Finally, Complainant argues that even if such training was provided, Respondent failed to ensure [redacted] understood or retained the information conveyed through the use of an assessment or examination.

Respondent, on the other hand, contends that [redacted] was provided with fall protection training that was adequate to address the hazards to which he would be exposed as a laborer and ground crew member. According to Respondent, [redacted] attended and completed all of the mandatory basic training and orientation for a laborer and recognized that he was assigned to ground crew duties and that he was only allowed to be on the scaffolding when it was fully planked and railed. (Tr. 37, 91, 95, Ex. R-4 to R-11). Further, in addition to the orientation training, [redacted], as well as other employees that were new to the Hangar One site, attended a 40–60 minute safety meeting that covered site-specific hazards and fall protection. (Tr. 317–18, 341–42, Ex. R-1, R-2).

The Court finds that Complainant failed to prove a violation of the standard. Although the standard is clearly applicable to this set of facts, there was no violation of its terms. As noted by both parties, the proper standard by which to measure Respondent's compliance with the regulation is whether a reasonably prudent employer would have given [redacted] the same instructions under the circumstances presented here. *See El Paso Crane,* 16 BNA OSHC 1419.

8. [redacted] admitted that this document was signed in error—he credibly testified that Respondent never issued him a harness or lanyard. (Tr. 91).

[redacted] received fall protection training on three separate occasions: (1) at orientation; (2) during his initial visit to Hangar One; and (3) a toolbox talk/safety meeting on the day of the accident. (Tr. 91, 94, 318, 351). Further, [redacted] was told, and he acknowledged, that his job duties were restricted to the areas on the scaffold that were fully planked and railed. (Tr. 95, 298).

The Secretary in *N & N Contractors* attempted to make the same argument that Complainant makes here: Someone fell doing something that they were not supposed to; therefore, they were not properly trained. *N & N Contractors, Inc.*, 18 BNA OSHC 2121. The problem with this train of thought, according to the Commission, is that there needs to be something in the record that connects unsafe practices to the failure to provide adequate training. *Id.* at *8. The Commission stated, "The failure to enforce compliance with work rules on the job does not establish a failure to train or instruct, and we cannot infer on the basis of these practices that the training was deficient." *Id.* (citing *Dravo Engrs. and Constructors*, 11 BNA OSHC 2010, 2012, (No. 81-748, 1984) (holding evidence of failure to enforce a safety rule does not prove a training violation)). The Commission also noted that a critical fact was missing from the Secretary's *prima facie case*; namely, the absence of direct testimony from employees, foreman, or safety officials that Respondent's employees did not receive the required training. *Id.*

[redacted]'s attendance at training that covered fall hazards and fall protection is well-documented. (Ex. R-2, R-4, R-7, R-10). Further, [redacted], Longfellow, Yeager, and Otterson all testified that [redacted] was aware of his job duties and the restrictions that were placed upon him. Although [redacted] may not have complied with the work rule, this does not, in and of itself, establish that he was not trained. Further, the Court rejects any argument that Respondent was required to administer an examination or assessment in order to determine whether [redacted] understood or retained the information provided to him at the training sessions

described above. By using such a line of argument, Complainant seeks to expand the scope of the regulation beyond what is required by its plain language and cites no authority for this requirement. By his own admission, [redacted] understood the scope of his job duties, the restrictions placed upon him in carrying out those duties, and, by extension, the training he received as it related to those duties. The Court finds that Respondent provided the requisite training that a reasonably prudent employer would have provided to an employee in [redacted]'s position. Accordingly, the Court finds that Complainant failed to prove a violation of the standard. Citation 1, Item 3(a) shall be VACATED.

D. <u>Citation 1, Item 3(b)</u>

Complainant alleged a serious violation of the Act in Citation 1, Item 3(b) as follows:

> 29 CFR 1926.503(b)(1): The employer did not verify compliance with paragraph (a) of this section by preparing a written (training) certification record including the name or other identity of the employee trained, the date(s) of training, and the signature of the person who conducted the training or the signature of the employer:
>
> (a) Hangar 1 Project, Moffett Field – Noted on or about 3/26/12, fall protection training records for the scaffolding crew did not include the signature of the person conducting the training or the signature of the employer.

The cited standard provides:

> The employer shall verify compliance with paragraph (a) of this section by preparing a written certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer. If the employer relies on training conducted by another employer or completed prior to the effective date of this section, the certification record shall indicate the date the employer determined the prior training was adequate rather than the date of actual training.

29 C.F.R. § 1926.503(b)(1).

The Court finds that Complainant proved a violation of the cited standard. First, the standard applies because, by its terms, an employer is required to verify compliance with

paragraph (a) of section 1926.503 by preparing a written training certification. Respondent provided fall protection training and was, therefore, required to maintain documentation of it.

Second, the terms of the standard were violated. Respondent failed to prepare and maintain proper certification of the training that was provided. There were five documents submitted at trial that are, or purport to be, a written certification record of fall-protection, or fall-protection-related, training. Exhibits R-2, R-4, and R-7 all contain the names of the employees trained, including [redacted], and the dates that the training took place. What is missing, however, is the signature of the individual conducting that training. In each of those documents, the name of the individual providing the training is printed on the document; however, the missing element is that person's signature. Without a signature from a trainer or an authorized official, there has been no certification, only a record. As to Exhibits R-8 and R-11, these documents indicate that training has taken place; however, they are merely [redacted]'s acknowledgements that he has received training. They indicate the date on which [redacted] acknowledged the receipt of training, as well as his name and signature; however, neither of them indicate the date that the training actually took place,[9] nor do they contain a signature of the trainer or representative of the employer. (Ex. R-8, R-11).

The Court also finds that there was exposure to the extent that [redacted] received the training on fall protection and worked in an area where such training would be implicated. Further, the Court finds that Respondent had knowledge of the violation, as it was Respondent's responsibility to ensure that training was provided and properly certified. The Court does not find, however, that the violation was serious. First, CSHO Trecartin did not provide any testimony as to how the failure to properly certify training records could result in a serious

9. Though it may seem obvious that the date of [redacted]'s signature is when the training took place, the Court notes that, without a signature from the individual providing the training, the training has not been certified by anyone with the authority to do so.

injury. Second, [redacted] was provided training coincident with his job responsibilities—the only real issue with respect to this citation item is that Respondent failed to comply with the requirements for certifying a training record. In that regard, the Court cannot find that the failure to sign or properly document a training record created a substantial probability that death or serious physical harm could have resulted from the violative condition. Accordingly, the Court shall AFFIRM the violation and MODIFY the characterization to other-than-serious.

E. Citation 2, Item 1

Complainant alleged an other-than-serious violation of the Act in Citation 1, Item 6 as follows:

> 29 CFR 1904.7(b)(3): When an injury or illness involved one or more days away from work, the employer did not record the injury or illness on the OSHA 300 log with a check mark in the space for cases involving days away from work: Hangar 1 Project, Moffett Field – Noted on or about 3/28/12, the employer did not record the following workplace injuries or illnesses correctly on the OSHA 300 Log for calendar year 2012.
>
> (a) On 2/29/12, a laborer was injured after falling approximately 21' from Systems scaffolding. His injuries resulted in four days away from work and were not recorded on the OSHA 300 log.

The cited standard provides:

> ***How do I record a work-related injury or illness that results in days away from work?*** When an injury or illness involves one or more days away from work, you must record the injury or illness on the OSHA 300 Log with a check mark in the space for cases involving days away and an entry of the number of calendar days away from work in the number of days column. If the employee is out for an extended period of time, you must enter an estimate of the days that the employee will be away, and update the day count when the actual number of days is known.

29 C.F.R. § 1904.7(b)(3).

As noted above in Section V, [redacted] was taken to the hospital following the fall. (Tr. 74–75). He was treated and released later on that evening. The next day, [redacted] came to the Hangar One jobsite, made a report about the accident, and was examined by the doctor on site at the hangar. (Tr. 76, 253). Approximately a week or two later, [redacted] was examined by the

doctor at the employee clinic. Due to the incident, [redacted] was suspended for one week; however, he did not return to the office for restricted duty until March 12, 2012. (Tr. 355, Ex. R-19). [redacted] testified that he was unable to return to work due to his injuries. (Tr. 75). However, according to Bill Yeager, Respondent's Branch Manager, [redacted] told him that he could not make it to the office due to "transportation issues". (Tr. 256). Bill Yeager testified that [redacted] never told him that he was physically unable to come to work. (Tr. 255–56).

Based on the foregoing information, Wesley Baker, Respondent's Northwest Regional Safety Manager, filled out the OSHA-300 form indicating that [redacted] was placed on 14 days of restricted duty.[10] (Tr. 197–198, 414). Complainant contends that the OSHA-300 form should have indicated that [redacted] suffered four lost workdays as a result of his injuries. CSHO Trecartin based her conclusion on statements made to her by [redacted]. (Tr. 197–98). In response to cross-examination, CSHO Trecartin stated that "[[redacted]] would not have been able to return to his *regular work*." (Tr. 201) (emphasis added). CSHO Trecartin also testified that she also received information from [redacted]'s physician saying that he could return to work in four days. (Tr. 203, 206). No such note or directive was introduced as evidence by Complainant.[11] The only evidence introduced as to [redacted]'s medical condition was his discharge paperwork from Stanford Hospital, which did not recommend any days off of work.[12] (Ex. R-15). Respondent based its determination of restricted duty versus lost workdays on the Stanford Hospital discharge document. (Tr. 417–18).

10. The Court would note that both parties include references to Complainant's Exhibit No. 23, which was the OSHA-300 log at issue. The problem, however, is that Complainant's Exhibit No. 23 was never submitted into evidence. During the housekeeping period at the end of the trial, the Court returned a number of exhibits to the parties that were not used or tendered for submission. (Tr. 434–37). At that time, the Court returned Complainant's Exhibit No. 23 to Complainant without objection or response. (Tr. 437). That fact notwithstanding, it is apparent that neither party disputes the contents of the document or its authenticity. Accordingly, the Court shall rule on the basis of the testimony provided by the parties.

11. It is reasonable for the Court to infer that, if such documentary evidence existed, it would have been offered as evidence.

12. The discharge document has a handwritten note that indicates "restricted duty" as well as "no restrictions"; however, this information was added by Wesley Baker. (Tr. 417, Ex. R-15).

The Court finds that, although the standard clearly applies to the facts of this case, the terms of the standard were not violated. Complainant has predicated its case on information that it received from the injured party. When looking at 29 C.F.R. § 1904.7 as a whole, however, it is clear that Respondent was justified in relying on the medical information that was available to it. The following subparagraphs of section 1904.7(b)(3) are illustrative:

> *How do I record an injury or illness when a physician or other licensed health care professional recommends that the worker stay at home but the employee comes to work anyway?* You must record these injuries and illnesses on the OSHA 300 Log using the check box for cases with days away from work and **enter the number of calendar days away recommended by the physician or other licensed health care professional**. If a physician or other licensed health care professional recommends days away, you should encourage your employee to follow that recommendation. However, the days away must be recorded whether the injured or ill employee follows the physician or licensed health care professional's recommendation or not. If you receive recommendations from two or more physicians or other licensed health care professionals, you may make a decision as to which recommendation is the most authoritative, and record the case based upon that recommendation.
>
> *How do I handle a case when a physician or other licensed health care professional recommends that the worker return to work but the employee stays at home anyway?* In this situation, you must end the count of days away from work **on the date the physician or other licensed health care professional recommends** that the employee return to work.
>
> *How do I record a case in which a worker is injured or becomes ill on a Friday and reports to work on a Monday, and was not scheduled to work on the weekend?* You need to record this case **only if you receive information from a physician or other licensed health care professional indicating that the employee should not have worked**, or should have performed only restricted work, during the weekend. If so, you must record the injury or illness as a case with days away from work or restricted work, and enter the day counts, as appropriate.

29 C.F.R. § 1904.7(b)(3)(ii), (iii), (iv) (emphasis added).

The section cited by Complainant—29 C.F.R. § 1904.7(b)(3)—is a general directive that indicates what an employer must do when confronted with the possibility that an injury or illness is work-related and involves one or more days away from work. The subsequent subparagraphs, on the other hand, deal with the specific situations that an employer may confront when deciding

how or whether to record a lost workdays injury. In almost every instance, the standard directs an employer to record a lost workdays injury based upon the recommendation of "a physician or other licensed health care professional." *Id.*; *see also* Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5916, 5969 (2001) ("These policies are a continuation of OSHA's previous policy of requiring employees to follow the recommendations of health care professionals when recording cases in the OSHA system"). Considering the medical information that was available to Respondent, and the fact that [redacted] apparently did not tell Respondent that he was incapable of working,[13] the Court finds that the decision to record [redacted]'s injury as one involving restricted duty as opposed to lost workdays was justified and reasonable.[14] *Cf. Shaw Global Energy Svcs.*, 23 BNA OSHC 2105 at n.7 (No. 09-0555, 2012) (citing *Amoco Chemicals Corp.*, *12* BNA OSHC 1849, 1855 (No. 78-250, 1986)) (holding that the Secretary must prove that the decision not to record an illness was unreasonable in light of the information and expertise available at the time of the decision).

Based on the foregoing, the Court finds that Complainant has failed to establish a violation of 29 C.F.R. § 1904.7(b)(3). Accordingly, Citation 2, Item 1 shall be VACATED.

VIII. AFFIRMATIVE DEFENSES

Respondent has alleged the affirmative defense of unpreventable employee misconduct. Based on the Court's previous conclusions, the only citation item that this defense is applicable to is Citation 1, Item 2, wherein the Court found that Complainant established its *prima facie* case.

13. Although [redacted] testified that he did not feel as if he could "go to his regular duties", there was no testimony or evidence indicating that he relayed this information to Respondent. (Tr. 75, 255–56).

14. The Court would also note that the regulations' focus on medical opinion comports with the purpose of the recording requirement, which is to "compile accurate statistics on work injuries and illnesses." 66 Fed. Reg. 5916, 5916. It would be problematic to rely solely on the information provided by the employee because the affected employee's reasons for not coming to work may not be medically related or, at the very least, supported by medical opinion. This, in turn, would undermine the validity of the data collected and undermine the purpose of the regulation.

In order to establish the defense of unpreventable employee misconduct, Respondent is required to prove: "(1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered." *Burford's Tree, Inc.*, 22 BNA OSHC 1948 (No. 07-1899, 2010) (citations omitted). "Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013 at *5 (No. 87-1067, 1991) (citing *Daniel Constr. Co.*, 10 BNA OSHC 1549 (No. 16265, 1982).

The Court has already found that a supervisory employee was involved in the misconduct in Section VII.B, *supra*; thus, the Court will apply a more rigorous analysis to the four-prong test listed above.

A. Respondent Had Established Work Rules Designed to Prevent the Violation and Communicated those Rules to its Employees

In order to be considered effective, "the work rule must be sufficiently precise to implement the requirements of the standard or be functionally equivalent to it." *Beta Constr. Co.*, 16 BNA OSHC 1435 at *10 (No. 91-102, 1993); *see also Archer-Western*, 15 BNA OSHC at 1017 ("An unpreventable misconduct defense will not be established where the employer's instructions were insufficient to eliminate the hazard even if the employee had complied with those instructions.")

The Court has found the [redacted] went through extensive training that included a discussion of fall hazards and fall protection. (Ex. R-1, R-2, R-6, R-7).[15] Although [redacted] did not receive the more extensive fall protection training provided to scaffold carpenters, the Court found that Respondent provided [redacted] with the proper level of training for his specific job duties. The training documents and AHAs clearly indicate that only qualified erectors were allowed to erect and dismantle scaffolding. Further, [redacted] was told multiple times by Otterson, Longfellow, and Yeager that he was restricted to areas on the scaffolding that was fully planked and railed and that he would only be moving material "from A to B. That's it." (Tr. 91–92, 95, 228–29, 281, 299, 348–49). In light of these facts, the Court finds that Respondent had an established work rule and that the work rule was adequately communicated to its employees, including [redacted].

B. Respondent Did Not Take Adequate Steps to Discover Violations

The employer must make a reasonably diligent effort to monitor compliance with its safety rules, which includes taking reasonable steps to monitor its supervisors. *See Sw. Bell Tel. Co.*, 19 BNA OSHC 1097 (No. 98-1748, 2000). That does not mean, however, that an employer is required to "provide constant supervisory surveillance." *Ragnar Benson, Inc.*, 18 BNA OSHC 1937 (No. 97-1676, 1999) (citing *New York State Elec. & Gas v. Sec'y of Labor*, 88 F.3d 106–110 (2d. Cir. 1996)).

It is without question that the Hangar One project was enormous both in terms of its scope and its size. Because of the large size of the workspace, it was difficult for Longfellow and his two foremen, Horiuchi and Franco, to visually identify each employee and, consequently, determine whether untrained employees such as [redacted] were working in restricted areas. In

15. It should be noted that Exhibit No. R-1 indicates that it was revised on March 19, 2012, which is after the date of the accident. According to Brett Yeager, the AHA was modified to include a requirement that material movers would be required to wear green hats to differentiate them from scaffold erectors. (Tr. 300). That said, the document itself still indicates other restrictions, such as control zones limiting access to "AUTHORIZED SCAFFOLDING ERECTORS ONLY." (Ex. R-1).

light of this difficulty, Brett Yeager testified that Longfellow and the foremen relied on the experience of the crew leads to identify violations and correct them. (Tr. 310). The problem, however, is that Respondent's reliance on [redacted]'s leadman, Jesse Mendoza, appears to have been misplaced considering that it was Mendoza who allowed [redacted] to equip himself with a harness and work in areas that he knew were off limits to anyone but trained and certified scaffold carpenters. Although Respondent disputes whether Mendoza could properly be called a supervisor, their reliance on him and the other crew leads belies any argument to the contrary. This was not the first time that a crew lead/foreman was recalcitrant in his duty to ensure safe work habits. According to Brett Yeager, approximately one year prior to the instant case, a crew lead/foreman, Joaquin Ramirez, was disciplined for failing to ensure that his crew members were properly tied off. (Tr. 322). This suggests that Respondent perhaps relied too heavily on its crew leads and did not institute a reasonable system to monitor the monitors, as it were.

The Court is not suggesting that Respondent provide constant surveillance for safety violations, as such would not be reasonable; however, the failure in this case is two-fold: (1) the individual upon whom so much reliance was placed failed to prevent an untrained and inexperienced laborer perform complex and dangerous tasks; and (2) for a period of almost 90 minutes, no one in a supervisory capacity—neither the systems scaffolding foreman nor the project manager—noticed or took the opportunity to notice that a 300-pound man in one of the only blue Tyvek suits was climbing down the legs of the scaffolding in violation of the work rule preventing laborers from performing erection and dismantling duties. In light of [redacted]'s immediate supervisor's failure to prevent the violation, and in consideration of the fact that there was no meaningful system of examination or review to identify such violations, the Court finds that Respondent failed to take adequate steps to discover violations.[16]

16. Although the Court places no emphasis on subsequent remedial actions, it is telling that the decision to impose a

C. Respondent Did Not Effectively Enforce the Rules When Violations Had Been Discovered

In general, an employer must show that it has a progressive and consistent disciplinary policy to demonstrate adequate enforcement of its safety program. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078 at *3 (No. 99-0018, 2003) (holding unpreventable employee misconduct defense not established when respondent could not provide specific and corroborating evidence of discipline).

First of all, although Respondent provided testimony about its disciplinary policy, the Court finds it curious that Respondent never introduced the actual policy as an exhibit. In fact, the only evidence of a hard and fast disciplinary policy was the write-up that was given to [redacted] after his fall. (Ex. R-18). Brett Yeager testified that the crew lead, Jesse Mendoza, was disciplined and suspended; however, no documentation of this discipline was produced. (Tr. 323–24). Yeager also testified that a foreman/crew lead and two other employees had been disciplined in the past year; however, Respondent did not introduce any documentation of those disciplinary actions either. (Tr. 322–23). Additionally, Longfellow testified that journeymen members of Mendoza's crew were disciplined, but no documentation of that discipline was offered into evidence. (Tr. 387). Finally, no one, including the Regional Safety Manager, Wesley Baker, was able to tell whether the individual that provided [redacted] with an unapproved harness was disciplined at all. (Tr. 431–32).

Ultimately, it is Respondent's burden to come forth with evidence that is sufficient to support an allegation of unpreventable employee misconduct. *Burford's Tree, Inc.*, 22 BNA OSHC 1948. Respondent did not introduce the policy itself, nor was it able to show that it consistently enforced that policy through anything more than the disciplinary notice that it

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rule requiring ground laborers to wear green hard hats occurred after [redacted] fell.

provided to [redacted] in this one incident. The lack of documentation, coupled with the Regional Safety Manager's apparent lack of knowledge regarding the disciplinary actions taken with respect to employees involved in this incident, strongly suggests to the Court that Respondent either failed to enforce the rules in an effective manner when violations did occur or simply failed to introduce evidence sufficient to prove otherwise. In either case, the Court finds that Respondent failed to establish the defense of unpreventable employee misconduct. Accordingly, Citation 1, Item 2 shall be AFFIRMED.

IX. PENALTY

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

There was very little evidence introduced as to the size of Respondent or its prior history of violations other than CSHO Trecartin's testimony that she did not give them credit for either. (Tr. 196–97). For the most part, it does appear as if Respondent is conscientious about the safety issues that are involved in a project of Hangar One's magnitude and makes attempts to address those issues. That said, gravity is the primary consideration in the Court's determination of penalty. With respect to Citation 1, Item 2, [redacted] and those around him were exposed to

very serious injuries due to him working in an area where he was not authorized to be. This went on for close to an hour-and-a-half with no intervention from his supervisor, the foreman, or the project manager. With those considerations in mind, the Court finds that Complainant's proposed penalty of $7,000.00 is appropriate.

With respect to Citation 1, Item 3(b), the Court finds that this is nothing more than a technical violation of the standard requiring certification of the training records. The Court finds that this violation was of very low gravity and finds that a penalty of $500.00 is appropriate.

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 1 and its associated penalty are VACATED;
2. Citation 1, Item 2 is AFFIRMED, and a penalty of $7,000.00 is ASSESSED;
3. Citation 1, Item 3(a) and its associated penalty are VACATED;
4. Citation 1, Item 3(b) is MODIFIED to other-than-serious, AFFIRMED as modified, and a penalty of $500.00 is ASSESSED;
5. Citation 2, Item 1 and its associated penalty are VACATED.

Date: August 1, 2013
Denver, Colorado

__/s/_____
Patrick B. Augustine
Judge, OSHRC