UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ACTING SECRETARY OF LABOR,[1] Complainant, v. DISH NETWORK, L.L.C., Respondent.	OSHRC Docket No. **23-0180**

DECISION AND ORDER

Appearances:

Megan J. Harris, Amy Tai, Attorneys, Office of the Solicitor, U.S. Department of Labor, New York, NY, for Complainant

Jeremy K. Fisher, Attorneys, Amy Conley, Jackson Lewis, P.C., Atlanta, GA, for Respondent

BEFORE: John B. Gatto, United States Administrative Law Judge

I. INTRODUCTION

Respondent DISH Network, L.L.C., a Colorado-based company proving satellite services, was installing a DISH antenna at a Sonic restaurant in Syracuse, New York, when it was investigated by the United States Department of Labor, through the Occupational Safety and Health Administration ("OSHA"), and subsequently issued[2] a willful citation for an alleged violation of

[1] On January 20, 2025, Vincent N. Micone III became the Acting Secretary of Labor and was automatically substituted *sub nom.* for former Acting Secretary of Labor Julie A. Su. Fed. R. Civ. P. 25(d). For ease of reference, the Acting Secretary will be referred to as the "Secretary" herein.

[2] The Secretary has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA and promulgated the Occupational Safety and Health Standards at issue. *See* Order No. 8-2020, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020), *superseding* Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has authorized OSHA's Area Directors to issue the citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651–678, with a proposed penalty of $124,305.00. DISH timely contested the citation, and the Secretary filed a complaint[3] with the Commission (the "Court") seeking an order affirming the citation and proposed penalties. (Compl. ¶X at 5). DISH answered the complaint asserting among other defenses that "if there was a violation, it was the result of an isolated incident of unforeseeable employee misconduct." (Answer at 3). The Court subsequently held a 2-day trial in Syracuse, New York.

Based upon the record, the Court concludes it has jurisdiction over the parties and subject matter in this case.[4] Pursuant to section 12(j) of the Act and Commission Rule 90(a)(1), after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings.[5] *See* 29 U.S.C. § 661(j); see also 29 C.F.R. § 2200.90(a)(1). For the reasons indicated *infra*, the Court concludes the Secretary has failed to establish all the elements of his *prima facie* case and therefore, has failed to establish a violation. Accordingly, the Court **VACATES** the citation.

II. BACKGROUND

DISH employs about 3,200 field technicians nationwide and had twenty-three employees at the time of the OSHA inspection in its office in Syracuse, New York. (Tr. 407, 328). On September 7, 2022, Travis Heim, a DISH field technician, and Brandon Barrett,[6] Heim's supervisor and DISH's field service manager, were working to install a DISH antenna at a Sonic restaurant located in Syracuse, New York (the "worksite"), when two OSHA Compliance Safety and Health Officers,[7] Ashley Irwin and Lydia Calderon, were having lunch across the street from the Sonic restaurant.

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[3] Attached to the complaint and adopted by reference is the citation at issue. (Compl., Ex. A.) Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[4] *See* Compl. ¶¶I-III; Answer ¶¶2-4).

[5] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

[6] Barrett had worked for DISH for eighteen years—the last five years as a field service manager and before that as a field technician. (Tr. 303-04). As a field service manager his duties included training technicians, ensuring safety rules were followed, achieving established performance metrics, and promoting employees. (Tr. 303). Heim worked as a field technician for DISH from 2017 to 2023. (Tr. 193). Heim was a top field technician and had mentored new hires as a DISH coach. (Tr. 305).

[7] "Compliance Safety and Health Officer" means "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. § 1903.22(d). Irwin and Calderon worked in OSHA's Syracuse Area Office.

(Tr. 194-95, 305). The restaurant was roughly 175-200 feet away from the worksite with a parking lot and a two-lane road in between. (Tr. 23, 45, 162).

As Irwin and Calderon waited for their meal, Calderon noticed someone on the roof of the Sonic restaurant across the street. (Tr. 22). She testified that initially she noticed two men on the roof who left the roof soon thereafter. (Tr. 23, 36). About fifteen minutes later, Calderon saw that one man, later identified as Heim, had returned to the roof, and appeared to be working. (Tr. 24, 25, 30, 37, 44). Calderon stated that from her perspective, she could not see the worker's legs below the knee. (Tr. 27, 39). Calderon testified that she did not believe Heim was attached to a fall protection system because she could not see a fall restraint rope attached to Heim. (Tr. 26, 28, 39-40).

Irwin also saw someone wearing a fall protection harness around walking around and looking at the roof's surface as if he were inspecting the roof. (Tr. 57-58). Because they appeared to be inspecting the roof and not performing work, Irwin and Calderon concluded fall protection was not required. (Tr. 23-24, 36). About fifteen minutes later, as their meal arrived at their table, Irwin noticed that a person on the roof, later identified as Heim, was kneeling, and appeared to be working on an antenna that was several feet away from the roof's edge. (Tr. 24-25, 48, 58-59).

At this point, Irwin determined that Heim was not just inspecting the roof but was actively engaged in work and took twelve photographs from her position inside the restaurant. (Tr. 59, 85-88; Ex. P-1, pp. 1-12). The sky in the background of these photographs is overcast and greyish blue. (Ex. P-1, pp. 1-12). Irwin testified she watched from the restaurant and could see there was no fall restraint rope attached to the D-ring on the back of Heim's fall restraint harness. (Tr. 74, 78, 88; Ex. P-1, p. 10). Specifically, Irwin testified, "when I looked across the way when we had been taking photos, Heim had been twisted in a manner that we could see his D-ring and I could see that there was nothing attached to it at the time when I took the photos." (Tr. 74).

Yet, the photographs show a front or side view of Heim, not the middle of his back where the D-ring is located. (Ex. P-1, pp. 1-12). Despite Irwin's testimony that she could see the D-ring on Heim's back, the D-ring is not visible in the photographs. (Tr. 186-87). Irwin also testified that while she was at the restaurant, she believed she saw a parapet wall around the roof but later learned that what she believed was a parapet wall was instead just a short curb a few inches high. (Tr. 71, 186-87; Ex. P-1, p. 8). Irwin's testimony regarding the parapet demonstrates the difficulty in accurately assessing the worksite conditions from a restaurant across the street.

During the trial, Heim reviewed the twelve photographs Irwin had taken from the restaurant and opined it was unlikely one would be able to see whether he was tied off to the fall restraint rope due to the significant distance and limited clarity of the photographs—and further, he opined it was even difficult to see the two-to-three-inch-wide yellow straps of the fall harness he wore. (Tr. 205-07; Ex. P-1, pp. 1-12).

Irwin attempted, by phone, to obtain permission to open an inspection. (Tr. 40, 59). When she could not reach the OSHA assistant area director, they left the restaurant and drove to the area office, which was about four minutes away. (Tr. 46, 59). Once there, OSHA opened an inspection of the worksite, and the Assistant Area Director assigned Irwin to inspect the worksite. (Tr. 27, 46, 59-60). Irwin retrieved her inspection kit and drove to the worksite a few minutes later.[8] (Tr. 28-29, 60, 174). As a result of Irwin's inspection, OSHA issued a citation to DISH on December 15, 2022, alleging a willful violation of the fall protection standard, 29 C.F.R. § 1926.50l(b)(l). The primary issues in dispute are whether Heim used the required fall protection, and if not, whether Barrett, Heim's supervisor, had knowledge that the required fall protection was not being used.

Worksite

The job at the worksite was a day-long assignment that included installing a DISH antenna on the roof, running the connection cable, and aligning the antenna. (Tr. 194-95, 267). The connection cable ran from the antenna on the roof, through a small pipe, into an interior office below. (Tr. 195, 340). Most DISH installations were done by one person; however, because it was a roof-top installation, Barrett assisted Heim in getting the equipment and materials onto the roof. (Tr. 256, 337-38).

That morning, before going to the worksite, Barrett loaded Heim's work truck with the required fall restraint kit (personal fall arrest system) and other equipment needed for the roof-top installation. (Tr. 238, 305, 326). Heim arrived at the worksite before Barrett and conducted a walk-around (site survey) to determine where the DISH equipment would need to be located, assess the area where the installation would take place, and coordinate with the customer. (Tr. 262-63, 307-

[8] The first photograph was time-stamped at 12:16 p.m. (Tr. 174). According to Irwin's field notes only 14 minutes elapsed between the first photograph at the restaurant until she entered the worksite—during that time she drove to the area office, obtained permission to open an inspection and drove to the worksite. (Tr. 46, 59-60, 174).

08, 311). As part of the site survey, Heim also evaluated the interior office to determine how the cable would be fed through the roof, via a pipe, into the office below. (Tr. 195-96, 262, 340).

The ladder to gain access to the roof was at the back of the building. (Tr. 261-62, 309). There was no parapet or wall at the roof's edge, just a ledge or curb that was a few inches high.[9] (Tr. 39, 71-72, 183, 196). To move the materials to the roof, Barrett worked from the ground and Heim worked from the roof. (Tr. 261-62, 309). Barrett placed a strap around each item, which Heim then pulled to the roof with a rope. (Tr. 261-62). Barrett and Heim spent roughly 20 minutes moving the materials and equipment up to the roof. (Tr. 261-62, 309).

While Heim was moving the materials onto the roof, he attached a one-inch diameter grey 25-foot-long fall restraint rope to the D-ring on his harness and anchored it to the pipe near the ladder on the opposite side of the building.[10] (Tr. 106, 196, 207, 242-44, 245, 309-10, 352). The D-ring was in the center back of the harness and was about four to six inches in diameter. (Tr. 207, 242-44). Heim wore his tool belt and suspenders over the fall protection harness and wore his harness at all times that day. (Tr. 196, 207-08, 242).

There were at least three HVAC units on the roof and after the materials were moved onto the roof, Heim moved the anchor point to the HVAC unit closest to the antenna located to the right towards the center of the building, which was within twenty-five feet of where the antenna would be mounted near the front left of the building. (Tr. 196-97, 200, 245-46, 288, 309-10, 356; see also Ex. P-1). Heim used a knot to connect the fall restraint rope to the HVAC unit that served as the anchor point.[11] (Tr. 197-99, 211). About one foot of the rope's length was affected by knotting it. (Tr. 202-03). Heim could reach the areas on the roof where he needed to work while attached to the HVAC anchor point. (Tr. 245).

The antenna was a square box mounted on a pole that was about five feet tall and was installed about six to seven feet from the roof's edge on the front side of the Sonic building. (Tr.

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[9] When a guardrail system is used to protect employees from falling, and there is no wall or parapet that is at least 21 inches high, the employer is required to install midrails, screens, mesh, intermediate vertical members, or equivalent intermediate structural members between the top edge of the guardrail system and the walking/working surface. (*See* 29 C.F.R. § 1926.502(b)(2).

[10] Because Irwin did not take any measurements at the site that day, distances are approximated by the memory of each witness. (Tr. 37, 126, 252, 352, 359). The height of the roof from the ground was measured with a measuring tape after the inspection and prior to the date the citation was issued. (Tr. 72, 79).

[11] Heim learned a few months after the Sonic job that a special device should have been used between the fall restraint rope and the anchor point. (Tr. 200, 274-76).

194-95, 202, 250-51, 264). The pole was on a rubber mat, which was secured to the roof using concrete blocks. (Tr. 212-13). The pipe where the cable was fed into the interior office was about ten feet away from the antenna and the roof's edge. (Tr. 252, 264, 286; Ex. P-1, p. 17).

During the installation, Barrett worked from the office inside and Heim worked from the roof's surface. (Tr. 195-96, 262). Before heading into the office inside, Barrett climbed the ladder to observe Heim. (Tr. 309-10, 325-26). Heim lifted the fall restraint rope to demonstrate to Barrett that he was attached and anchored to the HVAC unit. (Tr. 309-10, 325-26). Because Barrett could not see Heim while he was inside the office assisting Heim in feeding the cable through the roof into the interior, they used phones to communicate with each other. (Tr. 310, 360). Heim clipped and unclipped several times that morning as he returned to the work van for additional tools and equipment. (Tr. 203, 205-06, 228, 239, 241).

OSHA Inspection

When Irwin arrived at the worksite, she saw Heim at work on the roof, approximately fourteen feet above the ground.[12] (Tr. 72, 79, 88-89). Using the zoom feature of her camera, Irwin took four photographs[13] of Heim as she walked from her car to the Sonic building. (Tr. 88-89; Ex. P-1, pp. 13-16). Heim was feeding the cable to Barrett in the office below when Irwin entered the worksite. (Tr. 203-04). Heim was kneeling on the roof's surface with his left side toward the camera in those four photographs.[14] (Tr. 108, 252, 263-64; Ex. P-1, pp. 13-16). The back of Heim's fall protection harness and the D-ring are not visible in the photographs. (Tr. 73; Ex. P-1, pp. 13-16). From her position on the ground, Irwin admitted she could not see whether a fall restraint rope was attached to his fall harness. (Tr. 72, 88-89). Irwin also admitted she did not climb the ladder at any time to see where the restraint rope was anchored. (Tr. 68-69).

[12] While at the worksite Irwin recorded one page of brief field notes, which indicate she entered the site at 12:30 p.m., Heim came down from the roof at 12:37 p.m., and she left the site at 12:49 p.m.—a total of 19 minutes. (Tr. 66, 75, 77, 90-91, 93; Ex. P-2).

[13] Irwin estimated that she was five to seven feet from the building when she took these four photographs. (Tr. 72-73; Ex. P-1, pp. 13-16).

[14] The Secretary asserts that the cable Heim is holding in photograph in Exhibit P-1, page 14, is markedly different in size and shape than the fall restraint rope that extends behind him in the abatement photographs at pages 17-18. (Sec'y's Br. 23). The Court disagrees. There is nothing about the two different lines that look significantly different in the photographs—they both appear to be roughly the same size and color. However, a true comparison cannot be made since Heim is not in the same work position in all the photographs.

When she was a few feet from the building, Irwin called up to Heim and asked him to come down from the roof. (Tr. 61, 72-73, 89). At that time Heim was on the phone with Barrett and he informed Barrett that someone had asked him to come down from the roof. (Tr. 203-04; Ex. P-1, pp. 13-16, 61, 203). As Irwin walked around the building toward the ladder, Barrett came from inside the building and introduced himself to Irwin as the supervisor at the site. (Tr. 61).

Irwin introduced herself and told Barrett that she had "stopped to do an inspection because [she] noticed that the employee on the roof was not connected" to fall protection. (Tr. 61). Irwin asked Barrett to explain why the employee was not connected. (Tr. 62, 73-74, 78). Irwin testified that Barrett responded with "a couple of short statements, something along the lines -- and I don't have it memorized, so I'm going to kind of estimate, but along the lines of '[w]e have a restraint harness. It's up on the roof.'" (Tr. 62). Irwin testified that when she asked Barrett why it wasn't being used, "the statement was, '[w]e didn't take the time to move it' or somewhere along that line. That's not verbatim from my notes, without looking at them." (*Ibid.*) Heim had not yet come down from the roof when Barrett responded to Irwin's question. (Tr. 63).

Irwin's contemporaneous field notes state that she heard Barrett say: "restraint harness up on roof," "tie-off too far" and "didn't take time to move." (Tr. 92, 164; Ex. P-2). Irwin testified that Barrett said the anchor point was somewhere in the middle of the roof. (Tr. 77). However, Barrett did not recall providing information about the location of the anchor point on the roof to Irwin. (Tr. 318, 324).

Barrett noticed that Irwin took notes during the discussion but did not review or read those notes. (Tr. 324). Barrett asked Irwin for details or proof to support her belief that Heim had not been attached to the fall restraint rope. (Tr. 334, 350). Irwin did not respond to his requests for proof. (Tr. 317). Barrett told Irwin that employees had been fired for less. (Tr. 317). During the short discussion with Irwin,[15] Barrett was not shown any of the photographs Irwin had taken at the worksite or from the restaurant. (Tr. 318, 334-35).

When Heim came down from the roof, Irwin asked him for his name and contact information, but never interviewed him and never asked him where the anchor point was located

[15] Irwin's total time at the worksite was 19 minutes. (Tr. 90-91; Ex. P-2). Irwin's short discussion with Barrett consisted of a request for information about corporate contacts at DISH and general fall protection requirements. (Tr. 62-63). She also informed Barrett it was likely a citation for lack of fall protection would be issued to the company. (Tr. 65-66, 74). Barrett then mentioned that people in his company get fired for not following fall protection rules. (Tr. 65-66, 74).

on the roof and never asked him whether he had worked on the roof without fall protection. (Tr. 63-65, 73-74, 178, 265-66). She simply obtained Heim's name and contact information. (Tr. 63-65, 178, 265, 324). Irwin admitted she never attempted to interview Heim or get a written statement from either Heim or Barrett. (Tr. 75-76). Irwin also admitted she never asked Barrett if he knew whether or not Heim was tied off. (Tr. 78). And Barrett testified that Heim never told him he had worked without using fall protection. (Tr. 315).

Heim testified he had the harness on the entire time, that he had a fall restraint rope with him on the roof, which was attached to air conditioner. (Tr. 196). Although at both Heim's deposition and at trial, he could not confirm that he was clipped to a rope in any one of the photos, Heim explained, "I had to take the rope off 20 to 30 times as I was going up and down, moving stuff, setting up equipment." (Tr. 205). "You know, I think at some point we were feeding cable through the hole and the cable broke, and I had to go back to the van." (*Ibid.*) "It was quite the process." (*Ibid.*) This testimony is also corroborated by his testimony that a couple months after the job, he was on a conference call and at that time was told that he had attached the rope wrong, "there was a -- I forgot the name of the device, but it has a big strap on it and a hookable kind of thing that you put the rope through that won't let it go back the other way." (Tr. 200).

Heim asked if he could return to the roof to work, and Irwin said that he could as long he used fall protection. (Tr. 65, 178). Heim returned to the roof, attached to the anchor point and walked over to the area near the antenna. (Tr. 67, 245, 354). Irwin asked Heim to pose for two photographs ("abatement photographs") to demonstrate that he was tied-off. (Tr. 67, 89-90, 157, 244-45, 313; Ex. P-1, pp. 1-2, 17-18).

In the abatement photographs, Heim is standing near the mounted antenna, about ten feet from the roof's edge and facing the camera with his right hand resting on the antenna. (Tr. 89-90, 205-06; 250-51; Ex. P-1, pp. 17-18). Barrett testified Heim walked as far as possible from the attachment point to ensure the rope would be visibly taut for the abatement photographs. (Tr. 354). However, Heim is facing the camera, so again, the D-ring located on the back of his fall protection harness is not visible in the photographs. (Tr. 67, 89-90; Ex. P-1, pp. 17-18).

In reviewing the abatement photographs at trial Irwin testified she saw an outstretched rope or line that seemed to extend away from Heim's back to an unseen anchor point, which appeared to her to be a dark or black rope, about one inch in diameter, the type typically used in fall protection systems. (Tr. 67, 75, 89-90). Irwin did not explain how she determined the details of the rope from

her position on the ground. (Tr. 75). Irwin conceded that the abatement photographs show Heim in a different position and posture than the photographs she had taken from the restaurant— in the photographs taken from the restaurant, Heim was "kneeling, kind of leaned forward, working on the equipment"— in the abatement photographs taken at the worksite Heim is standing near the antenna and facing the camera. (Tr. 108). After the photographs were taken, Irwin left the worksite. (Tr. 69-70). Even though she could not see the anchor point or the D-ring on Heim's back, Irwin believed the two photographs were evidence of abatement—compliance with fall protection requirements—because she saw a rope coming away from Heim's body. Irwin assumed the rope she saw was attached to the D-ring on Heim's back and to an anchor point. (Tr. 67-68, 74-75, 89-90).

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety & Health Rev. Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. § 651(b)). The Act was a "revolutionary piece of labor legislation," *REA Express, Inc. v. Brennan*, 495 F.2d 822, 825 (2d Cir.1974), both remedial and preventative, the broad purpose of which was to assure safe and healthful working conditions for workers. *See* Act § 2(b), 29 U.S.C. § 651(b); *Brennan v. Occupational Safety & Health Rev. Comm'n (Underhill Const. Corp.)*, 513 F.2d 1032, 1038 (2d Cir.1975). And the "duty to insure such safe and healthful working conditions is cast primarily on the employer." *Frohlick Crane Serv., Inc. v. Occupational Safety & Health Rev. Comm'n*, 521 F.2d 628, 630 (10th Cir. 1975).[16]

"To implement the Act's legislative scheme, Congress imposed two duties on employers." *New York State Elec. & Gas Corp. v. Sec'y of Lab.*, 88 F.3d 98, 104 (2d Cir. 1996). "First, an employer has a general duty to 'furnish ... employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to

[16] The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the alleged violation occurred in Syracuse, New York, which is in the Second Circuit, and DISH is a Colorado-based company, which is in the Tenth Circuit.

[its] employees.'" *Ibid.* (quoting 29 U.S.C. § 654(a)(1)). "Second, an employer has a duty to comply with the more specific safety and health standards promulgated under the Act." *Ibid.* (citing 29 U.S.C. § 654(a)(2)).

Further, "Congress provided for the promulgation and enforcement of workplace standards through a comprehensive regulatory scheme. Regulatory responsibilities under the Act are divided between two administrative entities." *Id.* at 103. "The Secretary of Labor exercises rulemaking and enforcement powers, establishing the standards, investigating employers to discover non-complying conduct, issuing citations, and assessing monetary penalties." *Ibid.* (citing 29 U.S.C. §§ 655, 657–59). "The Commission exercises adjudicative powers and serves as the 'neutral arbiter' between the government regulatory body and an employer." *Ibid.* (quoting *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (*per curiam*)). Therefore, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I*, 499 U.S. at 151.

To establish a *prima facie* violation of applicable occupational safety and health standards, the Secretary must show by a preponderance of the evidence that "(a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions). *Jake's Fireworks Inc. v. Sec'y of Labor*, 893 F.3d 1248, 1256 (10th Cir. 2018) (citing *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994)). *See also*, *Walsh v. Walmart, Inc.*, 49 F.4th 821, 827, 2022 WL 4842041 (2d Cir. 2022).

Alleged Violation

The Secretary alleged a willful violation of 29 C.F.R. § 1926.501(b)(1), which mandates in relevant part that "[e]ach employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." 29 C.F.R. § 1926.501(b)(1). The Secretary alleges that DISH "did not ensure that the employee utilized a fall arrest system while the employee was performing an installation on a roof

that had a fall height of 14 feet." (Compl. At 13). DISH asserts the Secretary has not proved a violation of the cited standard or knowledge of a violative condition.[17] (Resp't's Br. 14, 24).

Applicability of Standard

DISH "does not dispute that, based upon the work being performed, the cited standard would apply to the worksite conditions." (Resp't's Br. ¶IV(a) at 14). The antenna was installed on a flat roof with an unprotected edge that was fourteen feet above the next lower level. Therefore, the Court concludes the Secretary has established the cited standard applies to the cited condition.

Employee Exposure

Heim worked approximately six to seven feet from the roof's edge to install the antenna. Heim was exposed to the fall hazard. *See Daniel Int'l Corp. v. Sec'y of Labor*, 705 F.2d 382, 388 (10th Cir. 1983) ("the Commission has determined that the Secretary need show only the existence of the hazardous condition and its accessibility to employees in order to satisfy the burden of proving exposure). The Court concludes the Secretary has established employee exposure.

Whether DISH Violated Standard

The Secretary's proof that Heim was not tied off to an anchor point rests heavily on the photographs taken by Irwin. The Court finds these photographs are not sufficient to demonstrate by a preponderance of the evidence that Heim was not using the fall protection equipment at the worksite. Binding Circuit court and Commission precedent dictate against solely relying on photographs as proof of a violation.[18] Here, twelve photographs in evidence were taken from 175-200 feet away from the worksite when Irwin was across the street in a restaurant, against a cloudy

[17] DISH also asserted the affirmative defense of unpreventable employee misconduct. (Resp't's Br. 32). Because the Secretary failed to prove his *prima facie* case, the Court does not address this defense.

[18] *See Stormforce of Jacksonville, LLC,* No. 19-0593, 2021 WL 2582530, at *8 (OSHRC Mar. 8, 2021) (Commission declined to rely on photograph alone to establish safety monitoring system was not in use); *David Weekley Homes,* 19 BNA OSHC 1116, 1120 (No. 96-0898, 2000) (finding "the photographs submitted in support of this violation simply do not support [compliance officer's] claims regarding the ladder's visibility, let alone the visibility of its violative condition"); *Phoenix Roofing, Inc*., 17 BNA OSHC 1076, 1079 n.7 (No. 90-2148, 1995) (*Phoenix*) (declining to rely on compliance officer's distance estimate that was solely based on a photograph); *see also, Rice v. United States*, 179 F.2d 26, 28 (D.C. Cir. 1949) (noting unreliability of one-dimensional photograph and finding that a photograph can be "deceiving because of the angle at which it was taken and the fact that perspective in two dimensional pictures does not give one an accurate idea of relative sizes and distances without some ascertainable scale to which various objects can be compared.").

overcast sky, which lack the detail to determine whether a one-inch grey rope is present. None of the twelve photographs show the back of Heim's fall protection harness.

The Court concludes these photographs show that neither Irwin nor Calderon could accurately determine whether a fall restraint rope was anchored and attached to the D-ring on Heim's fall arrest harness from their position in the restaurant. Although both Irwin and Calderon believed Heim was not tied off because they could not see a fall restraint rope attached to him from their vantage point across the street, none of the photographs taken from that distance show Heim's back where the D-ring on the fall protection harness is located. The inability to see a one-inch rope from that distance (175-200 feet) does not prove Heim was not using the fall restraint system. Given the distance from the restaurant to the worksite, the Court does not credit Calderon's statement since there was no evidence she even saw the D-ring on the back of Heim's harness, and she never went to the worksite. (Tr. 37).

The Court also does not credit Irwin's testimony. Although Irwin took four photographs from a closer vantage point when she entered the worksite, in these photographs Heim is kneeling on the roof and his back is not visible where the restraint rope attaches. None of the photographs support Irwin's testimony that the fall restraint rope was not attached to the D-ring on Heim's back or to the anchor point. And even though Irwin did visit the worksite, she never went up the ladder to personally observe whether Heim was tied off and never bothered asked Heim if he was tied off. The Court also does not credit Irwin's testimony because she testified that she could see the D-ring on Heim's back from her vantage point inside the restaurant, even though the D-ring is not visible in the photographs she took from that same vantage point inside the restaurant.

On the other hand, the Court found both Barret and Heim to be credible witnesses. The Court credits Barrett's testimony that he climbed the ladder to observe Heim, and that Heim lifted the fall restraint rope to show Barrett that he was attached and anchored to the HVAC unit. The Court also credits Barrett's testimony that Heim never told him he had worked without using fall protection. The Court also credits Heim's testimony. Although at both his deposition and at trial, he could not confirm that he was clipped to a rope in any one of the photos, he explained that he had to take the rope off 20 to 30 times, "as I was going up and down, moving stuff, setting up equipment." (Tr. 205). "You know, I think at some point we were feeding cable through the hole and the cable broke, and I had to go back to the van." (*Ibid.*) "It was quite the process." (*Ibid.*) This testimony is also corroborated by his testimony that a couple months after the job, he was on a

conference call and at that time was told that he had attached the rope wrong. (Tr. 200). The Court concludes the preponderance shows that Heim was attached to the fall restraint system. Therefore, the Secretary has failed to prove the standard was violated.

Whether DISH Had Knowledge

"The Secretary has the burden of showing that the employer knew or, with the exercise of reasonable diligence, could have known of the likelihood of the noncomplying condition or practice." *Austin Bldg. Co. v. Sec'y of Labor*, 647 F.2d 1063, 1067-68 (10th Cir. 1981) (*Austin Bldg.*) (citations omitted); *see also, New York State Elec. & Gas Corp.* (*NYSEG*) *v. Sec'y of Labor,* 88 F.3d 98, 105 (2d Cir.1996) (knowledge under the Act includes all knowledge that "with the exercise of reasonable diligence, [the employer] could have known"). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix,* 17 BNA OSHC at 1079-1080 (citations omitted) *aff'd,* 79 F.3d 1146 (5th Cir. 1996). Actual or constructive knowledge may be imputed to the employer through its supervisory employee. *NYSEG,* 88 F.3d at 105.

Here, it is undisputed that Barrett was at the worksite and that Barrett was Heim's supervisor. Thus, knowledge to DISH may be imputed through Barrett. The Secretary asserts there is actual knowledge because, according to Irwin, during the inspection, Barrett admitted that Heim worked without fall protection equipment. (Sec'y's Br. 24). DISH asserts there is no evidence that Barrett had actual knowledge. (Resp't's Br. 24-25). DISH contends that Barrett did not admit to Irwin during the inspection that Heim was working on the roof without the use of fall protection equipment. (Resp't's Br. 25). And DISH argues Barrett could not have seen from the building's interior whether Heim was attached to the fall restraint rope. (Resp't's Br. 26-27). The Court finds actual knowledge is not proved.

At the beginning of the workday, Barrett observed, from the ladder, that Heim was attached to the fall restraint rope. (Tr. 310, 325-26). Heim lifted the rope to show Barrett that it was attached to the fall protection harness. (Tr. 310, 325-26). After that, Barrett worked from the interior of the building where he assisted with feeding the antenna's cable from the roof to the interior. (Tr. 308). Barrett did not observe Heim working on the roof without the use of fall protection equipment. Further, both Heim and Barrett testified that at no time did Heim tell Barrett that he was not using his fall protection equipment. (Tr. 263, 313-14).

Nonetheless, the Secretary asserts that Barrett's comments to Irwin during the inspection were an admission of knowledge. (Sec'y's Br. 24). The crux of the Secretary's argument relies on the admission Barrett allegedly made to Irwin when she initially approached him at the worksite. However, the Court finds Barrett and Heim more credible on the issue than Irwin. After the alleged "admission" was made, Barrett asked Irwin for details or proof to support her belief that Heim had not been attached to the fall restraint rope. This request for proof contradicts Irwin's statement that Barret admitted Heim was not tied off. And Irwin admitted she never asked Barrett if he knew whether or not Heim was tied off. And none of the photographs taken by Irwin support her assertion that Heim was not tied off.

The Secretary also asserts that Barrett's comments, that employees could be terminated for not using fall protection, proves that Barrett knew Heim was not in compliance. (S. Br. 24; Tr. 65-67, 74). The Court finds no merit in this assertion. All it shows is that Barrett knew that DISH had a no-tolerance policy for fall protection violations and had terminated employees for a breach of that policy. (Tr. 317, 328). Barrett also knew that proof was required before an employee could be disciplined. (Tr. 317). Barrett admitted that he told Irwin that employees have been fired for less; however, Barrett testified those comments were based on Irwin's statement that fall protection was not in use. He testified he had also hoped to gain additional information from Irwin about proof because of the company's disciplinary policy. (Tr. 317).

The Court finds that Barrett's comments about the company's policy of firing employees for fall protection violations were not an admission that he knew that Heim had been working without fall protection. Rather, the evidence shows Barrett had no reason to believe, prior to meeting Irwin, that Heim was working without the use of fall protection. The Court also finds no merit in the Secretary's assertion that DISH had actual knowledge through Barrett. Barrett did not observe Heim working without fall protection and his comments to Irwin do not constitute an admission that he knew Heim worked without fall protection.

As to constructive knowledge, it can be proved if the Secretary establishes DISH, with reasonable diligence, should have known of the violative condition. *See Austin Bldg.*, 647 F.2d at 1067-68; *NYSEG,* 88 F.3d at 105 ("constructive knowledge may be predicated on an employer's failure to establish an adequate" safety program). The Secretary asserts DISH had constructive knowledge because, with reasonable diligence, Barrett could have known that Heim had not used fall protection at all times. Again, the Court finds no merit in the Secretary's position.

Barrett could not see Heim while he was inside the office assisting Heim in feeding the cable through the roof into the interior, and Heim was feeding the cable to Barrett in the office below when Irwin entered the worksite. Before going into the office Barrett climbed the ladder to observe Heim and Heim lifted the fall restraint rope to show Barrett that he was attached and anchored to the HVAC unit. Therefore, the Court concludes that with reasonable diligence, Barrett could not have known that Heim had not used fall protection at all times.

The employer may also defend against constructive knowledge by showing the conduct was not foreseeable. *Austin Bldg.*, 647 F.2d at 1067-68. "Evidence that the employer effectively communicated and enforced safety policies to protect against the hazard permits an inference that the employer justifiably relied on its employees to comply with the applicable safety rules and that violations of these safety policies were not foreseeable or preventable." *Id.*; see also, *Genesis Eldercare v. Sec'y of Labor*, 157 Fed. App'x 476, 478 (3d Cir. 2005) ("Foreseeability can be established by demonstrating the inadequacy of the employer's safety program, training or supervision.") (citations omitted).

The Secretary does not challenge the adequacy of DISH's work rules, training, or disciplinary program (Sec'y's Br. 24-27), and the record reflects DISH's safety program, training, and supervision were robust.[19] Nonetheless, the Secretary insists DISH's supervision of safety at the worksite was not reasonably diligent because Barrett did not continuously verify that Heim was attached to the fall restraint rope at the worksite.[20] (Sec'y's Br. 26-27). The Secretary's premise is faulty.

Reasonable diligence did *not* require DISH to continuously verify Heim was following its safety policy. *See NYSEG*, 88 F.3d at 109 ("[i]nsisting that each employee be under continual supervisor surveillance is a patently unworkable burden on employers"); *see also, Capital Elec. Line Builders of Kan., Inc. v. Sec'y*, 678 F.2d 128, 131 (10th Cir. 1982) ("The Commission

[19] *See* Tr. 220-21, 227, 239, 259, 276-77, 283-84, 305, 320-21, 366-68, 369-72, 374-75, 379, 380, 382-83, 384, 385, 386, 389, 390, 394, 398; see also Ex. R-14, R-16, R-17, R-21, R-22, pp. 1-136, R-23.

[20] Secretary cites *Kokosing Construction Co., Inc.,* to support the premise that reasonable diligence required Barrett to ensure fall protection was in continuous use. 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996) (Sec'y's Br. 28). The comparison is inapt. *Kokosing* does not state that oversight must be continuous; rather, constructive knowledge was found because the condition (uncovered rebar) was readily observable in a well-traveled area where the foreman had been prior to the accident. *Id.* Here, Barrett ascertained compliance at the start of work and was not able to see Heim at the time the Secretary alleges fall protection was not in use.

concedes that the supervisor is not required to actually accompany the employees in the aerial bucket or to oversee their work from below, and indeed such a requirement would be unreasonable."), and *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) ("where the employer maintains an appropriate monitoring or inspection program, the burden is on the Secretary to demonstrate that the employer's failure to discover the violative conditions was nevertheless due to a lack of reasonable diligence").

The Secretary also argues that *Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1869-70 (No. 16147, 1981) supports his assertion that Barrett should have done more on a continuous basis to verify Heim was using the fall protection equipment, such as observing Heim from outside or from the top of the ladder. (Sec'y's Br. 26). This is an inapt comparison. In *Prestressed,* the hazard was a hidden defect in the formwork and the cited standards included a requirement to inspect the formwork. *Prestressed*, 9 BNA OSHC at 1869-70. And the Commission found constructive knowledge based on the admission by a company representative that the violative condition could have been caught during an inspection and that no inspection had been conducted. *Ibid.* This is not comparable to the instant case.

Here, DISH required the use of fall protection, provided the equipment, and trained its employees. Barrett ensured the necessary equipment was available and verified that Heim was tied off as they began work that day. Heim was a trained and experienced employee with no history of work rule violations. DISH had no reason to believe Heim required continuous monitoring for use of fall protection.[21] *Compare LJC*, 24 BNA OSHC 1478, 1481-82 (No. 08-1318, 2014) (instructions sufficient in light of employee's extensive training, experience, and no evidence of safety violations—more specific scaffold instructions not necessary where employer was aware of employee's prior scaffold training) and *Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2088 (No. 06-1542, 2012) (supervision adequate for experienced laborers with no history of violating

[21] The Secretary cites *MPS Products Corp.*, No. 17-0372, 2020 WL 6818467, at **16-17, 23 (OSHRC Oct. 13, 2020) (ALJ) to support his assertion that DISH neglected to take basic steps to ensure safety compliance. (Sec'y's Br. 26-27). *MPS* has no precedential value as it is an unreviewed ALJ decision. *See Leone Constr. Co.,* 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (*Leone*) ("[A] Judge's opinion ... lacking full Commission review does not constitute precedent binding upon us."). Even if it did, *MPS* does not support the Secretary's position. In *MPS,* the judge found that if the foreman looked, he would have seen the obvious condition of the two workers. *Ibid.* Further the judge found the company's overall safety enforcement was lax. *Ibid.* Here, steps were taken to ensure Heim used fall protection. And Heim had no history of prior safety violations. And DISH had a robust disciplinary program that it implemented.

pertinent safety rules), *with Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1502 (no. 98-1192, 2001) (finding impermissible that employer relied on inadequately trained employee to recognize and avoid hazards where there were no specific work rules ensuring work was safely performed) and *Gary Concrete Products, Inc.*, 15 BNA OSHC 1051, 1054-56 (No. 86-1087, 1991) (instructions inadequate in light of insufficiently specific work rules, insufficient training, inability of supervisor to see operation, and employee's safety-deficient work history).

Additionally, the Secretary asserts that Barrett was required to but did not perform a site assessment or complete a hazard analysis form, did not discuss fall protection with Heim that day, did not ensure the fall restraint rope was the proper length for the job, and did not verify the restraint rope was correctly anchored. (Sec'y's Br. 27). The Court finds no merit in any of these contentions. Barrett verified fall protection equipment was available and that Heim was connected to an anchor point. With respect to the fall hazard assessment tool in the DISH safety policy, Williams, DISH's Corporate Risk and Safety Manager, testified that the tool is used when working in the state of Washington, and was not required at this worksite in New York. (Tr. 373). Finally, the allegations that the anchor point, and rope should have been examined by Barrett were not litigated and therefore will not be considered.[22]

The Court concludes the Secretary did not prove a lack of reasonable diligence and thus did not prove constructive knowledge. *See Austin Bldg.,* 647 F.2d at 1068 ("employer justifiably relied on its employees to comply with the applicable safety rules and that violations of these safety policies were not foreseeable or preventable" where safety policies were effectively communicated and enforced). Thus, actual, and constructive knowledge were not proved. And even if it was, the Court concludes the conduct was not foreseeable.

For all the foregoing reasons, the Court concludes the Secretary has failed to establish all the elements of his *prima facie* case because he failed to prove the cited standard was violated and failed to prove DISH had knowledge of the violative condition. Accordingly,

VI. ORDER

IT IS HEREBY ORDERED THAT the citation is **VACATED**.

[22] Without further context that is not in evidence here, the Court concludes Heim's testimony that he had used an incorrect anchoring method does not constitute a failure in DISH's safety program. (Tr. 260, 274-76).

SO ORDERED.

/s/

JOHN B. GATTO, Judge

Dated: March 18, 2025
Atlanta, GA