**United States Court of Appeals**
***For The Eighth Circuit***
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
**St. Louis, Missouri 63102**

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***Acting Clerk of Court***

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October 17, 2024

Richard C. Landon
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RE: 24-3107 MFA Enterprises, Inc. dba West Central Agri Svc. v. OSHRC, et al

Dear Counsel:

We have received a petition for review of an order of the Occupational Safety and Health Review Commission in the above case, together with electronic payment in the amount of $600 for the docket fee. Receipt for docketing fee, if paid by check, will be sent through the mail.

Counsel in the case must supply the clerk with an Appearance Form. Counsel may download or fill out an Appearance Form on the "Forms" page on our web site at www.ca8.uscourts.gov.

The petition has been filed and docketed. A copy of the petition is hereby served upon the respondent in accordance with Federal Rule of Appellate Procedure, 15(c).

Your attention is invited to the briefing schedule pertaining to administrative agency cases, a copy of which will be sent under separate Notice of Docket Activity. The clerk's office provides a number of practice aids and materials to assist you in preparing the record and briefs. You can download the materials from our website, the address of which is shown above. Counsel for both sides should familiarize themselves with the material and immediately confer regarding the briefing schedule and contents of the appendix.

Maureen W. Gornik
Acting Clerk of Court

CMH

Enclosure(s)

cc: Louise McGauley Betts
Tedrick A. Housh III
Nadine N. Mancini
Heather R. Phillips
Ellen Rudolph

District Court/Agency Case Number(s): 21-0725

**Caption For Case Number: 24-3107**

MFA Enterprises, Inc., doing business as West Central Agri Services

Petitioner

v.

Occupational Safety and Health Review Commission; Julie A. Su, Acting Secretary of Labor

Respondents

**Addresses For Case Participants: 24-3107**

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**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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|---|---|---|
| MFA ENTERPRISES INC. d/b/a WEST CENTRAL AGRI SERVICES,<br><br>Petitioner,<br><br>v.<br><br>Occupational Safety and Health Review Commission,<br><br>Respondent. | ) | **PETITION FOR REVIEW**<br><br>**24-3107** |

MFA Enterprises Inc. d/b/a West Central Agri Services, pursuant to 29 U.S.C. § 660 and Rule 15(a) of the Federal Rules of Appellate Procedure, hereby petitions the Court for review of the Decision and Order of the Occupational Safety and Health Review Commission in the matter of *Secretary of Labor v. MFA Enterprises Inc. d/b/a West Central Agri Services*, OSHRC Docket No. 21-0725, which became final on August 22, 2024. A copy of the Decision and Order is attached hereto. Venue is proper in this Court pursuant to 29 U.S.C. § 660 because the alleged violation occurred within this judicial circuit and Petitioner has its principal office in this judicial circuit.



Dated: October 16, 2024

LATHROP GPM LLP

By /s/ Richard C. Landon

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MFA ENTERPRISES INC. d/b/a WEST CENTRAL AGRI SERVICES,<br><br>Respondent. | OSHRC Docket No. 21-0725 |

## NOTICE OF FINAL ORDER

The Respondent's Petition for Discretionary Review in the above cited action was received by the Commission on August 12, 2024. The case was not directed for review. **Therefore, the decision of the Administrative Law Judge became a final order of the Commission on August 22, 2024.** Commission Rules 90(b)(2) and 90(d), 29 C.F.R. §§ 2200.90(b)(2) and 2200.90(d); Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j).

**ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MUST FILE A PETITION FOR REVIEW WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THE ABOVE FINAL ORDER DATE.** *See* Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660; Fed. R. App. P. 15.

FOR THE COMMISSION,

Dated: August 23, 2024

John X. Cerveny
Executive Secretary

DOCKET NO. 21-0725

NOTICE IS GIVEN TO THE FOLLOWING:

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**United States of America**
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MFA ENTERPRISES, INC. d/b/a WEST CENTRAL AGRI SERVICES,<br><br>Respondent. | OSHRC Docket No. 21-0725 |

Appearances:

Seema Nanda, Christine Henri, Evert H. Van Wijk, Dana Hague, Megan McGinnis, Department of Labor, Office of Solicitor, Kansas City, Missouri,
For Complainant

Tedrick Housh III, Ellen Rudolph, Lathrop GPM, LLP, Kansas City, Missouri,
For Respondent

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

## DECISION AND ORDER

This matter is before the United States Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (the Act). On December 31, 2020, a Compliance and Safety Health Officer (CSHO) inspected Respondent MFA Enterprises, Inc.'s facility after an explosion occurred at the site. As a result, the Occupational Safety and Health Administration (OSHA) issued a Citation and Notification of Penalty to Respondent. The Secretary alleges Respondent violated section 5(a)(2) of the OSH Act (29 U.S.C. § 654(a)(2)), by failing to comply with 29 C.F.R. § 1910.132(d)(1)(i). The Secretary alleges this violation was "willful" within the meaning of

section 17 of the OSH Act, 29 U.S.C. § 666, and decisions of the Commission. The proposed penalty is $136,532. Respondent timely contested the Citation. (J. Stip. 15).

The Chief Administrative Law Judge designated this matter for conventional proceedings, and a trial was held on April 3-5, 2023, in Kansas City, Missouri. The following individuals testified: (1) Andrew Schmitt, former Elevator Operator; (2) Corey McMullen, former Elevator Manager; (3) Bill John Umstattd, Elevator Operator; (4) Stanley Thessen, Safety Director at MFA, Inc.; (5) Christina Gibbs, CSHO; (6) Karena Lorek, Area Director (AD) of the Kansas City Area OSHA office; and (7) Dale Guss, Facility Manager.

After the trial concluded, both parties timely filed post-trial briefs, which were considered by the Court in reaching its decision. Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law.

For the reasons discussed, Citation 2, Item 1 is affirmed.

## II. Stipulations & Jurisdiction

The parties stipulated to several matters, including the jurisdiction of this Court over this proceeding and the parties before it. *See* Joint Stipulation Statement (J. Stip.) 1. The parties submitted the Joint Stipulation Statement to the Court prior to trial and entered the stipulations into the record. (Tr. 10). The Court shall incorporate by reference the Joint Stipulations and refer to them as necessary in this decision.

## III. Background

a. The Facility

Respondent was a corporation engaged in bulk farm product warehousing and storage, and one of its facilities was located in Adrian, Missouri (Adrian facility). (J. Stip. 3, 4). Respondent

stored grain in large concrete or steel bins (also called annex bins) near a grain elevator at the Adrian facility. (Tr. 38, Ex. C-9). It also shipped grain from the Adrian facility, which involved "railcar loadout." (Tr. 46). "Railcar loadout" was the process by which grain was transferred, via grain spouts, from the storage bins at the grain elevator onto railcars to be shipped to Respondent's customers. (Tr. 37, 46, 57).

Railcar loadout occurred on one of two railroad tracks that were separate from the main railroad line. (Tr. 50-52; Ex. C-9). The two parallel railroad tracks ran north and south and were referred to as the "east tracks" and the "west tracks." (Tr. 47-49, 52; Ex. C-9). The east and west tracks were adjacent to and on the west side of the grain elevator, with the east track located closest to the elevator and annex bins where the grain was stored. (Tr. 37, 57; Ex. C-9).

Railcar loadout was completed as follows. First, the employee operating the Trackmobile[1] would position the railcars onto the east or west tracks. (Tr. 55, 57). Another employee would then access the top of the railcars, approximately 15 feet off the ground, and open the lids on the railcar roof (typically 4 lids per railcar roof). (Tr. 59-60, 62). There were no physical barriers or railings on the roofs of the railcars. (Tr. 230). Next, the employee operating the Trackmobile would push the railcars along the track, allowing each railcar to receive grain from the grain spouts. (Tr. 55). The amount of grain transferred into each railcar was controlled from the scale house, a building adjacent to the tracks from which an operator could control movement of the grain. (Tr. 47, 56). Once all the railcars were full, the Trackmobile would push the railcars further down the tracks and leave them parked until an employee could close and seal the lids. (Tr. 111).

[1] A Trackmobile was a machine with steel wheels that would roll on the railroad tracks, hook up to the railcars, and push them into place. (Tr. 55, 743).

Generally, railcar loadouts were required approximately four times a week. (Tr. 69, 154). Railcar loadouts typically occurred between 8 AM and 11 AM and took four to five hours to complete. (Tr. 228). On Tuesdays, the busiest day, employees would load up to 20 railcars at a time. (Tr. 110, 228). Opening the lids on a line of railcars took about 30 minutes. (Tr. 78-79, 122). The team tried to complete railcar loadout within the same day. (Tr. 70).

Elevator Operators (Umstattd, Schmitt, and Knipp) and an Elevator Manager (McMullen) handled railcar loadout at the Adrian facility.[2] (Tr. 40; Ex. J-6). Umstattd was the most experienced Elevator Operator, and he most often opened and closed the railcar lids. (Tr. 87, 260). He accessed the tops of the railcars from the scale house via a retractable walkway, although railcars could also be accessed from the ground via a ladder. (Tr. 59, 233). Umstattd's practice was to walk along a catwalk (one to two feet wide) located on the roof of the railcars and open each lid by hand. (Tr. 66-67). After all the lids on one railcar were open, he would step across to the next railcar and repeat the process until all the lids on all the railcars were open. (Tr. 66, 234). Umstattd preferred to open and close all the lids at once to increase efficiency and to make sure he finished the task during daylight hours. (Tr. 234, 236). Opening the lids on 20 railcars took about 30 minutes if the employee opened all the lids at once. (Tr. 78-79).

McMullen usually operated the Trackmobile during railcar loadout. (Tr. 54). As the team lead, McMullen also supervised the day-to-day operations of the team. (Tr. 63, 212). Guss was the Adrian Facility Manager, and he had the authority to supervise and discipline McMullen, Umstattd, Schmitt, and Knipp. (Tr. 42, 148-49, 771-72). Guss had an office located in another building approximately 200 feet from the grain elevator. (J. Stip. 12). He would, several times per

[2] McMullen was no longer employed by Respondent as of October 21, 2020, and Schmitt was no longer employed by Respondent as of February 9, 2021.

month, assist with railcar loadout when the team was short-staffed or there was an issue with one of the railcars. (Tr. 43, 82, 160). Randy Morris was another Adrian Facility Manager, but he was rarely involved with railcar loadout. (Tr. 85). Instead, he was responsible for the financial operations of the Adrian facility. (Tr. 740-41).

Since 2016, the railcar loadout area had in place a fall protection system that consisted of suspended I-beams that ran overhead and parallel to each of the railroad tracks (trolly system). (Tr. 157). A trolley ran along each of the beams and connected to a pulley, body harness, and self-retracting lifeline. (J. Stip. 5). To use the fall protection system, an employee would wear the body harness and connect to the self-retracting lifeline. (Tr. 348-49). The trolley would glide along the beam as the employee moved along the railcars. (Tr. 238). However, the fall protection system's reach was limited to three or four railcars, so it would not allow the operator to walk along all the railcars on the track and open all the lids at once. (Tr. 78; Ex. C-25). Employees complained the harness was uncomfortable, the reach of the system was too short, and the trolley became "gummed up." (Tr. 172, 477; Ex. C-34 at 13-14). At some point, the trolley on the east track had been removed, so the fall protection system could not be used on December 31, 2020. (Tr. 241-43).

b. The Inspection

On December 31, 2020, at 10:46 AM, there was an explosion at the concrete grain elevator at the Adrian facility. (J. Stip. 10). Umstattd had been standing on the roof of a railcar on the east track in the process of railcar loadout. (J. Stip. 11; *See* Ex. J-4, video recording). He was not using any form of fall protection. (J. Stip. 11).

OSHA learned of the explosion through the media and conducted its first inspection of the Adrian facility that afternoon. (Tr. 446). The CSHO spoke with the fire chief and sheriff, reviewed

photos taken with a drone, conducted a walk-around with the fire department, and performed an opening conference with Scott Anderson (the Safety, Environmental, and Regulatory Field Specialist).[3] (Tr. 446). The CSHO returned to the Adrian facility on numerous occasions over a three-month period, at which time she took photos, requested and reviewed documents, conducted interviews, and took measurements. (Tr. 447).

c. Safety, Training, and Work Policies

Respondent's safety program consisted of the following: (1) the Retail MFA Employee Handbook (Employee Handbook); (2) the SHIELD Behavior Based Safety (BBS) program; (3) annual trainings; and (4) a progressive disciplinary policy. (Tr. 301-02, 369, 387, 411, 430). Respondent contracted with a separate entity called MFA, Incorporated (MFAI) to provide safety consulting services.[4] (Tr. 299). Specifically, MFAI's Safety, Environmental, and Regulatory (SER) Department was responsible for implementing a safety program at the Adrian facility, providing safety trainings, monitoring compliance with safety policies, and ensuring compliance with government agencies like OSHA, the Environmental Protection Agency, and the Department of Natural Resources. (Tr. 296, Tr. 296, 299, 305). Anderson was the MFAI SER Field Specialist assigned to the Adrian facility, and he oversaw its safety and compliance programs. (Tr. 322-23).

The Employee Handbook was developed by MFAI, and it stated: "Failure to wear safety equipment or to comply with any safety regulation will result in disciplinary action, up to and including termination even for a first offense." (Tr. 387; R-18, p. MFA000591-MFA000592). The Employee Handbook set forth a progressive disciplinary policy, which required for the first violation a verbal reprimand and formal documentation of the verbal reprimand. (Tr. 430; R-18 at

[3] Another individual named Ken Witt was also present at the opening conference, but the parties do not explain his role at the Adrian facility.

[4] MFAI also provided these services to 10 to 15 of Respondent's other facilities. (Tr. 316).

MFA000592). MFAI also provided to Respondent its corporate safety policies and written job descriptions for use at the Adrian facility. (Tr. 304, 318; Ex. C-13; Ex. C-15).

MFAI also furnished to Respondent an employee-driven program called the SHIELD BBS program to monitor compliance with its safety and work policies. (Tr. 337-38). Employees were asked to observe their peers' compliance with work policies and provide "appreciative" or "coaching" feedback using checklists for various work activities. (Tr. 268, 350-51, 423). According to the Employee Handbook, "There are no names on the observations, no documentation about the personnel subject of the observation. It's about what and why something happens, not who does it." (Ex. R-18 at MFA000593). Since the observed employees were anonymous, the BBS SHIELD program was not necessarily used to discipline individual employees but rather to encourage safe behavior and highlight any recurring safety issues that might require attention. (Tr. 411-15). Participation in the BBS SHIELD program was optional, but employees received a monetary incentive for submitting two observations per month. (Tr. 409).

Employees at the Adrian facility underwent monthly safety meetings as well as annual trainings throughout the year, including a training titled "Walking Working Surfaces," which addressed railcar fall protection and required: "If there is railcar fall protection present, you must use it every time." (Tr. 369, 404; R-5 at 1364). Chase Wrisinger, an MFAI SER Technician, provided the monthly safety trainings.[5] (Tr. 359-60; Ex. C-34 at 8). Anderson monitored compliance with the SHIELD BBS program and made recommendations for safety improvements or corrective action where necessary. (Tr. 322). Anderson visited the Adrian facility once a month or once every two months. (Ex. C-34 at 5). Thessen supervised Anderson, and Anderson would

[5] Wrisinger did not testify at trial.

report to Thessen whether there were deficiencies in a facility's safety program, implementation, or enforcement. (Tr.320).

Guss was charged with ensuring safety policies were followed at the Adrian facility. (Tr. 332; Ex. C-36 at 12). He occasionally walked through the facility to make sure things were running smoothly and check for safety issues. (C-36 at 9). Both Guss and Morris had the authority to discipline employees who failed to adhere to safety rules. (Tr. 335). Although McMullen was the Elevator Manager, he did not have the authority to discipline the elevator operators. (Tr. 345). Instead, he was charged with overseeing the day-to-day operations of the grain elevator and could direct work. (Tr. 336, 345).

Although the Employee Handbook required employees to use any fall protection available to them, employees routinely failed to do so during railcar loadout. (Tr. 76, 80, 240). Despite being the team lead, McMullen also did not wear fall protection during railcar loadout. (Tr. 157-58). McMullen knew other employees were not wearing fall protection while atop railcars, and he reported this to Guss shortly after McMullen was hired as Elevator Manager in 2019. (Tr. 145, 161). McMullen recalled Guss's reply: "Well, it's just how we do things here." (Tr. 165). McMullen had the impression that the Adrian facility had a culture of not seeing railcar loadout as hazardous, so "it just was normal not to wear it. . ." (Tr. 172, 181). None of the elevator operators were formally disciplined for failing to wear fall protection during railcar loadout. (Tr. 174).

Schmitt testified that he never wore fall protection while working atop railcars, and no manager or supervisor ever directed him to wear it. (Tr. 86, 138). He recalled that Guss never wore fall protection when he helped the team with railcar loadout, and Schmitt recalled Guss saying that wearing fall protection was optional. (Tr. 84).

Umstattd admitted he did not wear fall protection unless the railcars were slick or it was windy. (Tr. 243). He explained that the limited reach of the fall protection system did not allow him to open all the railcar lids at once, which was his preference because it helped him complete the task in the daylight. (Tr. 234). Although he recalled Guss telling him on one occasion that "We expect you to use it," referring to the fall protection system, Umstattd did not recall Guss wearing fall protection himself. (Tr. 246-47). After the December 31, 2020 explosion, Umstattd has always worn fall protection during railcar loadout. (Tr. 253).

Morris admitted in an administrative deposition[6] that in 2020, he saw employees not wearing fall protection while conducting railcar loadout. (Ex. C-35 at 7). He warned those employees that fall protection was required and told Guss that he needed to talk to the employees about wearing fall protection. (Ex. C-35 at 7). Morris never documented any verbal discipline. (Ex. C-35 at 7).

Guss testified at trial that he never considered fall protection to be optional. (Tr. 748, 750). However, he believed employees were allowed to open the lids of railcars located outside the reach of the fall protection system. (Tr. 780). He testified that when he helped with railcar loadout, he always wore fall protection. (Tr. 770). He considered his discussion with Umstattd after the explosion to be a form of verbal discipline, but he did not document it anywhere. (Tr. 768). He did not recall Morris telling him that employees were not wearing fall protection. (Tr. 778). He could not recall whether he had ever disciplined anyone at the Adrian facility for safety violations. (Tr. 779).

[6] Morris did not testify at trial.

Anderson stated in his administrative deposition[7] that he was aware employees failed to wear fall protection during railcar loadout. (Ex. C-34 at 14). McMullen alerted Anderson to employees' resistance to wearing fall protection because the trolley system would frequently get gummed up and did not extend far enough to allow employees to open all the railcar lids at once. (Ex. C-34 at 13, 14). Anderson admitted he had seen employees not wearing fall protection while atop railcars. (Ex. C-34 at 14). Nevertheless, he did not audit or conduct surprise inspections to determine whether employees were wearing fall protection while performing railcar loadout. (Ex. C-34 at 14). He did not report the issue to Thessen, his boss. (Tr. 332).

d. OSHA Citation and Notification of Penalty

On June 21, 2021, OSHA issued a Citation alleging one Willful violation of § 1910.132(d)(1)(i) for failure to require its employees to wear personal protective equipment while performing railcar loadout.[8] (Citation at 7). The proposed penalty was $136,532, the maximum penalty for a Willful violation. (Citation at 7; Tr. 601).

The CSHO concluded a fall from 15 feet could cause severe injury or death, so the severity of injury was deemed to be high. (Tr. 603). She determined the probability of injury was greater due to the frequency (at least weekly) with which employees were on top of the railcars without fall protection while opening and closing lids. (Tr. 604-05). The gravity was assessed as high due to severity and probability calculations. (Tr. 527).

The CSHO also considered adjustments for size and prior history. (Tr. 606). She concluded MFAI and Respondent were the same corporate entity for purposes of calculating size. (Tr. 505). She based her conclusion on the fact that Respondent used MFAI's SER Department. (Tr. 510).

[7] Anderson did not testify at trial.

[8] The Citation also alleged six Serious violations, but those items were resolved prior to trial and are not before the Court.

She also based her conclusion on her investigation at the Adrian facility, her discussions with other CSHOs, her review of MFAI's website, and an Internet search about MFAI. (Tr. 510, 517, 519, 521).[9] MFAI's website indicated it had 1,200 employees nationwide, so this is the figure the CSHO used to determine that Respondent was not eligible for a penalty reduction based on size. (Tr. 506, 520-21).

The CSHO considered Respondent's history with OSHA, which could result in a 10% increase in penalty. (Ex. C-1). The CSHO searched OSHA's database for any history with Respondent, MFAI, or any other corporate entities that she believed contracted with MFAI's SER Department: "MFA Farm and Home," "MFA, Inc.," and "MFA Agri Services," among others. (Tr. 510; Ex. C-1). Although the CSHO did find these entities had a prior history with OSHA, a 10% increase did not apply because the penalty was already set at the statutory maximum amount. (Tr. 612). The CSHO did not consider good faith because she claimed OSHA's Field Operations Manual did not permit CSHOs to reduce willful violations for good faith. (Tr. 614).

AD Lorek reviewed the CSHO's recommendation and concluded the following facts supported a willful classification. McMullen was a manager who saw employees working on the tops of railcars without wearing fall protection. (Tr. 598). Anderson, "who worked for corporate," had seen employees working on top of railcars without fall protection and had been warned about the issue. (Tr. 598). Morris had seen employees working on top of railcars without fall protection five to ten times in 2020. (Tr. 598). Guss saw employees working on top of railcars without fall protection and did not correct the behavior. (Tr. 597). Overall, management never removed

[9] The Secretary asks the Court to note that MFAI's website identifies the Adrian facility as one of its 106 company-owned "MFA Agri Services Centers." *See* Sec'y Brief 24. However, that information was never introduced into the record or considered by the CSHO when determining the size of Respondent.

employees from the hazardous condition or required employees to undergo additional training. (Tr. 599). Instead, management allowed the practice to continue. (Tr. 599). She agreed with the CSHO's assessment of gravity, severity, probability, size, history, and good faith. (Tr. 605-613).

## IV. Discussion

To establish the violation of a safety standard under the Act, the Secretary must prove: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at * 6 (OSHRC, Dec. 5, 1994). The Secretary has the burden of establishing each element by a preponderance of the evidence. *The Hartford Roofing Co.*, No. 92-3855, 1995 WL 555498, at *3 (OSHRC, Sept. 15, 1995).

The Citation alleged one Willful violation of 29 C.F.R. § 1910.132(d)(1)(i). The standard requires an employer to assess its workplace to determine if hazards are present that necessitate the use of personal protective equipment (PPE). 29 C.F.R. § 1910.132(d)(1). "If such hazards are present . . . the employer shall [s]elect, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the assessment." 29 C.F.R. § 1910.132(d)(1)(i). The Secretary described the willful violation as follows:

> (d)(1)(i): The employer did not select and have each affected employee use, the types of personal protective equipment that would protect the affected employee(s) from the hazards identified in the hazard assessment.
>
> The employer is failing to protect employees from the hazards associated with falls from heights. This was most recently documented on December 31, 2020, at the worksite located at 438 County Road 11002, Adrian, Missouri. Employees were accessing the tops of rail cars to open and close hatches without the use of fall protection at heights greater than 15 feet.

Citation at 7.

a. The Secretary Established the Standard Applied

The plain language of § 1910.132 requires an employer to perform a hazard assessment and then ensure its employees use the type of PPE identified in its hazard assessment. Here, the record supports a finding that Respondent performed a hazard assessment that resulted in a fall protection system being installed in the railcar loadout area in or around 2016.[10] Respondent acknowledged that work atop railcars presented a fall hazard (Tr. 346), and its work rules required the use of that fall protection. The standard applied.

Respondent, however, argues that even if the standard applied, the Secretary cannot cite Respondent for a violation because: (1) OSHA's jurisdiction over these working conditions is preempted by the Federal Railroad Administration (FRA); (2) the Secretary failed to provide Respondent with fair notice of the application of § 1910.132 to rolling stock; and (3) a more specific standard applied and superseded § 1910.132.

*1. Preemption by the Federal Railroad Administration*

Under section 4(b)(1) of the OSH Act, OSHA's jurisdiction over working conditions of employees may be preempted by another federal agency if that agency "exercise[s] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." *Conrad Yelvington Distrib., Inc*., No. 14-0713, 2016 WL 1377794, at *1 (OSHRC, Mar. 30, 2016) (quoting 29 U.S.C. § 653(b)(1)). In determining whether there is preemption under section 4(b)(1),

[10] Respondent argues that the standard applied only if the Secretary proved the existence of a written hazard assessment. However, OSHA noted that it was not necessary for employers to prepare and retain a formal written hazard assessment. *See* Personal Protective Equipment for General Industry, 59 Fed. Reg. 16334 (Apr. 6, 1994) (to be codified at 29 C.F.R. § 1910). Instead, the agency stated that "OSHA can best determine whether the employer conducted an adequate hazard assessment by inspecting the areas where PPE is required." *Id.* at 16336. In addition, the written certification mandated by the standard simply allowed employers to verify their compliance in the event OSHA alleged it failed to do so. *See id.* That is not the case here.

the Commission considers:

> (1) whether the other federal agency has the statutory authority to regulate the cited working conditions, and (2) if the agency has that authority, whether the agency has exercised it over the cited conditions by issuing regulations having the force and effect of law.

*Id.* (citations omitted).

Respondent argues that walking-working surfaces on railcars are regulated by the FRA, thus preempting OSHA's authority to cite employers. The Commission has recognized that an FRA policy statement published in the Federal Register is an exercise of regulatory authority which, pursuant to section 4(b)(1) of the OSH Act, can exempt certain hazards from OSHA's regulations and enforcement. *Consol. Rail Corp*., No. 91-3133, 1993 WL 119665, at *1 (OSHRC, Mar. 31, 1993) (consolidated). The FRA does not divest OSHA of all jurisdiction over railroad safety and health, but only as to the aspects of railroad safety the FRA has chosen to regulate. *Ass'n of Am. R.R. v. Dep't of Transp.*, 38 F.3d 582 (D.C. Cir. 1994).

In 1978, the FRA published a policy statement explaining the extent to which the FRA intended to exercise its jurisdiction and the "complementary role of OSHA in promoting safe and healthful working conditions for railroad employees." Railroad Occupational Safety and Health Standards and Termination Policy Statement, 43 Fed. Reg. 10583, 105875 (Mar. 14, 1978) (1978 FRA Policy Statement). Among other OSHA regulations, the 1978 FRA Policy Statement referenced the OSHA standards located in Subpart D, which regulates general industry walking-working surfaces, and set forth three exceptions when OSHA could not cite violations under Subpart D. The 1978 FRA Policy Statement did not address personal protective equipment violations cited under OSHA's standards located in Subpart I. Notably, the 1978 FRA Policy Statement did not wholly bar OSHA from regulating the occupational safety and health of railroad employees on an industry-wide basis. *See, e.g. Consol. Rail Corp*., No. 78–2546, 1982 WL 22641,

at *1 (OSHRC, July 30, 1982) (OSHA may require personal protective equipment for noise and eye protection and respirators for chemical exposures at railroad repair shops); *Consol. Rail. Corp.* (*Conrail II*), No. 79-1277, 1982 WL 22612, at *2 (OSHRC, Apr. 30, 1982) (indication that OSHA may require first aid training at railroad repair shops); *Consol. Rail Corp.* (*Conrail III*), No. 80-3495, 1982 WL 22624, at *1 (OSHRC, May 27, 1982) (OSHA may require occupational injury and illness recordkeeping by railroads); *Consol. Rail Corp*., (*Conrail IV*), No. 78-1504, 1982 WL 22615, at *1 (OSHRC, Apr. 30, 1982) (consolidated) (OSHA may require steel-toed shoes at railroad repair shops).

In 1996, OSHA issued a memorandum—written by John B. Miles, Jr., then-Director of OSHA's Directorate of Enforcement Programs—to "clarify OSHA's enforcement policy relating to fall hazards from the top of 'rolling stock' such as rail tank or hopper cars and tank or hopper truck or trailers." (Ex. J-1). The Miles Memorandum first explained that OSHA would not cite—as Subpart D violations—fall hazards from the tops of rolling stock. The Miles Memorandum also stated that OSHA would not cite fall hazards present atop rolling stock under Subpart I—the personal protective equipment standard, 29 C.F.R. § 1910.132(a)—unless that rolling stock was positioned inside or contiguous to a building or other structure where installation of fall protection was feasible.

The Miles Memorandum remains OSHA's enforcement policy position on citing fall hazards present on rolling stock. *See Erickson Air-Crane, Inc*., No. 07-0645, 2012 WL 762001, at *4 (OSHRC, Mar. 2, 2012) (discussing the Miles Memorandum). As discussed in Section IV(a)(3), *infra*, subsequent and proposed rule changes have not altered this enforcement policy. And, the parties have not cited—nor has the Court found—any other FRA policy guidance addressing the exception carved out by the Miles Memorandum. The facts presented in this case fall squarely

within the exception articulated in the Miles Memorandum: a fall hazard present upon railcars positioned adjacent to a structure where installation of fall protection was feasible and, in this case, was actually installed. Accordingly, the Court concludes OSHA's jurisdiction over the cited working condition was not preempted by the FRA.

*2. Fair Notice*

In general, "an employer cannot be held in violation of the [OSH] Act if it fails to receive prior fair notice of the conduct required of it." *Erickson Air-Crane, Inc.*, 2012 WL 762001, at *3 (citation omitted). Section 1910.132(a) is a general performance standard, which is broadly worded to apply to numerous hazardous conditions or circumstances. *Trinity Indus., Inc.*, No. 88-2691, 1992 WL 24122, at *5 (OSHRC, Jan. 23, 1992). "If the duty to comply with the standard is not defined, it could run the risk of being almost indefinitely applicable." *Id.* Due to the far-reaching and broad nature of this standard, in order to prove that the standard applies, the Secretary must establish "either that the employer had actual notice of a need for protective equipment or that a reasonable person familiar with the circumstances surrounding the hazardous condition would recognize that such a hazard exists." *Weirton Steel Corp.*, No. 98-0701, 1999 WL 34813785, at *10 (OSHRC, July 31, 2003). "[E]xternal, objective criteria, such as the knowledge and perceptions of a reasonable person, may define the requirements of the standard in a given situation." *Id.* A court may also consider evidence of industry custom and practice in order to determine whether a reasonable person familiar with the circumstances would perceive a hazard; however, such evidence is "not necessarily dispositive." *Id.; Lukens Steel Co.*, No. 76-1053, 1981 WL 18916, at *8 (OSHRC, Oct. 27, 1981).

Here, Respondent deemed feasible and installed a fall protection system in or around 2016. Similar fall protection systems were in place at other facilities that contracted with MFAI's SER

Department. Respondent had training and work rules in place that required the use of the fall protection system when it was available. Thus, Respondent's argument that it did not have fair notice of the requirements of the standard, i.e., that it should have enforced the use of the fall protection system it installed, is disingenuous.

Moreover, "[t]he touchstone for sufficiency of notice under the due process clause is reasonableness." *Wal-Mart Distrib. Cetr. #6016 v. Occupational Safety and Health Review Comm'n*, 819 F.3d 200, 205 (5th Cir. 2016) (citation omitted). Here, the Miles Memorandum has—for 30 years—articulated OSHA's enforcement policy with regard to fall hazards from atop rolling stock.[11] The circumstances presented in this case fall squarely within the Miles Memorandum exception. In the Court's view, the fall hazard was objectively foreseeable, and Respondent did in fact foresee the hazard when it decided to install the fall protection system. Respondent should have foreseen that it had to ensure employees actually used that fall protection system. The Court concludes Respondent had adequate notice of the applicability of the cited standard.

*3. More Specific and Superseding Standard*

"If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process." 29 C.F.R. § 1910.5(c)(1). Respondent argues § 1910.140 is the more specific and superseding regulation for fall protection that should have been cited because a 2016 final rule rendered obsolete the cited

[11] Although OSHA has at various times sought to clarify its enforcement policy with regard to rolling stock, no final rule has been published that directly addresses the issue. *See* Section IV(a)(3) (discussing rulemaking history). Thus, the enforcement policy articulated in the Miles Memorandum remains.

standard.

For a more specific standard to preempt a more general one, both standards must apply to the cited condition. The Commission has adopted the following test to determine the applicability of any statutory provision. First, the Court must look to "the text and structure of the statute or regulations whose applicability is questioned." *McNally Constr. & Tunneling Co.*, No. 90-2337, 1994 WL 377993, at *2 (OSHRC, July 13, 1994). Then, "[c]ourts may refer to contemporaneous legislative histories of the statute and, if that inquiry does not resolve whether the statutory provision applies, the Court then defers to a reasonable interpretation developed by the agency charged with administering the challenged statute or regulation." *Id.*, *aff'd*, 71 F.3d 208 (6th Cir. 1995).

Regulations that apply to walking-working surfaces are contained in Subpart D of Part 1910 of OSHA's Occupational Safety and Health Standards, called the "Walking-Working Surfaces" Standards. However, OSHA violations related to walking-working surfaces on rolling stock located in or contiguous to a structure where fall protection installation was feasible were cited under Subpart I (Personal Protective Equipment) and, more specifically, § 1910.132 (i.e. the policy articulated in the Miles Memorandum).

In 2016, OSHA issued a final rule revising and updating Subpart D. *See* Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), 81 Fed. Reg. 82494 (Nov. 18, 2016) (to be codified at 29 C.F.R. part 1910) (2016 Final Rule). In the preamble to the 2016 Final Rule, OSHA noted:

> Since [OSHA] did not propose any specific fall protection requirements for rolling stock or motor vehicles, OSHA has not included any in this final rule. However, it will continue to consider the comments it has received, and in the future the Agency may determine whether it is appropriate to pursue any action on this issue.

2016 Final Rule at 82505.

The 2016 Final Rule did not change OSHA's enforcement policy of citing under § 1910.132 fall hazards present on rolling stock if the rolling stock was adjacent to a structure where fall protection installation was feasible. In fact, the 2016 Final Rule expressly stated that OSHA "has not included any" specific fall protection requirements for rolling stock in the final rule. Thus, the 2016 Final Rule did not change how OSHA cites violations under the circumstances in this case. And, the existence of a hazard assessment and installation of a fall protection system as a result of that hazard assessment puts the violation cited here squarely within § 1910.132.

b. The Standard was Violated

The Secretary also established the standard was violated. Umstattd admitted he never used the fall protection system while performing railcar loadout unless weather conditions made the surfaces wet or slick. A video recording of Umstattd showed that he was not wearing fall protection on the day of the explosion. (Ex. J-3). Umstattd's colleagues also testified that the fall protection system was rarely, if ever, used. This establishes the standard was violated by Respondent. *See Clarence M. Jones*, No. 77-3676, 1983 WL 23870, at *3 (OSHRC, Apr. 27, 1983) ("Our cases make clear that merely having protective equipment available at a worksite does not satisfy a standard that requires that this equipment be used").

c. Respondent's Employee was Exposed to a Hazard

The Secretary also established exposure to a hazard. It is undisputed that Umstattd was standing atop a railcar without wearing fall protection at the time of the explosion. This failure to wear fall protection occurred on a regular basis for several minutes a day. Specifically, it took an elevator operator 20 minutes to open the tops of 30 railcars, meaning that the elevator operator would be opening the lids on each railcar for almost one minute per railcar. Since the fall protection system could only reach three to four railcars at a time, an employee deciding not to wear fall

protection was exposed to a fall hazard for up to four minutes, approximately four times a week. That is sufficient to establish employee exposure. *See Pace Constr.*, No. 86-0758, 1991 WL 12007630, at *5 (OSHRC, Apr. 12, 1991) (holding that short duration of exposure was immaterial because the violation was not confined to the particular incident; it was a failure to require the wearing of safety belts "over a long period of time").

d. The Secretary Established Employer Knowledge

"To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Jacobs Field Serv. N. Am.*, No. 10-2659, 2015 WL 1022393, at *3 (OSHRC, Mar. 4, 2015) (internal citations omitted). "Reasonable diligence is based on several factors, including an employer's obligation to inspect the work area, anticipate hazards, take measures to prevent violations from occurring, adequately supervise employees, and implement adequate work rules and training programs." *Id.* The actual or constructive knowledge of a supervisor is imputable to the employer. *Rawson Contractors Inc.*, No. 99-0018, 2003 WL 1889143, at *2 (OSHRC, Apr. 4, 2003).

Testimony elicited at trial reveals management at every level was aware of employees' failure to wear fall protection while atop railcars and did not enforce the rule requiring that fall protection be worn. McMullen, the team lead, testified that there was a culture of not wearing fall protection and believing that standing on top of a railcar was not hazardous. Schmitt and Umstattd corroborated this testimony, admitting they never wore fall protection unless the weather conditions made the railcars slick. Even though he did not have the power to discipline the elevator operators, McMullen directed the team's daily work and activities. His knowledge may be imputed to Respondent. *See M.C. Dean v. Sec'y of Labor*, 505 F. App'x 929 (11th Cir. 2013) (unpublished)

(affirming the Commission's decision that the employee "possessed enough supervisory authority to qualify as a supervisor, most importantly the authority to direct the work of the other team members.").

Guss also knew, or could have known, about the hazardous condition. McMullen and Morris told Guss that elevator operators were not wearing fall protection. (Tr. 161; Ex. C-35 at 7). Guss never disciplined any employees for failing to wear fall protection prior to the explosion. In fact, Guss himself failed to wear fall protection when he assisted the team with railcar loadout, which occurred at least monthly. At a minimum, Guss should have been aware of the practice when he conducted regular walk-throughs of the facility or when he assisted the elevator operators.

Anderson was also told about—and had seen—employees not wearing fall protection. He was charged with corporate oversight of the Adrian facility's safety program. Yet, he failed to inform his supervisor about the issue or take any other affirmative steps to remedy the problem.

In short, McMullen, Guss, Anderson, and Morris were actually aware, or should have been aware, that Adrian facility elevator operators routinely failed to wear fall protection while performing railcar loadout. Indeed, through the exercise of reasonable diligence, management could have discovered the violative actions on the date alleged in this case, December 31, 2020. The practice was prevalent, out in the open, and largely described as part of the culture of the Adrian facility. Knowledge is established and, accordingly, the Secretary proved a violation of the cited standard.

e. Respondent did not Establish Unpreventable Employee Misconduct[12]

Respondent maintains the cited violation was unforeseeable and the result of unpreventable employee misconduct. To establish the defense, Respondent must prove: (1) it had established

[12] In its Answer, Respondent asserted various affirmative defenses, including infeasibility and

work rules designed to prevent the violation; (2) it had adequately communicated those rules to its employees; (3) it had taken steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Am. Eng'g & Dev. Corp.*, No. 10-0359, 2012 WL 3875599, at *3 (OSHRC, Aug. 27, 2012). In other words, it is incumbent upon Respondent to "demonstrate that the actions of the employee were a departure from a uniformly and effectively communicated and enforced workrule [sic]." *Archer-W. Contractors Ltd.*, No. 87-1067, 1991 WL 81020, at *5 (OSHRC, Apr. 30, 1991).

The Commission defines a work rule as "an employer directive that requires or proscribes certain conduct, and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J. K. Butler Builders, Inc*., No. 12354, 1977 WL 35868, at *2 (OSHRC, Feb. 25, 1977). Here, the record demonstrates that Respondent's Employee Handbook required supervisors and employees to "observe the safety regulations, [] use the safety equipment provided, and [] practice safety at all times." (Ex. R-18 at MFA 000591). The Employee Handbook also noted that failure to wear safety equipment would result in disciplinary action. However, it was not clear to employees that the rule to wear fall protection while atop railcars was mandatory. McMullen, Schmitt, and Umstattd all testified that they believed the practice was optional. And, the work rule itself was not specific to fall protection while atop railcars. Thus, Respondent cannot prevail on either of the first two elements of unpreventable employee misconduct.

In addition, Respondent failed to establish it had taken steps to discover violations of the rules and effectively enforced the rules when violations were detected. Guss was responsible for

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greater hazard defenses. Respondent bears the burden of proving its affirmative defenses. *State Sheet Metal Co*., No. 90-1620, 1993 WL 132972, at *6 (OSHRC, Apr. 27, 1993) (consolidated). Respondent does not present arguments related to feasibility or greater hazard affirmative defenses in its post-trial brief, so they are deemed waived.

ensuring the Adrian facility operated safely, yet he testified that he only occasionally walked through the facility. And, while Respondent cites the BBS SHIELD program as evidence that it monitored compliance with safety rules, an employer's responsibility to monitor compliance cannot be achieved through employee self-monitoring alone. *See Stanley Roofing Co., Inc*., No. 03-0997, 2006 WL 741750, at *3 (OSHRC, Mar. 3, 2006) (holding that employer was not reasonably diligent when it largely relied on non-supervisory employees to monitor compliance with safety rules).

Moreover, Respondent did not enforce the progressive disciplinary policy set forth in the Employee Handbook. McMullen and Schmitt testified that no one was ever disciplined for their failure to wear fall protection, and Guss admitted he did not realize verbal warnings had to be formally documented. "Even when a safety program is thorough and properly conceived, lax administration renders it ineffective (and, thus, vitiates reliance on the [unpreventable employee misconduct] defense)." *P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Comm'n*, 115 F.3d 100, 110 (1st Cir. 1997) (finding lack of unscheduled safety audits and no documentation that it ever executed its four-tiered disciplinary policy fatal to employer's affirmative defense). Respondent has not met its evidentiary burden here.

f. Characterization as Willful

"A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference." *First Marine, LLC*, No. 18-1287, 2023 WL 2951422, at *6 (OSHRC, Apr. 6, 2023) (consolidated). "This state of mind is evident when the employer was actually aware, at the time of the violative act, that the act was unlawful, or when the employer possessed a state of mind such that if it were informed of the standard, it would not care." *Id.*; *see also A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d

1341, 1351 (D.C. Cir. 2002) (stating that "conscious disregard" and "plain indifference" are two "alternative" forms of willfulness). "Mere negligence or lack of diligence is not sufficient to establish an employer's intentional disregard for or heightened awareness of a violation." *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1264 (D.C. Cir. 2003).

The state of mind of a supervisory employee may be imputed to the employer for purposes of finding that the violation was willful. *Branham Sign Co*., No. 98-752, 2000 WL 675530, at *2 (OSHRC, May 15, 2000). "[W]illfulness will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible." *Arcadian Corp.*, No. 93-0628, 2004 WL 2218388, at *20 (OSHRC, Sept. 30, 2004) (citations omitted).

The record establishes Respondent had a heightened awareness that fall protection was required in the railcar loadout area. It installed a fall protection system. It had a rule that required employees to use the fall protection system when atop railcars. It provided annual safety training on using the fall protection system. *See Morrison-Knudsen Co*., No. 88-572, 1993 WL 127946, at *25 (OSHRC, Apr. 20, 1993) (holding an employer's safety program establishes heightened awareness of the duties embodied in the cited standards). Respondent's management employees and safety consultant understood fall protection was required during railcar loadout. (Tr. 156, 346, 748, Ex. C-34 at 13, C-35 at 7).

However, the Secretary did not establish that Respondent was "actually aware, at the time of the violative act, that the act was unlawful." *Propellex Corp*., No. 96-0265, 1999 WL 183564, at *8 (OSHRC, Mar. 30, 1999). The requisite state of mind must exist "with regard to the specific circumstances of the violation in issue." *Eric K. Ho*, No. 98-1645, 2003 WL 22232014, at *19 (OSHRC, Sept. 29, 2003) (consolidated), *aff'd*, 401 F.3d 355 (5th Cir. 2005).[13] Here, the Secretary

[13] *Eric K. Ho* was partially overruled on other grounds. *E. Smalis Painting Co., Inc*., No. 94-1979, 2009 WL 1067815, at *35 (OSHRC, Apr. 10, 2009).

did not prove actual knowledge of the violative conduct cited by the Secretary, i.e. Umstattd performing railcar loadout without wearing fall protection specifically on December 31, 2020. (Citation at 12), the date as alleged in the Citation. Upon review, the Court concludes there is no evidence in the record that any of Respondent's management employees had actual knowledge of the violative conduct at the time it occurred.

There is, however, evidence that Respondent acted with plain indifference. "Plain indifference" may be established by showing that the employer possessed a state of mind such that if the employer had known of an OSHA requirement, "the employer would not have cared that the conduct or conditions violated it." *Williams Enters. Inc.*, No. 85-355, 1987 WL 89134, at *9 (OSHRC, Apr. 27, 1987). Evidence of actual knowledge of the violative conduct as it occurred is not required. *See A.E. Staley Mfg. Co*, 295 F.3d at 1351 ("willfulness can be inferred from evidence of plain indifference without direct evidence that the employer knew of each individual violation"); *Caterpillar Inc*., No. 87-0922, 1993 WL 44416, at *23 (OSHRC, Feb. 5, 1993) ("Without such evidence of familiarity with the standard's or the provision's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally, that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it."); *see also Gen. Motors Corp., CPCG Okla. City Plant*, No. 91-2834E, 2007 WL 4350896, at *34 (OSHRC, Dec. 4, 2007) (consolidated) (finding the respondent-company had constructive knowledge of the violative condition, but that it was still willful as there was an "attitude of plain indifference" from which the Commission inferred the company would not have cared even if it knew of the noncompliance.).

Here, there is ample evidence that the Adrian facility harbored a culture of allowing employees to perform railcar loadout without wearing fall protection. The employees understood wearing fall protection to be optional, despite training and company rules to the contrary. However, the Secretary must show more than disregard of company rules. *See Branham Sign Co*., 2000 WL 675530, at *4 ("[A]an employee's disregard of a company safety rule does not automatically establish willful disregard of an OSHA requirement."). The Secretary must show a state of mind that even if the employer knew of the violative conduct, it would not have cared. That evidence is present here.

Anderson, the Safety Manager, knew employees did not use the fall protection system. Yet, he did not conduct additional safety audits or even report the problem to his supervisor. McMullen, the team lead, also knew his crew did not wear fall protection. He credibly testified that he told Guss about the failure to wear fall protection and he recalls Guss saying "that's just how we do it here." McMullen also told Anderson about the issue. Nevertheless, McMullen then failed to wear fall protection during railcar loadout himself, and he never told anyone on his crew to wear it.

Morris also told Guss that he saw employees performing railcar loadout without fall protection. Yet, nothing changed. No one was disciplined. No one performed additional safety walk-throughs or safety audits. The employees were not required to attend additional training on the fall protection system. *See Revoli Constr. Co., Inc*., No. 00-0315, 2001 WL 1568807, at *5 (OSHRC, Dec. 7, 2002) ("When an employer has clear warnings that unsafe practices or conditions persist, and decides to do little or nothing in response, as [the employer] chose to do here, it is strong evidence of willfulness.").

This plain indifference to a known safety issue is only bolstered by Guss's testimony that he did not remember McMullen or Morris discussing their concerns with him. *Cf. Stanley Roofing*

*Co., Inc.*, No. 03-0997, 2006 WL 741750, at *4 (no willfulness where employer "made a tremendous effort to work more safely" after superintendent notified employer of employee failure to wear fall protection). Guss's failure to recall conversations in which he was warned about issues with employees wearing fall protection supports a conclusion that even if management had known of the violative conduct, it would not care.

Respondent argues that its good faith efforts to abate the fall hazard precludes a finding of willfulness in this case.[14] "The Commission, and many circuit courts, have long held that a violation is not willful if the employer shows that it exhibited a good faith, reasonable belief that its conduct conformed to law, or it made a good faith effort to comply with a standard or eliminate a hazard." *Jim Boyd Constr., Inc*., No. 11-2559, 2016 WL 8201805, at *3 (OSHRC, Nov. 16, 2016). The employer bears the burden of establishing good faith. *See N. Landing Line Constr. Co.*, No. 96-721, 2001 WL 826759, at *14 (OSHRC, July 20, 2001) ("[Employer] had the burden of proving that [its superintendent] had an objectively reasonable good faith belief that the violative conduct conformed to the requirements of the Act.").

Here, Respondent installed a fall protection system to be used during railcar loadout and had rules mandating its use. However, a good safety program and the provision of safety equipment is insufficient to negate willfulness where the employer fails to enforce safety rules. *See Elliot Constr. Corp.*, No. 07-1578, 2012 WL 3875594, at *8 (OSHRC, Aug. 28, 2012) (no good faith where "record is devoid of evidence that the company ever enforced its rules by disciplining those who violated them"). There was a culture of not wearing fall protection during railcar loadout. This culture was reinforced by Guss, who never disciplined any employees for failing to wear fall

[14] The Court notes the CSHO did not consider good faith because OSHA's Field Operating Manual purportedly does not allow consideration of good faith for violations classified as willful. This is in direct contravention of Commission precedent.

protection during railcar loadout. And, even after the incident at issue, he did not formally reprimand Umstattd for violating the rule. Accordingly, Respondent has not established good faith, and the Court affirms the violation as willful. *See Weirton Steel Corp.*, No. 98-0701, 1999 WL 34813785, at *8 (OSHRC, July 31, 2008) (although employer provided safety equipment, employees understood safety rules, and employer demonstrated a concern for employee health, no good faith because employer nevertheless allowed employees to be exposed to known hazard); *Gen. Motors Corp., CPCG Okla. City Plant*, No. 91-2834E, 2007 WL 4350896, at *38 (OSHRC, Dec. 4, 2007) (in finding a willful violation, the Commission noted there was no evidence in the record to show the respondent-company could have believed its employees' activities conformed to the lockout/tagout standard's requirements at the time work was being performed, that no supervisor was present at the time of the violation, and that the company's standard practice was to perform servicing and maintenance without utilizing lockout/tagout).

g. Penalty

In calculating appropriate penalties for affirmed violations, section 17(j) of the OSH 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 Constr. Co.*, No. 87-2059, 1993 WL 61950 (OSHRC, Feb. 19, 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.*, No. 93-0239, 1995 WL 139505, at *3-4 (OSHRC, Mar. 29, 1995), *aff'd*, 73 F.3d 12466 (8th Cir. 1996); *Allied Structural Steel Co.*, No. 1681, 1975 WL

4613, at *2 (OSHRC, Jan. 7, 1975). The Court notes that since the violation has been recharacterized as Serious rather than Willful, the maximum penalty that may be assessed changes.

"Gravity is typically the most important factor in determining an appropriate penalty and depends upon the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Capform, Inc*., No. 99-0322, 2001 WL 300582, at *4 (OSHRC, Mar. 26, 2001). Here, employees were exposed to a height of 15 feet several times a week. Even if that exposure was relatively brief and only one employee was exposed at any given time due to the nature of the task, the Court issues a finding of high gravity due to the frequency of the exposure paired with seriousness of potential injury from a fall. *See Agra Erectors, Inc*., No. 98-0866, 2000 WL 1239811, at *3 (OSHRC, Aug. 31, 2000) ("an employer will not be credited for the fact that only one employee was exposed to a hazard where only one employee is required to perform the work and the size of the work area itself limits the opportunity for employee exposure").

Next, the Court considers Respondent's size. The Commission has viewed the size factor as "an attempt to avoid destructive penalties" that would unjustly ruin a small business. *A-1 Sewer and Water Contractors, Inc*., No. 21-0562, 2022 WL 2102909, at *12 (OSHRC, June 1, 2022). However, this concern for small businesses must be tempered with the need to achieve compliance with applicable safety standards. *Atlas Roofing Co. v. OSHRC*, 518 F. 2d 990, 1001 (5th Cir. 1975) (OSHA penalties are meant to "inflict pocket-book deterrence").

The Secretary essentially considered Respondent and MFAI to be a single employer for purposes of determining size and thus bears the burden of "establishing that the cited entity is part of a single employer relationship." *Freightcar Am., Inc*., No. 18-0970, 2021 WL 2311871, at *5 (OSHRC, Mar. 3, 2021). "The factors relevant to this inquiry include whether the two entities

share a common worksite, are interrelated and integrated with respect to operations and safety and health matters, and share a common president, management, supervision, or ownership." *Id*.

There is limited evidence that Respondent and MFAI were a single employer. Admittedly, both entities use the same SER Department for safety and regulatory compliance. In addition, Anderson—an MFAI employee—participated in the opening conference with the CSHO. And, Thessen—another MFAI employee—served as Respondent's corporate representative during discovery. However, it was reasonable for Anderson to be present at the opening conference and for Thessen to answer discovery requests on Respondent's behalf given the contractual relationship between Respondent and MFAI. Moreover, the Secretary offered no evidence that MFAI "shared" the Adrian facility or had a common president, management team, supervision, or ownership. In fact, Thessen testified under oath that the corporations were legally separate and distinct entities. The Court also notes that when the CSHO was pressed about how she reached her conclusion that Respondent and MFAI were a single employer, she stated that she relied on her internet search and retorted that she was not a corporate investigator. That is not enough.

The Secretary has not met her burden for the Court to consider Respondent and MFAI a single entity for purposes of calculating size. Respondent contends it had 140 employees during the relevant time frame. Resp't Answer 2. OSHA would generally grant an employer with 140 employees a 10% reduction in penalty. (Tr. 665). Accordingly, the Court will apply a 10% reduction in penalty for size.

Good faith should be determined by a review of the employer's own occupational safety and health program, its commitment to the objective of assuring safe and healthful working conditions, and its cooperation with other persons and organizations seeking to achieve that objective. *Nacirema Operating Co., Inc*., No. 4, 1972 WL 4040, at *2 (OSHRC, Feb. 7, 1972). As

noted previously, the record shows that although Respondent had written work policies, a BBS SHIELD program, and annual training, safety rules were not enforced. Moreover, employees testified that they never wore fall protection and that there existed a culture of not wearing fall protection while performing railcar loadout. These are significant failings on the part of the employer and its implementation of a safety program. *See Elliot Constr. Corp*., 2012 WL 3875594, at *9 (concluding that "significant failings" with respect to employee safety negated a penalty reduction for good faith); *see also Gen. Motors Corp., CPCG Okla. City Plant*, 2007 WL 4350896, at *38 (giving no credit for good faith when management tolerated and encouraged hazardous work practices). Accordingly, the Court will not reduce the penalty for good faith.

Lastly, the Court considers any history of violations. The CSHO found prior violations assessed against entities the CSHO believed were related to Respondent. However, the Secretary did not establish that the various MFA entities were a single employer such that their employees or violation histories could be considered in adjusting the penalty. Accordingly, the Court will not assess an increase in penalty for history.

The maximum statutory penalty for a citation alleging a willful violation issued on June 21, 2021 is $136,532. *See* Department of Labor Federal Civil Penalties Adjustments Act Annual Adjustments for 2021, 86 Fed. Reg. 2964, 2969-70 (Jan. 22, 2021) (to be codified at 29 C.F.R. 1903). The Court will award a 10% decrease in penalty for size but will not adjust the penalty for history or good faith. Accordingly, the Court will assess a penalty of $122,878.80.

## ORDER

This Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure and Commission Rule 90(a). Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 2, Item 1 is

AFFIRMED as a willful violation of 29 C.F.R. § 1910.132, and a penalty of $122,878.80 is ASSESSED.

**SO ORDERED.**

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

Date: July 9, 2024
Denver, Colorado