United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. CUSTOM HOUSE
721 19TH STREET, ROOM 407
DENVER, COLORADO 80202-2517

SECRETARY OF LABOR,

Complainant,

v.

FINLEY FARMERS GRAIN & ELEVATOR,

Respondent.

OSHRC DOCKET NO.: 24-0889

ORDER ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the Court on Respondent's *Motion for Partial Summary Judgment* (Motion). The Secretary[1] filed a response in opposition (Response). Upon careful consideration and for the reasons set forth below, the Court GRANTS the Motion. The rulings in this Order shall be deemed the law of the case. *United States v Harris*, 546 F. App'x 898, 900 (11th Cir. 2013) (an issue decided at one stage of a case is binding at later stages of the same case).

[1] The Secretary of Labor has assigned responsibility for enforcement of the Occupational Safety and Health Act to the Occupational Safety and Health Administration and has delegated its 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 Auth. & Assignment of Responsibility to the Assistant Sec'y for Occupational Safety & 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) & 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

Background

The following facts are undisputed for purposes of this Motion. Respondent, Finley Farmers Grain & Elevator (Finley), operates a grain elevator in Finley, ND, where it stored grain and distributed it to customers. Empty railcars were delivered by BNSF Railway to the Finley facility and placed down track, approximately 300 yards away from the loadout facility. Finley employees then performed loading preparation work on top of the railcars before the railcars were moved to the loadout facility to be filled with grain. Finley employees performed these activities without the use of fall protection.

On December 4, 2023, a Finley employee fell from the top of a railcar while preparing the railcar to be loaded with grain. The railcar was positioned approximately 300 yards away from the elevator structure, i.e. the loading facility. Finley reported the accident to the Bismark Area Office (Area Office) of the Occupational Safety and Health Administration (OSHA), and an inspection was initiated on December 6, 2023.

After completing its inspection, OSHA issued a Citation and Notice of Penalty (Citation) to Finley for one Serious violation[2] and one Willful violation, with combined penalties totaling $120,993. Citation 2, Item 1, which is the Willful Citation Item at issue in this Motion, cited Finley for the failure to provide and require personal protective equipment when an employee was exposed to falls, pursuant to 29 C.F.R. § 1910.132(a). In the alternative, OSHA cited Finley under section 5(a)(1) of the Occupational Safety and Health Act ("section 5(a)(1)" or "General Duty Clause").

[2] The serious citation is not in issue in this Motion. The Parties have advised the Court this Citation Item has not been settled.

This Order will set forth the relevant legal standards, the regulatory framework applicable to this case, and the Parties' positions, The Court will discuss the primary basis of citation (§ 1910.132(a)) and the secondary basis of citation (General Duty Clause). Then, the Court will evaluate whether Finley has a duty to move its railcars within reach of the fall protection system it had in place. Lastly, the Court will evaluate Finley's arguments regarding fair notice.

Summary Judgment Standard

The Court's resolution of the present dispute is limited to the sole issue of whether genuine issues of material fact remain such that partial summary judgment is inappropriate. In resolving a motion for summary judgment, a judge does not decide factual disputes; rather, the role of the judge is to determine whether any material factual disputes exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (2005). The Court has reviewed the Motion, the Secretary's Response, accompanying arguments, and exhibits and finds there are no disputed issues of material fact which prevent summary judgment on the legal issues presented. The rulings in this Order shall be deemed the law of the case. *United States v. Harris*, 546 F. App'x 898, 900 (11th Cir. 2013) (an issue decided at one stage of a case is binding at later stages of the same case).

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and demonstrating the absence of a genuine issue of material fact as to the issue(s) raised. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To prevail on a motion for summary judgment, there must be no genuine dispute as to any material fact, and the moving party must be entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *see also* 29 C.F.R. § 2200.40(g)(j) (motions for summary judgment governed by Fed. R. Civ. P. 56); *Ford Motor Co. – Buffalo Stamping Plant*, 23 BNA OSHC 1593, 1593 (No. 10-1483, 2011). In making

such a determination, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 83 (2d Cir. 2006). If there is any evidence in the record from which a reasonable inference in favor of the nonmoving party can be drawn, summary judgment is improper. *Celotex*, 477 U.S. at 324. Conversely, if a review of the entire record could not lead a rational trier of fact to find for the nonmoving party, then there is no genuine issue for trial, and summary judgment is appropriate. *Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

As to whether a fact is "material," the Supreme Court has stated:

> [T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *See generally* 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93–95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

Anderson, 477 U.S. at 248.

Under Federal Rule of Civil Procedure 56(c)(1), a party to a summary judgment motion "asserting that a fact cannot be or is genuinely disputed must support the assertion," and if a party "fails to properly address another party's assertion of fact as required by [Fed. R. Civ. P.] 56(c), the court may . . . consider the fact undisputed for purposes of the motion . . . ." FED. R. CIV. P. 56(e)(2). A nonmovant cannot, in other words, overcome summary judgment merely based on the

possibility that material facts it has not yet identified exist; instead, it must "present facts essential to justify its opposition" (unless it shows "by affidavit or declaration" that such facts are not yet available to it "for specified reasons"). Fed. R. Civ. P. 56(d); *see also Celotex*, 477 U.S. at 324 (the nonmovant must "designate specific facts showing that there is a genuine issue for trial").

The Court finds there are no material factual disputes which prevent the entry of summary judgment on the legal issues presented for resolution.

Personal Fall Protection Standard

OSHA's personal protective equipment (PPE) requirements for general industry employers are contained in Subpart I of Part 1910 of the Code of Federal Regulations, 29 C.F.R. § 1910.132. Section 1910.132 contains several requirements for personal fall protection systems. Relevant to this Citation and Motion, § 1910.132(a) provides:

> Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

29 C.F.R. § 1910.132(a). Section 1910.132(d) similarly provides:

> The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:
>
> . . .
>
> (i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment

29 C.F.R. § 1910.132(d). In the notice of final rulemaking for these provisions, OSHA explained that "§ 1910.132(a) requires employers provide, use, and maintain PPE, including personal fall

protection systems, in a reliable condition," while "§ 1910.132(d) requires employers to perform a hazard assessment" and select the appropriate PPE for the work. Walking-Working Surfaces & Personal Protective Equip. (Fall Protection Sys.), 81 Fed. Reg. 82494, 82617 (Nov. 18, 2016) (to be codified at 29 C.F.R. pt. 1910).

The Miles Memo

On October 18, 1996, OSHA's Director of Enforcement Programs issued a Memorandum to Regional Administrators entitled *Enforcement of Fall Protection on Moving Stock* (Miles Memo).[3] (*See* Motion, Ex. A, Miles Memo). The reason for the issuance of the Miles Memo was the ambiguity and uncertainty of the regulation as to how the fall protection and personal protective equipment regulations (Subparts D and I of the OSH Act) applied to "rolling stock,"[4] where use of a fall protection system or personal protective equipment for fall protection may not be feasible. The Miles Memo stated because OSHA's existing general industry fall protection standards did not specifically address fall hazards from the tops of rolling stock, "the enforcement policy of the Agency . . . is that falls from rolling stock also will not be cited under Subpart D." *Id.* The Miles Memo further stated, in relevant part:

> Additionally, it would not be appropriate to use the personal protection equipment standard, 29 CFR 1910.132(d), to cite exposure to fall hazards from the tops of rolling stock, unless employees are working atop stock that is positioned inside of or contiguous to a building or other structure where the installation of

[3] The Miles Memo is listed as a "Standard Interpretation" on OSHA's website. *See* https://www.osha.gov/laws-regs/standardinterpretations/publicationdate/1996) (last visited on July 1, 2025).

[4] The railcars at issue are "rolling stock." *See* Walking-Working Surfaces & Personal Protective Equip. (Fall Protection Systems), 81 Fed. Reg. at 82505, fn. 4 ("OSHA defines 'rolling stock' as any locomotive, railcar, or vehicle operated exclusively on a rail or rails[.]").

> fall protection is feasible. In such cases, fall protection systems often can be and, in fact, are used in many facilities in the industry.

(*Id.*). The Miles Memo also addressed the applicability of the General Duty Clause to fall hazards on rolling stock, as follows:

> The General Duty Clause, Section 5(a)(1) of the OSH Act, requires an employer to provide employees with a workplace that is free from hazards that are recognized by the employer's industry and that are likely to cause death or serious physical harm. Thus, where feasible means exist to eliminate or materially reduce the hazard, a citation can be issued for a Section 5(a)(1) violation.

(*Id.*).

The fall protection standard at Subpart D subsequently underwent a rulemaking process that resulted in a new final rule issued in November 2016. *See* Preamble for Walking-Working Surfaces & Personal Protective Equip. (Fall Protection Sys.), 81 Fed. Reg. 82494. During the course of rulemaking, OSHA solicited stakeholder comments about the feasibility of fall protection equipment for work on top of rolling stock to determine whether to change fall protection requirements for work atop rolling stock. However, after considering all public comments on the subject of rolling stock fall protection, OSHA decided not to change its longstanding requirements or enforcement policies related to rolling stock fall protection. *See id.* at 82926 ("[T]his Final Rule does not include any requirements for fall protection on rolling stock . . . and OSHA's current existing enforcement policies on rolling stock . . . will remain in effect.").

The Miles Memo remains the Secretary's guidance for how OSHA is permitted to enforce its regulations and cite employers regarding rolling stock and fall hazards when the rolling stock is not located in a facility or located next to a facility.. (Motion, Ex. J, Req. to Admit, No. 18;

Motion, Ex. D, Overson Dep. at 86:11-18).[5] In practice, the Miles Memo operates as an exemption to the application of § 1910.132(a), and a respondent has the burden of proof to establish it has met the requirements of the exemption. *C. J. Hughes Constr. Inc*., No. 93-3177, 1996 WL 514965, at *4 (OSHRC, Sept. 6, 1996).

Erickson Air-Crane, Inc.

Erickson Air-Crane, Inc., No. 07-0645, 2012 WL 762001 (OSHRC, Mar. 2, 2012) is a long-standing Commission case which interpreted and applied the Miles Memo in the context of a General Duty Clause citation for activities involving rolling stock. It directly addresses and controls some of the issues in this case.

In *Erickson Air-Crane*, the Secretary cited an employer for a violation of the General Duty Clause for failure to provide fall protection when an employee fell while retrieving spare helicopter parts from the top of a fuel tanker truck. *Id.* at *1. The employer asserted it lacked notice that it was required to provide personal fall protection to employees working on the fuel tanker. *Id.* at *4. The Secretary argued the Miles Memo provided the employer with requisite notice because the Miles Memo expressly allowed OSHA to cite employers for fall protection violations where installation of fall protection was feasible (for instance, when rolling stock was contiguous to a

[5] The Miles Memo remains effective OSHA interpretive policy despite Area Director Scott Overson's (Overson) deposition testimony, in which he said he was not in total agreement with the long-standing established policy. Specifically, when asked whether he disagreed with the Miles Memo, Overson said: "I think it's a 30-year-old interpretation; that times have changed." (Motion, Ex. D, Overson Dep. at 91:12-17). Overson views the Miles Memo as "just more of a guidance document," and did not admit it was binding guidance on OSHA. (Motion, Ex. D, Overson Dep. at 91:22-92:3). When asked his opinion whether the Miles Memo should be archived or replaced, Overson testified that he thought "all interpretation[s] should be evaluated after 10 years." (Motion, Ex. D, Overson Dep. at 99:14-17). The Secretary, in her Response, states Overson's views do not represent the positions of the Secretary. (Sec'y Resp. at 5).

building or structure). *Id.* The Secretary argued the fuel tanker had brackets on the roof to which fall protection could be affixed. *Id.* The Secretary argued since it was feasible to install fall protection on the fuel tanker, the employer should have known from the Miles Memo that it could be cited under the General Duty Clause. *Id.*

The Commission rejected the Secretary's arguments, reasoning the employer's fuel tanker did not fit the narrow exception to issue a citation contained in the Miles Memo's broad exemption for rolling stock from the fall protection standards; namely, the fuel tanker was not located contiguous to a building for the Secretary to issue a citation. *Id.* at *5. Furthermore, the Commission found the Miles Memo's reference to the General Duty Clause only indicated that employers would need to take "administrative measures[6] that reduce fall exposure, which are clearly distinct from the fall protection methods" the Secretary had sought. *Id.* And, the Commission held that the Miles Memo did not provide employers with fair notice of any duty to use fall protection equipment under the circumstances of the case. *Id.* at *5.

Finley's Positions

Finley argues partial summary judgment is proper for the following reasons: (1) the Secretary cannot cite Finley under the General Duty Clause because it is preempted by a specific OSHA standard; (2) Commission precedent establishes the General Duty Clause does not require fall protection equipment to address fall hazards on rolling stock; (3) section 1910.132(a) cannot be used as a basis for citing Finley; (4) neither § 1910.132(a) nor the General Duty Clause requires

[6] The Commission listed examples of administrative methods that might reduce fall exposure, including: (1) guarding against icy conditions, heavy rains and wind by determining if the tops of rail cars are free from such hazards; (2) assessing an employee's physical ability; and (3) providing adequate training. *Id.* at *4 n.11.

Finley to move the railcars to the loading facility within reach of the existing fall protection system before performing loading operations; and (5) the Secretary did not provide fair notice to Finley or the rest of the regulated community of an expansion of its enforcement authority to include the circumstances at issue in this case.

The Secretary's Positions

The Secretary does not argue, at the time of the incident, the railcars on which Finley's employees were working were not located contiguous to any structure. This is a material fact and is at the crux of this case. Instead, the Secretary takes issue with what she views as Finley's intentional unsafe practice of allowing employees to open lids down track away from the elevator structure. The Secretary contends Finley is avoiding using the fall protection system installed at the loading facility.

As to the Motion, the Secretary argues: (1) Finley is not entitled to partial summary judgment on the primary specific citation, § 1910.132(a); (2) the Miles Memo does not bar the Secretary from issuing a Citation under § 1910.132(a); (3) Finley had fair notice it could be cited under § 1910.132(a); (4) the General Duty Clause is appropriately cited in the alternative; (5) the Miles Memo does not bar Finley being cited under the General Duty Clause; and (6) Finley had adequate notice it could be cited under the General Duty Clause.

Discussion

As noted, Finley asserts several grounds for partial summary judgment. The Court will address each in turn.

1. The Primary Basis for Citation – Section 1910.132(a)

The Citation Item at issue in this case is primarily based on an alleged violation of § 1910.132(a). The alleged violation description (AVD) reads as follows:

> 29 CFR 1910.132(a): Protective equipment, including personal protective equipment, was not used wherever it was necessary by reason of hazards of processes that were capable of causing injury or impairment.
>
> * * *
>
> (a) On December 4, 2023, and at all times prior, at 503 Broadway Ave, Finley, North Dakota, the employer did not ensure employees were using personal protective equipment when exposed to falls of greater than 15 feet while working atop railcars opening lids for loading operations.

(Citation at 7).

Finley argues the Miles Memo, which has been in place for nearly 30 years, expressly prohibits OSHA from citing an employer under § 1910.132(a) where rolling stock was not located contiguous to a structure. The Secretary, however, argues § 1910.132(a) applies to work being performed atop rail cars where the use of fall protection was feasible, *i.e*. the loading facility was equipped with fall protection systems and therefore it was feasible to move the rolling stock next to it before beginning work. Specifically, she claims the Miles Memo does not contemplate a situation where the employer has a loadout facility equipped with a fall protection system but, rather than have its employees use it, the employer instead allows them to perform work atop railcars 300 feet away. The Secretary maintains the Miles Memo was focused on situations where installation of fall protection would not be feasible, which does not apply here. In short, the

Secretary believes Finley's reading of the Miles Memo improperly creates a loophole that allows Finley to avoid using its existing fall protection system.[7]

The Court is cognizant of the Secretary's concerns here. However, the Secretary is, in essence, seeking the authority to disregard her own interpretative ruling at her discretion. While it is true § 1910.132(a) applies to protect employees from fall hazards, it is also true the Miles Memo sets forth an exemption to § 1910.132(a): if a railcar is not located in or adjacent to a building or structure, fall protection regulations do not apply.

In this case, we are dealing with rolling stock located 300 feet away from any structure. The Miles Memo, which is interpretive guidance issued by the Secretary herself and still in effect, makes it clear that unless employees are working atop rolling stock that is positioned inside of or contiguous to a building or other structure (where the installation and use of fall protection was feasible), § 1910.132(a) would not apply. Reviewing the facts in a light most favorable to the nonmoving party, the exemption in the Miles Memo applies to the circumstances here.

The Secretary asks the Court to disregard the Miles Memo, arguing that "OSHA policy memos do not supersede the law." (Sec'y Resp. at 11). The Court rejects this argument outright. The Secretary misunderstands the use, importance, and impact of Interpretive Rulings, Letters, or Memos (collectively, Interpretive Rulings) by federal agencies. Interpretive Rulings are commonly used by federal agencies to provide fair notice to a regulated community where a regulation is ambiguous when applied to a particular situation. The Supreme Court has recognized the importance of agency interpretations of ambiguous regulations, and, throughout the years, has

[7] The Secretary also raises arguments regarding notice, due process, and feasibility. Those arguments will be addressed later in this Order.

addressed what deference a court should give to an agency interpretation of its own ambiguous standards. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452 (1997); and, most recently, *Kisor v. Wilkie,* 588 U.S. 558 (2019). When the Secretary issues an Interpretive Ruling there is a reason for its issuance. And upon issuance, she cannot, based on her whim, ignore such interpretation when it does not support her position. Such action would be arbitrary and capricious and is not supportable in a legal context.

The Miles Memo continues to be valid guidance from the Secretary on how to enforce § 1910.132(a) in cases involving fall protection atop rolling stock. It also offers compliance guidance to the rolling stock industry itself. Neither party advanced the argument the Miles Memo was an unreasonable interpretation by the Secretary of an ambiguous regulation under *Kisor. See Kisor*, 588 U.S. at 587 (holding that courts should not defer to unreasonable agency interpretations). And, the Court would not expect the Secretary to argue her own interpretation of an ambiguous regulation was unreasonable.

In theory, OSHA can cite Finley for failing to provide fall protection equipment to employees performing work on rolling stock under § 1910.132(a). *See Boise Cascade Corp*, No. 89-3087, 1991 WL 25319, at *4 (OSHRC, Feb. 1, 1991) (consolidated) ("prosecutorial discretion in the enforcement of the Act is vested solely in the Secretary"). The burden then shifted to Finley to prove, by a preponderance of the evidence, that it qualified for an exemption to applicability; an exemption is not automatic. *C. J. Hughes Constr. Inc*., 1996 WL 514965, at *4. Upon review of the undisputed facts of this case, Finley has met its burden to prove these circumstances qualify for the exemption set forth in the Miles Memo. Specifically, the undisputed evidence shows the rolling stock at issue was not located inside or adjacent to a structure. In fact, it was located 300

feet away from Finley's grain facility. Thus, the use of fall protection equipment was not feasible[8] when rolling stock was located at such a distance from a permanent structure. *See Erickson*, 2012 WL 762001, at *4 ("the policy described in the [Miles Memo] regarding the enforcement of subpart D, the PPE standard, and the general duty clause as applied to tanker trucks that are not adjacent to a building or structure is consistent—the use of fall protection equipment is not considered feasible and thus, not required under any one of these provisions").

For all these reasons, Finley is entitled to partial summary judgment as to Citation 2, Item 1, because although § 1910.132(a) addresses the hazard and is applicable to this case, Finley proved it qualified for the exemption to enforcement set forth in the Miles Memo.

2. The Alternative Basis for Citation - The General Duty Clause

The Secretary, in the alternative, cited Finley under the General Duty Clause. The Citation Item reads as follows:

> Section 5(a)(1): The employer did not furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause death, or serious physical harm to employees in that were exposed to the hazard pf falling;
>
> > (a) On December 4, 2023, and at all times prior, at 503 Broadway Ave, Finley, North Dakota. The employer did not ensure employees were using personal protective equipment when exposed to falls of greater than 15 feet while working atop railcars opening lids for loading operations

(Citation at 7).

Finley argues utilization of the General Duty Clause for enforcement in this case is improper and preempted by a more specific OSHA standard. It also argues, under Commission

[8] Later in this Order, the Court will more thoroughly discuss the Secretary's arguments related to feasibility.

precedent, failure to provide fall protection equipment to employees working atop rolling stock cannot be cited under the General Duty Clause. In response, the Secretary maintains she properly pled the General Duty Clause in the alternative, and she was not barred from doing so by the Miles Memo. Finally, the Secretary argues Finley had notice it could be cited under the General Duty Clause, as evidenced by its own safety policies and training and prior OSHA citation[9].

The Court agrees it is proper for the Secretary to plead, at times, a specific violation and, in the alternative, a General Duty Clause violation for the same alleged set of facts. *See, e.g.*, *Henkels & McCoy, Inc.*, No. 884, 1976 WL 6159, at *3 (OSHRC, Aug. 3, 1976) (there is "nothing objectionable about pleading or citing violations of subsections (1) and (2) of section 5(a) in the alternative"). Alternative pleading is one thing; determining if alternative pleading can be sustained is another. The Parties are now at the stage of litigation where this Court must resolve a dispositive motion to determine whether Finley should be granted judgment, as a matter of law, on the alternative means of enforcement under Citation 2, Item 1. Thus, although "two alternative theories must be treated equally until the section 5(a)(2) allegations may be said to fail for lack of proof,"[10] the Court now has undisputed material facts to resolve whether the General Duty Clause violation cited in this case, standing alone, can advance. *Id.* at *3 n.6.

Long-standing Commission precedent holds the applicability of a more specific standard addressing the cited hazard preempts the application of the general duty clause. *See Armstrong Cork Co*., No. 76-2777, 1980 WL 10754, at *4 (OSHRC, Feb. 29, 1980) (citing cases); *Active Oil Serv., Inc.,* No. 00-0553, 2005 WL 3934873, at *4 (July 15, 2005) ("It is well established that

[9] These arguments more appropriately go to the issue of fair notice which is discussed below.

[10] As determined above, the specific regulation under § 1910.132(a), which addresses the fall protection hazard, fails due to the exemption in the Miles Memo.

section 5(a)(1) cannot apply if a standard specifically addresses the hazard cited."); *see also Am. Smelting & Refining Co. v. OSHRC*, 501 F.2d 504, 512 (8th Cir. 1974). "In order for a specific standard to preempt the general duty clause, however, the standard must be addressed to the particular hazard for which the employer has been cited under the general duty clause." *Armstrong Cork Co*., 1980 WL 10754, at *4 (citations omitted).

The Secretary admits § 1910.132(a) specifically addresses and applies to the violative conduct, i.e., failure to use fall protection equipment. This is the same violative conduct alleged under the General Duty Clause. (S*ee* Motion*,* Ex. D, Overson Dep. at 69:20-71:6 (admitting the alleged violation description applies to both the alleged violation of section 1910.132(a) and the General Duty Clause)). In addition, the Court has found § 1910.132(a) specifically addresses the fall protection hazard also cited under the General Duty Clause. Accordingly, the more specific standard preempts the application of the general duty clause here. *Armstrong Cork Co.*, 1980 WL 10754, at *4.[11]

Moreover, allowing the Secretary to proceed with the General Duty Clause violation under this set of facts would run contrary to other Commission precedent. In *Erickson Air-Crane*, the Commission was confronted with a general duty clause violation related to fall hazards atop rolling stock. *Erickson Air-Crane*, 2012 WL 762001, at *2. The Commission noted the Miles Memo referenced the General Duty Clause in the context of rolling stock and fall hazards:

[11] The Secretary indirectly argues since she cannot hold Finley liable under § 1910.132(a), due to the exemption in the Miles Memo, the specific cited regulation does not address the fall protection hazard. The Secretary cites no case law for her argument for a regulation to address a specific hazard she must be able to hold a respondent liable under the regulation. That position runs counter to established case law, which holds as long as the specific regulation addresses the hazard the use of the General Duty Clause is preempted.

> Although the [Miles Memo] also states that a citation could be issued under the general duty clause "where feasible means exist to eliminate or materially reduce the [fall] hazard," the abatement examples listed are limited to methods of reducing fall exposure—none of them involve the use of fall protection equipment. In short, the policy described in the [Miles Memo] regarding the enforcement of subpart D, the PPE standard, and the general duty clause as applied to tanker trucks that are not adjacent to a building or structure is consistent—the use of fall protection equipment is not considered feasible and thus, not required under any one of these provisions.

Id.

The Commission then opined, in cases where the Secretary cites employers under the General Duty Clause, it could only seek administrative measures that reduced fall exposure, "which are clearly distinct from . . . fall protection methods." *Id.* at *5. In other words, according to the Commission's reading of the Miles Memo, § 1910.132 directly addresses fall hazards from rolling stock, while the General Duty Clause addresses measures that could reduce fall exposure, i.e., administrative measures.

Here, the Secretary cites Finley for failure to prevent fall hazards from rolling stock. She did not cite Finley for lack or insufficiency of administrative measures. She also did not cite Finley for failure to require fall protection for a situation expressly identified by the Miles Memo, such as inclement weather. As cited, the general duty clause alternative citation cannot stand. *See Daniel Int'l Inc.*, No. 78-4279, 1982 WL 22610, at *3 (OSHRC, Apr. 21, 1982) ("To permit the Secretary to require further [fall protection] precautions under section 5(a)(1) because his standards purportedly do not provide sufficient protection would circumvent the rulemaking process and is impermissible.").

In summary, the Parties agree: § 1910.132(a) addresses and applies to the violation at issue. (*See* Sec'y Resp. at 23 ("The Secretary agrees with Respondent that § 1910.132(a) applies to the

violation at issue."); Motion at 10). The Secretary admits that citing Finley under the General Duty Clause was a safeguard in the event the Court found § 1910.132(a) did not apply due to the Miles Memo exemption. (Sec'y Resp. at 23; *see also* Motion, Ex. D, Overson Dep., p. 70:4-10). The Court, as set forth in detail above, concluded that §1910.132(a) addresses and applies to the cited violation and the fall protection hazard.

Finally, the Secretary advances the argument that the Miles Memo permits a General Duty Clause violation where feasible means exist to eliminate or materially reduce the hazard. The Secretary argues the administrative measure she has identified, i.e., requiring no work on top of rolling stock until the railcar is located next to the loading facility which has fall protection systems, is feasible. Although the Miles Memo states that a citation could be issued under the general duty clause "where feasible means exist to eliminate or materially reduce the [fall] hazard," the abatement examples listed are limited to administrative methods of reducing fall exposure—none of them involve the use of fall protection equipment. *Erickson Air-Crane*, 2012 WL 762001, at *4. While the abatement identified may be classified as an administrative measure, the reasonable and feasible means of abatement identified in the General Duty Clause violation must relate back to a failure to implement a feasible administrative measure as the basis for the violation. In this case, the Secretary did not cite Finley for failure to adopt a feasible administrative measure, she cited Finley for lack of fall protection, which *Erickson Air-Crane* holds is improper. *Id.* at *5.

The General Duty Clause violation cannot advance because the Court held, as a matter of law, § 1910.132(a) addresses and applied to the alleged hazard. *Daniel Int'l, Inc*., 1982 WL 22610, at *3 ("Citation to section 5(a)(1) is inappropriate if the hazard is addressed by a standard."). Moreover, the Secretary's failure to cite Finley for lack or insufficiency of administrative

measures, in accordance with *Erickson Air-Crane*, was fatal. For all these reasons, the Court will grant summary judgment in favor of Finley as to Citation 2, Item 1 which includes the General Duty Clause violation.[12]

3. Duty to Relocate Rolling Stock Next to a Facility.

Respondent asserts the Secretary believes Finley must require its employees to wait until railcars are relocated to the elevator structure to perform work atop rail cars (i.e., to open lids and inspect) using fall arrest equipment. (Motion, Ex. D, Overson Dep. at 89:21-90:7; 165:5-23). The Secretary, however, claims she is not requiring Finley to relocate its railcars. Rather, "OSHA contends Respondent has an obligation to require its employees to perform work using the existing fall protection system at the loadout facility where the railcars are positioned for filling, rather than permitting them to do work unnecessarily down track with no protection . . . ." (Sec'y Br. 12; Motion, Ex. D, at 168:12-24; Ex. 1, at 75:24-76:9 (The Secretary is "not requiring them to relocate [the railcars]," Respondent is "going to relocate them anyway. It's just waiting to open them until they begin the filling process, . . . which is going to be at the elevator.")). She claims this is

[12] The cases cited by the Secretary do not alter the Court's decision because the Commission consistently held that where there exists a regulation that fully addresses the violative conduct or hazard, the General Duty Clause cannot be cited. *See Ted Wilkerson, Inc*., No. 13390, 1981 WL 18797, *3 (OSHRC, June 30, 1981) (holding the regulation was not "adequate to fully eliminate the hazard involved"); *Brisk Waterproofing Comp.*, *Inc.*, No. 1046, 1973 WL 4103, at *1 (OSHRC, July 27, 1973) (holding it would be inconsistent with the purpose of the Act if the Secretary were permitted to cite an employer under the General Duty clause when there existed a duly promulgated standard specifically covering the alleged infraction); and *Active Oil Serv., Inc.,* 2005 WL 3934873, at *2 (holding that the confined space standard, which by its own terms did not apply to construction work, was inapplicable to the work performed because it involved construction). The Secretary admitted in her briefing that § 1910.132(a) addresses and applied to the violation at issue, which forecloses citation under the General Duty Clause. (Sec'y Resp. at 23).

consistent with the recommended practices identified by the North Dakota Grain and Feed Association (NDGFA) and included in Respondent's own safety policies.[13]

The Secretary claims the use of fall protection for employees working on top of rolling stock under these circumstances is feasible, and she cites various industry statistics to advance that argument.[14] The Secretary also contends Finley has an *obligation* to require its employees to perform work using the existing fall protection system at the loadout facility rather than permitting them to unnecessarily do the work down track with no fall protection.[15] The Secretary argues that although this practice is quicker, it is less safe.

The Secretary can mince words as to her position on the moving of railcars next to the loading facility where fall protection is located. She can make a fine distinction with a word puzzle

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[13] The Secretary also pointed out that Finley, after the inspection, changed its practices to conform to this practice. (Sec'y Resp. at 16). Remedial actions taken after legal action has been commenced in not relevant and would be excluded under Federal Rule of Evidence 406.

[14] OSHA noted a National Grain and Feed Association survey "revealed that nearly 40 percent of their member facilities installed overhead fall protection systems in railcar loading areas." (Sec'y Resp. at 6). OSHA also noted that "by 2003 a company called Fall Protection Systems Corp. had provided more than 13,000 fall protection systems to the rail and trucking industries and reported they have found 'no technological or economic obstacles' to prevent employers from providing fall protection equipment for rolling stock and motor vehicles regardless of their location.'" (*Id.*).

[15] It appears to the Court, after having read his deposition, the Area Director would prefer Finley, as well as the entire industry, to change its business practice. However, this is not required by the Miles Memo or case precedent. The Area Director conceded the possibility, feasibility, or expectation of relocating rolling stock was not mentioned in the Miles Memo addressing rolling stock fall protection. (Motion, Ex. D, Overson Dep. at 171:19-25 (admitting the Miles Memo does not require an employer to position railcars next to structures or fall protection)). As this Court has already indicated, "if no language appears in the standard or the Miles Memo, the author intended to leave it out." (Order on Mot. for Leave to Take 30(b)(6) Deposition, No. 20 (Mar. 31, 2025), at 6) (*citing Field & Assocs.*, 19 BNA OSHC 1379, 1380 (No. 97-1585, 2001)). The Secretary's enforcement actions should be based on regulation, interpretations by the Secretary, or case precedent – not personal preference.

– OSHA is not requiring, there is no legal duty to move, but Finley has an obligation. Such fine distinctions are without merit since "if it walks like a duck, and quacks like a duck, it is a duck." The choice of the word "obligation" by the Secretary denotes "something that you must do because of a law, rule, [or] promise." *Obligation*, THE BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/obligation (last visited July 24, 2025). When the word "obligation" is read in this context, the Secretary's position is clear: Finley has a legal obligation to take the course of action required by the Secretary for Finley to avoid being cited.[16] The Court finds the Miles Memo does not impose upon Finley a legal duty or obligation to move the rolling stock located 300 feet down rail from the loading facility next to the loading facility where fall protection is available before work can be commenced on top of the rolling stock. Thus, failure of Finley to do so, under any enforcement theory, cannot serve as the basis of imposing liability.

All of the arguments advanced by the Secretary regarding Finley's obligations go to the reasonableness of feasibility. Feasibility of an action is only relevant if the Secretary is able to pursue a General Duty Clause violation. As noted previously, she cannot.[17]

[16] Area Director Overson testified in his deposition that the Citation issued to Finley would not have been issued if Finley had first relocated the railcars to the elevator before employees accessed the tops of the railcars to prepare them to receive grain. (Motion Ex. D, Overson Depo. at 81:9-17).

[17] The Secretary has spent a great deal of her Response addressing the feasibility of moving the railcars next to the loading facility where fall protection systems exist before work is performed. All her arguments are irrelevant to the issue of summary judgment since the Secretary's reasonable and feasible means of abatement analysis can only take place if she can pursue and prevail on a General Duty Clause violation. Since the Secretary cannot pursue her General Duty Clause violation as cited, it is not necessary for the Court to spend the time to address feasibility except when referenced elsewhere in this Order.

Finally, the Court declines to further assess the reliability or conclusiveness of the sources she cited, as they have nothing to do with whether Finley has a legal obligation under § 1910.132(a) or the General Duty Clause to move its rolling stock down the rail and next to the loading facility where fall protection systems are available.

4. Fair Notice.

Finley argues the Secretary did not provide fair notice to it or the rest of the regulated community that OSHA would expand its enforcement authority beyond the exemption set forth in the Miles Memo to include the circumstances at issue in this case. The Secretary maintains Finley had ample notice that it could be cited for this violation, and its own safety policies demonstrate its awareness of the hazard.

As discussed below, the Secretary can give fair notice to the regulated community or a particular respondent by: (1) issuing Interpretive Rulings; (2) engaging in formal rule making; (3) through litigation; and (4) from past citations to a respondent that address the same circumstances and the same regulation. The Court will discuss each of these below.

Core Concepts of Fair Notice

Fair notice encapsulates the principle that "*agencies* should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (citation omitted) (emphasis added). *Christopher* gives teeth and expanded reach to the principle the Due Process Clause of the Fifth Amendment to the United States Constitution requirement that federal agencies provide "fair warning" or "fair notice" of required or prohibited conduct. *Christopher*, 132 S. Ct. at 2168; *see also KS Energy Servs., Inc.*, No. 06-1416, 2008 WL 2846151, at *2 (OSHRC, July 14, 2008) ("An employer is entitled to 'fair

notice' and 'fair warning' of prohibited or required conduct and a "reasonably clear standard of culpability.") (citation omitted). "In general, an employer cannot be held in violation of the Act if it fails to receive prior fair notice of the conduct required of it." *Erickson Air-Crane*, 2012 WL 762001, at *3 (citation omitted).

Fair notice, a core principle of due process, mandates individuals and entities regulated by federal agencies are entitled to a clear and reasonable understanding of the laws and policies they must follow. This prevents arbitrary enforcement and ensures that these individuals have a fair opportunity to comply. Due process can only be accomplished by a federal agency since individuals or organizations cannot act on behalf of the government.[18]

Consistent with Supreme Court precedent, the Administrative Procedure Act (APA) mandates that administrative agencies provide fair notice and due process to individuals affected by their rules or actions.[19] 5 U.S.C. § 500 *et seq*. The Secretary has adopted procedures which it follows to provide fair notice to the regulated community.

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[18] Generally, due process guarantees protect individual rights by limiting the exercise of government power. The Supreme Court has held the Fifth Amendment, which applies to federal government action, provides persons with both procedural and substantive due process guarantees. *Due Process*, BLACK'S LAW DICTIONARY (12th ed. 2024). The Fifth Amendment's Due Process Clause requires that the government first provide certain procedural protections, i.e., fair notice. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (citing *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

[19] The APA broadly defines the term "rule" as "[t]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. 551(4). Within this category are "legislative rules" which have "the force and effect of law," and "interpretive rules," which "advise the public of the agency's construction of the statutes and rules which it administers" but "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez* v. *Mortgage Bankers Ass'n,* 575 U.S. 92, 96-97 (2015) (internal quotation marks omitted). The APA also recognizes a third kind of rule: "general statements of policy," 5 U.S.C. 553, which are understood to be agency statements of general

The Secretary's Process for Providing Fair Notice

The Secretary has adopted a process where she employs less formal means of interpreting regulations, *Martin (CF&I Steel Corp.) v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991), such as Letters of Interpretation[20] or Enforcement Memos.[21] The Miles Memo was issued as a Letter of Interpretation under the Secretary's procedures.

The Secretary can also give notice through public statements. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("If, by reviewing the regulations and other public statements *issued by the agency*, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.") (emphasis added) (quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)).

The Court may consult these less formal means of interpretation to determine whether the Secretary has consistently applied the interpretation. *Id*. "An *agency* is free to discard precedents or practices it no longer believes correct," but, before doing so, it must supply a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *See Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004) (emphasis added);

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applicability, not binding on members of the public, "issued . . . to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979).

[20] OSHA issues letters of interpretation to explain specific requirements and how they apply to particular circumstances. These letters clarify existing regulations but cannot create new employer obligations.

[21] These documents provide agency policies and guidance on enforcing OSHA standards or the OSH Act. Enforcement memos that interpret standards are also posted on the OSHA website alongside interpretation letters.

see Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (agency changing course must provide a reasoned analysis for the change). Neither party has directed the Court to any public statement issued by the Secretary which supplements or supplants the Miles Memo.

Most formally, OSHA can engage in the Rulemaking Process, which provides the most notice to employers.[22] Here, OSHA, for almost 30 years, has relied on the Miles Memo to provide fair notice to the regulated industry regarding the application of fall protection regulations to rolling stock, and the regulated industry reasonably relied on this 30-year interpretation. In fact, OSHA has stood behind its enforcement policy announced in the Miles Memo several times in the three decades since its issuance.

In 2002, OSHA restated that, pursuant to the Miles Memo, "falls from rolling stock would not be cited under Subpart D" but "there could be instances where 29 C.F.R. § 1910.132 . . . or the General Duty Clause . . . could apply." OSHA, Letter to Ms. Jennifer LeFevre, "Fall protection requirements for commercial motor vehicles," (Mar. 4, 2002) https://www.osha.gov/laws-regs/standardinterpretations/2002-03-04-2 (last visited July 15, 2025).[23]

Again, in 2003 when the Secretary reopened the rulemaking record, she reiterated that, under the Miles Memo, "it would not be appropriate to use the PPE standard (29 CFR 1910.132

[22] When establishing new standards or regulations, OSHA engages in a formal rulemaking process that includes public notice and comment periods. This process involves publishing Advance Notices of Proposed Rulemaking (ANPRMs) or Notices of Proposed Rulemaking (NPRMs) in the Federal Register and allowing stakeholders to provide feedback before final rules are issued.

[23] Although OSHA indicates in the 2002 letter that it expected to provide further enforcement guidance for fall protection on rolling stock, no such compliance directive is available on the agency's website.

(d)) to cite employee exposure to fall hazards on the tops of rolling stock, unless the rolling stock was positioned inside of or contiguous to a building or other structure where the installation of fall protection is feasible." Walking & Working Surfaces; Personal Protective Equip. (Fall Protection Sys.), 68 Fed. Reg. 23528, 23530 (May 2, 2003).

In her 2010 proposed rulemaking, the Secretary again stated the Miles Memo "did not result in clear direction to the public or to OSHA's field staff," and yet, the agency did not propose any regulatory changes in either the proposed rule or the final rule in 2016. *See* Walking-Working Surfaces & Personal Protective Equip. (Fall Protection Sys.), 75 Fed. Reg. 28862, 28867 (May 24, 2010); Walking-Working Surfaces & Personal Protective Equip. (Fall Protection Sys.), 81 Fed. Reg. at 82509.

During these opportunities, the Secretary could have repealed or amended the Miles Memo, but she did not. Now, the Secretary, through her Area Director, wants to change the scope of the Miles Memo—which has been in place for three decades—without using her established methods of fair notice to the regulated community. As stated above, the Secretary has not rescinded the Miles Memo nor issued a formal interpretation clarifying or updating the Miles Memo to address circumstances like those presented in this case. *See Greenbrier Cent. LLC*, No. 20-1192, 2021 WL 4810948, at *11 (OSHRCALJ, Sept. 3, 2021) (finding employer lacked fair notice because "the Miles Memorandum continues to represent OSHA's current enforcement policy since it has not been countermanded by a subsequent enforcement policy and still appears on OSHA's web page under its 'Standard Interpretations' tab.").

The Parties have not directed the Court to any public statements or other guidance issued by the Secretary changing its interpretation or modifying the Miles Memo. Rather, it appears that

OSHA's Area Director believes the Miles Memo should not apply to the circumstances in this case and is pursuing a new interpretation of fall hazards on rolling stock through this litigation without fair notice to the regulated community. This approach fails to utilize the established methods for fair notice discussed above.

Although the Secretary points to guidelines that Finley received from the NDGDA to demonstrate adequate notice,[24] the Court does not find it reasonable for OSHA to rely on a trade association's guidance to announce a purported change in OSHA policy and fulfill OSHA's fair notice requirement.[25] *See Wal-Mart Distrib. Ctr. #6016 v. OSHRC*, 819 F.3d 200, 205 (5th Cir. 2016) ("The touchstone for sufficiency of notice under the due process clause is reasonableness."). Moreover, Finley cannot have received fair notice of OSHA changing its enforcement policy under the Miles Memo though its own Railcar Loading Guidelines. Finley cannot give notice on behalf of the Secretary to itself of a change in long-standing policy.

For the reasons cited above, it is not necessary for the Court to analyze Finley's work polices, training of its employees, or other internal actions taken by Finley, which the Secretary argues provided it fair notice, as those documents do not constitute fair notice by the Secretary of any changes to the Miles Memo.

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[24] The NDGDA Guideline stated: "OSHA, has and will, [] cite any facility under its General Duty Clause where employees are required to be on the top of the railcars (for any reason) without the use of a proper employee railcar fall protection system and device(s)." (Sec'y Resp., Ex. 7, at SOL-000244).

[25] While trade associations play a vital role in informing their members about regulatory developments and advocating on their behalf, official channels are the primary means for agencies to provide formal notice. While a trade association's announcement might *supplement* official agency communications, it does not substitute the agency's responsibility to provide official fair notice through established legal and administrative processes. Regulated parties should always refer to official agency publications for the most accurate and legally binding information.

Use of Litigation to Provide Fair Notice

As previously stated, the Secretary is attempting to modify the Miles Memo. The Secretary is purporting to do this through the commencement of this litigation. The use of litigation to announce policy may be appropriate where the agency has provided *no pre-enforcement warning.* However, such a course "may bear on the adequacy of notice to regulated parties." *Martin (CF&I Steel Corp.)*, 499 U.S. at 158. "In such cases, we must ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations." *Gen. Elec. Co.*, 53 F.3d at 1329. Thus, while the "Secretary is entitled to use the citation process to provide the initial publication of a previously *unannounced* interpretation of an OSH regulation," it cannot do so in this case. *Trinity Marine Nashville, Inc. v. OSHRC*, 423, 430 (5th Cir. 2001) (emphasis added). Where the regulated community has received notice through the issuance and interpretation of a regulation via the Miles Memo, there has been pre-enforcement activity which cannot be changed by litigation. In other words, if an agency announces its interpretation of a regulation, which is then followed by a very lengthy period of enforcement action (like the Miles Memo), the agency then attempting to change it through individual litigation raises the acute potential for unfair surprise. *Christopher*, 132 S. Ct. at 2168 (citing *Heckler v. Chaney,* 470 U.S. 821, 831 (1985)).

The Court concludes the use of this litigation to provide fair notice may be appropriate where there has been no pre-enforcement announcement to the regulated community prior to the commencement of the litigation. *Trinity Marine Nashville, Inc.*, 275 F.3d at 430. However, that is not the case here. The Secretary has issued § 1910.132(a) and interpreted its provisions by issuing

the Miles Memo. Therefore, commencement of litigation by the Area Office cannot serve as fair notice to the regulated community of a change in the scope or application of the Miles Memo.

Fair Notice Through Previous Citations and Settlement Agreements

The Secretary argues Finley had been previously cited by OSHA for the same conduct under the same standard, providing it with "clear notice" of its intent to issue citations under these circumstances. (Sec'y Resp. at 19). The Secretary has also argued a previous settlement agreement entered into with Finley for a violation of § 1910.132(a) also provided notice to Finley. A settlement agreement can provide an employer with adequate notice. *General Elec. Co. v. EPA*, 53 F.3d at 1329. However, a settlement agreement alone does not necessarily establish that an employer had notice of the agency's position. *Martin (CF&I Steel Corp) v. Occupational Safety & Health Review Comm'n*, 941 F.2d 1051, 1058 (10th Cir. 1991). And, a previous citation or settlement cannot serve as fair notice where the Secretary's interpretation of the underlying standard is unreasonable. *Id.* (finding fair notice after determining that the Secretary's interpretation of a regulation was reasonable, "though perhaps not apparent").

First, for all the reasons previously set forth above, the Court concludes the Secretary's interpretation of the § 1910.132(a) proffered in this case, in light of her own long-standing published interpretation, is unreasonable. The Miles Memo has long served as the primary guidance for employers with employees who work atop rolling stock.

Second, the Secretary has pursued enforcement of violations of regulations at grain elevators in North Dakota against the backdrop of the Miles Memo. The Area Director testified that he alone has been involved in approximately 10 to 15 inspections involving evaluation of the use of fall protection equipment while working on top of railcars in which citations have been

issued for violations of § 1910.132(a). These 10 to 15 inspections did not all relate to Finley. The Area Director did not provide the location of the rolling stock at issue in those inspections. If the rolling stock was located in or next to a facility, and fall protection was not used, it would be appropriate to use § 1910.132(a) as an enforcement tool. However, the Court is not convinced these inspections provided fair notice. The Secretary has offered no evidence of how many of these inspections, if any, involved working atop rolling stock that was not contiguous to a facility such that the Miles Memo would be implicated.[26] Such a claim, without evidence, cannot overcome a summary judgment motion. *Celotex*, 477 U.S. at 324 (the nonmovant must "designate specific facts showing that there is a genuine issue for trial").

Finally, the Secretary continues arguing, more immediately, that Finley was previously cited by the Secretary for the same conduct under the same standard, thus providing it with clear notice. The violation description in the previous citation issued to Finley for a violation of § 1910.132(a) specifically stated that "employees were exposed to potential fall hazards for work done without fall protection equipment on the tops of railcars that were located immediately contiguous to the elevator structures…." (Motion, Ex. G). The agreed abatement was for Finley to install a fall protection system at the elevator and institute a new railcar safety policy. Accordingly,

[26] It is important for the Secretary to clearly understand the failure to specifically clarify the location of the rolling stock at issue in all the other prior enforcement actions she argues provides fair notice to Finley is fatal. While the Secretary notes the regulation cited in prior North Dakota enforcement actions were under § 1910.132(a) for working on top of rolling stock without fall protection, either intentional or by oversight, none of her statements indicated the citations were issued for working on top of rolling stock without fall protection where the rolling stock was not located next to a contiguous facility. For this reason, the Court need not spend time addressing *Latite Roofing & Sheet Metal Co., Inc*., 21 BNA OSHC 1282 (No. 05-0656, 2005).

the conduct addressed in the prior citation and settlement agreement is different than addressed here, thus providing no fair notice.

Cases Cited by the Secretary

The Secretary cites *MFA Enterprises, Inc.*, No. 21-0725, 2024 WL 4680814 (OSHRCALJ, July 9, 2024), as applying to the facts of this case and therefore providing notice to Finley. However, in *MFA Enterprises*, the rolling stock was located at the elevator where there was fall protection systems installed. *Id.* at *11. The respondent was therefore cited for failure to require its employees use the fall protection. *Id.* at *8. Thus, *MFA Enterprises* is not persuasive on the issue of fair notice, as the facts are substantially different than before the Court.

Likewise, although it discusses the Miles Memo, the Court does not find *Greenbrier Central* relevant to the issue of fair notice since it involved the respondent being cited under § 1910.28(b)(3)(1). 2021 WL 4810948, at *11.

On the foregoing findings, the Court finds summary judgment is proper for lack of fair notice.[27]

Catch-All

To the extent the Court has not specifically addressed or ruled on an argument, it has determined they are not relevant to the Court's findings and holdings. Therefore, those arguments are rejected.

[27] Finally, if the Secretary was permitted to pursue Finley as cited in this case it would equate to an *ad hoc* indirect repeal of the Miles Memo. The Court does not sanction this method to achieve a change in policy wanted by the Area Director. Change in longstanding policy and case precedent should come from the Secretary after a comment period and deliberative process so decisionmakers can weigh the impact of a change, from an engineering, administrative and financial impact basis.

Conclusion

There are no disputed material facts which prevent the entry of partial summary judgment for Finley. For the above reasons, the Court GRANTS the Motion. Citation 2, Item 1, which includes the primary citation under § 1910.132(a) and, in the alternative, the General Duty Clause, are VACATED.

SO ORDERED.

/s/ Patrick B. Augustine

Dated: July 24, 2025
Denver, Colorado

Patrick B. Augustine
Judge, OSHRC

CERTIFICATE OF SERVICE

This is to certify that on July 24, 2025, a copy of this order was sent to the parties listed below via electronic mail:

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