No. 05-60216

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

W.G. YATES & SONS CONSTRUCTION
COMPANY, INC., Hvy. Div.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION; ELAINE L. CHAO,
SECRETARY, DEPARTMENT OF LABOR,

Respondents

On Petition for Review of an Order of the
Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

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AUGUST 2005

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STATEMENT REGARDING ORAL ARGUMENT

Respondent Elaine L. Chao, Secretary of Labor, agrees with the Petitioner that the issues in this case are straightforward and that oral argument is unnecessary. The Secretary would, however, welcome the opportunity to present her views if the Court believes that oral argument would be helpful.

JURISDICTIONAL STATEMENT

1. *Agency jurisdiction*. The Occupational Safety and Health Review Commission (Commission) had jurisdiction pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (Act or OSH Act), 29 U.S.C. § 659(c). On October 30, 2003, the Secretary of Labor (Secretary) issued a citation and notification of penalty to the Petitioner, W.G. Yates & Sons Construction Company (Yates), alleging serious violations of two fall protection standards. Rec. Vol. 3, Doc. 1. By letter dated November 14, 2003, Yates notified the Secretary that it intended to contest the citation. *Id.*, Doc. 2. That notification fell within the 15-day time frame prescribed by section 10(a) of the Act, 29 U.S.C. § 659(a), and therefore was timely.

2. *Appellate jurisdiction*. This Court has jurisdiction pursuant to section 11(a) of the OSH Act, 29 U.S.C. § 660(a). The Commission issued a final order on January 31, 2005. Rec. Vol. 3, Doc. 22. Yates filed a petition for review with this Court on March 17, 2005, within the 60-day time frame prescribed by section 11(a). Yates appropriately sought review

in this circuit because its principal office is in Philadelphia, Mississippi. Rec. Vol. 3, Doc. 4 at 1; *see* 29 U.S.C. § 660(a) (a party aggrieved by a final order of the Commission may seek review in the "United States court of appeals for the circuit in which . . . the employer has its principal office").

STATEMENT OF THE ISSUES

1. Whether, in light of the fact that the ALJ considered evidence presented by both parties in deciding this case, this Court should address Yates's contention that the Secretary failed to prove her *prima facie* case of employer knowledge.

2. Assuming the Court addresses the issue, whether the Commission may impute a supervisor's knowledge of his own misconduct to his employer in determining that the Secretary has established, as part of her *prima facie* case, that the employer knowingly violated an OSHA safety standard.

3. Whether substantial evidence supports the ALJ's determination that Yates's violation of 29 C.F.R. § 1926.501(b)(1) was not the result of unpreventable employee misconduct.

STATEMENT OF THE CASE

Yates brought this action to contest a citation issued by the Secretary pursuant to section 9(a) of the OSH Act, 29 U.S.C. § 658(a). The Secretary alleged in the citation that Yates had committed serious violations of two OSHA fall protection standards (29 C.F.R. §§ 1926.501(b)(1) and 1926.502(a)(2)) while performing work at a construction site in Alabama in September 2003. An ALJ heard evidence on the matter and, in December 2004, issued a decision in which he sustained the citation and assessed a penalty of $9,000. Yates sought review of the ALJ's decision, but the Commission did not direct the case for review. The ALJ's decision thus became the Commission's final decision on January 31, 2005. Yates then filed a timely petition with this Court to seek review of the Commission's decision regarding the violation of 29 C.F.R. § 1926.501(b)(1).

STATEMENT OF FACTS[1]

1. *Statutory and regulatory background*

The OSH Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible . . . safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. OSHRC*, 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. § 651(b)). Toward that end, the OSH Act authorizes the Secretary to promulgate health and safety standards and to enforce compliance through the issuance of citations. 29 U.S.C. §§ 655(b), 658. Employers may contest citations before the Commission, which is an independent, non-policymaking adjudicatory body. *See* 29 U.S.C. § 659(c); *Martin*, 499 U.S. at 154-55. Any party aggrieved by a

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[1] In the statement of facts section of its opening brief, Yates merely recounts testimony favorable to its own position. Pet. Br. 1-5. Yates fails to point out that some of that testimony was specifically rejected by the ALJ. *See*, *e.g.*, ALJ Dec. 4, 10 (rejecting foreman Olvera's testimony regarding the circumstances of his failure to wear fall protection). Yates also fails to describe the ALJ's actual findings of fact and the evidence that was introduced in support of those findings. As the Seventh Circuit has pointed out, "[a] misleading statement of facts increases the opponent's work, [the court's] work, and the risk of error." *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1224 (7th Cir. 1995).

Commission order may seek judicial review in an appropriate court of appeals. 29 U.S.C. § 660.

The Secretary has promulgated safety regulations to govern the construction industry. *See* 29 C.F.R. part 1926. Because employees in that industry face a significant risk of injury from falls, the regulations include comprehensive requirements for fall protection systems. *See*, *e.g.*, 29 C.F.R. part 1926, subpart M; *see also* 59 Fed. Reg. 40672, 40673 (Aug. 9, 1994) ("OSHA estimates that there are at least 68,000 injuries due to falls from elevations covered under subpart M every year, and 95 fatalities"). The regulation at issue here addresses "unprotected sides and edges," and provides:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

29 C.F.R. § 1926.501(b)(1).

2. *The Secretary cites Yates for violating fall protection standards.*

Yates was a subcontractor at the Patton Creek mall development project in Hoover, Alabama. ALJ Dec. 1; Tr. 120.

On September 11, 2003, OSHA compliance officers James Cooley and Ron Hynes visited the site and observed Yates employees laying grass matting. ALJ Dec. 2. Their working surface sloped downward and then dropped off approximately 65 feet to the ground below. ALJ Dec. 2; Tr. 18-20. During the 15 to 20 minute time period in which the compliance officers observed them, two of the employees wore body harnesses attached to a lanyard, but had the harnesses on backwards. ALJ Dec. 2, 4; Tr. 22-23. A third employee, who turned out to be foreman Martin Olvera, wore no fall protection at all. ALJ Dec. 3; Tr. 21-23.

The Secretary issued a citation to Yates shortly thereafter. Rec. Vol. 3, Doc. 1. The first item in the citation alleged that Yates violated 29 C.F.R. § 1926.501(b)(1) by permitting Olvera to work without any fall protection while exposed to the hazard of falling 65 feet. Rec. Vol. 3, Doc. 1, at 6. The second item alleged a violation of 29 C.F.R. § 1926.502(a)(2). *Id.* at 7. According to the citation, Yates violated that standard by, among other things, permitting

employees to work while wearing their body harnesses backwards. *Ibid*.

The Secretary alleged that the violations were serious, and proposed a penalty of $5,000 for each item. Rec. Vol. 3, Doc. 1 at 6-7. Yates notified the Secretary that it intended to contest the citation and, in its answer, raised the affirmative defense of unpreventable employee misconduct. Rec. Vol. 3, Doc. 2, Doc. 5 at 2. The matter proceeded to an evidentiary hearing.

3. *The ALJ sustains the citation after an adjudicatory hearing*.

a. *Evidence adduced at the hearing*

The Secretary's case-in-chief rested primarily on the testimony of Compliance Officer Cooley. Tr. 11-97. During the inspection, Cooley testified, Olvera acknowledged that he was supposed to wear a harness and tie it off to an appropriate line. Tr. 76. Olvera told Cooley, however, that he "had gone to use the bathroom just a few minutes prior and had taken his harness off and lanyard and went to use the bathroom and just forgot to put it back on." Tr. 60. But

Olvera gave no answer upon being asked where his lanyard and harness were, and Cooley walked around the work area without observing any lanyard and harness except for the ones being worn by the other two crew members. Tr. 60-61. Cooley thus testified that he could not "ascertain that [Olvera's explanation] was the truth." Tr. 61. To the contrary, Cooley concluded that Olvera "did not, in fact, have on at any portion of that time, which could have been several hours, any fall protection system." Tr. 65, 93.

Olvera told Cooley that his supervisor was John Ray. Tr. 21-22, 64. According to Cooley, Ray arrived at the scene and confirmed that "Olvera did, in fact, work for him." Tr. 24. Ray explained that the crew had been working in that general area for between two and three weeks. Tr. 24. Ray also explained that the workers wore their harnesses backwards because "it made the ease of working in that area easier to perform." Tr. 34.

After the Secretary presented her case-in-chief, Yates presented testimony from four of its managers. Charles Maness, Yates's safety director, testified that the company had

a safety program that included rules on fall protection. Tr. 100-104. Maness also testified that Yates had a disciplinary program under which employees who violated rules were subjected to reprimands and termination for safety-related violations. Tr. 104-105. He added that Yates employees had been terminated for past violations. Tr. 105.

Olvera, Ray, and Joe Holyfield, Yates's project manager at the Patton Creek site, also testified about the use of fall protection. Holyfield testified that he had never known Olvera to violate safety rules, and that he had inspected the work several times a day without observing Olvera or his crew violating fall protection rules. Tr. 136, 138. On the day the compliance officers inspected the site, the crew had worked in a different area in the morning, and then began work at a new location after lunch, beginning at about 12:30 in the afternoon. Tr. 137, 185-186.[2] Although Holyfield and Ray testified that they had each inspected the crew twice that morning, neither had done so in the afternoon. Tr. 137, 232-

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[2] The compliance officers arrived at the site at about 2:30 p.m., about two hours later. Tr. 185-186.

233. Both testified that they had not observed the crew violating fall protection rules that morning. Tr. 137-138, 233.

Holyfield also testified that he issued Olvera a written reprimand for failure to wear fall protection following the compliance officers' inspection. Tr. 139, 170. He did not, however, reprimand Olvera or his crew for the crew's failure to wear harnesses properly. Tr. 171.

b. *The ALJ affirms the citation.*

In December 2004, the ALJ issued a decision and order in which he sustained the Secretary's citation and assessed an aggregate penalty of $9,000. ALJ Dec. 12. The ALJ first determined that the Secretary proved all of the elements of a serious violation of 29 C.F.R. § 1926.501(b)(1) based upon Olvera's failure to wear fall protection. ALJ Dec. 3-4. In so ruling, the ALJ imputed Olvera's knowledge of his own misconduct to Yates, on the ground that a supervisory employee's knowledge of misconduct is imputable to the employer. ALJ Dec. 4. The ALJ specifically rejected Olvera's claim that he had only worked without fall protection for a brief period following a trip to the bathroom; instead, the ALJ

accepted the compliance officer's testimony "as to the duration of Mr. Olvera's exposure." ALJ Dec. 4, 10.

The ALJ also rejected Yates's affirmative defense of unpreventable employee misconduct. ALJ Dec. 7-11. He noted that Olvera displayed a "lack of appreciation and understanding of the need for appropriate fall protection," since he not only worked without fall protection, but also allowed his crew members to use their own protection improperly. ALJ Dec. 10. The ALJ additionally found that supervisor Ray's "lack of understanding of fall protection is shown by his acceptance and validation of the practice of wearing harnesses backwards as making the employees' work easier." *Ibid.* In the ALJ's judgment, the lack of understanding displayed by Olvera and Ray was "a direct result of a breakdown in communication of any safety rules that might have been issued by [Yates]. It also demonstrates a lax safety program." ALJ Dec. 10.

Finally, the ALJ determined that Yates's disciplinary program was "flawed and inconsistent." ALJ Dec. 10. In support of that finding, the ALJ pointed out that, although

Olvera received a written reprimand for his failure to wear fall protection, "[n]either he nor the two members of his crew . . . were given warnings, reprimands or suspensions for improper wearing of safety harnesses." ALJ Dec. 10. The ALJ thus concluded that the disciplinary program had not been effectively enforced. ALJ Dec. 11.

4. *Yates seeks judicial review after the Commission refuses to consider the petition for discretionary review.*

Yates filed a petition for discretionary review, asking the Commission to vacate the citations. Rec. Vol. 3, Doc. 21. The Commission did not direct the case for review, however, and the ALJ's decision became the Commission's final decision on January 31, 2005. Rec. Vol. 3, Doc. 22. Yates then filed a petition for review with this Court, seeking review only of the Commission's decision upholding the violation of 29 C.F.R. § 1926.501(b)(1). Pet. Br. 1 n.2.

SUMMARY OF THE ARGUMENT

This Court should deny Yates's petition for review. Substantial evidence supports the ALJ's determination that Yates violated 29 C.F.R. § 1926.501(b)(1) when its foreman,

Martin Olvera, worked without fall protection at the Patton Creek site.

This Court need not address Yates's contention that the Secretary failed to meet the knowledge element of her *prima facie* case. The ALJ considered all of the evidence in the record when he determined that Yates had knowledge of Olvera's misconduct. The Secretary's *prima facie* case is irrelevant where, as here, the ALJ's determination is based upon evidence presented by both parties. In any event, the ALJ did not err: the OSH Act permits the Commission to impute a supervisor's knowledge of his own misconduct to the employer in determining whether the Secretary satisfied the knowledge element of her *prima facie* case. That does not result in strict liability, because the employer has the opportunity to rebut the *prima facie* case by showing that it took all feasible steps to prevent the misconduct. Here the ALJ afforded Yates that opportunity and therefore acted in accordance with the law.

The ALJ also reached the correct result in rejecting Yates's affirmative defense of unpreventable employee

misconduct. Substantial evidence in the record shows that at least two of Yates's supervisors -- Olvera and John Ray -- did not require full compliance with fall protection standards by their subordinates. As a result, Olvera and his crew members were placed at risk of death or serious injury from a fall of some 65 feet. That evidence supports the ALJ's conclusion that Yates did not effectively communicate its safety policy to two levels of supervisors (Olvera and Ray). The record shows further that Yates enforced its safety program only haphazardly: Olvera and his crew received no punishment whatever for the crew's failure to wear harnesses properly. Because Yates did not effectively enforce its safety program, the ALJ was justified in rejecting the affirmative defense. This Court should sustain that fact-bound determination.

ARGUMENT

A. *The governing standards of review are deferential.*

The Commission's decisions "are entitled to considerable deference on appellate review." *Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1236 (11th Cir. 2002). The Commission's factfinding is judged against the substantial evidence

standard, 29 U.S.C. § 660(a), even where, as here, the Commission has adopted the ALJ's findings of fact. *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 108 (1st Cir. 1997). Substantial evidence "does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal quotation marks and citation omitted). "The substantial evidence test protects both the factual findings and the inferences derived from them, and if the findings and inferences are reasonable on the record, they must be affirmed even if this court could justifiably reach a different result de novo." *Fields Excavating, Inc. v. Secretary of Labor*, 383 F.3d 419, 420 (6th Cir. 2004); *see also MICA Corp. v. OSHRC*, 295 F.3d 447, 449 (5th Cir. 2002).

This Court must also defer to the Commission's rulings on questions of law, to the extent they are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *MICA Corp.*, 295 F.3d at 449.

B. *Although the Court need not address this issue, the Secretary may establish the knowledge element of her prima facie case by imputing a supervisor's knowledge to the employer.*

Yates first raises the issue whether the ALJ applied "the correct legal test for determining whether the Secretary met her burden of proving knowledge of a violation of 29 C.F.R. § 1926.501(b)(1)." Pet. Br. viii. Specifically, Yates contends that the ALJ erred by imputing foreman Olvera's knowledge of his own misconduct to the company in determining that the Secretary met the knowledge element of her *prima facie* case. Pet. Br. 8-11. This Court need not address that issue, because the Secretary's *prima facie* case is irrelevant where, as here, the ALJ rendered his decision on the basis of evidence presented by both parties. On the merits, the ALJ acted in accordance with the law when he imputed Olvera's knowledge to Yates. The petition for review should therefore be denied.

1. *The Court need not address this issue.*

The ALJ determined that Yates had actual or constructive knowledge that Olvera was working without fall protection in violation of 29 C.F.R. § 1926.501(b)(1). He

reached that determination on the basis of the record as a whole, and his decision did not turn on burden of proof rules. Under these circumstances, it is irrelevant whether the Secretary made out a *prima facie* case. There is, therefore, no reason for this Court to consider the first issue that Yates raised in its opening brief.

It is well established that a plaintiff's *prima facie* case drops out of a proceeding once the defendant has come forward with evidence that supports his position. *See*, *e.g.*, *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant"). Thus, once an employer presents evidence on its own behalf, the appropriate question on appeal is not whether the Secretary established her *prima facie* case, but rather whether the record as a whole supports the Commission's determination. *See New York State Elec. & Gas Corp. (NYSEG) v. Secretary of Labor*, 88 F.3d 98, 108-09 (2d

Cir. 1996); *see also Lindsay v. NTSB*, 47 F.3d 1209, 1214 (D.C. Cir. 1995).

In this case, Yates introduced evidence after the Secretary concluded her case-in-chief. Tr. 97-98. At the close of all the evidence, the ALJ determined that Yates had actual knowledge of the violation because Olvera's knowledge was imputable to Yates. ALJ Dec. 4. In addition, the ALJ found that Yates did not effectively communicate and enforce its safety policy, ALJ Dec. 11, which is tantamount to a finding that Yates also had constructive knowledge of Olvera's misconduct. *See H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 819 n.17 (5th Cir. 1981) ("an employer's inability to establish the adequacy of its safety instructions to his employee shows a failure to exercise reasonable diligence"); *N & N Contractors, Inc. v. OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001) ("[a]n employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative condition").

The sole question on appeal, therefore, is whether substantial evidence in the record supports the ALJ's

determination that Yates had knowledge (whether actual or constructive) of Olvera's failure to wear fall protection. That question may be answered without regard to the ALJ's decision to impute Olvera's knowledge to Yates. For if the ALJ correctly determined that Yates's safety policy was not effectively enforced or communicated, then the record establishes that Yates had constructive knowledge of the violation. Conversely, if the ALJ's determination about the safety policy is not supported by substantial evidence, then Yates prevails on its unpreventable employee misconduct defense regardless of whether Olvera's knowledge is initially imputed to Yates. Either way, it is wholly irrelevant whether the Secretary established her *prima facie* case.

To be sure, a different analysis might apply in cases where the ALJ rests his decision on the parties' respective burdens of proof. But that is not the case here. Although the ALJ concluded that Yates "failed to prove its defense of unpreventable employee misconduct," he reached that conclusion only after determining that Yates had not effectively communicated or enforced its safety program. ALJ

Dec. 10-11. Nothing in the ALJ's decision suggests that the evidence was in equipoise and that Yates would have prevailed but for its burden of proof. Therefore, even if the ALJ had not properly allocated the burdens of proof, that error would have been harmless. *See N & N Contractors,* 255 F.3d at 127 ("the Commission opinion indicates that the constructive knowledge inquiry did not turn on burden of proof rules, and therefore even if the Commission had impermissibly shifted the burden the error would be harmless"); *see also Power Plant Div., Brown & Root, Inc. v. OSHRC*, 659 F.2d 1291, 1295 (5th Cir. 1981); *Bristow v. Drake Street Inc.*, 41 F.3d 345, 353 (7th Cir. 1994) ("[b]urdens of persuasion affect the outcomes only of cases in which the trier of fact thinks the plaintiff's and the defendant's positions equiprobable").

2. *The ALJ properly imputed Olvera's knowledge of his own wrongful conduct to Yates.*

If this Court decides to address the issue, it should reject Yates's contention that the ALJ erred in determining that the Secretary met her *prima facie* case. Because Olvera was a supervisor, his knowledge of his own misconduct was

imputable to Yates. The ALJ's decision was fully in accordance with the law.

a. *Imputation of a supervisor's knowledge to the employer is appropriate under the OSH Act's burden-shifting scheme.*

Section 17(k) of the OSH Act provides that an employer may be held accountable for a serious violation of a safety standard unless it "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). Under this Court's precedents, "[k]nowledge is a fundamental element of the Secretary of Labor's burden of proof for establishing a violation of OSHA regulations." *Trinity Indus., Inc. v. OSHRC*, 206 F.3d 539, 542 (5th Cir. 2000).[3] "To prove the knowledge element of [her] burden, the Secretary must show that the employer knew of,

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[3] The Secretary has long taken the position that employer knowledge is not an element of her *prima facie* case. In her view, the employer bears the burden of proving a lack of knowledge once the fact of the violation has been established. In this case, it is not necessary for the Court to reconsider its contrary position.

or with exercise of reasonable diligence could have known of the non-complying condition." *Ibid.*[4]

Where, as here, the employer is a corporate entity, knowledge "is necessarily a fiction; the corporation can only be said to 'know' information by imputing to it the knowledge of natural persons who serve as agents." *Central Soya de Puerto Rico, Inc. v. Secretary of Labor*, 653 F.2d 38, 39 (1st Cir. 1981). The general rule, therefore, is that "[k]nowledge or constructive knowledge may be imputed to an employer through a supervisory agent." *NYSEG*, 88 F.3d at 105; *see also Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979) (holding that Commission properly imputed supervisor's knowledge of hazardous condition to employer for purpose of assessing liability under general duty clause, 29 U.S.C. § 654(a)(1)). A foreman who has authority over a work crew is a "supervisory agent" for the purpose of imputing knowledge.

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[4] The Secretary must also prove that "(1) a relevant safety standard applies, (2) the employer failed to comply with it, [and] (3) employees had access to the violative condition." *NYSEG*, 88 F.3d at 105. Yates does not contend that the Secretary failed to establish any of these elements of her *prima facie* case.

See Danis-Shook Joint Venture XXV v. Secretary of Labor, 319 F.3d 805, 812 (6th Cir. 2003); *Secretary of Labor v. Rawson Contractors, Inc.*, 20 O.S.H. Cas. (BNA) 1078, 2003 WL 1889143, at *2 (April 4, 2003).

The Secretary may therefore establish the knowledge element of her *prima facie* case by showing that a supervisor was aware of the violative condition. But the Secretary does not automatically prevail whenever she makes that showing. To the contrary, if the Secretary makes out a *prima facie* case of an OSHA violation, the employer may rebut that case by establishing the "unpreventable employee misconduct" defense. *See H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 818 (5th Cir. 1981); *see also Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987).[5] An

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[5] A minority of circuits have held that the Secretary bears the burden of proving, as part of her *prima facie* case, that employee misconduct was foreseeable and preventable. *See, e.g., L.R. Willson & Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1240-41 (4th Cir.), *cert. denied*, 525 U.S. 962 (1998). This Court has adopted the majority position that unpreventable employee misconduct is an affirmative defense. *See H.B. Zachry*, 638 F.2d at 818; *see also L.E. Myers Co. v. Secretary of Labor*, 484 U.S. 989 (1987) (White, J., dissenting from denial of certiorari).

employer may escape liability under that defense if it proves that (1) "all feasible steps were taken to avoid the occurrence of the hazard"; and (2) "the actions of the employee were a departure from a uniformly and effectively communicated and enforced work rule of which departure the employer had neither actual nor constructive knowledge." *H.B. Zachry*, 638 F.2d at 818.[6] This burden-shifting scheme insures that employers are not held to a strict liability standard. *See P. Gioioso*, 115 F.3d at 109; *Secretary of Labor v. F.H. Sparks of Md., Inc.*, 6 O.S.H. Cas. (BNA) 1356, 1978 WL 7018, at *5 (Feb. 2, 1978).

b. *The ALJ correctly assigned the burdens of proof.*

In this case, the ALJ faithfully applied the foregoing legal principles when he determined that Yates violated 29 C.F.R. § 1926.501(b)(1). Nothing in the record suggests that he misapplied the burdens of proof.

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[6] The Commission and most other courts of appeals recast this inquiry as a four-part test. *See, e.g.*, *NYSEG*, 88 F.3d at 106; *Secretary of Labor v. Jensen Constr. Co.*, 7 O.S.H. Cas. 1477 (BNA), 1979 WL 8561, at *2 (June 29, 1979). The elements are essentially the same under both formulations.

The ALJ first required the Secretary to prove, as part of her *prima facie* case, that Yates had actual or constructive knowledge of Olvera's failure to wear fall protection equipment. ALJ Dec. 2. The Secretary met that burden, the ALJ determined, because Olvera was aware of his own misconduct and, because he was a foreman, his knowledge was Yates's knowledge. ALJ Dec. 4; *cf. Danis-Shook*, 319 F.3d at 812 ("Because Wagner was a foreman and knew of his own failure to wear personal protective equipment, this failure may be imputed to Danis-Shook"). In other words, the ALJ determined that Yates had actual knowledge of Olvera's misconduct.

Although the ALJ properly ended his analysis of the *prima facie* case there, the record shows that he could have gone further by holding that the Secretary proved constructive knowledge as well. In rejecting Yates's unpreventable employee misconduct affirmative defense -- and thereby concluding that Yates had constructive knowledge of Olvera's misconduct -- the ALJ relied principally on Compliance Officer Cooley's testimony, ALJ Dec. 8-10, which of course was

introduced during the Secretary's case-in-chief. Thus, for instance, the ALJ found on the basis of Cooley's testimony that John Ray exhibited a "lack of understanding" of fall protection rules when he explained that Olvera's crew wore harnesses improperly in order to make their work easier. ALJ Dec. 8. That testimony, as well as Cooley's testimony regarding Olvera's failure to wear fall protection, prompted the ALJ to conclude that Yates's safety rules were not effectively communicated to its supervisors. *Id.* at 10. Thus, substantial evidence presented during the Secretary's case-in-chief established that Yates had constructive knowledge of the violation. *See H.B. Zachry*, 638 F.2d at 819 & n.17.

After determining that the Secretary made out her *prima facie* case, the ALJ properly shifted the burden to Yates to establish that Olvera's conduct was an unforeseeable and unpreventable departure from company safety policies. ALJ Dec. 7. Yates did not, however, produce sufficient evidence to convince the ALJ that it took all feasible steps to prevent misconduct of the sort engaged in by Olvera. *Id.* at 11-12.

Therefore, the ALJ properly sustained the citation without impermissibly shifting the burdens of proof.

c. *Yates's contentions on appeal are misplaced.*

Yates does not dispute the general proposition that the Secretary may impute a supervisor's knowledge to his employer for the purpose of establishing her *prima facie* case. Rather, it contends that a supervisor's knowledge of *his own* misconduct may not be imputed to the employer. Pet. Br. 8-11. Imputing such knowledge, Yates argues, would effectively render the employer strictly liable for supervisory misconduct. Because the OSH Act is not a strict liability statute, *Horne Plumbing and Heating Co. v. OSHRC,* 528 F.2d 564, 571 (5th Cir. 1976), Yates asks this Court to reverse the Commission's determination that it violated 29 C.F.R. § 1926.501(b)(1).

Contrary to Yates's argument, a supervisor's knowledge of his own misconduct may be imputed to the employer. *See Danis-Shook*, 319 F.3d at 812; *Secretary of Labor v. Danis-Shook Joint Venture XXV*, 19 O.S.H. Cas. (BNA) 1497, 2001 WL 881247, at *5 (Aug. 2, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003). That conclusion is compelled by the general rule --

long adhered to by this Court -- that employers have a "'heightened duty to ensure the proper conduct'" of supervisory personnel. *Floyd S. Pike Elec. Contractor, Inc. v. OSHRC*, 576 F.2d 72, 77 (5th Cir. 1978) (quoting *National Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 n.38 (D.C. Cir. 1973)); *see also H.B. Zachry*, 638 F.3d at 819; *L.E. Myers*, 818 F.2d at 1277. Employers, after all, would have a lessened, not heightened, duty to ensure proper supervisory conduct if they could avoid the imputation doctrine whenever supervisory misconduct is at issue.

Although two circuits have held that the Secretary may not establish her *prima facie* case by showing a supervisor's knowledge of his own misconduct, *see Pennsylvania Power & Light Co. (PP&L) v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984); *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980), Yates is wrong in contending that this Court in *Horne Plumbing* aligned itself with those courts. *Horne Plumbing* does not hold or suggest that a supervisor's knowledge of his own misconduct may not be imputed to his

employer. This Court, moreover, should reject the Third and Tenth Circuits' view.

1. *Horne Plumbing does not support Yates's position.*

In *Horne Plumbing*, two employees -- both experienced foremen -- were killed when the unshored portions of a ditch collapsed. The record established that Horne "had an outstanding safety program for a small employer," and that the company's owner, Fred Horne, had specifically "instructed and cautioned his men" to shore the ditch before the excavation work began. 528 F.2d at 566. The ALJ, as affirmed by the Commission, nevertheless held that Horne had knowledge of his supervisory employees' violative conduct because their knowledge was imputable to the company. *Id.* at 567. In so ruling, the ALJ rejected Horne's defense that it "should not be liable for violations which occurred as a result of [its] employee's misconduct." *Ibid.*

This Court reversed that determination, holding that, "on the facts of this case, it was error to find Horne liable on an imputation theory for the unforeseeable, implausible, and

therefore unpreventable acts of his employees." *Horne Plumbing*, 528 F.2d at 571. Because Horne did everything feasible to prevent safety violations, the Court reasoned, the imposition of liability could only be justified under a strict liability standard, and there was no evidence that Congress intended that standard to apply in OSHA cases. *Ibid*.

The *Horne Plumbing* court did not focus its attention on the parties' respective burdens of proof, and the Court did not appear to be concerned with the Secretary's *prima facie* case. Instead, unpreventable employee misconduct was brought into the case as an affirmative defense, 528 F.2d at 571, as the ALJ's decision made clear:

> Respondent undertakes to show *as an affirmative defense* to the alleged violations, that he has met his responsibility to insure compliance with the safety standards, and that he should not be liable for violations which occurred as the result of his employee's misconduct.

Secretary of Labor v. Horne Plumbing & Heating Co., 2 O.S.H. Cas. (BNA) 1271, 1974 WL 4420, at *7 (Oct. 9, 1974) (emphasis added) (incorporating ALJ decision), *vacated*, 528 F.2d 564 (5th Cir. 1976). The ALJ essentially held that the

affirmative defense is never available where the misconduct at issue is that of a supervisory employee, *id.*, 1974 WL 4420, at *7-8, and the Court in *Horne Plumbing* corrected that misjudgment. It is not surprising, therefore, that this Court subsequently cited *Horne Plumbing* in discussing the elements of the unpreventable employee misconduct affirmative defense. *See H.B. Zachry*, 638 F.2d at 818.

So *Horne Plumbing* does not, as Yates contends, forbid the Commission from imputing a supervisor's knowledge of his own misconduct to his employer for purposes of the Secretary's *prima facie* case. *Horne Plumbing* does forbid the imposition of a strict liability standard, but here the ALJ imposed no such standard. To the contrary, the ALJ followed the established rule that "[t]he knowledge, actual or constructive, of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing that knowledge." *Secretary of Labor v. Ormet Corp.*, 14 O.S.H. Cas. (BNA) 2134, 1991 WL 64845, at *4 (March 6, 1991); *see also Western Waterproofing Co. v. Marshall*, 576 F.2d 139, 144 (8th Cir.)

("An employer is excused from responsibility for acts of its supervisory employees only if it shows that the acts were contrary to a consistently enforced company policy, that the supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors."), *cert. denied*, 439 U.S. 965 (1978). The ALJ gave Yates the opportunity to prove its unpreventable employee misconduct defense, but Yates failed to do so. ALJ Dec. 7-11. That outcome was perfectly consistent with *Horne Plumbing*.

2. *This Court should reject the approach of the Third and Tenth Circuits.*

It is not readily apparent why a supervisor's knowledge should be imputed to the employer except where the supervisor's own misconduct is at issue. The Third and Tenth Circuits nonetheless follow the rule that a foreman's knowledge of his own misconduct does not establish the knowledge element of the Secretary's *prima facie* case. *PP&L*, 737 F.2d at 358; *Mountain States*, 623 F.2d at 158. That rule is wrong and should be rejected.

Beginning with the seminal decision in *National Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 n.38 (D.C. Cir. 1973), the courts have interpreted the OSH Act as placing a heightened burden on employers to guard against supervisory misconduct where health and safety matters are concerned. *See, e.g., D.A. Collins Constr. Co. v. Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997); *H.B. Zachry*, 638 F.2d at 819; *Floyd S. Pike,* 576 F.2d at 77. That interpretation reflects the fact that supervisors are responsible for putting the employer's safety policy into action; when they ignore safety rules in their own conduct, they send a message to other employees that the rules may be disregarded. *Floyd S. Pike*, 576 F.2d at 77; *see also L.E. Myers*, 818 F.2d at 1277 ("In cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy."). Because employers have a heightened duty to prevent supervisory misconduct, there is nothing unfair about imputing a supervisor's knowledge of his own misconduct to

the employer. Indeed, that rule furthers the OSH Act's underlying policies by creating an incentive for employers to diligently train supervisors on matters of safety.

The contrary rule adopted by the Third and Tenth Circuits is based upon reasoning that cannot withstand scrutiny. The Tenth Circuit explained the basis for the rule in this way:

> When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate . . . But when the noncomplying behavior is the supervisor's own a different situation is presented. . . . [I]f we impute [the supervisor's] knowledge to the employer and declare that now the employer must show that the noncomplying conduct was unforeseeable we are shifting the burden of proof to the employer. All the Secretary would have to show is the violation; the employer then would carry the burden on nonpersuasion.

Mountain States, 623 F.2d at 158.

The *Mountain States* court failed to explain, however, why a "different situation is presented" when the misconduct at issue is the supervisor's own instead of a subordinate's. It is true, of course, that the burden of proof shifts to the employer

when the Secretary establishes the employer's knowledge and the other aspects of her *prima facie* case. But that is true regardless of whether the imputed knowledge is of the supervisor's own misconduct or of some other employee's misconduct. In addition, imputing knowledge does not necessarily carry the day for the Secretary; in both cases the employer may defend by showing that it took all feasible steps to avoid the misconduct. *See Horne Plumbing*, 528 F.2d at 569. And since a properly trained supervisor would be expected to observe rather than violate important safety standards, the employer should bear the burden of proving that the misconduct was truly a departure from normal company practice.

In a similar context, the Supreme Court has discerned no unfairness in imputing knowledge of a supervisory employee's misconduct to his employer. The Court held in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998), that an employer may be liable under Title VII when a supervisor creates a hostile work environment, even if the employer has no actual

knowledge of the harassing behavior. The Court also held, however, that the employer may escape liability by establishing an affirmative defense in cases where no tangible employment action has taken place. The affirmative defense, based on the "avoidable consequences doctrine," requires the employer to show in part that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." *Ellerth*, 524 U.S. at 765.

A similar allocation of the burdens of proof is appropriate under the OSH Act. The Secretary should be permitted to establish the knowledge element of her *prima facie* case by imputing a supervisor's knowledge of his own misconduct to the employer. The employer may then avoid liability by showing that it "exercised reasonable care to prevent" the supervisor's misconduct, through proof of a safety program that is effective in both theory and practice. *See P. Gioioso*, 115 F.3d at 109-10. To the extent the Third and Tenth Circuits suggest a different allocation, this Court should reject their approach.

C. *Substantial evidence supports the ALJ's finding that Yates should have foreseen Olvera's failure to wear fall protection.*

Yates's second argument is that the ALJ "applied the wrong legal test for employee misconduct" when he rejected Yates's affirmative defense that Olvera's failure to wear fall protection was an isolated and unforeseeable incident. Pet. Br. 11. Yet the ALJ clearly applied the legal test set forth in *Secretary of Labor v. Jensen Constr. Co.*, 7 O.S.H. Cas. 1477 (BNA), 1979 WL 8561, at *2 (June 29, 1979). ALJ Dec. 7-11. That is the correct test, as Yates acknowledges. Pet. Br. 11; *see also Frank Lill & Son, Inc. v. Secretary of Labor*, 362 F.3d 840, 845 (D.C. Cir. 2004) (applying same four-part test).

So Yates is not in fact challenging the legal basis for the ALJ's rejection of its unpreventable employee misconduct defense. Rather, Yates is challenging the ALJ's application of the governing legal test to the evidence presented in this case. That is an issue of fact, reviewable under the highly deferential substantial evidence standard. *See Frank Lill*, 362 F.3d at 845-46; *D.A. Collins*, 117 F.3d at 695; *P. Gioioso*, 115 F.3d at

109-10; *Austin Bldg. Co. v. OSHRC*, 647 F.2d 1063, 1068 (10th Cir. 1981); *H. B. Zachry*, 638 F.2d at 819-20.

The employee misconduct defense is available where the employer shows that it: "(1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed it." *P. Gioioso*, 115 F.3d at 109; *see also H. B. Zachry*, 638 F.2d at 818. Here, the ALJ determined that Yates did not effectively communicate or enforce its fall protection rules. ALJ Dec. 11. Substantial evidence supports that determination.

1. *Yates did not effectively communicate its fall protection rules.*

"Because the behavior of supervisory personnel sets an example at the workplace, an employer has if anything a heightened duty to ensure the proper conduct of such personnel." *Floyd S. Pike*, 576 F.2d at 77. The record here shows that Yates did not meet that heightened duty. Instead,

as the ALJ found, there was a "breakdown in communication of any safety rules that might have been issued by [Yates]." ALJ Dec. 10. That breakdown defeats Yates's contention that Olvera's conduct was unforeseeable.

The record shows that Yates had rules governing fall protection and that Olvera had received fall protection training prior to his work at the Patton Creek site. ALJ Dec. 4; Tr. 103-104, 122-124. Olvera's conduct at the site, however, left no room for doubt that he viewed fall protection rules as advisory and not mandatory. For at least 15 to 20 minutes, and quite likely for the entire afternoon, Olvera worked on a slope near a 65-foot drop off while wearing no fall protection whatsoever. ALJ Dec. 3-4; Tr. 19-22.[7] In addition, Olvera specifically

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[7] The compliance officer actually concluded that Olvera used no fall protection during the entire time he was working at the job site that afternoon. Tr. 62, 65, 93. The compliance officer based that conclusion on the fact that Olvera could not produce a harness and lanyard upon being asked to do so. Tr. 60-61, 65. Although the ALJ did not specifically address this aspect of the compliance officer's testimony, he did find the compliance officer's "testimony as to the duration of Mr. Olvera's exposure [to the risk of falls] to be credible." ALJ Dec. 4. In addition, the ALJ specifically rejected Olvera's testimony that he had taken off his harness to go to the bathroom and left it in his truck. ALJ Dec. 10. Therefore, substantial

authorized two employees under his direction to wear harnesses backwards -- while exposed to the same precipitous drop -- for at least 45 minutes. ALJ Dec. 10; Tr. 207-209. Olvera knew that it was incorrect to wear harnesses backwards, but he "didn't think nobody would notice it." Tr. 213.

Olvera's knowing disregard of two separate fall protection rules does not indicate an isolated departure from normal practice. It instead indicates a complete lack of appreciation for serious safety rules. "[T]he fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax." *Floyd S. Pike*, 576 F.2d at 77.[8] Standing alone, therefore, Olvera's disregard of fall

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evidence in the record supports the conclusion that Olvera did not have fall protection gear at his disposal while he was working at the site that afternoon.

[8] Citing this Court's unpublished decision in *North Dallas Acrylic & Stucco, Inc. v. OSHRC*, 51 Fed. Appx. 930, 2002 WL 31415365 (Oct. 16, 2002), Yates contends that Olvera's admission that he knew he was violating company safety rules proves that Yates effectively communicated those rules. Pet. Br. 14 n.5. Nothing in *North Dallas* supports that proposition. The sole issue in *North Dallas* was whether the ALJ applied the correct legal test in determining that the employer failed to

protection rules would likely be enough to sustain the ALJ's rejection of the unpreventable employee misconduct defense.

But the ALJ correctly found additional evidence for that result. Supervisor John Ray, who had twice inspected Olvera's crew on the day in question, told the compliance officer that the workers wore the harnesses on backwards because it made the work easier to perform. Tr. 23-24, 34.[9] The ALJ reasonably -- and therefore permissibly -- inferred from that statement that Ray "accept[ed] and validat[ed]" the workers' practice of wearing their harnesses the wrong way. ALJ Dec. 10. That reasonable inference, in turn, led the ALJ to conclude:

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adequately enforce its safety program. After concluding that the ALJ applied the wrong test, the Court remanded the case to the Commission for further proceedings. The Court did not make any judgments about the sufficiency of the evidence in that case.

[9] Yates attempted to establish at trial that Ray was not in fact Olvera's supervisor, even though Yates had identified Ray as Olvera's "immediate supervisor" in discovery responses. ALJ Dec. 8; Rec. Vol. 2, Exh. C-28 (Respondent's Answer to Interrogatory #2). The ALJ rejected Yates's attempt to distance Ray from his supervisory responsibilities over Olvera and his work crew. ALJ Dec. 8.

> Mr. Ray could not have found obvious fall hazards as he did not recognize or understand the hazard of employees wearing harnesses backwards. The inspections were inadequate attempts to discover violations by [Yates]. An individual must first know what is a violation before he can determine whether one exists at any given time.

Ibid. Ray's demonstrated failure to appreciate fall protection hazards further supports the ALJ's conclusion that Olvera's conduct was foreseeable. *Cf. Austin Bldg. Co.*, 647 F.2d at 1068 (employer's constructive knowledge of hazardous condition was established where foreman testified that he would not have expected workers to use safety belts while working 17 feet above ground).

On appeal, Yates contends, without citation to authority, that Ray's validation of the workers' misuse of harnesses is irrelevant to the question whether Olvera's failure to wear fall protection was foreseeable. Pet. Br. 16 n.6. That is incorrect. Ray's willingness to countenance one serious fall protection violation (the failure to wear harnesses) supports the reasonable inference that he would just as willingly countenance a substantially similar one (Olvera's failure to wear any fall protection). Consequently, Ray's attitude

regarding the workers' failure to wear harnesses provides substantial evidence that Yates's safety program "left something to be desired." *P. Gioioso*, 115 F.3d at 110.

Yates also points to evidence that another supervisor, Joe Holyfield, "checked on Olvera and his crew several times a day and found that they were always properly tied off." Pet. Br. 17. That evidence is hardly sufficient to overcome the ALJ's factfinding. Indeed, the fact that Holyfield and Ray both inspected Olvera and his crew twice that morning, but not at all in the afternoon, Tr. 137, 232-233, undercuts Yates's claim that the "supervisors on each job continuously monitor their employees to make sure the rules are being followed." Pet. Br. 12. In any event, "[t]he fact that [an employer] may not have known of the specific instance of violative conduct at the time it occurred does not mean that the conduct was unpreventable." *Secretary of Labor v. Ormet Corp.*, 14 O.S.H. Cas. (BNA) 2134, 1991 WL 64845, at *4 (March 6, 1991).

Holyfield's observations in no way diminish the fact that two other supervisory employees (Ray and Olvera) displayed a "lack of understanding of fall protection requirements." ALJ

Dec. 10. Because Yates's safety rules were not adequately communicated to those two supervisors, *ibid.*, the ALJ correctly rejected Yates's unpreventable employee misconduct defense.

2. *Yates did not effectively enforce its fall protection rules.*

Substantial evidence also supports the ALJ's determination that Yates's "disciplinary program was flawed and inconsistent." ALJ Dec. 10. Therefore, Yates did not establish that it effectively enforced its safety program.

"The conventional way to prove the enforcement element [of the unpreventable employee misconduct defense] is for the employer to introduce evidence of a disciplinary program by which the company reasonably expects to influence the behavior of employees." *Secretary of Labor v. Precast Servs., Inc.*, 17 O.S.H. Cas. (BNA) 1454, 1995 WL 693954, at *1 (Nov. 14, 1995). Thus, "[t]o prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred." *Secretary of Labor v. GEM*

Indus., Inc., 1996 WL 710982, at *3 (O.S.H.R.C. Dec. 6, 1996).

In this case, Yates introduced evidence to show that it had a progressive disciplinary policy. Tr. 104-05. It also introduced evidence that it had reprimanded employees for various safety infractions, including Olvera for his failure to wear fall protection on the date in question. Tr. 108-09; Exh. R-4. From this evidence, Yates's safety director, Charles Maness, testified that "when we observe employees not following written and expressed safety rules . . . corrective action is taken." Tr. 109.

Yet the record actually established that corrective action was taken only some of the time. Inexplicably, Yates did not issue a written reprimand to Olvera or the members of his work crew for the failure to wear harnesses properly. ALJ Dec. 10; Tr. 170-71. Since Yates was as much aware of that violation as it was of Olvera's failure to wear any fall protection, Tr. 34, it can hardly claim that the safety rules were uniformly enforced.

Yates's uneven enforcement of its safety program illustrates that the company sent mixed signals to its

employees about whether they would answer for safety-related misconduct. It is not surprising, then, that Olvera and his crew would all see fit to disregard important fall protection rules. *Cf. GEM*, 1996 WL 710982, at *4 ("Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule."). Under these circumstances, a reasonable person would conclude that Yates did not effectively enforce its safety program. The ALJ's factfinding should therefore be affirmed.

CONCLUSION

The petition for review should be denied.

Respectfully submitted.

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