No. 06-1542

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Complainant,

v.

THOMAS INDUSTRIAL COATINGS, INC.,

Respondent.

OPENING BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF THE CASE

A. *The accident*

This case arises from a fatal accident in which a Thomas Industrial Coatings, Inc. ("TIC") employee fell 100 feet into the Mississippi River and drowned. On the day of the accident, TIC, an industrial painting company that works on bridges, water towers, dams, and barges, was engaged in work on the "J.B. Bridge project." Tr. 611-13. This project involved

painting and sandblasting the underside of the J.B. Bridge, which spans the Mississippi River near St. Louis. Tr. 638-39. Work began in early February 2006. Tr. 623-24.

On February 17, 2006, when the accident occurred, TIC crews were installing a Safespan platform under the bridge. Tr. 638. To install Safespan, cables are strung between abutments under the bridge and pans are attached to the cables. The pans then serve as the workers' platform. Tr. 96-97, 638-39. One crew of four employees – James Belfield, Daniel Pulido, Severo Pasillas, and Manuel Gutierrez – was working under the westbound portion of the bridge; another crew was working under the eastbound portion. Tr. 96, 1463-64. Alan Jackson, a foreman, was in charge of both crews. Tate Martin, a foreman-in-training, was directing the work of the crew under the eastbound lanes. Tr. 1463-64.

Sometime after 11:00 am, one of the cables supporting the platform under the westbound portion of the bridge snapped and part of the platform collapsed. Tr. 100, 695. James Belfield, who was not tied off to a vertical line, plunged 100 feet into the Mississippi River. After he hit the water, he

surfaced with his arms moving and then went under again. Tr. 801-802, 1499. A tugboat pilot, on observing people dangling from the bridge, brought his boat upriver towards the bridge but did not see Belfield in the river. Tr. 204-205. Belfield's body was found nine weeks later by a fisherman. Exh. C-35; Tr. 529.

The remaining three employees working under the westbound side of the bridge were tied off by vertical lines anchored underneath the bridge. When the platform collapsed, they were left hanging over the water by their lifelines. Tr. 803, 1469-74. TIC employees, assisted by firefighters from the Mehlville Fire Department, pulled all three to safety. Tr. 247-48.

B. *The citations*

1. *TIC's violation of 29 C.F.R. § 1926.451(g)(1)(i)*

OSHA's investigation revealed that James Belfield's safety lanyard was not tied off at the time the platform on which he was standing collapsed. The Secretary thus cited TIC for a serious violation of 29 C.F.R. § 1926.451(g)(1)(i) ("section 451" or "the tie-off standard"). Section 451 requires that "Each

employee on a . . . catenary scaffold . . . shall be protected by a personal fall arrest system." 29 C.F.R. § 1926.451(g)(1)(i).

TIC did not dispute that Belfield, who was working on a catenary scaffold, was not tied off to a lifeline at the time of the accident. Dec. at 5. Jackson testified that he saw Belfield attached to a vertical lifeline sometime that morning. Tr. 1469. He also testified that he spoke with Belfield, through a gap in the bridge structure, just before the accident occurred. Tr. 1473. Martin, the foreman-in-training who was working under the opposite side of the bridge, testified that while Belfield was speaking with Jackson, Martin noticed that Belfield was not tied off. At this time, the crew had recently come back from a break. Tr. 799-800. It is unclear, from the testimony as a whole, just how long Belfield was working without his lifeline.

2. *TIC's violation of 29 C.F.R. § 1926.502(d)(10)(i)*

OSHA's investigation also revealed that two of the employees in the westbound crew – Daniel Pulido and Severo Pasillas – were attached to the same lifeline, in violation of the fall protection standard at 29 C.F.R. § 1926.502(d)(10)(i)

("section 502" or "the independent lifeline standard"). Tr. 105. This standard requires that "when vertical lifelines are used, each employee shall be attached to a separate lifeline." 29 C.F.R. § 1926.502(d)(10)(i). The Secretary thus cited TIC for a serious violation of section 502.

Conflicting testimony on this violation was presented at the hearing. Three firefighters who assisted with the rescue consistently testified that Pulido and Pasillas were clipped to the same rope and thus were pulled up at nearly the same time. Tr. 181-82, 236-38, 248-49, 286-300. Their testimony is corroborated by a written report, produced by Captain TenBroek only a day or two after the rescue. Exh. C-34; Tr. 256. It is also corroborated by the testimony of TIC's Safety Environmental Manager, Wayne Long, who stated in a sworn deposition for a related civil lawsuit that Pulido and Pasillas were attached to the same safety line. Exh. C-73 at 122-23.

The TIC supervisors who testified on this point, however, provided differing testimony. Jackson testified that Pulido and Pasillas were on two separate lines that had gotten twisted together when the workers fell. Tr. 1476. He also claimed

that the firefighters assisting in the rescue had never actually come down on the platform to help with the rescue, a statement contradicted by all other eyewitnesses. Tr. 235-36, 286, 854, 1478. Martin testified that Pulido and Pasillas were on separate lines when they were brought up onto the platform. Tr. 817. He conceded that the firefighters were on the platform where the rescue was being performed, but at first denied that they assisted in the rescue. Tr. 830, 854. Later in his testimony he admitted that they "did have their hands on the rope," but accused the firefighters of trying to take undeserved credit for the rescue. Tr. 826-31, 854. Martin also testified that he had been paying attention to what Pulido and Pasillas were doing before the accident, and that the two employees worked side by side most of that morning. Tr. 798-99, 822.

3. *TIC's violation of 29 C.F.R. § 1926.106(d)*

The skiff standard requires that "[a]t least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water." 29 C.F.R. § 1926.106(d) ("section 106" or "the skiff standard"). The

standard applied to the J.B. Bridge project. OSHA's investigation revealed that, despite TIC's knowledge of both the standard and its applicability, TIC consciously decided not to comply with the standard. The Secretary thus cited TIC for a willful violation of 29 C.F.R. § 1926.106(d).

Evidence at the hearing showed that TIC's decision not to locate a skiff below the J.B. Bridge was made by its president and project manager, Don Thomas. Dec. at 19; Tr. 619. Thomas knew that the standard applied to the project, had complied with it on previous jobs, and had even included the cost of keeping a skiff below the bridge in the bid for the project. Tr. 658, 717, 1366-69, 1498.

Instead of putting a skiff beneath the J.B. Bridge, Thomas testified, he made arrangements with commercial boat companies along the Mississippi to render assistance in the event of an emergency. Tr. 640-58. The arrangements testified to by Thomas consisted of informal agreements with commercial tugboat operators, who allegedly agreed to help out in an emergency. *Ibid*. One of these operators – Pat Kapper of J.B. Marine – denied the existence of any such

arrangement.[1] Tr. 431-34. Another company, Limited Leasing, agreed to help if it happened to have a boat available. Tr. 467-69. Thomas put the phone numbers of some of these boat companies – including companies that did not even have their own boats, such as Bussen Quarry – on his emergency contact list for the J.B. Bridge project. Exh. R-2; Tr. 481-82.

C. *TIC's safety program*

TIC's written safety program addresses fall protection and includes a mandatory "100% tie-off" rule. Tr. 677. This rule requires that any employee exposed to a fall of at least six feet must use a personal fall arrest system tied off to a separate lifeline. Tr. 1283-1287, 1447. This rule was reviewed in toolbox meetings attended by Belfield; such meetings were part of TIC's training program. Exh. R-22; Tr. 1458-1461. At the hearing, however, evidence proved that, on the morning of the fatal accident, three of four employees on the westbound bridge crew were in violation of both OSHA fall protection

[1] In fact, Kapper testified that Thomas called him before the hearing to try to get him to remember having a conversation on this topic; a conversation Kapper insisted never took place. Tr. 431-34.

standards and TIC work rules. Jackson, an experienced foreman, failed to detect or correct any of the three violations. Dec. at 18.

Although J.B. Bridge project superintendent, Kevin Sparks, admitted that fall protection violations were "completely foreseeable," TIC's outside safety consultant performed a total of only seven safety audits during a two-year period when TIC had 80-110 job sites per year. Tr. 416-18, 709, 1247. Of the seven audits, four were of the same project. Tr. 416-17. Further, on the day of the accident, Jackson was in charge of at least eight workers and had his own work duties to complete. Tr. 792-93. Jackson admitted that he did not try to discover safety violations, but instead would address only the ones that came to his attention. Tr. 1516-17. In fact, it was Martin, working under the other side of the bridge, who noticed – just before the platform collapsed – that Belfield was not tied off. Tr. 799-800.

Although there was evidence that the company sent employees home for safety violations, the record demonstrates that discipline was not universally administered. Dec. at 18;

Exh. R-29; Tr. 1279-80. For example, there was no evidence that Pulido and Pasillas were disciplined for their misconduct. Dec. at 18. Jackson, who failed to correct multiple fall protection violations on the day of the accident, was not disciplined either. Tr. 1414, 1514-15.

D. *The ALJ's decision*

1. *The ALJ vacated the citation issued under 29 C.F.R. § 1926.451(g)(1)(i)*

At the hearing, TIC did not dispute that the Secretary established three of the four elements necessary to prove the violation of section 451 (application of the standard, noncompliance, and employee exposure). Dec. at 5. The ALJ vacated the citation, however, based on his holding that the Secretary did not prove TIC had constructive knowledge of the violation. The judge found that the record failed to show that TIC, with the exercise of reasonable diligence, could have known that Belfield was not tied off at the time the platform collapsed. Dec. at 7.

As support for this holding, the judge found that there was no evidence that Belfield's violation occurred for more

than a few minutes, that foreman Jackson considered Belfield a generally safety conscious employee, and that "[w]hatever the reason for Belfield's lapse in judgement, it was a momentary occurrence that Jackson could not have anticipated."[2] Dec. at 6-7. The judge posited that Belfield either failed to tie off when he came back from his break or "briefly unclipped his lanyard to walk over and talk to Jackson." Dec. at 16. Despite his factual holding that TIC's safety program is deficient – made with respect to the section 502 violation – the judge vacated the citation.

2. *The ALJ affirmed the citation issued under 29 C.F.R. § 1926.502(d)(10)(i)*

Two elements of the Secretary's burden of proof were disputed with respect to this violation – noncompliance with the standard and employer knowledge. The judge found that the violation was established based on the firefighters' testimony that Pulido and Pasillas were clipped to the same lifeline. Dec. at 15. After evaluating conflicting evidence, the

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[2] The ALJ's holding that the violation was only a momentary occurrence is based on an assumption that Belfield was tied off until just prior to the accident. Dec. at 7. There is no evidence that directly supports this assertion.

judge found the testimony of the firefighters at the scene of the rescue to be more credible than that of the TIC supervisors who testified about this issue. Dec. at 14-15. He found that the testimony of the three firefighters was consistent and matched Captain TenBroek's written report. Dec. at 14; Tr. 256. On the other hand, the testimony of Martin and Jackson was inconsistent and both witnesses exhibited an accusatory and angry demeanor towards the firefighters, whom they asserted were trying to take credit for the rescue. Dec. at 14-15. After observing the demeanor of the firefighters and the TIC supervisors and evaluating their testimony, the ALJ held that the firefighters testified more credibly and found that the standard had been violated. Dec. at 15.

The judge then addressed TIC's knowledge of the violation. He found that the issue of employer knowledge of the independent lifeline violation differed from the issue of knowledge of the tie-off violation. Dec. at 16. The ALJ found that Pulido and Pasillas had to have agreed to tie off to the same line, in violation of their training, and that they were in clear view of supervisory trainee Tate Martin, who was "paying

attention to what they were doing." *Ibid.* Thus, the judge held that TIC had constructive knowledge of the section 502 violation through Martin. *Ibid.*

Finally, the judge rejected TIC's employee misconduct defense. He found that TIC's written safety program required each employee to tie off to a separate vertical line, but that foreman Jackson's work duties prevented him from effectively monitoring employees for safety infractions. Dec. at 17-18. The judge found this to be compelling evidence that TIC does not take adequate steps to discover safety violations. Dec. at 17. He also found that TIC does not effectively enforce rules when violations are found, citing evidence that TIC's employees "exhibited a continuing resistance to abiding by the company's rules" and the fact that neither of the two employees tied off to the same lifeline was disciplined for the infraction. Dec. at 18-19.

3. *The ALJ affirmed the citation issued under 29 C.F.R. § 1926.106(d) but downgraded its classification*

The applicability of the skiff standard, exposure of employees to the hazard, and TIC's knowledge of the violation

were not in dispute at the hearing. The only issue to be determined, therefore, was whether TIC complied with the standard. The ALJ found that the company was aware of the skiff standard's requirements and had complied with it on previous jobs. Dec. at 21. He then rejected TIC's argument that the company's alternative arrangements constituted compliance with the standard. Dec. at 22; Tr. 1342-43.

Even assuming TIC's version of the facts on this issue is accurate, the ALJ held, any steps taken by TIC "fell far short of meeting the requirements of § 1926.106(d)." Dec. at 26. The judge described TIC's arrangements as "vague assurances" of help. Dec. at 25. He recognized that the point of having a dedicated skiff at or near the jobsite is, of course, immediacy of response. "Calling around to various businesses to see if they had a boat available defeats the purpose of the standard." *Ibid.*

The ALJ noted that the violation of the standard was highlighted by the inadequacy of TIC's response in the face of a real emergency. When Belfield fell, TIC failed to contact any boat operator for assistance or even broadcast a call for help

on the emergency marine radio channel. Dec. at 25-26; Tr. 724-25, 1184-85. The ALJ thus held that TIC failed to comply with the standard. Dec. at 25-26.

The Secretary argued that the violation was willful based on the fact that TIC was well aware of the standard's requirements yet elected not to comply because of economic concerns. While TIC offered a variety of reasons for its decision not to comply, the judge found that "TIC chose to substitute its judgement for the requirements of the standard." Dec. at 26. Although he described it as a "close case," the judge held that, "to the extent [Don Thomas] met with the various business owners to discuss rescue services and listed the telephone numbers for supervisors," TIC did not act with knowing disregard of the requirements of the Act. Dec. at 28. These actions were sufficient, in the judge's view, to negate willfulness. *Ibid.* Based on this holding, the ALJ downgraded the characterization of the violation from willful to serious.

SUMMARY OF ARGUMENT

Although the ALJ vacated the citation issued under 29 C.F.R. § 1926.451(g)(1)(i) because the Secretary failed to prove TIC's constructive knowledge of the violation, the judge's factual finding that TIC's safety program was inadequately enforced requires the opposite holding. *See Danco Constr. Co. v. OSHRC,* 586 F.2d 1243, 1247 (8th Cir. 1978). The ALJ's holding should thus be reversed and the Secretary's requested penalty of $4,200 be reinstated.

The ALJ's holdings with respect to the violation of 29 C.F.R. § 1926.502(d)(10)(i) are supported by the facts and should be affirmed. The ALJ, who was able to observe the demeanor of all witnesses, explained in detail why he found the firefighters' testimony to be more credible than that of the TIC employees in determining that the standard was violated. He then held that TIC had constructive knowledge of the violation based on its readily observable nature and Tate Martin's clear view of Pulido and Pasillas that morning. The ALJ also rejected TIC's attempt to prove unpreventable employee misconduct based on his well-supported factual

findings that TIC did not take adequate steps to discover violations or effectively enforce its work rules when violations were found.

Finally, there was a clear violation of 29 C.F.R. § 1926.106(d) and that violation was willful. TIC's decision not to place a dedicated skiff at the worksite, despite the standard's clear requirement that a skiff be "immediately available" where employees are working over water, was an obvious violation of the standard. Further, the company's actions demonstrated intentional disregard for, or plain indifference to, the standard's requirements. The fact that Don Thomas had one informal, unguaranteed arrangement for help does not demonstrate good faith. In fact, good faith is irrelevant where, as the ALJ found, the company substituted its judgment for that of the standard. *See Western Waterproofing Co. v. Marshall*, 576 F.2d 139, 143 (8th Cir. 1978); *Valdak Corp. v. OSHRC*, 73 F.3d 1466, 1468 (8th Cir. 1996). TIC's violation of section 106 was plainly willful under both Commission and Eighth Circuit caselaw.

ARGUMENT

A. *The ALJ erred in vacating the citation issued under 29 C.F.R. § 1926.451(g)(1)(i)*

1. *TIC had constructive knowledge of the violation of 29 C.F.R. § 1926.451(g)(1)(i)*

The ALJ found that the Secretary failed to prove TIC's constructive knowledge of the violation of 29 C.F.R. § 1926.451(g)(1)(i). Dec. at 7. This holding was in error and cannot be reconciled with the ALJ's factual finding that TIC's safety program was deficient.

To prove knowledge of a violation, the Secretary can demonstrate either actual or constructive knowledge. Proof of constructive knowledge rests on a determination that the employer, with the exercise of reasonable diligence, could have known of the violation. *Trinity Indus. v. OSHRC*, 206 F.3d 539, 542 (5th Cir. 2000). Factors relevant to evaluating reasonable diligence include the employer's "duty to inspect the work area and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program and work rules." *N & N Contractors, Inc. v. OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001); *Pride Oil Well Serv.,* 15 BNA

OSHC 1809, 1814 (No. 87-692, 1992). Constructive knowledge may be imputed to an employer through a supervisor. *New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105-106 (2d Cir. 1996).

A finding of constructive knowledge can rest on an "employer's failure to establish an adequate program to promote compliance with safety standards." *Id.; also Pride Oil Well Serv.,* 15 BNA OSHC at 1814. Further, constructive knowledge has been found when an employer is aware both that its work is inherently dangerous and that its employees have exposed themselves to hazards. *Omaha Paper Stock v. Sec'y of Labor,* 304 F.3d 779, 785 (8th Cir. 2002).

Here, even accepting the ALJ's finding that foreman Jackson could not have detected Belfield's failure to tie off when it occurred, TIC had constructive knowledge of the violation under any of the legal bases described above. The judge held that TIC's safety program was inadequate. Dec. at 17-19. Further, evidence showed that TIC knew its work was inherently dangerous, that violations were foreseeable, and that its employees exposed themselves to hazards. Tr. 758,

821, 1247. Had TIC effectively enforced its safety program, both of the fall protection violations that occurred on February 17, 2006 might have been prevented.

The Eighth Circuit, among others, has held that evidence of lax supervision of safety rules establishes the employer's constructive knowledge of violations within the scope of such rules:

> A particular instance of hazardous employee conduct may be considered preventable even if no employer could have detected the conduct, or its hazardous nature, at the moment of its occurrence, . . . (where) such conduct might have been precluded through feasible precautions concerning the hiring, training, and sanctioning of employees.

Danco Constr. Co., 586 F.2d at 1247 (citing *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 (7th Cir. 1975)). The ALJ specifically found that TIC "failed to establish it took steps to discover violations" and that it "failed to establish it effectively enforced the rules when violations are discovered." Dec. at 17-18. The judge failed to draw the correct legal conclusion from these findings. Although the findings were made in connection with the independent lifeline violation,

they establish that TIC could, with the exercise of reasonable diligence, have known of the tie-off violation.

While reversal is warranted on this basis alone, the Secretary notes that the judge's analysis is faulty for other reasons. Belfield's violation was not simply a momentary occurrence that could not have been detected prior to the accident. In fact, the violation *was* detected. Tate Martin, who was supervising a different crew on the other side of the bridge, was able to determine from Belfield's movements that he was likely not tied off. Tr. 799-800. Martin's knowledge is chargeable to TIC. Dec. at 16. In addition, Jackson, who was directly responsible for Belfield's safety and was standing on the deck immediately above him, *could* have observed the violation had he been paying attention. *KS Energy Servs., Inc.,* 22 BNA OSHC 1261, 1265-66 (No. 06-1416, 2008) ("constructive knowledge may be found where a supervisory employee was in close proximity to a readily apparent violation.").[3] The ALJ himself posited that Belfield might have

[3] The judge correctly determined that TIC had constructive knowledge of the independent lifeline violation because Martin

"briefly unclipped his lanyard to walk over and talk to Jackson," in which case Jackson should have known Belfield was too far away from his lifeline to be tied off.[4] Dec. at 16. Jackson failed to detect Belfield's violation not because the violation was undetectable, but because he was too busy to adequately monitor employees and took no steps to actively discover infractions. Dec. at 18. Because TIC had knowledge of the tie-off violation, the Commission should reverse the ALJ's decision to vacate the citation under section 451.[5]

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could have observed that Pulido and Pasillas were attached to the same vertical lifeline. Dec. at 16. The ALJ did not, however, apply the same case law with respect to the tie-off violation, which was actually observed by Martin and *could have* been observed by Jackson.

[4] In fact, that is exactly how Martin knew, from 50-70 feet away, that Belfield was not tied off. Tr. 799-800. Even if Jackson could not see Belfield's body while they were talking, as he testified, he could have discerned that Belfield was not tied off simply by his positioning.

[5] The affirmative defense of unpreventable employee misconduct, which was raised by TIC at the hearing regarding both fall protection violations, was rejected by the ALJ with respect to the section 502 violation. Dec. at 17-19. This holding by the ALJ applies equally to the claim that the section 451 violation was caused by unpreventable employee misconduct. *See infra* Argument section (B)(3).

2. *TIC should be assessed a penalty of $4,200*

The penalty initially assessed by OSHA was a gravity-based penalty of $7,000. This amount was then reduced by 40 percent based on the size of the company. No credits were given for good faith – since a willful citation was issued in the same inspection – or history. The Secretary thus requests that TIC be assessed a penalty of $4,200 for the violation.

B. *The violation of 29 C.F.R. § 1926.502(d)(10)(i) was appropriately affirmed*

1. *TIC violated the standard*

To determine whether the independent lifeline standard was violated, the judge evaluated the conflicting testimony of the Mehlville firefighters and the TIC supervisors who participated in the rescue. Three firefighters who testified at the hearing climbed down to the platform beneath the bridge and assisted in the rescue. Tr. 235-36, 286, 854. They all testified that two men – Pulido and Pasillas – were tied to the same lifeline. The testimony of Kevin Reis was particularly persuasive. He testified that, once he got onto the platform, he could clearly see the single lifeline, which was directly in front

of him, to which both Pulido and Pasillas were attached. Tr. 286. Reis definitively rejected TIC's claim that there were two lines which had twisted together. Tr. 297-98. Captain TenBroek stated that he looked over the edge of the scaffolding and saw Pulido and Pasillas hanging back to back ("they were tethered on the same rope, and then each had individual ropes from that center rope"). Tr. 237-38. Both he and firefighter Thomas Daniels stated that it was obvious the two men were tethered to the same line because when the rescuers pulled one man up, the other came up as well. Tr. 181, 237-38. The firefighters' testimony was corroborated by Captain TenBroek's incident report. Exh. C-34.

Two TIC employees – Jackson and Martin – testified that Pulido and Pasillas were tied to separate lifelines. However, their testimony was internally inconsistent and appeared to be colored by anger towards the firefighters. Dec. at 14-15. Jackson stated the firefighters were not on the platform during the rescue; Martin admitted the firefighters were on the platform but charged them with lying about their

participation.[6] Tr. 826-30, 1478. TIC did not produce either Pulido or Pasillas to testify. Dec. at 17.

The Commission generally defers to an ALJ's credibility determinations "because he is the one who heard the witness and observed his demeanor." *American Wrecking Corp.*, 19 BNA OSHC 1703, 1708 (Nos. 96-1330 & 96-1331, 2001); *also Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993) ("[w]hen such an evaluation is based on the judge's observation of a witness' demeanor and is clearly stated and explained, we generally accept that finding."). The ALJ in this case determined, after an extensive analysis, that the testimony of the firefighters was more credible. Dec. at 15. He noted that, as supervisors, both Jackson and Martin had "an interest in promoting the notion that Pulido and Pasillas were properly tied off." Dec. at 14. He also noted that Martin's demeanor changed when speaking about the firefighters; he became belligerent and expressed "unabated anger" towards

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[6] Wayne Long of TIC, in a deposition for a related civil lawsuit, admitted that the two employees were attached to the same safety line. Exh. C-73 at 122-23. Because Long was not an eyewitness to the rescue, the ALJ did not consider this testimony in making his credibility determination. Dec. at 15.

the firefighters. Dec. at 15. The firefighters, in contrast, were disinterested third party professionals who were not emotionally involved in the situation. Dec. at 14. These factors, combined with the firefighters' consistent and convincing testimony, persuaded the ALJ that the Secretary proved, by a preponderance of the evidence, that the terms of 29 C.F.R. § 1926.502(d)(10)(i) were violated. Dec. at 15. This amply-supported factual finding should not be disturbed.

2. *TIC had constructive knowledge of the violation*

The ALJ held that TIC had constructive knowledge of the violation based on Martin's ability to clearly see Pulido and Pasillas. *See KS Energy Servs., Inc.,* 22 BNA OSHC at 1265-66 ("'the conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge'") (quoting *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996)). This finding is clearly supported by the evidence and should be affirmed.

In the alternative, the cases cited above with respect to TIC's knowledge of the section 451 violation support a finding

of constructive knowledge here. *See Danco Constr. Co.,* 586 F.2d at 1247; *New York State Elec. & Gas Corp.*, 88 F.3d at 105-106; *Pride Oil Well Serv.,* 15 BNA OSHC at 1814. The ALJ found that TIC's safety program was inadequate and that fall protection violations were common at its worksites. Dec. at 17-19. These findings support a holding that TIC had constructive knowledge of the independent lifeline violation.

3. *TIC failed to prove its defense of unpreventable employee misconduct*

To establish the affirmative defense of unpreventable employee misconduct, an employer must prove that "due to the existence of a thorough and adequate safety program, which is communicated and enforced as written, the conduct of its employee(s) in violating that policy was idiosyncratic and unforeseeable." *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987). The ALJ held that TIC failed to prove it took steps to discover violations or effectively enforce its rules and that violations were foreseeable. Dec. at 17-19. These findings are amply supported by the evidence.

The evidence shows that TIC's insurance company safety specialist conducted only seven safety audits (four of the same project) during a period of two years when TIC had 80-110 worksites per year. Dec. at 17; Tr. 709-710. Jackson corrected safety violations that he noticed, but admitted that he did not take steps to discover them. The evidence demonstrates that Jackson's own work duties, plus the fact that he was supervising two work crews totaling eight men on the day of the accident, prevented him from adequately monitoring for safety violations. Dec. at 18; Tr. 1516-17. Further, the evidence shows that discipline was not universally administered when violations were found. Neither Pulido nor Pasillas was disciplined for the independent lifeline violation, and Jackson was not disciplined although three of his four employees were out of compliance with OSHA standards and work rules on February 17, 2006. The ALJ concluded that "TIC has had long-standing problems getting its employees to observe safety rules" and agreed that there is "some merit" to the Secretary's claim that fall protection violations are endemic at TIC worksites. Dec. at 19. TIC's

President, as well as its superintendent, agreed that fall protection violations were foreseeable and had occurred prior to the accident at issue here. Tr. 758, 1247. The ALJ's rejection of the unpreventable employee misconduct defense is supported by a preponderance of the evidence and should be affirmed.

C. *In violating 29 C.F.R. § 1926.106(d), TIC intentionally disregarded or was plainly indifferent to the standard*

1. *There was a clear violation of 29 C.F.R. § 1926.106(d)*

Although TIC argues that there was no violation of the skiff standard, the evidence clearly shows a violation. The standard requires that "[a]t least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water." 29 C.F.R. § 1926.106(d). TIC had no skiff at all, much less one that was immediately available.

TIC's argument that its informal arrangements with two marine operators (one of which denied any such arrangement) to provide assistance in an emergency constituted compliance with the standard is plainly wrong. Even assuming, *arguendo*,

that the standard can be read to permit the employer to rely on offsite rescue services under some circumstances, TIC's arrangements were not remotely adequate. As the judge found, TIC's arrangements amounted to "vague assurances from the businesses that they would help if they had a boat available." Dec. at 25. There were no guarantees that a boat would be available at all or that an available boat would be used for rescue services. Tr. 476. That hardly satisfies the standard's requirement that a skiff be "immediately available."[7] Because TIC failed to have a lifesaving skiff immediately available, the ALJ's holding that the standard was violated is correct.

2. *TIC intentionally disregarded or was plainly indifferent to the requirements of 29 C.F.R. § 1926.106(d)*

The ALJ affirmed the violation of 29 C.F.R. § 1926.106(d) but downgraded its classification from willful to serious. Dec.

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[7] The Secretary need not address whether a formal agreement might meet the requirements of 29 C.F.R. § 1926.106(d). As OSHA Area Director William McDonald testified, even if – as TIC argues – the skiff standard is a performance standard, it allows no flexibility on the requirement that a skiff be immediately available. Tr. 1574-78.

at 28. In doing so, the ALJ misapplied the test for willfulness used by both the Commission and the Eight Circuit. In fact, the ALJ's factual findings support a willful characterization.

The OSH Act does not define willfulness. The federal circuit courts and the Commission, however, affirm a finding of willfulness under the OSH Act if the employer "intentionally disregarded or was plainly indifferent to the requirements of the [Act]." *Dakota Underground, Inc. v. Sec'y of Labor*, 200 F.3d 564, 567 (8th Cir. 2000) (citing *Valdak Corp.*, 73 F.3d at 1468); *Wynnewood Refining Co.*, 22 BNA OSHC 1410, 1422 (No. 07-0609, 2008), *aff'd,* No. 08-9572, 2009 WL 2371862, at *3 (10th Cir. Aug. 4, 2009). Malicious intent is not necessary for a finding of willfulness. *E.g.*, *Donovan v. Capital City Excavating Co., Inc.*, 712 F.2d 1008, 1010 (6th Cir. 1983).

In his decision, the ALJ referred to TIC's "alternate arrangements" as "tragically inadequate to the emergency situation" and an "abysmal failure," as well as "terribly misguided." Dec. at 25-27. He found that TIC substituted its judgment for the requirements of the standard. Dec. at 26. The ALJ then held that, although it was a "close case," TIC's

actions, or lack thereof, did not demonstrate plain indifference to employee safety or intentional disregard of the standard's requirements. Dec. at 27-28.

The ALJ appears to conclude that, because Thomas took *some* action relevant to employee safety, TIC acted in good faith. This, however, is not enough to avoid a finding of willfulness. First, good faith is irrelevant where an employer substitutes its judgment for that of the standard. *Valdak Corp.*, 73 F.3d at 1468 ("An employer who substitutes his own judgment for the requirement of a standard or fails to correct a known hazard commits a willful violation even if the employer does so in good faith."); *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 1999). The ALJ found that TIC knew of the requirements of the standard – in fact, had complied with the standard before – and "chose to substitute its judgement for the requirements of the standard." Dec. at 26. Thus, TIC's violation was plainly willful regardless of whether Thomas's discussions with other business owners about rescue services show some concern for employee safety. Dec.

at 28. In *Western Waterproofing Co. v. Marshall*, the Eighth Circuit held that:

> In applying this [willfulness] standard to the present case, we need not decide whether or not Western did in fact believe that their actions met the underlying purpose of the standards through other means. Western's management personnel were well aware of the scaffolding standards for which they were cited. Western's officials substituted their own judgment for the provisions of the standards and therefore cannot escape the conclusion that they acted voluntarily with either intentional disregard of, or plain indifference to, the requirements of the Act. . . . The regulations allow no such unbridled discretion.

576 F.2d at 143; *see also RSR Corp. v. Brock*, 764 F.2d 355, 363 (5th Cir. 1985). TIC acted with just the sort of unbridled discretion that proves willfulness in the Eighth Circuit.

Second, even if good faith were relevant to willfulness in this case, an employer's efforts must be objectively reasonable to support a finding of good faith. *See Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997); *A.E. Staley Mfg. Co.*, 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000). TIC's "tragically inadequate" efforts – Thomas's failure to contact OSHA, apply for a variance, attempt to put a skiff under the bridge, or have any rescue assistance immediately

available during an emergency – were not objectively reasonable. The ALJ's finding on willfulness was in error and must be reversed.

3. *TIC should be assessed a penalty of $56,000*

The penalty proposed by OSHA was calculated starting at $70,000. This was based on the high probability and severity of harm that could result from the violation. This amount was then reduced by 20 percent based on the size of the company.[8] Exh. C-15; Tr. 328-30. The ALJ held that the gravity of this violation was "extremely high" and that "[t]he failure to have a skiff immediately available may have contributed to Belfield's death." Dec. at 28. The Secretary thus requests that TIC be assessed a penalty of $56,000 for the skiff violation.

CONCLUSION

The ALJ correctly affirmed the violations of 29 C.F.R. § 1926.502(d)(10)(i) and 29 C.F.R. § 1926.106(d), but erred in vacating the 29 C.F.R. § 1926.451(g)(1)(i) violation and

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[8] The 40 percent reduction for the size of the company, which was applied to the violation of section 451, was reduced by half because of the willful nature of the violation. Exh. C-15; Tr. 328-30.

reclassifying the violation of 29 C.F.R. § 1926.106(d) as serious. Accordingly, the Commission should uphold the ALJ's decision with respect to the violations of 29 C.F.R. § 1926.502(d)(10)(i) and 29 C.F.R. § 1926.106(d), but reverse the ALJ's decision to vacate the citation issued under 29 C.F.R. § 1926.451(g)(1)(i) and to downgrade the violation of 29 C.F.R. § 1926.106(d) from willful to serious. The Commission should also apply penalties of $4,200 for the serious violation of 29 C.F.R. § 1926.451(g)(1)(i) and $56,000 for the willful violation of 29 C.F.R. § 1926.106(d).

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2009, the following counsel of record for Respondent Thomas Industrial Coatings, Inc. was served with one copy of the Brief of Complainant Secretary of Labor by facsimile and two copies by overnight mail:

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