UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PALACIOS MARINE & INDUSTRIAL COATING INC., Respondent.	OSHRC DOCKET NO. 20-0401

Christopher Lopez-Loftis, Esq. and Lindsay Woffard, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Joseph Garnett, Esq., Sheehy, Ware & Pappas PC, Houston, Texas
For Respondent

Before: First Judge Patrick B. Augustine – U. S. Administrative Judge

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On November 13, 2019, in response to a report of a hospitalization arising out of an incident on a Point Comfort, Texas worksite operated by Palacios Marine & Industrial Coating Inc. ("Palacios Marine" or "Respondent"), the Occupational Safety and Health Administration ("OSHA") Corpus Christi Area Office dispatched a Compliance Safety and Health Officer ("CSHO") to conduct an inspection of Respondent's worksite. (Tr. 162, 168; Ex. C-3.) As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging serious violations of the Act and proposing a total penalty of $53,976. The

Citation was issued on February 10, 2020. Respondent timely contested the Citation, bringing this matter before the Commission[1].

A two-day trial was held on November 16 and 17, 2021, in San Antonio, Texas. Three witnesses testified: (1) Palacios Marine Scaffold Builder SG[2]; (2) OSHA CSHO Andrei Guzman; and (3) Palacios Marine Corporate Safety Director Jhon Arias. Both parties filed post-trial briefs.

Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and arguments of counsel, the Court issues this Decision and Order as its Finding of Facts and Conclusions of Law. Based on what follows, the Court vacates Citation 1, Items 1(a), 1(b), 2(b), 3(a), 3(b), and 4(a).[3]

II. Stipulations

The parties entered into a stipulation agreement ("Joint Stipulation Statement") prior to the beginning of trial. The Joint Stipulation Statement was introduced into the record as Joint Exhibit No. 1 (hereinafter "Ex. J-1.") (Tr. 11-12.) [4] In lieu of reproducing the stipulations in their entirety, the Court shall make references to the Joint Stipulation Statement as necessary.

III. Jurisdiction

[1] "[T]he Commission is responsible for the adjudicatory functions under the OSH Act" *StarTran, Inc. v. OSHRC*, 290 F. App'x 656, 670 (5th Cir. 2008) (unpublished), and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (per curiam). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *Martin v. OSHRC,* (*CF&I Steel Corp*.), 499 U.S. 144, 151 (2012).

[2] In the interest of personal privacy, the name of the injured worker has been removed from this Decision and Order. *See* 29 C.F.R. §§ 2200.8(c)(6), (d)(5).

[3] At the trial, the Secretary withdrew Citation 1, Items 2(a) and 4(b) and so those citation items are not adjudicated herein. (Tr. 11; Ex. J-1 ¶¶ e, f); *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985) (holding that the Secretary's discretion to withdraw citation is unreviewable).

[4] *See Armstrong Utils. Inc.*, No. 18-0034, 2021 WL 4592200, at *2 n.2 (OSHRC, Sept. 24, 2021) (finding it was "plain error" to not accept parties' stipulation); *CF & T Available Concrete Pumping, Inc*., 15 BNA OSHC 2196, 2199 (No. 90-329, 1993) (the Commission accepted the parties' stipulation the alleged violation, if any, was serious).

The parties stipulate, and the record supports, Respondent is engaged in a business affecting interstate commerce and is an employer within the meaning of the Act. (Ex. J-1 ¶ b.) The record establishes Respondent filed a timely notice of contest. (Ex. J-1 ¶ d.) Accordingly, the Court has jurisdiction over this proceeding pursuant to § 10(c) of the Act. 29 U.S.C. § 659(c). *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, U.S. Dep't of Labor*, 518 F.2d 990, 995 (5th Cir. 1975), *aff'd sub nom., Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (describing "Enforcement Structure of OSHA"); *see also Joel Yandell*, 18 BNA OSHC 1623, 1628 n.8 (No. 94-3080, 1999); 29 U.S.C. § 659(c).

IV. Factual Background

Respondent is a general mechanical contractor and supplies an array of services to clients in various industries, including the petrochemical and refinery industries. (Tr. 224-225; Ex. C-8.) One of Respondent's services it provides to its clients is scaffolding. (Ex. C-8.) In this case, Respondent was building a scaffold for one of its clients, Formosa Plastics Corporation ("Formosa" or "FPC"), at Formosa's expansive petrochemical plant. (Tr. 169, 410.) At the time, Respondent supplied over 500 workers at Formosa's plant, 120-140 of which were scaffold builders. (Tr. 311-312.)

Formosa's plant spanned at least three-fourths mile in distance and had designated "live" and "non-live" areas where heavy machinery processed (or did not process) flammable chemicals. (Tr. 46-49, 109-111, 169.) Respondent's specific worksite at issue on the day of the incident at Formosa's plant was in a "non-live" area – no flammable material was being processed at Respondent's worksite. (Tr. 61.) The closest "live" area was three-fourths of a mile away from the worksite at issue. (Tr. 110-111.)

The Scaffold

On November 11, 2019, a team of Respondent's scaffold builders was tasked to build a "hooch." This "hooch," once assembled, would eventually be a shelter from the elements for welders who would be working within it on the ground level. (Tr. 368, 444-445, 446-450.) At the time of the incident, however, the hooch was under assembly – it was not yet complete. (Tr. 102; Ex. R-20.) It was determined at trial this structure, which Respondent's scaffold builders were working on, was a type of scaffold. (Tr. 446-450.)

As shown in the picture below, the scaffold consisted of steel vertical "legs" and horizontal "runners" connected to form a "skeletal" frame-like structure. (Tr. 54-56, 102, 233; Ex. R-20.) Wooden planks were placed across the runners on one level at seven feet in height so the scaffold builders could stand on them to build up the hooch, which was estimated to ultimately reach 18 feet in height. (Tr. 104.) Once assembled, all of the wooden planks that served as temporary working platforms within the structure would be removed leaving in place a tarp-covered shelter (i.e., the "hooch") for welders to work inside on the ground level. (Tr. 55-56, 76, 81, 136.)

(Ex. R-20 at PMIC-276.)

The skeletal structure was about 24 feet long, and four rows of wooden planks were placed across the runners so that workers could walk on the wooden planks across/within the structure as they built it up. (Tr. 52-53, 211.) Each wooden plank was nine inches deep and ten feet long, and they were placed near where a runner intersects with a leg, which, according to SG, when locked "won't move nowhere."[5] (Tr. 54, 77, 452; Ex. R-20.) In this way, the planks were supported

[5] When asked about the legs of the skeletal structure, SG testified: "They have a rosetta where you put in the runner and it has a pin where the bar gets locked. It won't move nowhere. You just hit it with a hammer. It's a pin. It's like a little hole, the rosetta. The pin goes in. Then you hit it all the way down. It locks. It makes the runner go nowhere. That what I'm referring to as the leg." (Tr. 54.)

temporarily such that a worker could traverse the planks while building up the hooch. (Tr. 52.) According to SG, the planks were used by workers to access/build a higher level within the hooch such that the hooch would extend up to what was supposed to be eighteen (18) feet in height. (Tr. 81, 104.) Also, according to SG, once he and his team members completed a level and began working on the next level up, the wooden planks at the first level would be removed. (Tr. 81.)

The Incident

According to SG, the relevant events leading up to the incident are as follows: SG arrived at the worksite, termed the LDPE[6] laydown yard, around 7 a.m. wearing his own fire-retardant clothing ("FRC") and bringing his own fall protection harness. (Tr. 63, 75, 82, 150.) SG performed his first job of the day, which was a modification of another scaffold, and finished that job around 9:45 a.m. (Tr. 64-65.) Around 9:45-10 a.m., SG began preparing for his second job of the day, building the hooch. (Tr. 65.)

Respondent's hooch building team included SG, Argelio Abrego, Leo Lopez, and foreman Luis Hernandez. (Tr. 57-60, 82, 406-407, 409.) Mr. Hernandez was also the designated competent person for this scaffold building team. (Tr. 128-129, 180.) Mr. Hernandez completed the Job Safety Analysis (JSA) for this project. (Ex. R-5.) Mr. Hernandez personally selected the group of workers for this hooch project. (Tr. 62-63.) Superintendent Jose Gonzalez was present supervising the progress, but not actually participating in the scaffold building process. (Tr. 59.)

SG attended a hooch crew meeting in the laydown yard with Mr. Abrego, Mr. Lopez, and Mr. Hernandez, wherein Mr. Hernandez discussed the JSA for building the hooch and which included scaffolding hazards and fall protection hazards. (Tr. 62, 114-118; Ex. R-5.) Each member of the team signed the JSA. (Ex. R-5.) SG and his team members gathered scaffolding

[6] The record does not establish what the term "LDPE" means. (Tr. 109-110.)

materials and tools from the tool room at the laydown yard to build the hooch. (Tr. 62-66, 118, 415.) SG had a hammer, a ratchet, a level, measuring tape, a tool pouch, tool belt and his harness. (Tr. 71.) SG was also wearing his FRC at the time. (Tr. 75.) A forklift delivered wooden planks to the worksite. (Tr. 51, 65, 127-128; Ex. R-22 at PMIC-286.) The record establishes that SG then took lunch.

After lunch, SG and his team members began building the hooch around 12:30 p.m. (Tr. 66.) The crew began assembling the hooch "from the bottom up" – they connected the legs and runners together on the ground and up to 7 feet in height. (Tr. 51, 55.) At that point, Mr. Hernandez placed the wooden planks across the runners at the 7 foot spot. (Tr. 51-53.) SG and his fellow team members climbed on top of the wooden planks., Mr. Hernandez remained at the bottom to pass up materials to the workers. (Tr. 59-60.) Mr. Gonzalez was also on the ground watching the crew work "in terms of having all your equipment and working safely." (Tr. 59.) SG tied off his harness onto a runner at his feet in accordance with the JSA which noted Respondent's 100% tie off policy. (Tr. 105; Ex. R-5.) SG explained: "I was about to put more legs up in order for me to hook onto something else. But since there was nothing there, that was my safest point for me to hook up to." (Tr. 77.)

SG worked on the first level – on the wooden planks – for "at least 10 to 20 minutes." (Tr. 67.) SG described what happened next:

> I got on one of them and I walked towards it was my north side. I had walked it already once and then it was time for us to come back and start building up. So that's when I came back. I stepped on the first board. Everything was good. On the second board, I was stepping on the board and on the runner, but when I stepped on the board, I mean I didn't feel anything wrong. But slowly I started going to the middle and they handed me another leg -- that's what you call them. And as soon as I put my feet together on the board, that's when everything happened so fast. It broke.

(Tr. 51-52.) SG fell seven feet to the ground and sustained broken bone injuries requiring reconstructive surgery to his legs and feet. (Tr. 68-70.) SG's harness did not break his fall because it was "too short distance" for his lanyard to protect him when it was anchored at his feet. (Tr. 267.) The record does not establish any worker, by the time of the incident, ever worked at a height greater than 7 feet at the instant worksite. (Tr. 106-107.) SG estimated about 35-45 minutes had passed from the time the crew began working on the hooch to when he fell. (Tr. 67.)

At trial, SG testified he looked at the top of the board when he stepped on it, and he did not notice whether it appeared rotten to him. (Tr. 131-132, 155.) He testified that if it did look rotten from the outside, it was "probably facing the other way because when I stepped on it it didn't look that way. And if I seen it that way I mean, I wouldn't take a chance a[nd] step on it. I wouldn't try getting myself hurt." (Tr. 145.) SG testified the plank looked "black" when shown a picture of it at trial. (Tr. 154-155; Ex. R-32 at DOL-144, 145.)

(Ex. R-32 at DOL-145.)

SG was then shown a picture of the pile of wooden planks, that had been delivered by forklift, to be used when building the hooch. (Tr. 155-156; Ex. R-22 at PMIC-286.) SG testified the wooden planks in the pile all appeared "black" like the plank that broke beneath him and now he would "maybe not" step on one of them or he "would look it over again, like check if they're sturdy for me to step on." (Tr. 156.) He testified the color black may not indicate "exactly" that the plank was rotten, but "I will double check myself to see if it's worth it to me to work on." (Tr. 160.)

(Ex. R-22 at PMIC-286.)

OSHA Investigation

Respondent reported SG's hospitalization pursuant to OSHA's reporting regulations, and OSHA assigned CSHO Andrei Guzun from the Corpus Christi OSHA Area Office to investigate this matter.[7] (Tr. 168.) CSHO Guzun arrived at the Formosa plant on November 13, 2019, around

[7] CSHO Guzun has been employed by OSHA since May 2, 2014. He has a master's degree in Ecology and Environmental Protection, and another master's degree in Science International Affairs and Public Administration.

8:30 am and attended Formosa's orientation, which was required by Formosa for "every visitor, every contractors, any government officials, [and] anybody who show up at their premises." (Tr. 169-170.) He explained all petrochemical plants or refineries, because they are considered high risk industries, have such orientations to maintain rigorous safety and health policies and procedures. (Tr. 169.) Shortly thereafter, CSHO Guzun conducted an opening conference with Respondent supervisor Jose Gonzalez, Respondent corporate safety director Jhon Arias, Respondent Formosa site manager Dave Adams, and Respondent Formosa site safety representative Cody Hoffman. (Tr. 168-169, 223, 312; Ex C-5 at 2, Ex. C-3 at DOL 097.)

At Formosa's orientation upon arriving at Formosa's plant, and during the opening conference with Respondent's representatives, CSHO Guzun asked what type of personal protective equipment ("PPE") requirements were required for him to enter Formosa's plant. CSHO Guzun explained:

> Because we going in so much industry and from one industry to another different employers require different PPE. We want to make sure we are protecting ourself when we going in somebody else premises. So after that they told me what kind of PPE they require for their plant or for their facility.

(Tr. 171.) CSHO Guzun testified that "they" told him, during orientation and after orientation during the opening conference, that he must have a "hard hat, safety glasses, steel toed shoes, FRCs," and a safety vest in order to come into Formosa's plant. (Tr. 171-172.)

After the opening conference, CSHO Guzun performed a walkaround inspection of the worksite where the incident occurred. He took pictures and interviewed employees. (Tr. 172.) CSHO Guzun obtained signed interview statements from an unidentified informant, foreman

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He has a bachelor's degree in Biology and Chemistry. (Tr. 163.) CSHO Guzun has attended the OSHA Training Institute, OSHA Region VI trainings, area office trainings, and online training including OSHA E-Learning, as well as field training provided by management and senior CSHOs. (Tr. 163-165.) CSHO Guzun performs about 30-40 inspections per year. (Tr. 166.)

Hernandez, and a signed joint statement from supervisor Gonzalez[8] and safety director Arias. (Tr. 315-317; Ex. C-7.) CSHO Guzun explained he asked the workers questions, they answered the questions, CSHO Guzun wrote down what the workers said, and then CSHO Guzun told the workers to review what he wrote and then sign the statement at the bottom. (Tr. 283-285; Ex. C-7.)

Interview Statements

The interview statements are a source of discord between the parties because much of The Secretary's case – for example, whether Mr. Hernandez is a competent person as defined by OSHA regulations – depends on a few sentences within them. (Tr. 429-432; Ex. C-7.) The statements were admitted into the record as CSHO Guzun's records of his regularly conducted inspection activity. (Tr. 181-183.); *see* Fed. R. Evid. 801(d)(2); 803(6) (as to records of a regularly conducted activity); *see also Beta Constr. Co.*, 16 BNA OSHC 1435, 1441-1442 (No. 91-102, 1993) (noting that out-of-court, contemporaneous statements made by the employee to the OSHA compliance officer during the OSHA investigation are admissible).

While admissible, the statements must still be evaluated for their reliability. *Beta Constr. Co.*, 16 BNA OSHC at 1442 (holding that while admissible, the out-of-court, contemporaneous statements made by the employee to the OSHA compliance officer during the OSHA investigation "should be given weight only to the extent they are reliable.").

> Although admissions under Rule 801(d)(2)(D) are not inherently reliable, there are several factors that make them likely to be trustworthy, including: (1) the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted.

[8] Supervisor Gonzalez did not testify at the trial.

Regina Constr. Co., 15 BNA OSHC 1044, 1047-1048 (No. 87-1309, 1991) citing 4 D. Louisell & C. Mueller, *Federal Evidence* § 426 (1980 & Supp.1990).

Multiple issues surround the statements, the most problematic of which is they appear illegible to anyone except CSHO Guzun, who wrote them. At the Court's request, because the Court was having difficulty reading the interview statements, CSHO Guzun read them all entirely into the record. (Tr. 209-222.)[9] As counsel for Respondent noted in his examination of CSHO Guzun, it is questionable whether anyone could read the documents when CSHO Guzun instructed them to "review it and sign the statements." (Tr. 284.) Based upon an examination of the interview statements, and the Court having them read into the record so it could understand the content, the Court infers it is highly unlikely any worker could have reviewed them and understood their content before they signed them. *Okland Constr. Co*., 3 BNA OSHC 2023, 2024 (No. 3395, 1976) (reasonable inferences can be drawn from circumstantial evidence). "[T]he Commission may draw reasonable inferences from the evidence[.]" *Fluor Daniel*, 19 BNA OSHC 1529, 1531 (No. 96-1729, 2001) (consolidated) (citing *Atl. Battery Co*., 16 BNA OSHC 2131, 2159 (No. 90-1747, 1994)). For this reason alone, the Court gives little weight to the interview statements.

Other issues surround these interview statements. One, CSHO Guzun jointly interviewed supervisor Gonzalez and safety director Arias, and they both signed the one joint interview statement as having read it. (Tr. 313-316; Ex. C-7.) However, it is not clear from their joint interview statement who said what to CSHO Guzun, and only Mr. Arias testified at the trial (and not Mr. Gonzalez). (Tr. 316-317.) Two, Mr. Hernandez did not testify at the trial, and he was not deposed before the trial. (Tr. 369-377); *see also* Sec'y Notice of Intent to Withdraw Motion to Enforce Subpoenas dated Dec. 2, 2021; Order dated Dec. 2, 2021 (order issued on motion for

[9] The Court has appended the Interview Statements, which were marked as Ex. C-7, to this Decision and Order as Decision Appendix A.

enforcement of subpoenas). Three, the Court notes that the interview statements were recorded two days after the incident took place. The Court has taken all these issues relating to the interview statements into account when considering the weight given the evidence for an issue.

Training

Both Formosa and Respondent required safety training for the hazards that were typical at the petrochemical plant. Formosa required all workers, including Respondent's workers, to attend Formosa's own training regimen. (Tr. 383.) Formosa audits Respondent every year for training documentation of Respondent's workers. (Tr. 383-384.) Formosa's training covered topics such as chemical exposures, lockout/tagout, hazardous energy control, fall protection, confined space, hot work, hole watch attendant, excavation, and PPE usage. (Tr. 383.) Formosa's training is computer-based, and Respondent required a passing grade from all of its workers before they could perform the relevant job duties. (Tr. 74, 384-385.) Respondent also provided general safety training via the provider PAYCOM. (Tr. 90, 384, 412-413.) The training through PAYCOM was computer-based and included topics such as PPE and fall protection in construction environments. (Tr. 90-92.)

Respondent also required safety training for specific crafts, including scaffolding. (Tr. 388.) Respondent's scaffold builders, in addition to the training provided by Formosa, were expected to attend and pass training provided by the National Center for Construction Education (NCCER), which, according to Respondent, goes "above and beyond" the training provided by Formosa. (Tr. 388, 390; Ex. R-10.) Those employees which completed the NCCER scaffolding course and passed were deemed a "competent person" by both Respondent and Formosa. (Tr. 389.) Those workers that were issued an NCCER card had to complete "performance verified tasks" that included:

> dismantle a tube and coupler scaffold. Safety for tube and coupler scaffold, he would've had to evaluate and inspect the jobsite to set up the scaffold, select and inspect system scaffold components, safety erect the scaffold system, inspect a completed scaffold system, and dismantle a complete scaffold.

(Tr. 408 (Mr. Arias quoting Ex. R-10).) According to the NCCER program description, "all performance verifications have been developed and approved by subject matter experts from the respective craft." (Ex. R-10.) According to Mr. Arias, to achieve the NCCER Plus designation, an instructor visually watches the student erect a scaffold and meet the requirements of the performance verification using actual materials and equipment. (Tr. 406.) Mr. Arias did not take this training. (Tr. 455-456.)

SG, Mr. Abrego, Mr. Lopez, Mr. Gonzalez, and Mr. Hernandez all took the Formosa and PAYCOM computer-based training. Mr. Hernandez, Mr. Gonzalez, and even Mr. Abrego were designated NCCER Plus, meaning they were trained in scaffolding through NCCER and therefore deemed to be a "competent person" by Formosa and Respondent on the worksite with regard to scaffolding. (Tr. 390, 401-412, 419-421, 455.) Respondent also provided in-person training in the form of daily safety meetings with all types of craftsmen, where everyone would discuss general safety topics for scaffolding, welding, and pipefitters; and also, daily crew meetings, where crew members discussed safety topics for their task that day like drinking water and ensuring PPE was working properly. (Tr. 111-113.)

As an example of in-person training, SG testified that while his computer-based training covered scaffold topics, his training specifically for building the hooch came directly from Mr. Hernandez: "If we had any questions or know how to build it haven't ever building the one he would explain to us how the process goes." (Tr. 139-140.) SG testified Mr. Hernandez gave training and direct instructions to the team on how to build the skeletal structure. (Tr. 78.) SG explained a hooch is a "similar to a complete scaffold. It's just not 100 percent complete. So on

the [computer-based] training it's not going to tell you specific a hooch[.] It just tell you build a scaffold." (Tr. 142.) Mr. Hernandez documented a morning crew meeting regarding the hooch assembly on the day of the incident in the JSA in which he designated scaffold hazards. (Tr. 114-119; Ex. R-5.)

SG testified in the time he worked at the Formosa plant, six months, he had built hundreds of scaffolds throughout the plant. (Tr. 50.) SG testified he had four and a half years of experience building scaffolds, and everyone else on his team had more experience than he had. (Tr. 83.) No sworn testimony from Mr. Abrego, Mr. Lopez, Mr. Gonzalez, or Mr. Hernandez is in this record.

PPE

CSHO Guzun entered Formosa's plant with the impression, based on the safety orientation he went through at Formosa's gate and his opening conference, that all workers must wear FRC at the plant at all times. (Tr. 293-294.) He stated the workers walk from unit to unit, from one project to another; and in the case of "a potential explosion or release of the chemical, you have downwind, you can have upwind directions of the wind [, and] an adequate FRC will be the best FRC in case something happen." (Tr. 294-295.)

According to the testimony in the record, however, Respondent required its workers to wear FRC in the live area, but not the non-live areas. For example, SG testified he was required to wear FRC when working in a live area, which was three-fourths mile away from the non-live unit where he was working on the day of the incident. (Tr. 61, 72, 75, 111.) SG explained he wore the FRC that morning because, in the event he was called to a live worksite, he would not have to

take the time to change into FRC.[10] (Tr. 149-150.) Similarly, Mr. Arias testified consistently with SG that Respondent required FRC in live areas only. (Tr. 320, 414.)

In terms of fall protection, Respondent's employees were expected to follow Respondent's 100% tie-off rule: "an employee is better to be tied off 100 percent." (Tr. 360-361.) This 100% tie-off rule was communicated during on-site safety crew meetings as well as worksite JSAs. (Tr. 76-77; Ex. R-5 at 1 "100% tie off at all times").

SG and Mr. Arias testified consistently Respondent provided PPE, including fall harnesses and FRC coveralls, to its workers. However, if workers preferred to wear their own PPE, workers were allowed to purchase (through a payroll deduction) and bring their own preferred private PPE as long as it "meets all the credentials." (Tr. 81-82, 338-340, 424-425.) Respondent's inspection procedures of company-owned and employee-owned PPE are discussed below.

V. Discussion

A. Applicable Law

i. The Secretary's Prima Facie Case

When there has been a violation of any specific OSHA regulation, such as the alleged violations in the instant case, such violation constitutes violation of the "special duty clause" of the Act, 29 U.S.C. § 654(a)(2). *Sw. Bell Tel. Co. v. Chao,* No. 00-60814, 2001 WL 1485847, at *4 (5th Cir. Nov. 15, 2001) (unpublished). Under the law of the Fifth Circuit where this case arose,[11] "[t]o establish an employer has violated a regulation, the Secretary has the burden to prove

[10] As discussed *infra*, however, Mr. Hernandez required FRC to be worn during work on the hooch project in the JSA. (Ex. R-5.)

[11] The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Texas which is in the Fifth Circuit. The Commission has held that where it is highly probable that a case will be appealed to a particular circuit, it generally has applied the precedent of that circuit in deciding the case— even though it may differ from the

(1) 'that the cited standard applies'; (2) that the employer has not complied with the cited standard; (3) that employees have 'access or exposure to the violative conditions'; and (4) 'that the employer had actual or constructive knowledge of the conditions,' i.e., that it actually knew of the conditions or, with the exercise of reasonable diligence, should have known." *S. Hens, Inc. v. OSHRC*, 930 F.3d 667, 675 (5th Cir. 2019) (quoting *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016)); *Atl. Battery Co.,*16 BNA OSHC at 2138.

ii. Secretary's Burden of Proof

The Secretary has the burden of establishing each element by a preponderance of the evidence. *Sanderson Farms, Inc. v. Perez,* 811 F.3d at 735; *Hartford Roofing Co*., 17 BNA OSHC 1361, 1365-66 (No. 92-3855, 1995). Preponderance of the evidence has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Preponderance of the evidence, Black's Law Dictionary, (10th ed. 2014).

At trial, the Secretary brought to the Court's attention Respondent failed to produce documents which would have assisted him in meeting his burden. (Tr. 323, 433-443). Yet, the Court notes the Secretary failed to avail himself of the remedies provided under Commission Rule 52 and Federal Rule of Civil Procedure 37 which would have compelled Respondent to produce those documents. In addition, the Secretary did not take the deposition of a crucial and main witness in this case – Mr. Hernandez – who the Secretary alleges was *not* a competent person and who was the person directing and supervising the work of the crew in assembly of the hooch

Commission's precedent. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court therefore applies the precedent of the Fifth Circuit in deciding the case where it is highly probable the case would be appealed.

project. Finally, while the Secretary did identify Mr. Hernandez as a witness to be called at trial and served a subpoena on him, when Mr. Hernandez failed to show for the trial, the Secretary made an oral motion to enforce the subpoena at the end of the trial only to then withdraw the motion to enforce after trial. (Tr. 369-377); *see also* Sec'y Notice of Intent to Withdraw Motion to Enforce Subpoenas dated Dec. 2, 2021; Order dated Dec. 2, 2021 (Order issued on Motion for Enforcement of Subpoenas).

Failure of the Secretary to be diligent in pursuit of discovery, which would assist him in meeting his burden of proof to establish violations of the standards cited, does not excuse him from meeting his burden required under the law. In essence, even if the Secretary demonstrated good faith reasons for its lack of diligence and pursuit of available remedies (which he did not do here), it would not excuse or lessen his burden to prove his case by the preponderance of the evidence. As noted below, the Secretary, in every cited standard, failed to meet his burden to establish a violation of the cited standards. A different conclusion may have been dictated if due diligence had been pursued by the Secretary. The Court has no power, or the patience, to grant relief to the Secretary for non-performance of Respondent during the discovery phase (if indeed established which that fact has not) during the course of the trial for which remedies could have been obtained by the Secretary during the discovery phase of this case. *See, e.g.,* No. 19-0550, *UHS of Denver, Inc., d/b/a Highlands Behav. Health Sys.*, 2022 WL 17730964, at *3 (OSHRC, Dec. 8, 2022) (holding post-hearing requested adverse inference was in line with a discovery sanction which should have been, but was not, handled during discovery, and setting aside adverse inference finding in that regard).

B. Threshold Findings

Two issues the parties dispute affect more than one citation item. The Court addresses those issues as a threshold matter here.

1. The Skeletal Structure: A Scaffold Under Erection

As an initial matter, the Court finds the skeletal frame Respondent's workers were building during the hooch project is a scaffold as recognized under OSHA's scaffolding standards found at 29 C.F.R. § 1926.450. The record establishes Respondent's workers used wooden planks, elevated at seven feet above the ground, and which were supported by the skeletal steel structure, to support the workers as they built up the hooch.

Auer v. Robbins instructs that courts must defer to an agency's construction of its own regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945). The Supreme Court emphasized that *Auer* does not apply unless the regulation is "genuinely ambiguous" meaning it does not lend itself to a single correct interpretation after a court exhausts all traditional tools of construction by considering the text, structure, history, and purpose of the regulation. *Kisor v. Wilkie*, 588 U.S. _____, 139 S. Ct. 2400, 2414 (2019). Thus, nothing in *Kisor* changes the Commission's longstanding approach to regulatory interpretation: "begin with the text of the regulation, and if the meaning is clear, look no further." *See Scalia v. Wynnewood Refining Co., LLC*, 978 F.3d 1175, 1181 (10th Cir. 2020); *see also Mitchell v. Comm'r*, 775 F.3d 1243, 1249 (10th Cir. 2015); *c.f. Callahan v. U. S. Dep't of Health and Human Servs*, 939 F.3d 1251, 1259 n.9, 1262 (11th Cir. 2019) (noting, post-*Kisor*, that courts need not "consult extra[]textual evidence concerning 'history' and 'purpose'" of regulation where "text is clear"; explaining that "*Kisor* itself disclaims any groundbreaking").

The skeletal scaffold structure at issue in this case, and its wooden planks, fall squarely within the definitions of "scaffold" and "platform" as set forth in OSHA scaffold standard 29 C.F.R. § 1926.450(b)("Definitions").[12] The cited regulation is clear on its face and is not ambiguous in this regard.

Respondent then argues if the hooch is a scaffold, then this matter is not a scaffold "use" case, it is a scaffold "erection" case. (Resp't Br. 4, 7, 10, 13.) According to Respondent, the cited standards apply only to workers "using" completed scaffolds, not to workers "erecting" scaffolds which Respondent claims is the case here. As such, Respondent argues the Secretary failed to establish the cited standards applied to Respondent's worksite for Citation Items 1(a), 2(b), 3(a) and 4(a).[13]

The Secretary does not address this argument in his brief. At trial, however, he stated, "the dispute here [is] when it actually became a scaffold." (Tr. 450) (emphasis added). CSHO Guzun testified, "they build already the first section of the scaffold. They was working in that section to build the second section. So they was working in the first section of the scaffold." (Tr. 232.) The Court finds the parties have litigated whether the first level platform of the skeletal

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[12] Section 1926.450(b)("*Definitions*") states in pertinent part:

> *Scaffold* means any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both.
>
> …
>
> *Platform* means a work surface elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated planks, fabricated decks, and fabricated platforms.

29 C.F.R. 1926.450(b).

[13] Whether the skeletal structure was being erected or was in "use," is an important factual finding in this case; however, as discussed *infra*, this factual finding is not determinative of the applicability of each citation item. The Court, however, will analyze each citation item keeping in mind this factual finding.

scaffold structure was a completed scaffold or whether the skeletal scaffold structure as a whole was under erection. *See* Fed. R. Civ. P. 15(b)(2) (providing that "issues litigated by express or implied consent are 'treated in all respects as if they had been raised in the pleadings,' and any relevant amendments of the pleadings may be made upon any party's motion 'at any time, even after judgment.'"); *see also Nat'l Bus. Forms & Printing, Inc. v. Ford Motor Co*., 671 F.3d 526, 538 (5th Cir. 2012) (citing Fed. R. Civ. P. 15(b)(2)); *Zenergy, Inc. v. Performance Drilling Co*., 603 F. App'x 289, 292 (5th Cir. 2015) (unpublished) (same). The Court finds the skeletal scaffold structure as a whole was under erection at the time of the incident.

The Court notes 29 C.F.R. § 1926.451(f)("Use") includes, as one of its sub-standards (and indeed is one of the standards cited in this case (Item 3(b)), requirements for how a scaffold shall be "erected, moved, dismantled, or altered[.]" 29 C.F.R. § 1926.451(f)(7). When the regulations are read as a whole, again, the Court finds it is clear and not ambiguous. Therefore, the Court finds that scaffold "erection" is a type of scaffold "use." *Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("[R]egulations are to be read as a whole, with each part or section ... construed in connection with every other part or section") (internal citation omitted).

Re-enforcing the Court's finding the regulations at issue are clear and not ambiguous, the Court has located the following language regarding the scaffold erection process from OSHA in a letter of interpretation in which OSHA finds the regulation clear and not ambiguous.

> Would moving work platforms, (including outriggers (buck boards), or scaffold planking) from a second level to higher levels be considered erection and dismantling requiring employers to comply with Subpart L's §1926.451(e)(9)(i) and (iii)?
>
> …
>
> [M]oving, altering, removing, reassembling or reconstructing scaffold components/parts is considered part of the erection and dismantling processes, requiring employers to comply with the provisions of §1926.451(e)(9) introductory

text and (i) through (iv).

See Dep't of Labor, Letter of Interpretation, "Clarification of requirements for construction scaffold erection/dismantling; safe means of access; blocks for two-point suspension scaffolds," (Jan 2, 2002) (emphasis added) ("January 2002 LOI").

With regard to the skeletal scaffold structure for the hooch project, the record establishes that, once SG was finished with the first level of the platform, the wooden plank he was standing on was to be "removed" at that time. (Tr. 81); (January 2002 LOI). The Secretary has not addressed this issue either in its post-trial brief. All the record evidence indicates the workers were intent on building up the skeletal structure; in no way was any part of the skeletal scaffold structure considered "complete" at the time of the incident. (Tr. 79-80, 433.) Therefore, the Court finds the skeletal scaffold structure, including the scaffold platform that SG was standing on when it broke, was in the process of being erected at the time of the incident.

The Court notes, however, the determination of the applicability of a cited standard is more than a simple "use" or "erection" analysis. Under Commission precedent, "the focus of the Secretary's burden of proving the cited standard applies pertains to the cited conditions, not the particular cited employer." *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *KS Energy Servs., Inc.,* 22 BNA OSHC 1261, 1267 (No. 06-1416, 2008)(finding "the cited ... provision was applicable to the conditions in KS Energy's traffic control zone"), *aff'd*, 701 F.3d 367 (7th Cir. 2012); *Active Oil Serv., Inc.,* 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005)(finding "that the confined space standard applies to the cited conditions" because "the vault was a confined space"); *Arcon, Inc.,* 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004) ("In order to establish a violation, the Secretary must show that the standards

applied to the cited conditions.")

While upon completion of the project the hooch would not be classified as a completed scaffold, until the hooch was completed the steps and conditions leading to completion of the hooch are considered elements of scaffold erection since Respondent uses scaffold techniques to accomplish the finished project. As such, all of the Citation Items derive from Title 29, Subpart B, Chapter XVII, Part1926, Subpart L. This subpart applies to all scaffolds used in workplaces covered by this part. 29 C.F.R. § 1926.450(a). As determined above, the hooch project structure has been determined to be a scaffold in the erection phase (which is a type of "use") and the cited regulations *generally* apply to each scaffold violation. Nevertheless, the Court will analyze each cited regulation on applicability addressing the arguments of the parties on the question of whether the cited regulation applies to the specific alleged violative conditions.

2. Competent Person: The Secretary's Failure to Carry Burden of Proof

One of the central issues in this case is whether the Secretary has established, by preponderance of the evidence, that Mr. Hernandez was not a "competent person" as defined by the cited OSHA regulations. The Secretary bears the burden to prove Mr. Hernandez did not meet the requirements of a "competent person." *S. Hens, Inc. v. OSHRC*, 930 F.3d at 675. As it is Secretary's burden, he must set forth some affirmative evidence and cannot rely on a lack of evidence to meet the preponderance of evidence standard. On this issue, the Secretary has failed to carry his burden to establish Mr. Hernandez was not a competent person for the purpose of determining compliance with the cited regulations.

The relevant regulation provides that a:

> *Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

29 C.F.R. § 1926.450(b)("Definitions"). Regarding 29 C.F.R. § 1926.451(f)(3), the preamble to the final rule provides:

> [T]"he Agency notes that the criteria for a "competent person" depends on the situation in which the competent person is working. For example, a "competent person" for the purposes of this provision must have had specific training in and be knowledgeable about the structural integrity of scaffolds and the degree of maintenance needed to maintain them. The competent person must also be able to evaluate the effects of occurrences such as a dropped load, or a truck backing into a support leg that could damage a scaffold. In addition, the competent person must be knowledgeable about the requirements of this standard. A competent person must have training or knowledge in these areas in order to identify and correct hazards encountered in scaffold work.

Safety Standards for Scaffolds Used in the Construction Industry, 61 Fed. Reg. 46026, 46059 (to be codified at 29 C.F.R. pt. 1926). OSHA has also issued a letter of interpretation regarding the requirements of a competent person:

> Thus, successful completion of a course does not, alone, necessarily establish an individual as a 'competent person' for a number of reasons. By its terms, the definition of a 'competent person' compels the employer to select an employee based upon his or her **capability** to identify hazards. The course may not be sufficiently comprehensive with respect to the information needed to meet the knowledge requirement in the definition. Remember that the type and extent of the knowledge will vary with what is necessary to successfully perform the task required of the competent person in the standard. Also, the course may not adequately test the employee's understanding of the course material.
>
> Finally, the definition of a competent person requires the individual to have the authority to take prompt corrective action. No course can provide that authority, since it can only be provided by the employer.

OSHA Interpretation Letter, Re: Requirements for being designated a competent person under Part 1926 Subpart L (Scaffolds), June 17, 2005 (emphasis in original). Simply stated a competent person is one:

1. Who knows the hazards existing and likely to exist;
2. Knows how to control or eliminate the hazards; and
3. Has been given the authority to promptly correct the hazards and does.

The Court determines, at a minimum, the Secretary must establish Mr. Hernandez did not, for the purpose of the scaffold regulations, satisfy the requirements as to what is included in the training regulations for scaffolds found at 29 C.F.R. § 1926.454 ("Training requirements"). Understanding of the scaffold training requirements are necessary for Mr. Hernandez, as a competent person, to make the determinations a competent person in scaffolds must make. A person cannot be deemed a competent person under the scaffolding regulation unless he possesses at least knowledge of the scaffolding requirements. The Court also determines, with regard to the skeletal scaffold structure for the hooch project, the Secretary must also establish that Mr. Hernandez did not know the hazards likely to exist – namely, fall hazards and scaffold material (i.e., the wooden plank) failure. *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1188-1189 (No. 96-1043, 2003) (holding that lead laborer was not instructed about specific hazards to enclosed scaffold and therefore was incapable of identifying hazard). Again, the Secretary has failed to meet this burden.

The Secretary has proffered affirmative evidence in the form of the interview statements to support his contention that Mr. Hernandez was not a competent person in scaffolding. As noted above, the interview statements have issues regarding their reliability which affect this factual finding. The Secretary relies heavily on the statement attributed to Mr. Hernandez where he allegedly states:

> I'm a competent person for building scaffolds for this company. I'm a competent person for about one year. The Safety Council of Port Lavaca provided me with the computer-based trainings to be a competent person. The hands-on training as a competent person I got for one day about a year ago provided by the City of Victoria. My company management never provide me a company hands-on training on how to inspect the scaffolding materials (for scaffold building purpose) . . . we did not spend too much time to inspect the scaffolding materials. Nobody from my company trained me that the inspection of the scaffold have to be planked at the working area.. . . I think I did not have enough training as a competent person….

(Sec'y Br. 29 citing Tr. 218-219; Ex. C-7 at DOL 86-87.)

The Secretary asked Mr. Arias the following regarding Mr. Hernandez's statement: "what do you make about him calling his own qualifications as a competent person into question?" (Tr. 421.) Mr. Arias testified he did not remember Mr. Hernandez stating his training was not sufficient to be deemed a competent person in scaffolds. (Tr. 421.) Mr. Arias testified Mr. Hernandez had worked for Respondent for eight years, never once had any kind of violation with safety and never before shown a disregard of safety. (Tr. 423-424.) He testified that "this is an accident of [Mr. Hernandez] not being able to see something inside of a board," and the allegation, if true, would be an "intentional" or "criminal" act because Mr. Hernandez himself placed the board for SG to walk on after visually looking at it. (Tr. 423.) He testified he did not believe Mr. Hernandez's act was intentional. (Tr. 423.) When challenged by the Secretary for implying that CSHO Guzun made up Mr. Hernandez's statement, Mr. Arias conceded he had no reason to doubt Mr. Hernandez would make that statement. (Tr. 427.)

As noted above, CSHO Guzun interviewed Mr. Hernandez two days after the incident.[14] It is apparent to this Court Mr. Hernandez had ample time to think about his liability, as Mr. Arias testified, regarding the incident, especially since he was responsible for placing the wooden plank on which SG walked and from which SG fell and sustained his serious injuries. Mr. Hernandez, therefore, had time to realize his own self-interest, thus affecting the reliability of this aspect of his interview statement. *Regina Constr. Co.*, 15 BNA OSHC at 1047-1048. The Secretary does not address this even though Mr. Arias raised this possibility at trial.

[14] The Court notes some of the basic information that CSHO Guzun wrote within Mr. Hernandez's statement appears to be factually incorrect. For example, CSHO Guzun wrote down that Mr. Hernandez allegedly stated, "the incident happened yesterday. Mr. Jose Gonzalez assigned me yesterday 11/12/2019 approximately at 7:00 a.m. to build a temporary laydown yard shop for the welders [the hooch]." (Tr. 218.) However, it is undisputed that CSHO Guzun interviewed Mr. Hernandez on November 13, 2019, and the incident occurred on November 11, 2019.

The remainder of the Secretary's arguments on this issue are also not persuasive. He criticizes Respondent's training records claiming they do not illustrate the requirements of the scaffold training regulations and they do not demonstrate Mr. Hernandez's capability to identify and control hazards. (Sec'y Br. 29.) However, the record, though thin, establishes the scaffolding training Mr. Hernandez took through NCCER was established by "subject matter experts," and included in-person performance verification tasks. (Tr. 408; Ex. R-10.) To achieve the NCCER Plus designation, which Mr. Hernandez did, an instructor visually watches the student erect a scaffold and meet the requirements of the performance verification using actual materials and equipment. (Tr. 406.) Nowhere does the Secretary proffer any affirmative evidence Mr. Hernandez was *not* a competent person as defined by OSHA regulations.

Further, the Secretary criticizes the fact Mr. Arias had not taken the NCCER scaffolding training. "It is hard to imagine how an employer can verify an employee's qualification to be competent person based on a training it never took." (Sec'y Br. 31.) But Mr. Arias is not a scaffold builder and is not the individual who was designated as the competent person at this worksite. The Secretary had the opportunity to gather testimony from someone who had taken the NCCER training but failed to pursue that opportunity. The cited standards require the Secretary to carry this burden of proof with regard to Mr. Hernandez – not Mr. Arias. The Secretary cannot vicariously impute the lack of scaffold training of Mr. Arias to Mr. Hernandez when the record demonstrates otherwise.

Additionally, as discussed *infra*, the record establishes: (1) Respondent designated Mr. Hernandez a competent person because he had a NCCER Plus certification – which includes in person performance verification, (2) Mr. Hernandez selected the team members for the hooch project, (3) Mr. Hernandez provided in-person specific hooch instructions to the team members

before beginning work on the hooch, (4) Mr. Hernandez filled out the JSA – including fall hazards – for the hooch, (5) Mr. Hernandez visually looked at the scaffold materials for the hooch before passing them up to SG, in accordance with Respondent's scaffold building policies, (6) SG recognized Mr. Hernandez as being the "foreman" for the hooch project, and (7) all of the other hooch team members were more experienced in scaffolding than SG, who had 4 and a half years of experience building scaffolds. (Tr. 60, 62, 65, 78, 83, 98-99, 130, 140, 367, 411-412, 420; Ex. R-5); *Superior Masonry Builders, Inc.*, 20 BNA OSHC at 1188-1189.

The Court determines that the Secretary has failed to prove Mr. Hernandez was *not* a competent person in scaffolds by preponderance of evidence. The record evidence supports a finding Mr. Hernandez was a competent person as defined by OSHA regulations to act in the scaffolding arena. This ruling affects Citation 1, Items 2(b), 3(a), 3(b), and 4(a).

C. Citation 1, Item 1(a) – The Alleged Employer Provided PPE Violation

Citation 1, Item 1(a) alleges a serious violation of 29 C.F.R. § 1926.20(f)(1), which provides:

> (f) *Compliance duties owed to each employee* – (1) *Personal protective equipment*. Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

The Secretary alleges Respondent violated 29 C.F.R. § 1926.20(f)(1) in the following manner: "At this establishment, the employer did not provide personal protective equipment to each employee required to use the personal protective equipment, when employees were assigned to work with and around scaffold, fall hazards and hazardous materials.[15]" (Citation at 6). The Secretary further

[15] The Secretary failed to establish Respondent's employees were working around hazardous materials since the

states OSHA cited Respondent for a violation of this standard "because, during employee interviews, [Respondent] employees stated they purchased their own FRCs and harnesses while employed with [Respondent]." (Sec'y Br. 12.)

a. Does the Regulation Apply?

Under Commission precedent, "the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Ryder Transp. Servs.*, 24 BNA OSHC at 2064 (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *KS Energy Servs., Inc.,* 22 BNA OSHC 1261, 1267 (No. 06-1416, 2008) (finding "the cited ... provision was applicable to the conditions in KS Energy's traffic control zone"), *aff'd*, 701 F.3d 367 (7th Cir. 2012); *Active Oil Serv., Inc.,* 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005) (finding "that the confined space standard applies to the cited conditions" because "the vault was a confined space"); *Arcon, Inc.,* 20 BNA OSHC at 1763 ("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions.") While upon completion of the project the hooch would not be classified as a completed scaffold, until the hooch is completed the steps and conditions leading to completion of the hooch are considered elements of scaffold erection since Respondent uses scaffold techniques to accomplish the finished project. As noted above, all of the Citation Items derive from Title 29, Subpart B, Chapter XVII, Part 1926, Subpart L. This subpart applies to all scaffolds used in workplaces covered by this part. 29 C.F.R. § 1926.450(a). As determined above, the hooch project structure has been determined to be a scaffold in the erection phase and

worksite was a "non-live" work area where hazardous chemicals were not present. The "live" work area where hazardous chemicals was present was three-fourths of a mile away. The Secretary's failure to establish the work area where employees were working contained hazardous chemicals, the cited regulation would not require FPC which he argued was not provided to Respondent's employees. If the regulation does not require it, Respondent cannot be found to have violated the regulation as it relates to FPC as FPC was not required at the "non-live" worksite. Thus, the focus of the Secretary should have been confined to whether Respondent provided fall protection equipment to its employees.

the cited regulations *generally* apply to each scaffold violation.

As an initial matter as it relates to this Citation Item, the Secretary has not explained how this standard applies to Respondent's workers on the skeletal structure at issue at the *non-live area* at the Formosa plant. The Secretary claims the standard applies because Respondent "performed work at the [Formosa] petrochemical plant in Port Comfort, Texas" citing section 1926.20(c).[16] (Sec'y Br. 12.) The cited standard, however, requires in pertinent part employers "must provide PPE to each employee *required to use* the PPE[.]" 29 C.F.R. § 1926.20(f)(1) (emphasis added). Respondent claims the cited standard does not apply because fall protection and FRC PPE were not required by Respondent at the stage of the project at issue – the workers were at a height less than 10 feet and they were three-fourths mile away from a live area of the Formosa plant, where FRC was required by Respondent. (Resp't Br. 2-5.) Respondent fails to understand there is a distinction between whether or not a cited regulation applies and, if so, whether it was violated. The two requirements are distinct from each other.

The Court nevertheless finds that the standard is applicable to the cited conditions. The Commission has analyzed OSHA's PPE requirements within its construction standards in conjunction with each other. *Custom Built Marine Constr. Co.*, 23 BNA OSHC 2237, 2239 (No. 11-0977, 2012) (holding that "certain personal protective equipment standards in Part 1926, Subpart E, may not explicitly specify that use of such equipment is required, but § 1926.28 makes

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[16] Section 1926.20(c) states:

> The standards contained in this part shall apply with respect to employments performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, and Johnston Island.

29 C.F.R. § 1926.20(c).

clear that those standards do impose a use requirement if they 'indicate the need for using such equipment to reduce . . . hazards,' and if employees are in fact exposed to hazardous conditions") (citing *Turner Communic'ns Corp. v. OSHRC,* 612 F.2d 941 (5th Cir. 1980)); *see also Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d at 740 (regulations are to be read as a whole).

The scaffold fall protection standard, which the Secretary argues also applies to Respondent's worksite, requires fall protection in two instances: at 10 feet when the scaffold is in use, and at the discretion of the competent person when the scaffold is under erection. 29 C.F.R. § 1926.451(g)(1), (2).[17] Contrary to Respondent's arguments, the record establishes even though Respondent's workers were only at seven feet in height at the time of the incident, the workers were fully expecting to eventually work up to 18 feet in height. SG wore his harness and tied off, in accordance with Respondent's 100 percent tie-off policy and with what Mr. Hernandez required in the JSA, once SG reached the seven-foot-high plank. (Ex. R-5.) Additionally, again contrary to Respondent's arguments, SG wore his FRC even though he was not working in a live area, also in accordance with what Mr. Hernandez indicated was required in the JSA. SG testified that he could be expected to go to a live site, where he could be exposed to flammable hazards, during the day. The Court finds that these facts triggered the requirement of fall protection and FRC PPE on

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[17] Section 1926.451(g)("Fall protection") states in pertinent part:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

29 C.F.R. § 1926.451(g)(1).

> [T]he employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

29 C.F.R. § 1926.451(g)(2).

Respondent's worksite as they show what Respondent required as well as a potential exposure to the relevant hazardous conditions. *Custom Built Marine Constr. Co.*, 23 BNA OSHC at 2239. Accordingly, the cited standard applies.

b. Was the Regulation Violated?

Respondent argues even if the standard applies, Respondent complied with it because it did provide company-issued fall protection harnesses and FRC to it workers. (Resp't Br. 5.) While the Secretary cherry-picks excerpts from SG's testimony and the confidential employee's statement, which indicate some workers bought their own PPE, he fails to address the undisputed evidence in the record that established, while employees were free to purchase and wear their own PPE as long as it met company requirements, Respondent provided the required PPE (including harnesses and FRC) in the tool rooms for workers to pick up on their way to their jobs tasks. Mr. Arias testified CSHO Guzun's allegations were based on opinions by "somebody who had never worked in this environment." (Tr. 423-424.) For example, Mr. Arias testified, contrary to CSHO Guzun's testimony, "[w]e do provide FRCs for our employees. But our employees have the right to buy their own FRCs," and similarly, the same for harnesses. (Tr. 424-425.)

The Secretary relied heavily on the interview statements to which the Court, as previously stated, gives no or very little weight. The Court is troubled the Secretary jumped to the conclusion Respondent did not provide the required PPE simply based on the fact that some employees bought their own PPE. The Secretary would have been better served if he focused on the plain requirement of the cited regulation – whether Respondent provided the required PPE to those employees who did not purchase their own. He offered no proof to support this *prima facie* element of the regulation. He claims *Respondent* did not offer evidence of company-issued harnesses and then claims that "PMI records show that it only offered harnesses to employees for a fee." *Id*. As noted

above, Mr. Arias explained Respondent's company-issued common PPE is located in the tool rooms for workers to use. Mr. Arias explained Respondent will purchase private PPE for its employees via a payroll deduction, but that does not mean Respondent never provided common PPE. (Tr. 338-340.) He did not address any of this record evidence. He also does not claim common PPE is insufficient. The Secretary has therefore failed to establish non-compliance with the cited standard.

Citation 1, Item 1(a) is VACATED.

D. Citation 1, Item 1(b) – The Alleged Employee-Owned PPE Violation

Citation 1, Item 1(b) alleges a serious violation of 29 C.F.R. § 1926.95(b), which provides:

> (b) *Employee-owned equipment.* Where employees provide their own protective equipment, the employer shall be responsible to assure its adequacy, including proper maintenance, and sanitation of such equipment.

The Secretary alleges Respondent violated 29 C.F.R. § 1926.95(b) in the following manner: "At this establishment, the employer did not assure that employee-owned equipment was adequate and safe to use, when employees were assigned to work with and around scaffold, and exposed to fall hazards and hazardous materials." (Citation at 7). The Secretary states OSHA cited Respondent for a violation of this standard "because, during employee interview, [Respondent] employees stated that [Respondent] did not inspect their FRCs and harnesses for adequacy." (Sec'y Br. 18.)

a. Does the Regulation Apply?

As discussed above in the analysis for Citation 1, Item 1(a), the Court finds the cited standard applies to this worksite. Respondent's employees were free to bring their own PPE, and since SG brought his own fall harness and FRC on the day of the incident, Respondent was therefore obligated to assure its workers' PPE were adequate, including proper maintenance, and

sanitation of such equipment.

b. Was the Regulation Violated?

The Secretary relies solely on employee interview statements to which the Court previously stated it was giving little to no weight. The record, however, establishes Respondent had procedures in place to regularly inspect employee-owned and company-owned fall protection harnesses to assure they were adequate. Mr. Arias testified employees were responsible for bringing their own harnesses to the tool room for inspection. (Tr. 354.) Mr. Arias testified harnesses go through a monthly and quarterly inspection process that is documented using a color-coding system. (Tr. 354-355.) At trial, Mr. Arias described the harness SG wore on the day of the incident and shown in CSHO Guzun's photographs that he took during his inspection.[18] (Tr. 354-355.) Mr. Arias explained the different colored pieces of tape on the pelican hooks on SG's own harness indicated either a safety representative or a tool room attendant that had been instructed on the functions of harnesses had verified that SG's own harness could retract, opened up properly, and was free of tears, wear, and damage. (T. 172-173, 354-359; Ex. R-32 at DOL-141). This testimony remained unrebutted by the Secretary during the trial.

SG knew about this monthly and quarterly color-coding inspection process for his own harness. (Tr. 122-124) (describing his harness pictured in Ex. R-32 at DOL-141.) According to SG, one color of tape indicates the monthly inspection was successfully completed and the other color of tape indicates the quarterly inspection was successfully completed. (Tr. 124.) SG also confirmed he inspects his own harness every day by putting it on, stretching it out all the way down and retracting it back. (Tr. 122.) This testimony remained unrebutted during the trial. In addition,

[18] CSHO Guzun testified he understood the scene of the accident was preserved from the moment of the incident until he arrived on site for his inspection and took the photographs testified to at trial. (Tr. 300.)

the Court notes the discredited interview statements contain no inquiry by the CSHO into this line of testimony. The Secretary taking an employee's statement as *carte blanche* evidence to determine there was a violation, without further due inquiry, ultimately is fatal to his case with regard to this Citation Item.

Mr. Arias also testified Respondent had similar procedures in place to regularly inspect employee-owned and company-owned FRC. (Tr. 319-320.) According to Mr. Arias, all FRC must "have a tag on the pants, the shirt or the coverall that states FR clothing." (Tr. 320.) Then, the FRC is visually inspected to make sure it has "no tears, no fraying of the waistline of the pants…no hole in an elbow, the arm, the stomach region." (Tr. 320.) If it is visually damaged, the FRC is taken out of service and, if a worker was wearing it, the worker receives a written infraction, which is sent to Mr. Arias and human resources and noted in the worker's file. (Tr. 320-321.) Mr. Arias testified his safety representatives conduct daily safety audits, which include FRC inspection audits. He also specified the frequency of FRC inspection audits varies. (Tr. 323-324.)

Mr. Arias also testified CSHO Guzun's allegation Respondent did not assure adequate PPE, specifically the fall protection harness, was incorrect because of Respondent's color-coding inspection process. (Tr. 415-416.) The Secretary argues these "visual inspections" by Respondent are inadequate to meet the requirements of the cited standard. (Sec'y Br. 19-20.) He, however, despite carrying the burden of proof, does not explain how Respondent's policies and inspections are deficient. Mr. Arias explained that: "If somebody is observed, and the color code for that obviously was yellow and orange, if it is yellow and green, that means that harness was not inspected for that month. That means it was either a month prior and it's still not inspected but is in use, which is a violation." (Tr. 415-416.)

The Secretary states, in a footnote, that Mr. Arias's testimony regarding "records" of the color-coding system was inconsistent with his interview statement given to CSHO Guzun during the joint interview. (Sec'y Br. 20 n.4 citing Tr. 354-357.) However, the alleged interview statement ("We don't have any records of the inspections of FRC") is not inconsistent with Mr. Arias's testimony stating the tape on the fall protection harness pelican hook is considered the "record" for harness inspections. Additionally, a record of inspections is not required under the cited standard. The question posed by CSHO Guzun in the interview is not included in the interview statement – it is unknown in what context Mr. Arias's alleged statement was made. Moreover, the Court accepts Mr. Arias's testimony regarding Respondent's "color-coding" inspection process in part because the Secretary had the opportunity to cross-examine him at trial and could have raised the issue of a deficient discovery response before discovery ended but did not do so and his testimony is consistent with the photographs taken by the CSHO which shows the color coding.

Similarly, the Secretary points to the confidential informant's interview statement. (Sec'y Br. 19 citing Tr. 210-212.) In this statement, the confidential informant allegedly stated in pertinent part: "Nobody from my company inspect my FRC[.] Our company did not inspect our harnesses. We inspect them but nobody train us how to inspect the harnesses, fall personal protection." (Tr. 211.) This allegation – from a heavily redacted and illegible document rendering it difficult for an employe to verify as accurate – swings wide away from SG's and Mr. Arias's testimony with no other corroborative evidence in the record. In addition, If the Secretary knew the identity of the government informant and could have produced the informant at trial for cross-examination and failed to do so. Without such fundamental due process opportunity being provided, the Court gives little weight to the unidentified informant's statement. *Beta Constr. Co.*,

16 BNA OSHC at 1442 (out-of-court, contemporaneous statements made by the employee to the OSHA compliance officer during the OSHA investigation "should be given weight only to the extent they are reliable."). Further, the confidential informant and Mr. Hernandez's statements revolve around SG's fall and how his harness failed to protect him. But that fact is irrelevant to whether the harnesses were inspected by Respondent and functioned properly – SG fell to the ground because, as CSHO Guzun testified, the fall "was too short distance to be anchored under his foot." (Tr. 267.) CSHO Guzun testified he found nothing inadequate with SG's harness or the FRC. (Tr. 267, 303-304.) The Secretary has failed to carry his burden of proof of establishing noncompliance for this citation item.

Citation 1, Item 1(b) is VACATED.

E. Citation 1, Item 2(b) – The Alleged Damaged Scaffold Violation

Citation 1, Item 2(b) alleges a serious violation of 29 C.F.R. § 1926.451(f)(4), which provides:

> (f) *Use.* – (4) Any part of a scaffold damaged or weakened such that its strength is less than that required by paragraph (a) of this section shall be immediately repaired or replaced, braced to meet those provisions, or removed from service until repaired.

29 C.F.R. § 1926.451(f)(4) (emphasis added).[19] The Secretary alleges Respondent violated 29 C.F.R. § 1926.451(f)(4) in the following manner: "At this establishment, employees worked from a scaffold with damaged and broken scaffold components such as planks." (Citation at 9); *see also* Sec'y Br. 23 (OSHA cited Respondent "for failing to repair, replace, brace, or remove the damaged plank from service.")

[19] Section 1926.451(a)(1) states in pertinent part: "(a) *Capacity*. (1) each scaffold and scaffold component shall be capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it." 29 C.F.R. § 1926.451(a)(1).

a. Does the Regulation Apply?

As noted above, the Court found the skeletal scaffold structure as a whole was under erection at the time of the incident. It is unclear based on the plain language of the standard whether 29 C.F.R. § 1926.451(f)(4) applies to scaffold erection procedures. *Unarco Comm. Prods.*, 16 BNA OSHC, 1499, 1502 (No. 29-1555, 1993) (holding Commission has always looked to the language of the standard to determine whether it applies). As Respondent notes, however, OSHA has issued a Letter of Interpretation discussing whether 29 C.F.R. § 1926.451(a) – which is incorporated by reference into the cited standard – must be met during the scaffold erection process. (Resp't Br. 8-9 citing Dep't of Labor, Letter of Interpretation, Whether 2"-x-6" No. 2 pine boards may be used as a scaffold platform; whether §1926.451(a) and §1926.451(f)(16) are applicable when erecting and dismantling scaffolds, dated Apr. 5, 2005 ("April 2005 LOI").) In this letter, OSHA states in pertinent part:

> Consequently, we cannot say as a general matter that, in all cases and at all times throughout the erecting and dismantling process, the capacity and deflection requirements must be met. Rather, under the direction and supervision of the competent person, they must be met to the extent feasible.

(April 2005 LOI at ¶ 1B) (emphasis added). OSHA has therefore stated, during the scaffold erection process, paragraph (a) of section 1926.451 must be met under the direction and supervision of the competent person to the extent feasible.[20] Respondent did not argue the April 2005 LOI clarifying this requirement was inconsistent with the regulation or such requirement of relying on the competent person was unreasonable. Respondent focuses on the part of the April 2005 LOI stating OSHA could not determine if at all times during the erection phase of a scaffold, the regulation applied. The Court relies on the interpretation of the Secretary as being a reasonable

[20] The Secretary has not addressed this April 2005 LOI.

interpretation of the regulation. The Court notes when the regulations are read as a whole, the designated competent person is charged with ensuring the workplace and work being performed is safe. Accordingly, the Court finds the cited standard is applicable to the skeletal scaffold structure under erection here, but only to the extent required by paragraph (a). 29 C.F.R. § 1926.451(f)(4); April 2005 LOI.

b. Was the Regulation Violated?

With regard to inspecting scaffold parts during the scaffold erection[21] procedure, Mr. Arias testified Respondent's competent person conducts the inspections as required by OSHA. (Tr. 328, 364, 367.) Mr. Arias testified the competent person performs a visual inspection of the planks, runners, legs, scaffold equipment, line wire, nails, braces, and tow boards. (Tr. 328.) He testified the inspection entails picking up the material, looking at it, then handing over or placing the material as the scaffold is being built. (Tr. 328.) He testified this inspection procedure is documented in Respondent's "scaffolding policy," which follows "FPC Procedure 41" that is "in all scaffold trailers, tool rooms" and which "is above" OSHA and PMI that FPC's employees must follow.[22] (Tr. 329, 434.) SG's testimony is consistent with Mr. Arias's testimony. SG testified

[21] The Court has found that the scaffold at issue was under erection and therefore analyzes this citation item based upon that factual finding. It is noted, however, the record contains evidence Respondent had procedures in place to inspect a *completed* scaffold under the direction of Mr. Hernandez, the competent person (as found above). SG testified a competent person, like Mr. Hernandez, inspects all "complete scaffolds" in the morning, and if it passes inspection, he signs and dates a tag that is placed on the completed scaffold that would indicate to any worker whether the scaffold is safe from which to work. (Tr. 79-80.) The skeletal structure at issue, however, according to SG, was never intended to be a complete scaffold from which to work, and so there was no inspection of the skeletal structure to indicate that it was a "complete scaffold." (Tr. 79-80.) SG's testimony is consistent with Mr. Arias's testimony regarding the skeletal structure at issue. Mr. Arias agreed the skeletal structure would not have been inspected yet because it was "nowhere near complete." (Tr. 433.) And when it was complete, Mr. Arias further testified, "it would have been a red-tag scaffold, as well, because it was not a working scaffold." (Tr. 433.)

[22] The record does not contain Respondent's written scaffolding policy or "FPC Procedure 41." The Court notes this deficiency in the record was addressed at trial. (Tr. 439-444.) The Court further notes that the Secretary did not file a motion to compel for such documentation during discovery, nor did he ask during the trial for an adverse inference against Respondent for any alleged lack of production of such documentation during discovery.

Mr. Hernandez would inspect materials when he passed material or placed material. (Tr. 128-129.) SG agreed; he saw with his "own eyes" that Mr. Hernandez handled the plank at issue and placed it on the skeletal structure. (Tr. 130-131.)

Despite having this burden of proof, the Secretary points only to the pictures of the broken wooden plank and Mr. Hernandez's questionable interview statement (to which the Court gives little to no weight) as evidence establishing non-compliance with the cited standard. (Sec'y Br. 23-25.) CSHO Guzun pointed to a picture of the broken wooden plank and stated it looked rotten. (Tr. 173.) Upon being asked, however, whether it is possible that a piece of wood looks fine externally but that it could be rotten in the middle, CSHO Guzun stated he did not know. (Tr. 190.) Instead, he stated he determined the wooden plank was rotten based on a post-incident examination of the piece of wood, post-incident pictures, and post-incident interview statements. (Tr. 192-193.) SG testified the blackened condition on the board does not "exactly" mean the wooden plank is compromised, and "I will double check myself to see if it's worth it to me to work on." (Tr. 160).

The Secretary does not proffer what else Respondent should have done to ensure the requirements of paragraph (a) of section 1926.451 were met under the direction and supervision of Mr. Hernandez to the extent feasible. (April 2005 LOI at ¶ 1B.) Rather, he makes broad assertions or assumptions without scientific evidence to argue Respondent failed to comply with the standard by using the wooden plank that broke underneath SG. Latent defects in wooden planks are sometimes not visually detectible, as even CSHO Guzun agreed. (Tr. 190.) CSHO Guzun also conceded that OSHA itself does not have a testing mechanism "to prove that we have rotten wood beside our visual inspection[.]" (Tr. 192-193.) However, despite the acknowledgments of the CSHO set forth above, the CSHO determined the wooden plank must

have been defective because after the inspection he determined the wooden plank was rotten inside. This conclusion is a classic argument that things become clearer in hindsight.

As noted above, Mr. Hernandez is found to be a competent person and the evidence establishes he indeed followed Respondent's scaffold building procedures, including personally looking over and handling the wooden plank at issue, before placing it on the runner of the skeletal structure. It was in place for 10-20 minutes, and SG had successfully walked across it at least once, before it suddenly broke to the surprise of SG and Mr. Hernandez. (Tr. 51-52, 67.) Mr. Arias testified that "[t]his is an accident of [Mr. Hernandez] not being able to see something inside of a board." (Tr. 422.) The Court agrees because there is no other evidence in this record to indicate how else Mr. Hernandez would be able to satisfy the capacity requirement of the cited standard. In addition, the Secretary offered no expert testimony, no scientific evidence, or any other helpful evidence that Mr. Hernandez looking at the color and condition of the wooden plank would have led to a conclusion the wooden plank was defective.

The Secretary did not establish it was feasible for Mr. Hernandez, the competent person, to ensure the wooden plank met the requirements of paragraph (a) of section 1926.451, beyond that which he already did, while working on the hooch project. (April 2005 LOI at ¶ 1B.) The Secretary failed to meet his burden of establishing non-compliance with section 1926.451(f)(4).

Citation 1, Item 2(b) is VACATED.

F. Citation 1, Item 3(a) – The Alleged Scaffold Inspection Violation

Citation 1, Item 3(a) alleges a serious violation of 29 C.F.R. § 1926.451(f)(3), which provides:

> (f) *Use.* – (3) Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity.

The Secretary alleges Respondent violated 29 C.F.R. § 1926.451(f)(3) in the following

manner: "At this establishment, the employer failed to inspect the scaffold and its components for defects and missing parts." (Citation at 10).

a. Does the Regulation Apply?

The Court finds the cited standard applies. As found above, the skeletal structure supporting the wooden planks was a scaffold; the scaffold was under erection at the time of the incident. Also as found above, scaffold erection is a type of scaffold use. The wooden planks would be considered scaffold components. Therefore, Respondent was required to inspect the wooden planks for "visible defects" before each work shift which, in this case, was before SG and Mr. Hernandez began working on assembling the skeletal scaffold structure for the hooch project. 29 C.F.R. § 1926.451(f)(3).

b. Was the Regulation Violated?

The Court finds Respondent complied with the cited standard. SG testified Mr. Hernandez or Mr. Gonzalez would inspect materials when they arrived at the jobsite. (Tr. 128.) Mr. Hernandez's interview statement includes a statement that he looked the materials over before working on the project. (Tr. 218-219.) The Secretary claims just looking at the materials is insufficient to satisfy the requirements of the standard. (Sec'y Br. 27-28.) The Court disagrees. The standard is clear on its face and requires an inspection for only "visible defects."

CSHO Guzun testified he recommended this citation item based on the incident itself – that SG in fact fell through the wooden plank – and Mr. Hernandez's interview statement that he did not inspect the scaffold building materials. (Tr. 202-203.) "Determining whether the standard was violated is not dependent on the cause of the accident …[but] the circumstances of an accident may provide probative evidence of whether a standard was violated." *Am. Wrecking Corp.,* 19 BNA OSHC 1703, 1707 n.4 (No. 96-1331, 2000) (consolidated) *aff'd in relevant part*, 351 F.3d

1254 (D.C. Cir. 2003).

Mr. Hernandez's interview statement contains this relevant part:

> And that morning we went to our companies scaffold materials laydown yard to pick up materials to build that scaffold frame. We looked at those materials very quick. But we did not spend so much time to inspect the scaffolding materials. Nobody from my company trained me that the first section of the scaffold had to be planked at the working area. [SG] (he is the victim) has harnesses and the lanyard that he used for the last five years. The lanyard was too long and [SG] hit the ground. I don't know if that was his personal or company personal fall arrest system. Nobody inspect and November 12, 2019 the day of the incident [SG] that personal fall arrest system, fall protection. I'm guessing it's a company practice to not inspect meticulously all scaffold components. We did not inspect adequately those plans.

(Tr. 218-220 reading Ex. C-7 at DOL-85-87) (emphasis added). The Secretary claims Mr. Hernandez did not inspect the materials at all, but that is not what is written in the statement. (Sec'y Br. 27-28.) According to CSHO Guzun, the statement includes the clarification that Mr. Hernandez did not "inspect meticulously" all scaffold components.[23] But the standard requires inspecting for "visible defects," not defects that would be discovered only from a meticulous inspection.

CSHO Guzun pointed to a picture of the broken wooden plank and stated it looked rotten. (Tr. 173.) Upon being asked, however, whether it is possible that a piece of wood looks fine externally but that it could be rotten in the middle, CSHO Guzun stated he did not know. (Tr. 190.) Instead, he stated he determined the wooden plank was rotten based on a post-incident examination of the piece of wood, post-incident pictures, and post-incident interview statements. (Tr. 192-193.) SG testified the blackened condition on the board does not "exactly" mean that the wooden plank is compromised, but "I will double check myself to see if it's worth it to me to work

[23] The use of the word "meticulously" in the statement written by CSHO Guzun is also suspect. It appears out of character with the rest of the way the statement was written. The Court has doubts whether Mr. Hernandez used the word while making his statement to CSHO Guzun, which further makes the statement unreliable as it may not reflect the exact words used – only the ones written down by the CSHO.

on." (Tr. 160.) As noted above in the discussion with Item 3(b), latent defects in a wooden plank are not necessarily uncovered by a visual inspection. This record is not sufficiently developed to make a determination that the wooden plank at issue visually appeared defective before it broke. Also noted above, despite CSHO Guzun's belief to the contrary, the Commission has long held that a violation of a regulation is not proven just because an accident took place. *Am. Wrecking Corp.*, 19 BNA OSHC at 1707 n.4. The Secretary must still establish, by a preponderance of the evidence, that Mr. Hernandez did *not* inspect the wooden plank – or other scaffold components – for "visual defects." 29 C.F.R. § 1926.451(f)(3).

When weighing the evidence, the Court is mindful of who has the burden in establishing the violation here. The Secretary had the opportunity to gather testimony, either from deposition or at trial, from Mr. Hernandez himself to flesh out what he meant by a "meticulous" inspection as opposed to looking at the scaffolding materials but failed to do so. The Secretary offered nothing but post-incident evidence that CSHO Guzun himself brought into question. As noted above, the evidence establishes Mr. Hernandez followed Respondent's inspection procedures for scaffold and scaffold components by visually looking at them as he gathered materials and then as he passed the materials while helping build the skeletal scaffold structure for the hooch project. Also, as stated previously, the wooden plank had been in place for approximately 10-20 minutes and SG walked on it and did not notice any issue or he indicated he would have stopped and did an inspection himself of the wooden plank. (Tr. 67, 131-132.) Therefore, the preponderance of the probative evidence does not establish that Mr. Hernandez did *not* examine the materials for visual defects in violation of the cited regulation. As this was the Secretary's burden to carry, he failed to establish the regulation was violated.

Citation 1, Item 3(a) is VACATED.[24]

G. Citation 1, Item 3(b) – The Alleged Scaffold Erection Violation

Citation 1, Item 3(b) alleges a serious violation of 29 C.F.R. § 1926.451(f)(7), which provides:

> (f) *Use.* – (7) Scaffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. Such activities shall be performed only by experienced and trained employees selected for such work by the competent person.

The Secretary alleges Respondent violated section 1926.451(f)(4) in the following manner: "At this establishment, employees were exposed to fall hazard[s] while working from a scaffold. The Respondent did not provide a trained and experienced competent person for scaffold erection and dismantling." (Citation at 11). The Secretary states in his brief that OSHA cited Respondent for an alleged violation of this standard because "during employee interviews, [Respondent] employees stated that [Respondent] did not have a qualified competent person inspecting the planks for defects." (Sec'y Br. 32.)

a. Does the Regulation Apply?

As noted above in the threshold issue section, the Court found the skeletal scaffold structure was a scaffold being erected at the time of the incident. As it was being erected it was also being altered as it was built up. The cited standard applies.

b. Was the Regulation Violated?

As also found above Mr. Hernandez was found to be a competent person as defined by OSHA regulatory requirements. It is undisputed that he was in charge of the hooch project. The

[24] The Court noted at trial that Items 2(b) (alleged damaged scaffold) and 3(a) (alleged scaffold inspection) appeared duplicative. (Tr. 202-204.) Neither party addressed the issue in post-hearing briefs. As the parties have not raised the issue and the Court has resolved the citation items on other grounds, the Court declines to address the apparent issue of these citation items being duplicative.

record establishes Mr. Hernandez selected SG, Mr. Abrego and Mr. Lopez, all of whom had a least four and a half years of scaffold building experience and had attended scaffold training to work on the hooch project. (Tr. 83, 97, 380-385, 411-414, 419.) Mr. Hernandez and Mr. Abrego both had the NCCER Plus certification, which designated them both by Respondent and Formosa as being a competent person in scaffolding. SG, Mr. Abrego and Mr. Lopez all attended Mr. Hernandez's specific in-person training on how to build the hooch project at issue before beginning work. The evidence also establishes Mr. Hernandez inspected the planks for visual defects, as discussed above. The Secretary's sole reliance to establish a violation of this regulation was an employee interview statement. That interview was discussed above in the threshold determination section finding Mr. Hernandez a competent person. Without more evidence, the Secretary has failed to establish non-compliance with this citation item.

Citation 1, Item 3(b) is VACATED.

H. Citation 1, Item 4(a) – The Alleged Scaffold Erection Training Violation

Citation 1, Item 4(a) alleges a serious violation of 29 C.F.R. § 1926.454(a), which provides:

> (a) The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. The training shall include the following areas, as applicable: (1) The nature of any electrical hazards, fall hazards and falling object hazards in the work area; (2) The correct procedures for dealing with electrical hazards and for erecting, maintaining, and disassembling the fall protection systems and falling object protection systems being used; (3) The proper use of the scaffold, and the proper handling of materials on the scaffold; (4) The maximum intended load and the load-carrying capacities of the scaffolds used; and (5) Any other pertinent requirements of this subpart.

29 C.F.R. § 1926.454(a). The Secretary alleges Respondent violated 29 C.F.R. § 1926.454(a) in the following manner: "At this establishment, employees were exposed to fall hazards when working above lower level. The employer did not provide training to employees to recognize the hazards associated with erection of the scaffolds." (Citation at 12.) In his post-hearing brief, the

Secretary states the citation was issued "because, during employee interviews, [Respondent] employees stated that they were not properly trained on the use of scaffold materials." (Sec'y Br. 34.)

a. Does the Regulation Apply?

The applicability of this standard has been called into question because, as the Court found, the skeletal structure was under erection at the time of the incident. The workers on the wooden planks were considered "scaffold builders," and, as found above, the skeletal structure was not complete and was still being erected by Respondent's scaffold builders at the time of the incident. Respondent points out while the cited standard, section 1926.454(a), applies to workers who "perform work" on a scaffold, the companion training standard at section 1926.454(b), not cited here, specifically applies to workers who are "involved in erecting, disassembling, moving, operating, repairing, maintaining, or inspecting a scaffold trained by a competent person to recognize any hazards associated with the work in question." (Resp't Br. 14); 29 C.F.R. § 1926.454(b) (emphasis added). The Secretary has not addressed this issue. Under these circumstances, the Court cannot find that the Secretary established the cited standard was applicable. The Secretary has failed to establish the cited regulation applied in the face of Respondent's argument on preemption,

b. Alternative Finding – Was the Regulation violated?

Even if the Secretary had cited the correct standard, section 1926.454(b), the Court finds the evidence establishes Respondent complied with it. If an employer "rebuts the allegation of a training violation 'by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided.' " *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2126-27 (No. 96-0606, 2000) (quoting *Am. Sterilizer Co.*, 18 BNA OSHC

1082, 1086 (No. 91-2494, 1997)), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

The alleged violation description (AVD) of the citation suggests this citation arises out of the fact that SG tied off at his feet using his harness that was too long to protect him from a seven-foot fall. The AVD seems to claim that none of the workers on the hooch project were trained to identify fall hazards because the situation demonstrated that SG and Mr. Hernandez did not understand that SG's fall harness would be ineffective at seven feet. As noted above, testimony at trial explained this confusing situation. Mr. Hernandez wrote in the JSA that to minimize fall hazards, all workers would comply with the 100 percent tie off rule. (Ex. R-5.) The fall protection standards require protection at ten feet, and the workers were only at seven feet at the time of the incident. However, in accordance with Mr. Hernandez's instructions, SG tied off even at seven feet, knowing his harness would not protect him against a fall but intending to tie off again once he reached a higher anchor point. (Tr. 106.) In so doing, SG showed that he was trained in and complied with Respondent's 100 percent tie off requirement. *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1019-20 (No. 87-1067, 1991) (relying on uncontested testimony regarding "rigging and signaling" to hold that "the performance of those employees establishes that they were trained in rigging and signaling"), *aff'd*, 978 F.2d 744 (D.C. Cir. 1991) (unpublished).

The Secretary also claims Respondent failed to properly train its employees on the use of scaffold materials. (Sec'y Br. 34.). As noted above, Respondent trained its employees in scaffold requirements. Mr. Hernandez, Superintendent Gonzalez and Mr. Abrego all held the NCCER Plus certification. The course included "performance verified tasks" that specifically included "selecting and inspecting scaffold components":

> dismantle a tube and coupler scaffold. Safety for tube and coupler scaffold, he would've had to evaluate and inspect the jobsite to set up the scaffold, <u>select and inspect system scaffold components</u>, safety erect the scaffold system, inspect a completed scaffold system, and dismantle a complete scaffold.

(Tr. 408 (Mr. Arias quoting Ex. R-10) (emphasis added).) Additionally, SG testified he received in person training, from Mr. Hernandez and another competent person, regarding hazards associated with construction sites, including those hazards associated with scaffolds. (Tr. 98-99.) SG also testified he received the skeletal structure scaffold training directly from Mr. Hernandez before starting to work on the hooch project, as did the rest of the hooch team. (Tr. 78.)

The Secretary does not show any deficiency in this training. *N & N Contractors, Inc.*, 18 BNA OSHC at 2126-27. Rather, he resorts to throwing irrelevant red herrings into play to shine the light away from his lack of due diligence in conducting discovery and preparing for and calling the appropriate witnesses at trial. Further, he criticizes Respondent's training policies and records, but yet does not proffer affirmative evidence these workers were not trained. As noted above, he does not even address the testimony that is in the record.

Instead, the Secretary argued that Respondent has failed to produce evidence which is irrelevant at this stage of adjudication. (Sec'y Br. 35-36.) He failed to file a motion to compel during discovery and failed to file a motion for sanctions. At trial, he failed to request the Court for a negative inference during the trial due to the failure to produce the requested discovery. *UHS of Denver, Inc., d/b/a Highlands Behav. Health Sys.*, No. 19-0550, 2022 WL 17730964, at *3, (OSHRC Dec. 8, 2022) he also did not pursue a written motion for subpoena enforcement for Mr. Hernandez's testimony and withdrew his oral motion to enforce Mr. Hernandez's subpoena after the trial was recessed to permit him the opportunity to present to the Court a written motion to enforce.

Red herrings and failure to pursue available remedies for non-production of documents or for a witness's failure to appear do not equate to the Secretary meeting his burden of proof on this citation, or any citation in this case. The Court finds the Secretary has also failed to establish non-

compliance with this citation Item.

Citation 1, Item 4(a) is VACATED.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Items 1(a), 1(b), 2(b), 3(a), 3(b) and 4(a) are VACATED.

SO ORDERED.

/s/ Patrick B. Augustine
Patrick B. Augustine
First Judge - Denver OSHRC

Date: February 21, 2023
Denver, Colorado

PALACIOS MARINE & INDUSTRIAL COATING, INC.

OSHRC Docket No. 20-0401

Decision and Order

Appendix A

Ann Thornton Berry, LLC
Certified Shorthand Reporters

OFFICIAL EXHIBIT

OSHRC Docket No. 20-0401

EXHIBIT NUMBER: C-7

Number of Pages: 8
Identified: (premarked)
Admitted: Vol. 1, Pg. 183
Received Not Admitted: _____
Rejected: _____
Withdrawn: _____
Not Offered: _____
Reporter: Ann Thornton Berry
Reporter Signature: /s/ Ann Thornton Berry

The parties have agreed that electronic copies of all exhibits shall be the official copies for the official record in this case. This exhibit is one of the electronic copies and has been placed on the computer compact disk (CD) together with other exhibits. This page has been created by the court reporter for this purpose. The notations on this page concerning the number of pages, admission, rejection, withdrawal, identification, the court reporter's name. and the court reporter's signature have been added by the court reporter. **The original (non-electronic version) of the exhibit shall also be submitted to the court reporter by the party offering this exhibit.**

Interview Statement

U.S. Dept. of Labor
Occupational Safety & Health Administration

Company: [illegible] Marine	Location/Date: 11/13/19	Inspection No.:

[redacted] management officials of providing us with scaffolding materials (pipes, planks, boards, bolts, cross bracing), tools (big tools) and he is providing with Personal Protective Equipment (PPE) such as safety glasses, hard hats, leather gloves, ear plugs. We buy from our pocket the steel toe shoes and the Fire Retarding clothing. Nobody from my company inspect my FRC even though the company required the FRC to wear inside of the Formosa plant and all units.

2) The company PPE requirements: safety glasses, hard hat, FRC, steel toe boots, leather gloves and ear plugs (case by case). I have my own FRC for 3 years from previous my company.

3) Our trainings are computer based trainings, we don't have any hands on trainings. I would love to have hands on trainings.

The above statements are true and correct to the best of my knowledge. I request that my identity will be kept confidential by the U.S. Department of Labor to the maximum extent permitted under existing law.

[redacted]

Witness: A. [signature]

Interview Statement

U.S. Dept. of Labor
Occupational Safety & Health Administration

Company: Pole	Location/Date: 11/13/19	Inspection No.:

[redacted]

Mr. Luis Hernandez was a competent person by Jose Gonzalez. We start that project on Monday, 11/11/19 (total 4 employees). Yesterday 1:00 PM, on 11/12/19, [redacted] fall through the plank/board (9 inch x 10 Foot) on the ground when he broke one ancle and 1 pod on both legs; He fell approximately from 7 feet. That scaffold was covered with a rotten plank that broke and [redacted] fell through. His harness and lanyard was inadequate. The lanyard was to long and that's why he hit the ground. I have my own harness, they did not provide me with harnesses, my management never provide me a hands-on training (only computer based). Our company did not inspect our harness, we inspect them, but nobody train us how to inspect the harness (fall personal protection). Our competent person did not inspect our scaffold materials, because one of the board (wood plank fell). An employee get injured after that poor inspections of scaffold materials. [redacted] (victim) and his lanyard/decelerator system of his harness didn't [?] his [?], that's why he hit the ground and

The above statements are true and correct to the best of my knowledge. I request that my identity will be kept confidential by the U.S. Department of Labor to the maximum extent permitted under existing law.

[redacted]

Witness: A-

Interview Statement **U.S. Dept. of Labor**
Occupational Safety & Health Administration

Company: Pelecio	Location/Date: 11/3/19	Inspection No.:

[redacted]

get injured. The victim did not have any anchor point above his head to hook that harness. I think it was wrong to use a personal fall protection when you don't have anything above to anchor. It was better to use a boom lift or scissor lift with a basket. The victim probably hit the small piece of concrete/stone, that's why he got injured badly. If that stone was removed before you start the scaffold, maybe the injury could be minor.

The above statements are true and correct to the best of my knowledge. I request that my identity will be kept confidential by the U.S. Department of Labor to the maximum extent permitted under existing law.

[redacted]

Witness: A. Buran

Interview Statement Industrial coating **U.S. Dept. of Labor**
Occupational Safety & Health Administration

Company: Palacios Marine	Location/Date: 11/13/18	Inspection No.:

1) Luis Hernandez — Foreman (8 years)

[redacted]: Monday-Saturday: 7:00AM - 5:30 PM.

Supervisor — Jose Gonzalez. He is a supervisor of the job tasks, checking our job quality, he is telling me what to do. I'm reporting to him. He is coming on site on a daily basis. Our Company Management officials provide us with tools, materials, equipment, chemicals, and Personal Protective Equipment (PPE). Mr. Jose Gonzalez is responsible for all our Employees Safety and Health (4 EEs).

2) My company PPE requirements: Hardhat, steel toe shoes, safety glasses, ear plugs, and leather gloves. The company is purchasing all PPE and the scaffolding materials (planks, pipe scaffold structures, cross braces).

3) My company is providing all my safety and health training (scaffolding building, chemical awareness). I'm a competent person for building scaffolds for this company. I'm a competent person for about 1 year. The Safety Council of Port Lavaca provided me with a computer based training to be a competent person. The hands-on training on a competent person I got for 1 day about 1 year ago

The above statements are true and correct to the best of my knowledge. I request that my identity will be kept confidential by the U.S. Department of Labor to the maximum extent permitted under existing law.

Signature / initial: [redacted] 11-13-18	Witness: A. Guzman

OSHA 94- - slm

Luis Hernandez

DOL-000085

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Interview Statement

U.S. Dept. of Labor
Occupational Safety & Health Administration

Company: Palacios Marine & Ind	Location/Date: 11/13/19	Inspection No.:

Luis Hernandez — Foreman (8 years)
provided by city of Victoria. My company
management never provide me a company
Hands-on training on how to inspect the
scaffolding materials (for scaffold building
purpose).
4) The incident happen yesterday. Mr. Jose
Gonzalez assign me yesterday 11/12/19, approxi-
mately 7:00 AM to build a Temporary ley
Down Yard Shop for the welder. Yesterday
the assignment was for me and other 3 EEs.
In that morning we went to our company
Scaffold materials laydown Yard to pick-
up materials to build that scaffold frame.
We look at those materials very quick, but
we did not spend to much time to inspect
the scaffolding materials. Nobody from
my company trained me that the 1st ledger
of the scaffold have to be placed at the
working area. [redacted] The
victim has harness and lanyard that he
use for the last 5 years. The lanyard was
to long and [redacted] hit the ground.
I don't know if that was his personal or
a company personal fall arrest system.
Nobody inspect on 11/12/19 (day of the incident)

The above statements are true and correct to the best of my knowledge. I request that my identity will be kept confidential by the U.S. Department of Labor to the maximum extent permitted under existing law.

Signature / initial: [redacted] 11-13-19	Witness: A. Cruz

Luis Hernandez

OSHA 94- - slm

Interview Statement

U.S. Dept. of Labor
Occupational Safety & Health Administration

Company: Placido Marine	Location/Date: 11/13/18	Inspection No.:

Luis Hernandez — Foreman/Competent Person inspect [redacted] (victim) that personal fall arrest system (fall protection. I'm guessing that is a common practice to not inspect meticulously all scaffold components; we did not inspect adequately those planks. I think I do not have enough training of a competent person. The 2nd cause was that the personal fall protection was inadequate. The lanyard was too long to protect him (victim). We saw that the board/plank (from scaffold - 10 feet) was rotten. The victim fell through that rotten board. I think it was a safer way to build this scaffold (for example scissors lift or aerial lifts). My company has aerial and scissors lift. The victim anchored him self below his feets, and that was another cause of his fall and broken legs.

The above statements are true and correct to the best of my knowledge. I request that my identity will be kept confidential by the U.S. Department of Labor to the maximum extent permitted under existing law.

Signature / initial: [redacted] 11-13-18

Witness: A. [signature]

Luis Hernandez

OSHA 94- - slm

DOL 000087

Interview Statement

U.S. Dept. of Labor
Occupational Safety & Health Administration

Company: Palacios Marone	Location/Date: 11/13/19	Inspection No.:

1) Jose Gonzalez – Superintendent (1.5 Years)
Jhon Arias – Corporate Safety Director (1 Year) before that Safety manager (5 Years).
[redacted]
I'm on site on a daily basis. Mr. Cody Hoffman (site safety manager) is on site on a daily basis. I Jose Gonzalez assigning the work/job tasks, checking the quality of their work, providing with tools, material, supply, equipment and Personal Protective Equipment (PPE). We are responsible for our Employees safety and Health. We have the Authority to fire and hire employees.

2) The company PPE Requirements for your employees that are working by LDPE lay down yard: Hard Hat, steel toe boots, safety glasses, gloves (leather, fabric, cut resistant gloves), Ear plugs (case by case). FRC is not require at that Area. We provide our Company FRC but we allow our employees to bring theyre own FRC. We don't have any records of inspections of FRC but we will start to record those visual Inspections of the FRC.

3) We provide to our employees with Safety and Health training through Safety Consel

The above statements are true and correct to the best of my knowledge. I request that my identity will be kept confidential by the U.S. Department of Labor to the maximum extent permitted under existing law.

Signature / initial: [redacted] Jose A. Gonzalez 11/13/19	Witness: A. Guzman

Jhon Arias 11/13/19

Interview Statement

U.S. Dept. of Labor
Occupational Safety & Health Administration

Company:	Location/Date:	Inspection No.:
Delacon Moran	10/13/18	

Jose Gonzalez — Superintendent
Jhon Arias — Corporate Safety Director
in Port Lavaca (70%, computerized drawing), and 30% of the drawing are providing by our company (computer based).

4) Our Competent person, Mr. Luis Hernandez (Foreman) did not inspect the scaffold building components, such as a wood plank/board. An employee fell down, when a rotten wood board broke in 2 parts. The employee broke one right ankle and left knee.

5) Our scaffold vestidor was not fully planed and the planks was not secured. We will make sure that our employees will fully planned the scaffold working/walking surfaces and to ensure them that they are secured.

6) We will retrain all our scaffold builders to use properly the personal fall arrest system. The injured victim anchor his harness below his feet approximately 7 foot. We will retrain them to inspect them (harnesses).

The above statements are true and correct to the best of my knowledge. I request that my identity will be kept confidential by the U.S. Department of Labor to the maximum extent permitted under existing law.

Signature / initial: [Redacted] Jose A. Gonzalez 11/15/19

Witness: A. Guzman

Jhon Arias 11/13/18

OSHA 94- - slm