United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BRADY SOCAL, INC. Respondent.	OSHRC Docket No. 18-1584

Appearances:

Tara Stearns, Esq., Department of Labor, Office of the Solicitor, San Francisco, California
For Complainant

Kevin D. Bland, Esq., and Eugene F. McMenamin, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Costa Mesa, California
For Respondent

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

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (the "Commission") under §10(c) of the Occupational Safety and He alth Act of 1970, 29 U.S.C. § 651 *et seq.* (the "Act"). Brady SoCal, Inc. ("Brady"), is a contractor in the construction industry providing framing, drywall, and insulation services. (Ex. J-1, ¶ 5).[1] In March of 2018, Brady was a subcontractor on the worksite of the Barona Casino and Resort ("Barona"), located at 1932 Wildcat Canyon Road, Lakeside, California. (*Id.*). In furtherance of its work at the Barona worksite, Brady had a scaffold erected on a building being converted from an outdoor dining space

[1] The parties entered into stipulations ("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. at 15-16).

to an indoor buffet ("the buffet building"). (Ex. J-1, ¶¶ 10 & 11). Early in the morning on March 16, 2018, an employee from another subcontractor at the worksite, American Sheet Metal ("ASM"), climbed the subject scaffold to access the roof of the buffet building. (Tr. 53-54, 71; Exs. C-4 & 5). At some point after doing so, the employee fell off the roof and died. (*Id.*)

As a result of the ASM employee's death, the Occupational Safety and Health Administration ("OSHA") sent Compliance Safety and Health Office ("CSHO") Eric Christensen to conduct an inspection of the Barona worksite. (Tr. 53). Following the inspection, OSHA issued a two-item *Citation and Notification of Penalty* (the "Citation") to Respondent alleging serious violations of the Act and proposing a total penalty of $15,706. The Citation was issued on September 6, 2018. Respondent timely contested the Citation, bringing the matter before the Commission.

Citation 1, Item 1 alleged a serious violation of 29 C.F.R. § 1926.451(f)(3) for failure to inspect the scaffold for visible defects by a competent person before each work shift. (Citation at 6). Citation 1, Item 2 alleged two instances of a serious violation of 29 C.F.R. § 1926.451(g)(4)(i) for failing to have guardrail systems installed along all open sides and ends of platforms of the subject scaffold. (Citation at 7).

A two-day trial was held on October 1 and 2, 2019, in San Diego, California under the Commission's rules for Simplified Proceedings. *See* 29 C.F.R. § 2200.200, *et seq.* Seven witnesses testified: (1) CSHO Christensen; (2) Jorge Ambriz, a scaffold erector for A Step Above Scaffold; (3) Albert Ros, a superintendent for the general contractor of the Barona worksite, Tutor Perini; (4) Michael Maland, the general superintendent for Tutor Perini; (5) Ricky Solis, a metal framer for Brady; (6) Brady foreman Fernando Hermasillo; and (7) Brady's general foreman at the Barona worksite, Alex Mendoza. 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. Accordingly, the Court vacates Citation 1, Item 1, vacates Instance (a) of Citation 1, Item 2, but affirms Citation 1, Item 2, Instance (b) as a serious violation.

II. Stipulations

In lieu of reproducing the parties' stipulations in their entirety, the Court will make reference to Exhibit J-1, the parties' Joint Stipulation Statement, as necessary.

III. Jurisdiction

The Joint Stipulation Statement states, and the record supports, Respondent is engaged in a business affecting interstate commerce and is an "employer" within the meaning of § 3 of the Act. (Ex. J-1, ¶ 2). The Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act. (*Id.*, ¶ 1).

IV. Factual Background

A. The Barona Worksite and the Buffet Building Scaffold

In March of 2018, Respondent was a subcontractor working under general contractor Tutor Perini to provide framing, drywall, and insulation services at the Barona worksite. (Ex. J-1, ¶ 5). Brady's work was divided between three buildings: the casino's main entrance, a food court, and the buffet building.[2] Respondent contracted with A Step Above Scaffold to construct a scaffold around the structural steel for the new buffet building.[3] (Tr. 143-44, 156; Ex. J-1, ¶ 11). When A Step Above installed the scaffold, in January of 2018, it had guardrails on the platforms for all

[2] The nomenclature at trial varied for these different "phases" of Respondent's work at the Barona site. (Tr. 203-04, 414-15). Only Respondent's work on the buffet building is relevant for purposes of this Decision and Order.

[3] As explained by Tutor Perini superintendent Albert Ros, the buffet building was to be built around an existing screened-in patio, such that the entire structure, framing, and roofing were new. (Tr. 154-56). The scaffold was built around the structural steel installed for the purpose of framing the exterior walls on this new building. (Tr. 156; Ex. C-2A p.1).

levels. (Tr. 143-46, 301; Exs. J-1, ¶ 11; C-2A pp. 1 & 21). However, at some point in time before March 16, 2018, two guardrails were removed: one on the top platform of the scaffold located at the buffet building's west side, in the direction of the building's southwest corner (Tr. 54-56; Ex. C-2A pp. 1 & 5); and another on the top platform of the scaffold located at the buffet building's east side, in the direction of the building's northeast corner (Tr. 67-68; Ex. C-2A pp. 20 & 21).

B. Brady's Use and Inspection of the Scaffold

Starting in February of 2018, Brady employees used the scaffold while they framed the exterior walls of the buffet building. (Ex. J-1, ¶ 12). From March 7 to 9, and again from March 12 to 13, 2018, Brady employees were installing DensGlass sheathing (a drywall material) on the exterior of the buffet building. (Tr. 257-59; Exs. C-10; J-1, ¶ 13). Among these employees were two individuals: Miguel Frias and Jesus Lizarraga. (Tr. 83-86, 261-62, 323-24, 338-39; Exs. C-9, pp. 1 & 6, R-20). After March 13, 2018 Brady's employees had finished installing the DensGlass and were working on the interior of the buffet building. (Tr. 58, 185, 275-79, 418-19). Other subcontractors on the worksite were allowed to use Brady's scaffold so long as they signed an indemnity agreement.[4] (Tr. 385; Exs. C-6 & R-6).

On the days Brady's employees were to be working on the scaffold, Alex Mendoza, a "general foreman" for Brady, was designated as the competent person to inspect the scaffold. (Tr. 168, 418-20; Exs. R-1 & 10). Mr. Mendoza would typically arrive at the Barona worksite around 2:30 a.m. and inspect the scaffold around 5 or 6 a.m., before the workers started accessing the scaffold. (Tr. 426-29). Although this inspection typically occurred before dawn, there was ambient lighting of various sources coming from the casino. (*Id.*). During his inspection, Mr. Mendoza would fill out a checklist and after his inspection sign a "green card" attached to the scaffold to indicate he

[4] Because of the Court's conclusion in Part V(A), *infra*, rejecting Complainant's alternative theory of liability under the multi-employer worksite doctrine, extensive discussion of these indemnity agreements is unwarranted.

had conducted his inspection. (Tr. 168, 419-20; Exs. C-2A, p. 8; C-7, R-10). Mr. Mendoza would only inspect those areas of the scaffold where Brady employees were scheduled to work. (Tr. 418-19, 449-52). From March 14 to 16, 2018 the day of the accident, Mr. Mendoza inspected the scaffold; however, he did not inspect all levels of the scaffold because Brady's employees would not be working on it while they worked on the interior of the building. (Tr. 58, 185, 418-19; Exs. C-7, R-10).

C. The Accident and OSHA Investigation at Barona

On March 16, 2018, an employee from ASM climbed the subject scaffold to access the roof of the buffet building. (Tr. 53-54, 71; Exs. C-4 & 5). Shortly thereafter, he fell off the roof of the building and died. (Tr. 53-54, 71-77; Exs. C-4 & 5). In response, OSHA sent CSHO Christensen to conduct an investigation of the Barona worksite. (Tr. 53). After arriving at the worksite, the CSHO inspected the west side of the scaffold and immediately noticed the missing guardrail on the topmost platform. (Tr. 54-56; Ex. C-2A, pp. 1, 2, & 5). As he proceeded around the building to inspect its east side, he saw another missing guardrail on the topmost platform of the scaffold. (Tr. 67-68; Ex. C-2A, pp. 20 & 21).

The CSHO interviewed Mr. Mendoza and then went to the second level of the scaffold, i.e., the level below the topmost level with the missing guardrail, on both the east and west sides of the buffet building. On the west side of the building, the CSHO measured a fall distance of approximately six feet from the topmost level of the scaffold to the next level of the scaffold, which was the most direct path for a fall. (Tr. 60-63, 288-94; Exs. C-2A, p. 12; C-2B, pp. 5 & 6; R-19). The CSHO measured a fall distance of almost 29 feet from the topmost level of the scaffold to the ground. (Tr. 60-62; Ex. C-2A, pp. 13 & 14). On the east side of the building, the CSHO measured a fall distance of approximately 21 feet, which was the distance from the topmost level of the

scaffold where the guardrail was missing to a "canopy" over the sidewalk directly below. (Tr. 128-30; Ex. C-2C, p.12).

As part of his investigation, the CSHO also interviewed several employees from the Barona worksite on March 19, March 26, and April 6, 2018. Of particular relevance with regard to the missing guardrails are the interviews of Brady employees Messrs. Frias and Lizarraga, who had been installing DensGlass on the buffet building, and ASM employee Ruben Solano. The Court details each interview in turn:

Messrs. Frias and Lizarraga – the CSHO first interviewed Messrs. Frias and Lizarraga on March 19, 2018, the Monday following the accident, for approximately five minutes. (Tr. 82-84, 357-60). This interview was in a group setting with a Brady employee named Ricky Solis, who helped to translate the CSHO's questions, and another Brady employee named "Eric."[5] (Tr. 83, 274-75, 323-24, 358). During this interview, Mr. Frias indicated he thought the missing guardrails had been present while the crew installed DensGlass. (Tr. 83-84, 323-24; Ex. R-20). Mr. Lizarraga indicated he could not recall if the guardrails had been there. (Tr. 83-84, 323-24, 359-60; Ex. R-20).

CSHO Christensen returned to the Barona site on April 6, 2018 and interviewed Mr. Frias and Mr. Lizarraga again, this time individually. (Tr. 84, 337, 365). Mr. Solis was again present to translate the interviews. (Tr. 84, 274-75, 363). These interviews were more extensive, lasting nearly an hour each. (Tr. 85, 337, 365-66). During his interview, Mr. Lizarraga indicated he and Mr. Frias had been installing DensGlass on both the east and west sides of the buffet building and

[5] Based on Mr. Solis' testimony about who was present for this first interview, the employee the CSHO referred to as "Eric" appears to be the Brady employee "Eddie Frejos." (Tr. 362).

the guardrails were not present on either side during the installation. (Tr. 85-86, 261-62; Ex. C-9, p. 1). Mr. Frias indicated likewise.[6] (Tr. 86. 261-62, 338-39; Ex. C-9, p. 6).

During both interviews, Mr. Solis translated the CSHO's questions from English to Spanish, and translated the employees' answers from Spanish to English, which the CSHO then wrote down. (Tr. 308-09, 360, 366-67). Following the interviews, the CSHO asked Mr. Solis to translate his written notes into Spanish to each of the employees and to ask them to sign if the statements were accurate. (Tr. 87-88, 308-09, 368-70). Each employee signed the CSHO's written statements. (Tr. 88, 310-12; Ex. C-9, pp. 2 & 7).

Mr. Solano – CSHO Christensen spoke with an ASM employee named Ruben Solano on March 16, 2018 and again on March 26, 2018. (Tr. 100, 328-31). Mr. Solano stated he was installing metal roof panels on the buffet building on March 12 and 13, 2018 and noticed the guardrails were missing on those dates. (Tr. 104-05, 328-31; Ex. C-9, pp. 10 & 11).

D. The Citation Issued to the Respondent

Following his investigation, the CSHO concluded Brady had violated 29 C.F.R. § 1926.451(g)(4)(i) due to the missing guardrails on the east and west end of the scaffold and concluded one Brady employee, Mr. Lizarraga, had been exposed to the fall hazard created by the missing guardrails.[7] (Tr. 255-56, 259-60). The CSHO further concluded Brady had violated 29 C.F.R. § 1926.451(f)(3) based on Mr. Mendoza's failure to adequately inspect the scaffold while Brady employees were using the scaffold to install DensGlass on the buffet building. (Tr. 255-57). He found three Brady employees were exposed to the hazard for failure to adequately inspect:

[6] The only material difference between the two employees' accounts was Mr. Frias stated he had been using a personal fall protection system while Mr. Lizarraga stated neither he nor Mr. Frias were employing any alternative form of fall protection while working near the missing guardrail. (Tr. 87, 340; Ex. C-9, pp. 1, 4, & 6).

[7] CSHO Christensen believed Mr. Lizarraga was the only Brady employee exposed because he was the only employee not wearing a safety harness as an alternative means of fall protection. (Tr. 255).

Messrs. Frias and Lizarraga and another Brady employee named "Eric." (Tr. 255-57, 259-60). Thus, for both Items in the Citation, the CSHO concluded only Brady employees had been exposed to the hazard. (Tr. 255). Based on the CSHO's conclusions, Complainant issued the two-item serious Citation to Respondent.

In addition to the CSHO, the following witnesses provided substantive testimony at trial:

Ricky Solis was a "metal stud framer" for Brady for 13 years and was working at the Barona worksite at the time of the accident. (Tr. 350). He was present for both of the CSHO's interviews with Miguel Frias and Jesus Lizarraga as an English-Spanish translator. (Tr. 351-53). He was born in Mexico but moved to the United States when he was 11 years old and considers himself to be "90%" fluent in English. (Tr. 351). In his opinion, neither Mr. Frias nor Mr. Lizarraga could have a full conversation in English and neither reads nor writes English. (Tr. 355-56, 368).

Fernando Hermosillo had worked for Brady since 1984 and was the "project coordinator" of the Barona worksite as well as another site at the time of the accident. (Tr. 381-83; Ex. J-1, ¶ 8). He supervised Alex Mendoza, who handled the day-to-day operations; Mr. Hermosillo would only visit the Barona worksite about twice a week. (Tr. 383, 406). Either he or Mr. Mendoza would attend a coordination meeting once a week. (Tr. 384-85). With regard to the subject scaffold, Brady inspected the scaffold every time a Brady employee worked on it, and Brady kept records of those inspections. (Tr. 397-98).

Alex Mendoza was a union "general foreman" for Brady at the Barona worksite. (Tr. 411-413; Ex. J-1, ¶ 7). He reported to Mr. Hermosillo. (Tr. 413). He was designated as the competent person to inspect the scaffold on the buffet building. (Tr. 418-19). In inspecting the scaffold, he would use a checklist and then sign a green card. (Tr. 419-20). He only inspected the levels of the scaffold on which Brady employees would be working on a given day. (Tr. 418). On March

14 through March 16, 2018, he did not inspect the entire scaffold because Brady's employees would not be working on the scaffold at all. (Tr. 418-19). Following his inspection of the scaffold on March 16, 2018 he checked a box indicating "All platforms on all levels fully planked and in good condition." (Tr. 456; Ex. C-7, p. 13). He did not consider this to be inaccurate because Brady's policy was to only inspect the parts of the scaffold on which Brady employees would be working. (Tr. 457).

V. Complainant's Controlling/Correcting Employer Theory of Liability

Before addressing the merits of the Citation, the Court will first address the issue of Complainant's theory of liability against Respondent based on the ASM employee's exposure to the subject scaffold. As CSHO Christensen noted at trial, Complainant issued several Citations in connection with the CSHO's investigation of the death of the ASM employee, including to the general contractor, Tutor Perini. (Tr. 335-36). Apparently as a result of information obtained during the course of discovery in that case, Complainant decided to allege a new theory of liability against Respondent in this case. (Tr. 42-43). To that end, on July 22, 2019, Complainant's attorney sent a letter to Respondent's attorney alerting him Complainant intended to assert a new theory of liability against Respondent. (Tr. 42-43; Exs. C-19, ¶ 2, R-22). Namely, Complainant intended to "argue that based on its contractual responsibilities with Tutor Perini, Brady may be either a controlling or correcting employer (or both) under the OSHA Multi-Employer Citation Policy." (Ex. R-22). *See also* Multi-Employer Citation Policy, OSHA Instruction CPL 02-00-124 (Dec. 10, 1999). Respondent's attorney replied, by email, with documents intended to "refute any contention that Brady had any duty to AS[M]'s employees." (Ex. A to Ex. C-19). Respondent's attorney further argued Complainant "is in perilous ethical territory propagating this new, legal

theory." (*Id.*). Subsequent to this exchange between the parties, Complainant never formally moved the Court to amend the Citation to allege facts in support of this new theory of liability.

At trial, Complainant's attorney again stated her intention to introduce evidence on Complainant's newly asserted legal theory. (Tr. 42-43). Respondent's attorney again opposed. (Tr. 33-34). The Court allowed evidence to be introduced in support of the theory with instructions to the parties to brief the issue for the Court's disposition. (Tr. 44).

In his brief, Complainant argues "the purpose of pleadings is to provide fair notice of the issues to be tried" and, particularly in Simplified Proceeding like those governing here, "the issues for hearing are defined initially by the Citation and are refined through prehearing procedures." (Sec'y Br. at 20). Complainant goes on to argue the term "employees" used in the Citation "did not specif[y] that only Brady employees had been exposed" to the hazard posed by the missing guardrails of the scaffold and thus was "broad enough to encompass employees of other subcontractors at this multi-employer worksite." (*Id.*). Complainant also points to the letter sent to Respondent's counsel in July of 2019 and argues Respondent "gave no indication that [it] would lack time to prepare its defenses." (*Id.* at 20-21). Thus, Complainant continues, Respondent has not demonstrated prejudice by the newly asserted theory of liability. (*Id.* at 21).

For its part, Respondent continues to object to the new theory of liability, arguing Complainant is bound by the allegations in the original Citation, which related only to Brady's employees. (Resp't Br. at 3). Respondent goes on to argue that even if the Court would entertain an amendment to the Citation at this stage in the proceeding, an amendment this long after the violation would run afoul of the six months statute of limitations for issuing a citation set forth by the Act. (*Id.*). *See also* 29 U.S.C. § 658(c) ("No citation may be issued under this section after the expiration of six months following the occurrence of any violation.").

Before addressing the parties' arguments, the Court finds it important to contextualize the disagreement presented. This case was designated for Simplified Proceeding by the Commission's Chief Judge, a designation to which neither party objected. *See* "Chief Judge's Order Designating Case for Simplified Proceedings," OSHRC Docket No. 18-1584 (Oct. 17, 2018); *see also* 29 C.F.R. § 2200.204 (governing motions to discontinue Simplified Proceedings). Because of this unchallenged designation, formal pleadings were never required in this matter.[8] *See id.*; 29 C.F.R. § 2200.205(a). Thus, any notice given to Respondent about the basis for the violations was to be provided by the Citation alone. *See* 29 U.S.C. § 658(a) (a citation must "describe with particularity the nature of the violation"); *Barlament Erection Crane Rentals*, 24 BNA OSHC 1777, 1795 n.7 (No. 12-1516, 2013) (discussing the purpose of the citation in simplified proceedings to give notice and define the issues for trial); *see also Asarco, Inc.*, 8 BNA OSHC 2156, 2162 ("In a proceeding under the Act, an employer is given notice of the charge and the relief requested by a citation ….")

In the Court's view, it is also important to emphasize Complainant has *never formally moved to amend the Citation* to include factual assertions to support his new theory of liability.[9] Had Complainant done so, most of the issues raised at this late stage of the proceeding, issues of notice, fairness, prejudice, as well as the statute of limitations, could have been more pointedly briefed and decided in the disposition of the motion. In the absence of a motion with a proposed amendment to the Citation, the Court is in the position of trying to guess what amendment Complainant *might* have sought and whether such amendment *might* have unfairly prejudiced Respondent at an unspecific point in the proceeding. *See generally Gem Indus., Inc.*, 17 BNA

[8] Although Complainant did nonetheless file a formal complaint, it merely realleged the factual allegations in the Citation. *See* Complaint at ¶ VI, OSHRC Docket No. 18-1584 (Oct. 12, 2018). The Court's analysis would thus be the same even if the Citation and Complaint were read together as the notice-giving pleadings for this case.

[9] Even in his post-trial brief, while arguing "leave to amend would have been proper," Complainant never actually requests this relief from the Court. (Sec'y Br. at 21).

OSHC 1184, 1188 (No. 93-1122, 1995) (discussing prejudice with regard to the amendment of pleadings). There is simply no way for the Court to effectively analyze this issue in absence of a formal motion by Complainant with the proposed amendment put before the Court.

Contrary to Complainant's position, the Commission's rules for Simplified Proceedings did not obviate the basic requirement for Complainant to file a motion to amend the Citation. In absence of a more specific rule, this case was still governed by the Federal Rules of Civil Procedure, including Rule 15 relating to the amendment of pleadings. *See* 29 C.F.R. § 2200.2(b). See also, 29 C.F.R. § 2200.211.[10] Indeed, the procedure for Simplified Proceedings contemplates motions practice, even if it is to be "limited." 29 C.F.R. § 2200.205(b). It is true the Commission rules cited by Complainant do contemplate narrowing the issues in a case under Simplified Proceedings prior to the commencement of the hearing. (Sec'y Br. at 20 (citing 29 C.F.R. §§ 2200.200(b)(2), 207(b), 209(b))). But what Complainant ignores is that each of these rules specifically contemplates the involvement of "*the Judge*" in narrowing the issues for trial. *See* 29 C.F.R. §§ 2200.200(b)(2), 207(b), 209(b) (emphasis added); *see also C.P. Buckner Steel Erection, Inc.*, 23 BNA OSHC 1929, 1930-31 (No. 10-1021, 2012) (in a simplified proceedings case, where the respondent's affirmative defense was raised in a pre-hearing conference with the judge, Complainant could not claim lack of notice). The reason for the Court's involvement in such matters is apparent from the instant situation. Here, although Complainant raised the issue of changing the factual basis and legal theory as to Respondent's liability to opposing counsel, he never sought the Court's involvement in the matter until the day of trial. *Cf. C.P. Buckner*, 23 BNA OSHC at 1930-31. In sum, the Court finds Complainant is bound by the four corners of the

[10] Commission Rule 211 states as follows: "The provisions of Subpart D (§§ 2200-50-2200.57 and §§ 2200.34, 2200.37(d), 2200.38, 2200.71, and 2200.73 will not apply to Simplified Proceedings. All other rules contained in Parts A through G of the Commission's rules of procedure will apply when consistent with the rules in the subpart governing Simplified Proceedings."

Citation in determining issues of notice, prejudice, and fairness to Respondent in alleging an additional theory of liability prior to trial.[11] *See KS Energy Servs. Inc.*, 22 BNA OSHC 1261, 1263 (No. 06-1416, 2008) (the citation gives notice in simplified proceedings due to lack of formal pleadings); *Asarco, Inc.*, 8 BNA OSHC at 2152 (discussing the notice-giving function of the citation). *See also P. & M. Sales, Inc.*, 4 BNA OSHC 1158, 1159 (No. 3443, 1976) (citation and complaint's allegation of failure to "provide" required equipment not sufficient to plead failure to "use" required equipment).

With the issue so framed, the Court agrees the Citation fails to provide fair notice of Complainant's proposed theory of liability for exposure of non-Brady employees to the hazard. Complainant argues the "employees" referenced in Item 2 "did not specif[y] that only Brady employees had been exposed" and thus could refer to the deceased ASM worker. (Sec'y Br. at 20). The Court disagrees. To start, the Court notes both the CSHO and Complainant's attorney *confirmed the original Citation only related to Brady's own employees*. (Tr. 42, 255) (emphasis added). But even assuming that intent does not control the meaning of the Citation, a plain reading of the Citation's allegations would not apply to the ASM worker because he was not Respondent's employee. Respondent had no control at all over ASM or its workers as it would over an "employee." *See The Barbosa Grp., Inc.*, 21 BNA OSHC 1865, 1866-67 (No. 02-0865, 2007) (control over a worker is a hallmark of being an "employee"). Indeed, if the Court were to read "employee" as broadly as Complainant suggests, Respondent could have been forced to defend the violations as against any worker on the worksite if Complainant had decided to assert such a

[11] Because Complainant never formally moved to amend the Citation, the Court finds no reason to address Respondent's argument with regard to the statute of limitations and whether any such hypothetical amendment would sufficiently "relate back" to the original Citation to be permitted under Federal Rule of Civil Procedure 15(c). *See generally Avcon Inc.*, 23 BNA OSHC 1440, 1442-43 (Nos. 98-0755 & 98-1168) (consol.) (discussing the "relation back" doctrine with regard to the statute of limitations). In absence of an actual proposed amendment from Complainant, the Court would be forced to resort to guesswork in resolving this issue.

theory at trial. The Court cannot give the Citation Complainant's broad reading. Rather, in the context of the Citation as a whole, it is clear the "employees" referred to are the employees "installing Densglass." (Citation at 6). Such employees could only be Brady's employees, as ASM did not install Densglass but rather metal roofing. (Tr. 116; Ex. C-2C, p. 8). The Court therefore considers Complainant's multi-employer worksite theory unpleaded.

Complainant suggests Respondent suffered no prejudice because it adequately defended against Complainant's new legal theory at trial. (Sec'y Br. at 21). However, the unpleaded issue could only be tried with Respondent's consent. *Cf. KS Energy Servs.*, 22 BNA OSHC at 1263 (general principles of due process for simplified proceedings require a post-trial amendment to allege a new legal theory to have the consent of the parties); *Zidell Explorations, Inc.*, 5 BNA OSHC 1364, 1365 (No. 12408, 1977) (respondent would be prejudiced where Secretary shifted the theory of the hazard from one of hoses in the work area to "general debris" and the issue was not tried with consent). Respondent's attorney objected to the new legal theory in response to Complainant's July 22, 2019 letter (Ex. C-19), at trial (Tr. 32-34), and again in his post-trial brief. (Resp't Br. at 3). There was no consent to try this unpleaded issue.

Because Complainant failed to move to amend the Citation, and because the original Citation failed to provide notice of Complainant's new allegations, the Court analyzes the Citation only in regard to Brady's employees being the exposed employees to the hazard.[12]

[12] In so doing, the Court has no need to examine a substantial portion of the evidence submitted by the parties at trial, particularly the evidence related to Brady's policy of requiring other subcontractors to sign an indemnity agreement before using their scaffolds and whether Tutor Perini was involved in or otherwise responsible for that process. The only apparent purpose for which this evidence was submitted was to refute Complainant's theory that Respondent was responsible for ASM employees' exposure to the hazard.

VI. Applicable Law for Citation Items

The Citation relates to standards promulgated pursuant to § 5(a)(2) of the Act. To establish a violation of a safety or health standard promulgated pursuant to § 5(a)(2) of the Act, Complainant must prove: (1) the cited standard applies; (2) the terms of the standard were violated; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant must establish his case by preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (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.

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

VII. Citation 1, Item 1 – Competent Person Inspection Violation

Complainant alleged a serious violation of 29 C.F.R. § 1926.451(f)(3) as follows:

> 29 CFR 1926.451(f)(3): Scaffolds and scaffold components were not inspected for visible detects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity:
>
> Barona Casino Buffet Expansion Project: Employees were performing work, such as installing Densglass, from the supported scaffold that had not been adequately inspected prior. The scaffold inspection was conducted in the dark without adequate illumination and did not include an evaluation of the upper scaffold elevations, where two guardrails were identified as missing. Employees were exposed to fall hazards.

The cited standard provides: "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." 29 C.F.R. § 1926.451(f)(3) (emphasis added).

1. The Standard Applies

The parties have stipulated the standard applies to the worksite and the subject scaffold. (Ex. J-1, ¶ 6). The evidence clearly supports the stipulation and indicates a scaffold was used on the worksite. The scaffold was subject to inspection before each work shift by a competent person.

2. The Standard Was Not Violated

Brady designated Mr. Mendoza to be the competent person to inspect the subject scaffold. Complainant does not dispute Mr. Mendoza's competent person designation and his qualifications to inspect the scaffold;[13] rather, Complainant argues Mr. Mendoza's inspection of the scaffold was deficient because he inspected the scaffold with inadequate lighting and failed to inspect the top level of the scaffold. (Sec'y Br. 17-18). The alleged violation description ("ADV") sets forth the factual basis for the alleged violation. The ADV references the inspection was conducted in the dark without adequate lighting. Therefore, the ADV is referring to March 16, 2018 and no earlier date. Citation at 6. Respondent argues it had no duty to inspect an area of the scaffold on which no Brady employees would be working because there could not have been exposure of any of its

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[13] The limited record on the subject supports a finding Mr. Mendoza *was* a "competent person" for purposes of inspecting the scaffold. A "competent person" is defined as "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. § 1926.32(f). Although he reported to Mr. Hermosillo, Mr. Mendoza ran the day-to-day operations of Brady at the worksite. (Tr. 383, 406). He completed "Scaffold Competency Training" as recently as 2015. (Ex. R-1). He described his routine for inspecting scaffolds to look for defects and/or hazards (Tr. 418-20, 423-24; Exs. C-7, R-10 & 11). It was his signature on the "green tag" which indicated to others the scaffold was safe for use. (Tr. 168, 343-46, 419; Ex. C-2A, p.8). Taken together, the preponderant evidence establishes Mr. Mendoza was a competent person to inspect the scaffold. *See Superior Masonry Builders, Inc.*, 18 BNA OSHC 1182 at *8 (No. 96-1043, 2003) ("experience alone does not qualify [a] designated employee as a 'competent person'… [he must be] instructed about the specific hazards presented [by the worksite] …"); *Sw. Bell Telephone*, 19 BNA OSHC 1097 at *2 (No. 98-1748, 2000) (competent person is one who has "the authority to order the steps required to bring the physical conditions into compliance" and to "abate hazards").

employees to the identified hazard on those dates, i.e., the missing guardrails. (Resp't Br. at 4-5). The Court agrees with Respondent.

By March 16, 2018, Brady's employees had finished installing DensGlass on the exterior of the buffet building and had moved on to do work in the interior of the building. (Tr. 58, 185, 275-79, 418-19). Thus, no Brady employees were working on the scaffold on March 16, 2018. (*Id.*). In inspecting the scaffold, Mr. Mendoza would use a checklist and then sign a green card. (Tr. 419-20). He only inspected the levels of the scaffold on which Brady employees would be working on a given day. (Tr. 418). On March 14 through March 16, 2018, he did not inspect the entire scaffold because Brady's employees would not be working on the scaffold at all. (Tr. 418-19). The testimony Respondent's employees were not working on the scaffold on March 14 through 16, 2018 because they had finished the outside work and had moved to the interior of the building is uncontroverted. As the Court previously decided (*see* Part (V)(A), *supra*), the only relevant employees for purposes of this Citation are those of Brady, and the evidence established no Brady employees would be working on the scaffold on the date in question. As to Brady's employees, the Court finds Respondent had no duty to inspect the scaffold as they could not have been exposed to the fall hazard identified by Complainant. *See Blocksom & Co.*, 11 BNA OHC at 1261-62; *Edison Lamp Works*, 7 BNA OSHC at 1819. This conclusion is also in accordance with the CSHO's view that Respondent had no duty to inspect those levels of the scaffold where no Brady workers would be performing work on a given a day. (Tr. 281-82).

Additionally, the Court finds Respondent had no duty to inspect the scaffold on the date in question because it was not "before [a] work shift" during which Brady employees would be

working on the scaffold.[14] *Cf. Blocksom & Co.*, 11 BNA OHC 1255, 1261-62 (No. 76-1897, 1983) (where there was no evidence employees' could have been injured by the cited hazard, Complainant failed to prove a violation of the cited standard); *Edison Lamp Works*, 7 BNA OSHC 1818, 1819 (No. 76-484, 1979) (where there was no evidence the condition actually constituted a hazard to respondent's employees, the Commission vacated the citation). The Court thus finds the standard was not violated. Citation 1, Item 1 will be VACATED.

VIII. Citation 1, Item 2 - Guardrail Violations.

Complainant, in Citation 1, Item 2, has alleged two instances of a serious violation of 29 C.F.R. § 1926.451(g)(4)(i) as follows:

> 29 CFR 1926.45 l (g)(4)(i): Guardrail systems were not installed along all open sides and ends of platforms
>
> In the following instances, the north edge of the scaffold had an open side that did not have a standard guardrail affixed. Employees were exposed to fall hazards.
>
> a) Barona Casino Buffet Expansion Project - West scaffold elevation. At the north end of the upper scaffold platform, employees were exposed to 29 foot falls to the ground from the northwest corner.
> b) Barona Casino Buffet Expansion Project - East scaffold elevation. At the north end of the upper scaffold platform, employees were exposed to 21 foot falls to the ground from the northeast corner.

29 C.F.R. § 1926.451(g) reads in part relevant to the parties' arguments as follows:

> (1) 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.
> …
>
> (4) Guardrail systems installed to meet the requirements of this section shall comply with the following provisions (guardrail systems built in accordance with appendix A to this subpart will be deemed to meet the requirements of paragraphs (g)(4) (vii), (viii), and (ix) of this section): (i) Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.

[14] This is not to say Brady had no duty at all to inspect the scaffold on March 16, 2018. As detailed below, the substance and quality of Mr. Mendoza's inspections of the scaffold bears on Respondent's constructive knowledge of the guardrail violation. *See* Part (V)(D)(4), *infra*.

29 C.F.R. § 1926.451(g).

"Scaffold" is defined as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." 29 C.F.R. § 1926.405(b).

"Lower level" is defined as "areas below the level where the employee is located and to which an employee can fall. Such areas include, but are not limited to, ground levels, floors, roofs, ramps, runways, excavations, pits, tanks, materials, water, and equipment." 29 C.F.R. § 1926.450(b).

1. Citation 1, Item 2 – Instance (a)

a. The Standard Applies

Citation 1, Item 2, Instance (a) relates to the scaffold on the west side of the buffet building. "In order to establish a violation, the Secretary must show that the standards applied to the cited conditions." *Arcon, Inc.*, 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004). *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). Respondent does not dispute the cited standard generally required the subject scaffold to have the guardrails required by 29 C.F.R. § 1926.451(g)(4)(i).[15] Respondents arguments are more directed to whether the standard was violated; not that the regulation did not apply at all in this instance. The Court finds the regulation applies as a scaffold was in use on the worksite and as such the construction of the scaffold would need to comply with the standard.

[15] The Court notes paragraph 6 of the Joint Stipulation Statement, referenced at page 12 of Complainant's Brief, which reads: "The Secretary's regulations at 29 C.F.R. §§ 1926.451(f)(3) and 1926.451(g)(4)(i) were applicable to the worksite." (Ex. J-1, ¶ 6). While Respondent has not disputed the regulations were generally applicable to the construction activities being conducted on the Barona worksite, it has disputed their applicability to the specific conditions on the subject scaffold. (Resp't Br. 7-8). Respondent's argument is not foreclosed by its stipulation. *See Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) ("the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions …").

b. The Standard was not Violated as to Instance (a)

Respondent points to 29 C.F.R. § 1926.451(g)(1) and argues the top level of the scaffold was not more than 10 feet above the next lower level thus providing a "safe harbor" from the requirements of the proceeding requirements. (Resp't Br. at 7-8). Respondent points out Complainant's own measurements show only about a six-foot fall from the topmost level of the scaffold to the platform immediately below and argues Sections (g)(1) and (g)(4) must "be read in context" and "[b]y its terms, Section 451(g) is triggered only when an employee is on a scaffold more than 10 feet (3.1 m) above a lower level." (Resp't Br. at 7-8 (internal quotations and emphasis omitted)). Complainant has not meaningfully addressed this argument.

An employer's obligations under Section 1926.451(g)(4)(i) are not "triggered" unless fall protection is required by Section (g)(1). (Resp't Br. at 8). Section (g)(1) only requires fall protection when a scaffold, i.e., a specific "elevated platform …" (29 C.F.R. § 1926.405(b)), is more than 10 feet above a lower level. A lower level is defined, in part, as a place a worker "can fall." *Id.* Thus, the Court concludes Complainant must show the cited platform was more than 10 feet above a lower level to which an employee "c[ould] fall."[16]

At trial, the CSHO admitted the most likely place a worker would fall from the top platform of the western portion of the scaffold would be to the platform directly beneath the missing guardrail, which was less than ten feet below. (Tr. 291, 293-94). The platform directly below as had railings and bars on the side of the platform facing away from the building to prevent a person from rolling over the edge to the ground below. (Exhs. C-2A, 1, 2, 5 and R-19).

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[16] This is somewhat different than the argument styled by Respondent, who has framed the 10-foot requirement of Section (g)(1) as a "safe harbor" from the requirements of Section (g)(4)(i). (Resp't Br. at 7-8). The Court thinks the better reading of the regulation as a whole is to require Complainant to demonstrate the applicability in the first instance, which includes demonstrating the guardrail was required by Section (g)(1). *See Southern Scrap Materials Co., Inc.*, 23 BNA OSHC 1596, 1608 (No. 94-3393, 2011) (standards and subsections must be read as a whole, construing their provisions together).

Complainant's only support the standard was violated was the CSHOs measurement from the top platform vis-à-vis the ground and the CSHO's speculation an employee could potentially fall in a manner so as to miss the platform six feet below and therefore fall 29 feet to the ground below. (Tr. 294-98). The CSHO did not articulate any plausible ways in which it would have been possible for an employee to fall to the ground level when there was a lower platform extending to the end of the building which was six feet below and which had rails and posts on the outside of the platform to prevent an individual from falling to the ground. (Tr. 291, 293-94). Mere speculation or conjecture cannot fulfill Complainant's burden to demonstrate the standard was violated. *Keystone Body Works*, 4 BNA OSHC 1523, 1524 (No. 6606, 1970), citing *Forth Worth Enters.*, 2 BNA OSHC 1103, 1105 (No. 769, 1974). Thus, the Court finds Complainant has failed to prove the standard was violated as to Instance (a). *Cf. Kenny Indus. Servs., LLC*, 19 BNA OSHC 2099, 2100 (No. 01-1626, 2002) (ALJ) (where the "fall from the edge of the fourth floor would have been to the second floor, which was 20 to 24 feet below" 29 C.F.R. § 1926.451(g)(1) applied and was violated). Citation 1, Item 2 – Instance (a) will be VACATED.

2. Citation 1, Item 2 – Instance (b)

a. The Standard Applies.

Citation 1, Item 2 - Instance (b) relates to the scaffold on the east side of the buffet building. Respondent does not dispute the cited standard generally required the subject scaffold to have the guardrails required by 29 C.F.R. § 1926.451(g)(4)(i).[17] Respondents arguments are more directed to whether the standard was violated; not that the regulation did not apply at all in this instance. The Court finds the regulation applies as a scaffold was in use on the worksite. As such the construction of the scaffold would need to comply with the standard.

[17] *See* Fn. 15, *supra*.

b. The Standard was Violated

As to Instance (b), Respondent's arguments about the 10-foot "safe harbor," that it made as to Instance (a), are inapposite. It is uncontested a direct fall from the topmost level of this scaffold would be 21 feet to a canopy over the sidewalk below. (Tr. 128-30; Ex. C-2C, p.12). Complainant's photographs of this part of the scaffold do not depict the same configuration which Respondent cites in support of its "safe harbor" argument; namely they do not depict a fall to a lower level of the scaffold as the most direct course in the event of a fall. There is no intervening lower platform from the upper deck of the scaffold as was the case in Instance (a). (Ex. C-2A, pp. 20 & 21). Respondent does not dispute there was no guardrail on the upper deck of the scaffold the east side of the buffet building. The distance to the next lower level was 21 feet. Complainant has established the standard was violated.

c. Respondent's Employee was Exposed to the Hazard

As clarified by the CSHO at trial, the employee who was alleged to have been exposed to the fall hazard presented by the missing guardrail was Mr. Lizarraga.[18] (Tr. 255). As the parties recognize, this element turns largely on the CSHO's statements from Messrs. Frias and Lizarraga as to whether the guardrail was missing when they were installing DensGlass on the buffet building. The CSHO's initial interview was conducted on March 19, 2018 in a group setting, and lasted approximately five minutes. (Tr. 82-84, 274-75, 323-24, 357-60). In his initial interview with the CSHO on March 19, 2018 Mr. Frias indicated he believed the guardrails had been present while he and Mr. Lizarraga had been installing DensGlass on the buffet building. (Tr. 83-84, 323-24; Ex. R-20). Mr. Lizarraga indicated he could not recall whether the guardrails had been present. (Tr. 83-84, 323-24; Ex. R-20).

[18] Because Mr. Frias was using a personal fall protection system, he was not considered exposed to the fall hazard presented by the missing guardrail. (Tr. 255; Ex. C-9, p. 4).

However, the CSHO returned to the worksite for a more extensive interview with each of these employees individually on April 6, 2018 which interviews lasted nearly an hour each. (Tr. 84-85, 274-75, 363-66). During these interviews both employees indicated the guardrails were missing when they were installing DensGlass. (Tr. 85-86, 261-62, 338-39). Both employees also signed statements to this effect. (Ex. C-9, pp. 1 & 6).

Complainant asks the Court to credit the signed statements of the employees about the missing guardrails. (Sec'y Br. at 13). Respondent raises numerous concerns with the process by which these statements were obtained. (Resp't Br. at 6). Having reviewed the relevant evidence and circumstances, the Court gives great weight to the employees' signed statements and finds Mr. Lizarraga was exposed to the fall hazard created by the missing guardrail while installing the DensGlass on the buffet building.

In assessing the credibility and reliability of these statements, while the Court notes they are hearsay statements, it also finds that hearsay statements are generally not excluded under the Simplified Case procedural rules. In addition, the Court finds the statements are admissible under *Regina Construction Co.*, 15 BNA OSHC 1044 (No. 87-1309, 1991). *See*29 C.F.R. § 2200.209(c) (under Simplified Proceedings, "the admission of evidence is not controlled by the Federal Rules of Evidence" and "[t]he Judge will receive oral, physical, or documentary evidence that is not irrelevant, unduly repetitious, or unreliable.").

Respondent *does* ask the Court to take an adverse inference based on Complainant's failure to call Messrs. Frias and Lizarraga to testify. (Resp't Br. at 5). The Court declines to do so. An adverse or "missing witness" inference is only appropriate, *inter alia*, if "one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so." *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1968, 2003); *see also*

Richard Carrier Trucking, Inc., 26 BNA OSHC 2250, 2255-56 (No. 16-1655, 2017) (ALJ). Here, the "missing" witnesses for which Respondent asks the Court to take an adverse inference were Respondent's own employees. Thus, these witnesses were, if anything, "peculiarly within [Respondent's] power to produce," not Complainant's. *Capeway Roofing Sys., Inc.*, 20 BNA OSHC at 1342-43. The Court therefore takes no adverse inference from their failure to testify.

As to the reliability of the employees' statements, the Court first notes Mr. Lizarraga's two statements to the CSHO are not inherently inconsistent. His failure to remember whether the guardrails were there when initially asked by the CSHO is not inconsistent with him later recalling, having had time to consider the question, they had been missing when he was installing DensGlass. To be sure, Mr. Frias' two interviews with the CSHO produced inconsistent statements about the missing guardrails. *Compare* (Tr. 83-84, 323-24, Ex. R-20), *with* (Tr. 85-86, 261-62, 338-39; Ex. C-9, p. 6). However, the second interview statements from both employees indicating the guardrails *were* missing is corroborated by other evidence in the record, namely the statement from ASM employee Ruben Solano to the CSHO. (Tr. 100, 328-31; Ex. C-9, pp. 10 &11). Mr. Solano recalled the guardrails having been missing on March 12th or 13th, 2018. (Tr. 104-05, 328-31; Ex. C-9, pp. 10 & 11). The Brady employees would have been installing DensGlass on the buffet building during this time. (Ex. J-1, ¶ 13).

Respondent takes aim at the process by which the Brady employees' second statements were obtained, particularly with Mr. Solis acting as translator. (Resp't Br. at 6). Respondent argues the entire interview and translation processes were "flawed" and "coercive," such that "inaccuracy was inevitable." (Resp't Br. 6). The Court disagrees. Mr. Solis testified at length about his qualifications to provide the translation between the CSHO and the Brady employees,[19] as well as

[19] According to Mr. Solis, he is "90%" fluent in English, having lived in the United States since he was a child. (Tr. 351). He was also apparently fully fluent in Spanish, given he conversed with Messrs. Frias and Lizarraga entirely in

the process by which the CSHO interviewed the employees and took their statements. (Tr. 366-70). *See also* (Tr. 87-88, 308-09 (CSHO testifying to a similar translation process)). Contrary to Respondent's assertion, each employee was asked to sign the paper only if the account translated to him in Spanish was accurate. (Tr. 376-78). Furthermore, and again contrary to Respondent's assertions, Mr. Solis testified he found no reason to distrust the CSHO during the interview process. (Tr. 372).

Therefore, even considering the conflicting statements of Mr. Frias, the Court finds a preponderance of the evidence establishes Mr. Lizarraga was exposed to the hazard presented by the missing guardrail on the eastern side of the buffet building, as alleged in Citation 1, Item 2, Instance (b). Complainant has established employee exposure.

d. Respondent had Constructive Knowledge of the Violation

Complainant can establish its burden of Respondent's knowledge by demonstrating actual or constructive knowledge. *Revoli Constr. Co., Inc.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). Here, Complainant has only argued for Respondent's constructive knowledge which can be established if Complainant demonstrates the employer could have uncovered the violating condition with the exercise of reasonable diligence. *Martin v. Commission*, 947 F.2d 1483, 1485 (11th Cir. 1991). "What constitutes reasonable diligence will vary with the facts of each case." *Id.*

The Court finds Complainant has established constructive knowledge based on Respondent's failure to exercise reasonable diligence to uncover the missing guardrails. The CSHO testified both missing guardrails were immediately apparent to him upon entering the worksite and merely looking up at the subject scaffold from the ground level. (Tr. 54-55, 68-70). The photographs of

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Spanish. (Tr. 356-57). The Court notes Mr. Solis testified at the hearing entirely in English with no apparent impediments.

the worksite, which were taken by the CSHO from ground level, corroborate the CSHO's testimony. (Ex. C-2A, pp. 1, 2, 5, 20 & 21). Such violations in "plain view" could have been uncovered by Respondent with reasonable diligence. *See Kokosing Construction Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996). However, despite Mr. Mendoza inspecting the scaffold daily (Tr. 419-20), his inspections failed to uncover the missing guardrails. The Court therefore finds Mr. Mendoza failed to exercise reasonable diligence to uncover the missing guardrails and thus had constructive knowledge of the violation.

Under Commission law, the actual or constructive knowledge of a supervisor is imputable to a corporate respondent. *Revoli Constr.*, 19 BNA OSHC at 1684. Here, Complainant argues the constructive knowledge of Messrs. Hermosillo and Mendoza is imputable to Respondent. (Sec'y Br. at 16). The Court finds Mr. Mendoza's constructive knowledge is imputable to Respondent. Mr. Mendoza was the "foreman" for Brady at the Barona worksite and ran the day-to-day operations in the absence of Mr. Hermosillo, who was only at the site once or twice a week. (Tr. 383, 406). Mr. Mendoza was also the competent person charged with inspecting and ensuring the safety of the scaffold. *See* note 133, *supra.* Respondent has not refuted Mr. Mendoza's status as a supervisor. The Court therefore finds Mr. Mendoza was a supervisor for purposes of imputing his knowledge to Respondent. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003) (supervisory status is based on "indicia of authority that the employer has empowered a foreman or other employee to exercise on its behalf."); *Iowa Southern Utils. Co.*, 5 BNA OSHC 1138, 1139 (supervisory status found for employee whose "authority included the power to order that the necessary steps be taken in order to complete properly the job"). Because Mr. Mendoza was a supervisor, his constructive knowledge of the violation is imputed to Respondent. *Revoli Constr.*, 19 BNA OSHC at 1684. Complainant has established knowledge/

e. The Violation was Serious

Complainant has classified the violation of 29 C.F.R. § 1926.451(g)(4)(i) as serious. A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Complainant need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010).

Here, Mr. Lizarraga was exposed to a fall distance of 21 feet on the east side of the buffet building. This distance is well in excess of the six-foot requirement for guardrails under 29 C.F.R. § 1926.451(g)(4)(i). The Court finds serious physical serious harm could result from a fall of this height. *See* Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672, 40,682 (Aug. 9, 1994) (to be codified as 29 C.F.R. pt. 1926) (noting the risk of fatality or injury from falling from heights of even six to ten feet). Thus, Citation 1, Item 2, Instance (b) was properly categorized as serious.

IX. Penalty

When a citation is issued, it may include a penalty amount. *See* 29 U.S.C. § 659(a). OSHA has published a Field Operations Manual ("FOM") to, among other things, guide its employees in determining what penalty, if any, to propose for violations. FOM at 1-1, 6-1. FOM, Directive No. CPL-02-00-150, effective April 22, 2011, available at 4 Employment Safety and Health Guide, (CCH), ¶ 7965, at 12,133, 12,139 (2015). The penalty amounts proposed in a citation become advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441-42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC at1686 n. 5. The Secretary's proposed penalties are not accorded the same deference the Commission gives his reasonable interpretations of an ambiguous standard. *See Hern Iron Works*, 16 BNA OSHC 1619, 1621 (No. 88-1962, 1994)

(rejecting Secretary's contention that his penalty proposals are entitled to "substantial weight"); *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1003 (No. 4, 1972) (declining to agree with the result or methodology the Secretary used to calculate the penalty). It is the Secretary's burden to introduce evidence bearing on the factors and explain how he arrived at the penalty he proposed. *Orion Constr. Co., Inc.*, 18 BNA OSHC 1867, 1868 (No. 98-2014, 1999) (giving less weight to the history factor as the Secretary provided little specific information).

"Regarding penalty, the Act requires "due consideration" be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (citing 29 U.S.C. § 666(j)); *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (citation omitted). When applying the penalty assessment factors, the Commission need not accord each one equal weight. *See, e.g.*, *Astra Pharm. Prods., Inc.*, 10 BNA OSHC 2070, 2071 (No. 78-6247, 1982); *Orion Contr. Co., Inc.*, 18 BNA OSHC at 1867 (giving less weight to the size and history factors). Rather, the Commission assigns the weight that is reasonable under the circumstances. *Eric K. Ho*, 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003) (Consol.), *aff'd sub nom.*, *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005).

Because the Court has vacated Citation 1, Item 1 and Citation 1, Item 2 – Instance (a), the only relevant penalty calculation is for Citation 1, Item 2 – Instance (b). Complainant has proposed a penalty of $7,853 for both instances alleged in Item 2. (Citation at 7). The CSHO indicated this proposed penalty was "computer generated" (Tr. 133), which the Court understands to mean it was calculated using the methodology set forth in the FOM.

A. Gravity

The gravity of the violation is the principal factor in a penalty determination. Assessing gravity involves considering: (1) the number of employees exposed to the hazard; (2) the duration of exposure; (3) whether any precautions have been taken against injury; (4) the degree of probability that an accident would occur; and (5) the likelihood of injury. *See e.g., Capform, Inc.*, 19 BNA OSHC at 1378, *aff'd*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished). *See also Ernest F. Donley's Son, Inc.*, 1 BNA OSHC 1186 (No. 43, 1973) (viewing gravity as the probability of an accident's occurrence and the extent of exposure). "A lack of injuries is not a measure for determining gravity or any other penalty factor." *Altor Inc.*, 23 BNA OSHC 1458, 1468 (No. 99-0958, 2011), *aff'd* 498 F. Appx. 145 (3d Cir. 2012) (unpublished).

The CSHO assigned the violation a "moderate" gravity. (Tr. 139). This calculation was a function of severity and probability. (Tr. 139). The CSHO assigned a "lesser" probability to the violation because "aside from the missing guardrail, it appeared that other components were in place and sound and there were no other identifiable issues [with the scaffold] at the time [of the inspection." (Tr. 133-34). However, the CSHO further assigned a "high severity" to the violation because a "fall from that height … can result in permanent disability and/or death if [an employee fell to] the lower level." (Tr. 134). This resulted in a violation of moderate gravity. (Tr. 139).

B. Size

The gravity factor focuses on treating violations of similar quality and severity alike. In contrast, the other three factors—size, history, and good faith—require consideration of circumstances pertaining specifically to the cited employer. The Commission frequently relies on the number of employees to evaluate the merits of altering a penalty for size. The Commission has viewed the size factor as "an attempt to avoid destructive penalties" that would unjustly ruin a

small business. *Intercounty Constr. Corp.*, 1 BNA OSHC 1437, 1439 (No. 919, 1973), *aff'd*, 522 F.2d 777 (4th Cir. 1975). This concern for small businesses must be tempered with the need to achieve compliance with applicable safety standards. *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1001 (5th Cir.1975) (OSHA penalties are meant to "inflict pocket-book deterrence"), *aff'd*, 430 U.S. 442 (1977). Respondent received no reduction in the penalty for its size because it employs over 250 employees. (Tr. 134).

C. History

The next statutory consideration, history, examines an employer's full prior citation history, not just prior citations of the same standard. *Orion Contr. Co., Inc.*, 18 BNA OSHC at 1868; *Manganas Painting Co.*, 21 BNA OSHC 2043, 2055 (No. 95-0103, 2007) (Consol.) (history includes prior uncontested citations). The CSHO did not indicate any reduction in penalty based on Respondent's history.

D. Good Faith

As to the final factor, good faith, this entails assessing an employer's health and safety program, its commitment to job safety and health, its cooperation with OSHA, and its efforts to minimize any harm from the violation. *Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013); *Nacirema Operating Co.*, 1 BNA OSHC at 1002. The CSHO applied a 15% good faith reduction for the violation because Respondent had a "safety and health program. Although with minor deficiencies, they had a program with training in place." (Tr. 134, 139).

E. Penalty

The Court agrees with the factors relied on by the CSHO in calculating the penalty for Citation 1, Item 2 – Instance (b). Respondent is a large employer with over 250 employees, and thus no reduction for size is warranted. (Tr. 134). Complainant has applied a 15% reduction for

Respondent's good faith. The CSHO did not indicate whether a reduction was applied for Respondent's history. Respondent has not argued for a reduction based on history, and the record is otherwise silent on Respondent's citation history. Thus, to the extent the CSHO did not already apply such a reduction in reaching the proposed penalty, the Court finds no basis to reduce the penalty based on Respondent's history. As to gravity, the Court finds it was accurately characterized as moderate based on the probability and severity outlined by the CSHO.

However, Citation 1, Item 2 alleged two separate instances of a violation of 29 C.F.R. § 1926.451(g)(4)(i) for missing guardrails on the east and west sides of the buffet building. As set forth above, the Court found only one of these instances, Instance (b), constituted a violation of the standard. Thus, a reduction of the penalty by one half is warranted. The Court therefore assesses a penalty of $3,926.50 for Citation 1, Item 2 – Instance (b).

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, is it ORDERED that:

1. Citation 1, Item 1 is VACATED.

2. Citation 1, Item 2, Instance (a) is VACATED.

3. Citation 1, Item 2, Instance (b) is AFFIRMED as SERIOUS, and a penalty of $3,926.50 is ASSESSED.

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine
Judge - OSHRC

Date: September 25, 2020
Denver, CO