United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. THE PENTA BUILDING GROUP, LLC, Respondent.	OSHRC Docket No. 21-0575

Appearances:

Luis A. Garcia, Esq., Department of Labor, Office of the Solicitor, Los Angeles, California
For The Secretary

Charles P. Keller, Snell & Wilmer, LLP, Phoenix, Arizona
For PENTA

Before: First 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[1] (Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). Respondent, The PENTA Building Group, LLC (PENTA), is a general contractor in the construction industry. (J. Stip. ¶ A (5); Exs. C-20, R-28). In November of 2020, PENTA had contracted with the Agua Caliente Band of Cahuilla Indians (Tribe), a federally

[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for the adjudicatory functions under the OSH Act" *StarTran, Inc. v. OSHRC*, 290 F. App'x 656, 670 (5th Cir. 2008) (unpublished) and serves "as a neutral arbiter and determine[s] whether the Secretary's citations should be enforced over employee or union objections."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).

recognized Native American Tribe,[2] to construct the Agua Caliente Casino (Casino) on a 10-acre plot of land on the Tribe's reservation in Cathedral City, California. (J. Stip. ¶¶ A (1)-(4), (5); Tr. 448-49; Ex. R-30).

By mid-November of 2020, the Casino was approximately 95% finished and was scheduled to open to the public the weekend following Thanksgiving. (J. Stip. ¶ A (39); Tr. 120, 231-32, 262-63, 278, 427, 482-83, 521-23, 636-38, 655, 799-800; Exs. C-28 & C-29). However, there were still ongoing projects being completed both in the interior and on the exterior of the Casino. (Tr. 637-38, 655-56; Ex. C-29). One such project was the installation of a gate to control access to a loading dock located in the rear of the Casino. (Tr. 637-38; Ex. C-29). For this project, PENTA contracted with a subcontractor called No Limit Steel (NLS), a sole proprietorship owned and operated by an individual named Ricardo "Rick" Sotelo. (J. Stip. ¶ A (12); Tr. 415-17; Ex. C-20).

On November 20, 21 and 23, 2020, NLS installed a large, "telescoping" metal gate (Gate) capable of spanning the loading dock entrance. (J. Stip. ¶ A (12); Tr. 61-63, 190-91, 461-62, 597, 881, 936-41; Exs. C-27 & C-32). The Gate was composed of two large, heavy panels each measuring approximately 25 feet wide by 9.5 feet tall and weighing approximately 3,000 pounds. (J. Stip. ¶¶ A (12) & (14); Tr. 52, 190-91, 461-62, 597, 881; Ex. C-24, at 13). The Gate was intended to be operated by an electric motor; however, for reasons discussed more fully below, NLS never installed the electric motor or chains that would have allowed the Gate to operate as intended. (Tr. 61-63, 936-41; Exs. C-25, C-27, C-32). The Gate's panels could, however, be moved manually. (Tr. 104-07, 948-49; Ex. C-32). After installing the two panels on November 21, NLS manually moved them into a storage area comprised of "two concrete masonry units … walls,"

[2] *See generally* AGUA CALIENTE BAND OF CAHUILLA INDIANS, https://www.aguacaliente.org/ (last visited May 8, 2023).

referred to as the "cubby" area. (J. Stip. ¶ A (17); Tr. 107; Ex. C-36, at 01:38:28 to 01:39:45).

Another of PENTA's subcontractors, Raymond – San Diego, Inc. (Raymond), was tasked with painting the Gate. (J. Stip. ¶ A (26) & (31); Tr. 459-61). Early in the morning of December 7, 2020, four Raymond employees arrived at the Casino worksite to begin painting. (J. Stip. ¶ A (31); Tr. 133, 300, 319, 347). To do so, the Raymond employees needed to move the Gate panels out from the cubby. (J. Stip. ¶ A (33); Tr. 316-17). Shortly after arriving at the loading dock area, three of the four Raymond employees started physically moving the south panel of the Gate from the cubby. (J. Stip. ¶ A (33); Tr. 133-35, 316-17; Exs. C-37, at 1:00:06; C-38, at 1:00:14). However, the unfinished nature of the Gate was not known by anyone at Raymond, nor was the fact the only physical restraint keeping the south panel upright was a "roller guide" attached to the top of the north panel. (Tr. 54, 66-67, 941, 953; Exs. C-2, at 11, 26-28, 32; C-24, at 11; R-4, R-9, R-11, R-14, R-15). Once the south panel was rolled beyond this roller guide, nothing was keeping the south panel upright, and it immediately fell over due to its massive weight. (J. Stip. ¶ A (34); Tr. 137; Exs. C-37, at 1:00:21; C-38, at 1:00:29). As it was falling, the south panel crushed one of the Raymond employees, killing him. (J. Stip. ¶ A (34)).

The Raymond employee's death was reported to the United States Occupational Safety and Health Administration (OSHA), which sent Compliance Safety and Health Officer (CSHO) Mark Donnald to investigate the same day. (Tr. 48-49). Following the CSHO's investigation, on May 12, 2021, OSHA issued a three-item,[3] serious Citation and Notification of Penalty (Citation) to

[3] All the Citation items are performance standards. Performance standards indicate the degree of safety and health protection to be achieved, are more flexible than specification standards, and leave the method of achieving the protection to the employer. *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007). In this case, the issue is what the duty of care is for a general contractor on a multi-employer worksite who has none of its employees on the worksite in the context of a performance standard. As set forth below, Commission case law, which has established the duty of care in this type of work context, have all involved performance standards. Whether this duty of care would be controlling in a case which involved a specification standard where the conduct of the employer is dictated remains an open question.

PENTA. The Citation proposed a total penalty of $40,959. PENTA filed a Notice of Contest with the Commission on June 7, 2021.

A three-day trial was held on April 19-22, 2022, in Santa Ana, California. Twelve witnesses testified at the trial as identified below. Additionally, portions of deposition testimony for Mario Trujillo, a Virtual Design and Construction Engineer for PENTA, were designated and submitted by the parties as Joint Exhibit 4. The parties also submitted over fifty factual and legal stipulations, over one hundred and thirty exhibits, and post-trial briefs.[4]

Pursuant to Commission Rule 90, 29 C.F.R. §2200.90, 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.

II. Stipulations[5]

The parties agreed to over fifty factual and legal stipulations.[6] *See* Ex. J-1. Rather than set forth these stipulations in their entirety, the Court will cite the Joint Stipulation Statement (J. Stip.), submitted as Exhibit J-1, in the body of this Decision as is relevant and appropriate.

III. Preliminary Findings

A. Jurisdiction

The Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act based on PENTA filing its Notice of Contest. (J. Stip. ¶¶ A (4), (43), (44); Tr. 11-12); *Joel Yandel*, 18 BNA OSHC 1623, 1628 n.8 (No. 94-3080, 1999).

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[4] Any affirmative defenses not raised at the trial or briefed in post-trial briefs are deemed waived by PENTA. *See, e.g.*, *United States v. LeMaux*, 994 F.2d 684, 689-90 (9th Cir. 1993). PENTA did not raise any affirmative defenses at trial or in its post-trial brief.

[5] *See* Joint Stipulation Statement marked as Joint Exhibit 1.

[6] *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).

B. Business Affecting Interstate Commerce

PENTA is engaged in a business affecting interstate commerce. (J. Stip. ¶¶ A (4), (5), (42) & B (1); Tr. 11-12, 384-85, 415, 519, 636, 670, 770, 819). *Clarence M. Jones*, 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983) (there is an interstate market in construction materials and services and therefore construction work affects interstate commerce).

C. PENTA is an Employer Under the Act

The Act defines an "employer" as "a person engaged in a business affecting interstate commerce who has employees…" 29 U.S.C § 652(3). Based on his investigation, CSHO Donnald concluded PENTA was the "controlling employer" of the multi-employer Casino worksite (controlling employer) based on the "vertical contract structure" between PENTA and all the subcontractors working onsite. (J. Stip. ¶ A (42); Tr. 214, 225-26, 228; Exs. C-5 to C-7; C-20 to C-23; R-28). The parties stipulated PENTA was cited as a "controlling employer" under the Act. (J. Stip. ¶ A (42)). However, the term "controlling employer" is not defined in the Act but instead has been defined by the Commission in cases it has issued adopting the "multi-employer worksite doctrine" and by OSHA under its Multi-Employer Citation Policy (Multiple Employer MEP).[7] *See, e.g.*, *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1203-05 (No. 05-0839, 2010) (finding a general contractor can be cited as a controlling employer even for workers with which it has no

[7] OSHA's policy is embodied in a non-binding directive issued by OSHA. *See* Multi-Employer MEP, OSHA Instruction No. CPL 02-00-124 (Dec. 10, 1999); *see also Summit Contractors, Inc.*, 22 BNA OSHC 1777, 1779-80 (No. 03-1622, 2009) (holding the policy is not a substantive rule because it does not "create liability on an employer" separate from the requirements of the Act). Separate from OSHA's policy, the Commission has adopted the "multi-employer worksite doctrine," which often tracks, but is independent from, the Multi-Employer MEP. *See, e.g.*, *Summit Contractors, Inc.*, 22 BNA OSHC at 1781 (noting where the Secretary's policy was to the "same effect" as Commission caselaw). As the Commission noted early in applying the multi-employer doctrine, the Commission's adoption of the doctrine was an "exercise of the Commission's adjudicatory function in determining liability for safety and health violations," and the Commission makes an "independent legal determination" of an employer's liability under the doctrine. *Limbach Co.*, 6 BNA OSHC 1244, 1245-46 (No. 14302, 1977).

employment relationship), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished); *cf. Beatty Equip. Leasing, Inc.*, 577 F.2d 534, 537 (9th Cir. 1978) (finding an employer can be liable for violations even where none of its own employees were exposed to the hazard). In this regard, while "a business organization is generally only liable under the Act for violations that affect the safety and health of persons with whom it has entered into an employment relationship," the Commission has held under the multi-employer worksite doctrine, under certain circumstances, the Act imposes a duty on employers to ensure the health and safety of non-employees.[8] *See Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992); *Van Buren-Madawaska Corp.*, No. 87-214, 1989 WL 223348, at *1 (O.S.H.R.C., April 21, 1989) (consolidated); *see also* Multi-Employer MEP, at ¶ 3. In the context of a controlling employer, "[u]nder Commission precedent, an employer may be held responsible for the violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority over the worksite." *StormForce of Jacksonville, LLC*, No. 19-0953, 2021 WL 2582530, at *3 (O.S.H.R.C., Mar. 8, 2021); *see also* Multi-Employer MEP, at ¶¶ 6-7 (definition of "controlling employer").

[8] Typically, the Commission applies the precedent of the Circuit where a case is most likely to be appealed. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000). Here, the Court finds that Circuit is the Ninth Circuit, where both the accident occurred and where PENTA's principal place of business is located (California and Nevada, respectively). *See* 29 U.S.C. § 660(a) (employer may appeal a Commission decision to the "United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit …"). However, as the Commission recently held, where an employer could potentially appeal to the D.C. Circuit, that Circuit's law can also be relevant. *See T.H. Constr. Grp.*, No. 22-0739, 2023 WL 1223909, at *2 (O.S.H.R.C., Jan. 24, 2023) (where ALJ applied the law of the Second Circuit where the case arose and PENTA's principal place of business was located, Commission nonetheless remanded noting "[c]ontrary to the judge's decision … the Second Circuit is not the only relevant circuit here. PENTA (but not the Secretary) could appeal this matter to the D.C. Circuit …"). Although several other Circuits have passed on the validity of the Secretary's multi-employer theory of liability under the Act, the Ninth Circuit has yet to do so. In absence of authority from the Ninth Circuit, the Commission's law applies. *See McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1112 (No. 97-1918, 2000). The D.C. Circuit, for its part, has affirmed Commission decisions applying the multi-employer worksite doctrine, albeit in unpublished, non-precedential dispositions. *See, e.g.*, *Century Cmmtys., Inc. v. Sec'y of Labor*, 771 F. App'x 14, 15 (D.C. Cir. 2019); *Summit Contractors, Inc. v. Sec'y of Labor*, 442 F. App'x 570 (D.C. Cir. 2011); *see also* D.C. Cir. R. 36(e)(2) ("[A] panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition."). With no contrary authority from either the Ninth or D.C. Circuits, the Court finds the multi-employer worksite doctrine is validly applied in this case.

Furthermore, as the Court discusses in more detail below, a controlling employer has a duty to "exercise reasonable care, i.e., to take reasonable measures to prevent or detect … violative conditions." *Summit Contracting Grp.*, No. 18-1451, 2022 WL 1572848, at *4 (O.S.H.R.C., May 10, 2022); *see also* Multi-Employer MEP, at ¶¶ 7-8.

PENTA "agrees it was the controlling employer" over the Casino worksite.[9] (Resp't's Br. 13, citing J. Stip. ¶ A (42)). The Court finds PENTA, who exercised both contractual and actual control over the subcontractors and safety on the Casino worksite, was the controlling employer for purposes of assessing liability in this case. (Tr. 467-69, 570-71, 577-78, 673-74, 721-24, 728-29, 809-10, 814-15, 855-56; Exs. C-21 & 23, at ¶ 16; R-34, at 3, 4, & 9); *see Summit Contractors, Inc.*, 23 BNA OSHC at 1206 (general authority over worksite safety, including daily walks by the superintendents, as well as weekly meetings to address safety issues with its subcontractors suggested Summit was a controlling employer); *Summit Contractors, Inc.*, 22 BNA OSHC at 1781 (contractual provision giving ability to terminate subcontractor for violating safety regulations indicated controlling employer status).

IV. Factual Background

A. Trial Witnesses

Twelve witnesses testified at trial, including the CSHO, seven PENTA employees, two Raymond employees, a Casino employee, and an expert witness. Additionally, deposition testimony for another PENTA employee was submitted after the trial. The Court will briefly discuss each witness, so all relevant actors have been set forth prior to the Court describing the

[9] PENTA does contest its status as a "correcting employer," as it was indicated to be on OSHA's violation worksheets. (Resp't's Br. 12-13; Exs. C-5, at 1; C-6, at 1; C-7, at 1); *see also* Multi-Employer MEP, at ¶ 6 (A "correcting employer" is an "employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard."). The Secretary has not pursued a theory of liability based on PENTA being a correcting employer, and so the Court sees no need to further address this issue.

factual background of this case.

Seth Sherrod was a Superintendent for PENTA who was hired in November of 2018. (Tr. 519-20). He was mainly charged with handling exterior work on the Casino. (Tr. 520). Starting November 30, 2020, Mr. Sherrod was transitioning off the Casino project to another PENTA project in Palm Springs, California. (Tr. 520, 560, 605-06, 612). After Mr. Sherrod transitioned off the Casino project, his duties concerning the remaining exterior work were transferred to Albert Ros, another PENTA Superintendent. (Tr. 520-21, 636-38, 655; Ex. C-29). Mr. Sherrod returned periodically to the Casino worksite after November 30, including on December 7, 2020, when he was informed of the accident involving the Gate. (Tr. 536-37, 560, 605-08).

Albert Ros was another Superintendent for PENTA who was hired in March of 2020 and assigned to the Casino project in October of 2020. (Tr. 636). When Sherrod stopped working at the Casino worksite on November 30, 2020, Ros took over the responsibility of completing the final "punch list" of outstanding items, including the installation and painting of the Gate. (Tr. 637-38, 655; Ex. C-29). In the week prior to the accident, Ros's attention was focused on finishing punch list items in the interior of the Casino. (Tr. 656). However, he remained responsible for the remaining items on the exterior of the Casino as well. (Tr. 661).

Marsha Carrol was hired by PENTA in 2007, working first as a laborer, then as a Safety Manager, and was a Senior Safety Manager at the time of the accident. (Tr. 669-70, 698-99). As detailed below, Carrol had a central role in PENTA's process for onboarding new subcontractors to work at the Casino worksite. In the week before the accident, she was preparing to transition from the Casino worksite to another PENTA worksite starting on December 7. (Tr. 686). Because the Casino project was winding down, PENTA did not intend to replace Ms. Carrol with another safety manager; rather, the remainder of her responsibilities would be assumed by PENTA's

superintendents left onsite. (Tr. 689-90).

Scott Rodarte was PENTA's Project Manager for the Casino worksite and had been working for PENTA since April of 2015. (Tr. 415, 444). He negotiated the contract with NLS on behalf of PENTA to fabricate and install the Gate. (Tr. 416, 453; Ex. C-20). He also negotiated the contract with Raymond on behalf of PENTA to paint the Gate once it was installed. (Tr. 451, 459-60; Ex. R-28).

Joshua James was a Project Engineer for PENTA and was hired in June of 2020. (Tr. 384-85, 397). As a Project Engineer, he acted as an "information hub," relaying information about work being performed between PENTA's Superintendents and Project Manager and the various subcontractors onsite. (Tr. 385). He also was a "document manager," requesting clarifying information for construction drawings and submitting plans to the architectural team for the Casino project. (Tr. 385-86, 397). James did not consider his position as a Project Engineer to be a management position because he did not direct or supervise anyone's work. (Tr. 397).

Greg Church was another Project Engineer for PENTA who started working in 2018. (Tr. 770). Along with Luquin, he was one of the primary Project Engineers assigned to coordinate with NLS on the Casino site. (Tr. 772). In the week before the accident, his focus was finishing the interior punch lists with Ros, and so he did not have any role in completing exterior work, like the Gate, at that time. (Tr. 800). Like James, Church did not consider project engineers to be in a management position. (Tr. 816).

Juan Luquin was another Project Engineer for PENTA who started working in 2018. (Tr. 819). Along with Church, he was primarily responsible for coordinating with NLS on its work on the Casino site. (Tr. 819). Like James and Church, Luquin did not consider his position as a Project Engineer to be a management position. (Tr. 849).

Mario Trujillo did not testify at trial, but designated portions of his deposition testimony were entered as Joint Exhibit 4. Trujillo worked for PENTA from September of 2018 until August of 2021 as a Virtual Design Construction Engineer. (Tr. 399-400; Ex. J-4 at 13). In this capacity, he "composed 3D construction models and coordinated them prior to field installation," i.e., "detect[ed] clashes with other trades." (Tr. 400; Ex. J-4, at 13). His work focused on the interior of the Casino and thus he did not deal directly with NLS or Sotelo or have any direct knowledge of the installation or painting of the Gate. (Ex. J-4, at 83, 99-102, 107-108).

Dillon Lopez was the Director of Facilities for the Casino, starting in that position in October of 2020 shortly before the Casino opened. (Tr. 276). As Director of Facilities, he oversaw "property maintenance and cleanliness." (Tr. 276). He was also sent "disruption notices" from PENTA's project engineers as to when subcontractors would be performing work at the Casino worksite once the Casino was opened, alerting him to where work was to be performed or work that had been completed. (Tr. 277-78).

James Charpentier was a "Project Plaster Superintendent" for Raymond and was with the crew assigned to paint the Gate when the accident occurred. (Tr. 292-93). He had worked for Raymond since 2008. (Tr. 292).

Brett Michael was a "Plaster Foreman" who had worked for Raymond since 2005 and had worked as a Foreman on the Casino worksite since April of 2020. (Tr. 314, 345-46). He oversaw the crew assigned to paint the Gate on the date of the accident. (Tr. 345).

Gerard Schiller was PENTA's expert witness on large, industrial gates like the telescoping, sliding Gate at issue in this case. (Tr. 881). Mr. Schiller set forth an extensive background in the manufacture and installation of such gates. (Tr. 860-920; R-83). Despite the

Secretary's opposition to certifying Mr. Schiller as an expert witness,[10] the Court found Mr. Schiller demonstrated ample qualifications to testify as an expert witness on some of the issues raised in this case under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow. Pharms, Inc.*, 509 U.S. 579 (1993).[11] (Tr. 920-23). Namely, Mr. Schiller was certified to testify on: 1) the underlying facts and circumstances leading up to the accident as he understood them to be; 2) whether PENTA acted reasonably and prudently under the cited performance standards, i.e., 29 C.F.R. §§ 1926.20(b)(2) and 1926.21(b)(2), as well as "ATM F.22-29 and UL 325 and also DASMA and any other technical data sheets issued by DASMA and to the Installer's Guide, 2 F.22-20, which clarifies F.22-20" [12]; 3) a "rebuttal opinion on whether a crush-by hazard or struck by hazard was a recognized hazard at the project based upon industry standard and industry operations"; and 4) the knowledge element of the Secretary's *prima facia* case. (Tr. 923-24); Schiller Order 5-6, 8-10.

The Court, where it cites Mr. Schiller, gives great weight to his testimony as it was not rebutted and for the following other reasons. Mr. Schiller's background included over 25 years (as of the date of trial) of working in the manufacture, design, and installation of large industrial gates

[10] *See* Sec'y of Labor's Mot. to Exclude the Expert Test. of Gerhard Schiller, O.S.H.R.C. Docket No. 21-0575 (filed Apr. 4, 2022); (Tr. 920).

[11] The Court did not allow Mr. Schiller to testify on: 1) the "primary or secondary cause of the accident"; 2) "any failure of [NLS] or Raymond employees that reference the fact that the [G]ate wasn't finished," i.e., whether those employers (as opposed to PENTA) acted in a reasonable and prudent manner; 3) "whether or not a citation should have been issued and … whether or not PENTA … may or may not have violated any of the issued citations." (Tr. 923-24); *see also* Order Regarding Sec'y's Mot. to Exclude Resp't's Proposed Expert Witness – Gerhard Schiller 5-9, O.S.H.R.C. Docket No. 21-0575 (issued Apr. 14, 2022) (Schiller Order) (setting forth similarly in the event Mr. Schiller was certified as an expert witness and citing cases).

[12] Under Commission precedent, the appropriate test for determining compliance with a performance standard in an exposing employer context is whether or not the employer acted as a reasonable and prudent employer familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry. *Walmart Distrib. Ctr., #6016*, 25 BNA OSHC 1396 (No. 08-1292, 2015); *see also, Brennan v. Smoke Craft Inc*., 530 F.2d 843, 845 (9th Cir. 1976). However, as discussed below, the appropriate test in this case is "reasonable care," which is a different test than the "reasonable and prudent employer" standard and does not involve the evaluation of industry standards.

like the Gate at issue in this case. (Tr. 870-77; Ex. R-83, at 7). In forming his expert opinion, Mr. Schiller reviewed an extensive amount of evidence, including depositions, shop drawings for the Gate, and the video of the accident, as well as heard the testimony from the other witnesses at trial before he himself testified. (Tr. 927-29; Ex. R-83, at 1). Overall, Mr. Schiller's testimony demonstrated a thorough knowledge of the issues presented by this case, including specifics of the Gate. (*E.g.*, Tr. 881-829, 929-30, 931-46).

B. PENTA and the Casino Worksite

PENTA is a general contractor working in the construction industry. (J. Stip. ¶ A (5); Exs. C-20, R-28). Sometime before December of 2019,[13] PENTA had contracted with the Tribe to construct the Casino on a 10-acre plot of land located at 68960 E. Palm Canyon Drive, Cathedral City, California on the Agua Caliente Indian Reservation. (J. Stip. ¶¶ A (1)-(4), (5); Tr. 448-49; Ex. R-30). Although the scale of the Casino project at its height is not clear from the instant record,[14] by the time of the accident leading to the issuance of the Citation in December of 2020, the project was winding down with about five percent of the project left to complete. (J. Stip. ¶ A (39); Tr. 120, 231-32, 262-63, 427, 482-83, 521-23 636-38, 655, 799-800; Exs. C-28 & C-29).

C. PENTA's Safety Measures at the Casino Worksite

PENTA employed several safety measures and policies at the Casino worksite, described in relevant part as follows:

[13] The contract between PENTA and the Tribe was not entered into evidence. The earliest date related to the Casino project was mentioned by one of PENTA's project engineers, Luquin, who stated he first reported to the Casino worksite in December of 2019. (Tr. 849).

[14] Based on the size of the Casino and surrounding grounds depicted in Exhibit R-30, the Court infers the scale of the project was substantial at its height. (Ex. R-30). *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).

i. Safety Manual

The 2020 Edition of PENTA's "Corporate Safety Manual" (Manual) was in effect at the Casino worksite and applied to all PENTA employees.[15] (J. Stip. ¶ A (6); Tr. 563; Ex. R-34). The first twenty pages of the Manual set forth PENTA's "Injury Illness Prevention Program (IIPP)." (Ex. R-34, at 2-22). Many of the safety measures described in more detail below are also set forth in the IIPP. In addition to those measures, the IIPP required PENTA's Project Manager (like Rodarte), its Superintendents (like Sherrod and Ros), and its Safety Managers (like Carrol) to conduct safety inspections of PENTA's worksites. (Ex. R-34, at 3 ("Project Manager … Conducts regular job-site safety audits."); *id.* ("Project Superintendent … Performs daily safety inspections of crafts or areas and corrects unsafe conditions as they are found."); *id.* at 3-4 ("Site Safety Manager … Personally conducts [a] daily safety walk through [sic] of the site.")). The IIPP also required PENTA's Superintendents to "conduct formal, documented safety inspections of their work areas on at least a weekly basis." (Ex. R-34, at 9; *see also* Tr. 732-37; Exs. R-38 to R-59).

PENTA's IIPP also contained a variety of policies designed to identify site-specific hazards and communicate those hazards to workers on the Casino worksite. As is most relevant here, the IIPP required Superintendents, like Sherrod and Ros, to "[i]dentif[y] workplace deficiencies" and "[e]nsur[e] that employees have required training based on evaluation of the site hazards." (Ex. R-34, at 3). The IIPP also required Superintendents to "discuss hazards identified with other subcontractors during their weekly construction progress meetings." (Ex. R-34, at 9). For changing worksite conditions, the IIPP provided, in relevant part:

> Whenever conditions, practices, or hazards change, including new … equipment that may have arrived on site, the appropriate actions must be taken to ensure that employees and the site are safe. Any newly discovered, ongoing, or previously

[15] For subcontractors and their employees, the Manual referred to Exhibit D, discussed more fully below. (Tr. 563; Ex. R-34, at 8).

> identified safety deficiencies that were not properly abated, will be immediately addressed, including required corrective actions that must be taken.

Id.

In the same vein, the IIPP required training on hazards posed by new equipment or otherwise as follows:

> Anytime a deficiency, a change in work conditions, a new process, procedure, substance, or equipment is discovered or introduced to the work site, or a previously unrecognized or new hazard is discovered, training will be provided to each potentially affected employee. … Employees will receive additional training whenever a new tool, process or substance is introduced into the job assignment or work area.

Id. at 17.

ii. Exhibit D

All subcontractors, including NLS and Raymond, working on PENTA's worksites, including the Casino worksite, were required to sign "Exhibit D – Subcontractor Safety Requirements" as part of their subcontracts. (J. Stip. ¶ A (30); Tr. 85-88, 442-43, 566, 715, 754; Exs. C-21 & C-23). Among other requirements, Exhibit D required PENTA's subcontractors to:

> 1) designate a competent person who must be onsite whenever the subcontractor's employees were working (Exs. C-21 & C-23, at ¶ 3);
>
> 2) develop and maintain a safety program and communicate this program to the subcontractor's employees (*Id.* at ¶ 4);
>
> 3) attend a "pre-mobilization meeting" with a PENTA representative and submit various safety forms and certifications to the satisfaction of PENTA (*Id.* at ¶ 5);
>
> 4) perform a job hazard analysis (JHA), "[p]rior to the commencement of any work operation [by] identify[ing] the hazards and other safety issues and concerns associated with the work to be accomplished [and] includ[ing] the methods by which the safety hazards will be eliminated" (*Id.* at ¶ 6);
>
> 5) conduct a "daily huddle" safety meeting each morning, conduct a "regularly scheduled weekly safety meeting" and forward documentation of this meeting to PENTA, and "attend any mandatory safety meetings whenever present on

site." (*Id.* at ¶ 7);

6) have all the subcontractor's employees attend a "site-specific safety orientation" and "acknowledge receipt of these instructions" (*Id.* at ¶ 8);

7) "provide for frequent and regular safety inspections (at least weekly) of the worksites, materials and equipment by competent employees" (*Id.* at ¶ 9);

8) "immediately correct all unsafe acts or conditions that are brought to its attention" (*Id.* at ¶ 10); and

9) ensure "that all onsite personnel, activities, equipment, tools and facilities … conform fully to the standards contained and referenced in [Exhibit D]" train its workers "to follow the JHA … specific work practices." (*Id.* at ¶ 11).

Exhibit D had a reporting requirement for safety incidents and provided "[s]ubcontractor employees failing to comply with [PENTA's] job safety requirements, or supervisors failing to enforce compliance … shall be promptly disciplined, which at [PENTA's] discretion, may include discharge." (*Id.* at ¶¶ 16 & 17). Finally, Exhibit D "reserve[d] the right [for PENTA] to inspect all equipment, tools, machinery, etc. at any time while located on their premises," to stop work "until [any] unsafe acts and/or conditions are corrected to the satisfaction of [PENTA]," and further provided if PENTA "must aid[,] remedy or correct an unsafe condition, any associated costs for materials or services will be the financial responsibility of the subcontractor[]." (*Id.* at ¶¶ 9, 10, & 31; *see also* Tr. 220-21, 443-44).

iii. Pre-mobilization Meeting

All subcontractors working on the Casino worksite had to attend a "pre-mobilization meeting" with Carrol before they could begin to work. (Tr. 564-65, 705; Exs. C-21 & 23, at ¶ 5; R-32, R-34, at 22). During the pre-mobilization meeting, Carrol would discuss each of the nine points listed on the "Pre-Mobilization Meeting Agenda." (Tr. 564-67, 706-07; Ex. R-32). This included a review of:

1) the subcontractor's own safety program, including Exhibit D to PENTA's

subcontracts, and the use of required "daily, weekly & monthly forms," including the use of JHAs as required by Exhibit D;

2) a review of the "project emergency action plan"; project start times and the requirement for daily safety orientations; the requirement for a Foreman to attend a daily site-wide safety meeting; the requirement for a Foreman to attend a weekly subcontractor coordination meeting;

3) the requirement for subcontractors to submit daily reports to PENTA Superintendents; and

4) project specifics, logistics, and schedule. (Ex. R-32).

Carrol also discussed PENTA's work rule that no subcontractors were supposed to begin work until a PENTA employee was onsite. (Tr. 568-69). Subcontractors were required to submit various safety documents to the satisfaction of Carrol, including JHAs,[16] an Activity Hazard Analysis (AHA),[17] and an IIPP for each subcontractor.[18] (Tr. 566, 706; Exs. C-13, R-17 to 27, R-29, R-35, R-62, R-75). Both NLS and Raymond attended a pre-mobilization meeting before beginning work on the Casino site. (Tr. 567-68, 707-08, 737-38; Exs. R-32 & R-33).

iv. Safety Orientation

After a subcontractor's representative completed the pre-mobilization meeting, all employees of the subcontractor were required to attend a site-specific safety orientation led by

[16] As the Court noted above, subcontractors had an obligation to use JHAs under Exhibit D, which required "[p]rior to the commencement of any work operation [a JHA] shall be performed by Subcontractor to identify the hazards and other safety issues and concerns associated with the work to be accomplished [and] shall include the methods by which the safety hazards will be eliminated." (Ex. C-21, at ¶ 6; *see also* Tr. 78, 150-52, 324-25, 355-56, 726-28; Exs. C-13, R-17 to 24). JHAs were for more general activities, e.g., "painting." (Tr. 325, 573-74, 727-28; Ex. C-13, R-17 to 24). In addition to the requirement for subcontractors to complete JHAs, subcontractors were also required to fill out "pre-task plan" (PTP) forms which were contained in a small book provided by PENTA and carried by the subcontractors' foremen and leadmen. (Tr. 326-27, 574-75, 618, 724-26). The PTP forms were a "shortened" version of the JHAs and were meant to address more specific activities, e.g., "painting a handrail." (Tr. 326-27, 574-75, 726-27).

[17] The AHA listed all of a given subcontractor's anticipated activities on the Casino worksite and describes the activity, the potential hazards associated with that activity, methods to reduce or eliminate the hazards associated with the activity, and a "Risk Assessment Code" for each activity from "Low Risk" to "Extremely High Risk," which accounts for "Severity" and "Probability." (Exs. R-26 & R-62).

[18] The subcontractors' IIPPs, much like PENTA's own, were more comprehensive documents, accounting for many different types of workplace safety hazards and policies to address them. (Tr. 709-10, 713-15; Exs. R-25; R-34, at 2-22; R-35).

Carrol. (J. Stip. ¶ A (10); Tr. 569, 715-16, 745-46; Ex. R-34, at 15-16). This orientation consisted of a PowerPoint presentation, which covered topics such as:

> 1) the requirement for subcontractors to hold daily "pre-task plan" (PTP) meetings to discuss safety issues related to the day's work (Ex. R-77, at 10);
>
> 2) the requirement of weekly toolbox talks (*Id.*);
>
> 3) the requirement for subcontractors to hold weekly jobsite safety meetings (*Id.* at 15); and
>
> 4) PENTA's work rule that "[a]bsolutely NO WORK is to be performed without a PENTA representative on site." (*Id.* at 5 (emphasis in original); *see also* J. Stip. ¶ A(11); Tr. 568-69, 719; Ex. R-68 (employee acknowledgement of rule stating "Jobsite is ABSOLUTELY off-limits without PENTA's prior approval." (emphasis in original)).

"At the end of the orientation, each worker signed an acknowledgement, and each worker had to successfully complete an orientation quiz, after which they were issued a jobsite[-]specific identification sticker for their hard hat."[19] (J. Stip. ¶ A(10); *see also* Tr. 569-70, 720-21; Exs. R-34, at 16; R-72). Both NLS and Raymond's employees attended the safety orientation. (Tr. 692-93; Exs. R-65 to R-71).

v. Safety Meetings

Subcontractors working on the Casino worksite were required to hold and/or attend a variety of safety meetings each week.

a. Daily Huddle Meetings

To start, each subcontractor was required to hold a daily safety meeting before starting work, during which a foreman or other supervisor was required to complete a two-sided "Daily Site Inspection/Daily Huddle Pre-Task Safety Plan" form. (Tr. 309-10, 329-30, 357; Exs. C-14;

[19] The hardhat stickers served the purpose of alerting PENTA as to which employees had attended the safety orientation. (Tr. 569-70). If an employee was found to not have a hardhat sticker, they were sent to attend the safety orientation training. (Tr. 570).

C-21 & C-23, at ¶ 7; R-34, at 16; J-4, at 78). The "Daily Site Inspection" side of the form set forth a variety of potential workplace safety hazards while the "Daily Huddle" side of the form required foremen to describe the nature of the day's task, possible hazards associated with it, and "control measures" designed to address those hazards. (Tr. 357; Ex. C-14).

b. Weekly Subcontractor Meetings

In addition to the daily safety meetings PENTA required of its subcontractors, a representative (either a "site foreman or site supervisor") from each subcontractor was required to attend a weekly subcontractor safety meeting. (Tr. 467-68, 570-71, 673-74, 721-23, 728-29, 809-10, 814-15, 855-56; Ex. R-34, at 9). At this meeting, PENTA's Superintendents would "always start with [discussing] safety" and address logistics, scheduling, and quality assurance and control. (Tr. 571, 723, 809-11; *see also Quality assurance/quality control QA/QC definition*, LAW INSIDER, https://www.lawinsider.com/dictionary/quality-assurance-quality-control-qa-qc (last visited May 8, 2023)). The subcontractors' representatives could raise any safety issues or concerns and ask questions at these weekly meetings. (Tr. 571, 728-29; Ex. R-34, at 9, 17).

c. "OAC" Meetings

Finally, PENTA also held weekly "owner/architect/contractor" or "OAC" meetings every Tuesday morning. (Tr. 464-65, 500-01). As suggested by their title, these meetings were attended by representatives from the general contractor (PENTA), the owner of the Casino (the Tribe), and the architect for the Casino project (Allen + Phillip Partners). (J. Stip. ¶ A (7); Tr. 464). These meetings also started with discussion of safety on the worksite, including issues with new equipment being brought onsite like the Gate. (Tr. 464-65).

vi. Other Safety Policies

PENTA had a "policy that no subcontractor could be on-site without someone from

PENTA present on-site." (J. Stip. ¶ A (11); *see also* Tr. 568-69, 719). This policy was communicated to the subcontractors' employees at least twice during the orientation process, particularly during the PowerPoint presentation and in the acknowledgement signed by each employee following the site-specific orientation.[20] (Tr. 719; Exs. R-68, R-77, at 5).

Subcontractors working on the Casino worksite were required to submit written JHAs for each activity they would be conducting onsite. (Tr. 150-52, 566, 573, 726; Exs. C-13, C-21 & 23, at ¶ 6; R-17 to 24, R-27, R-29, R-34, at 20-22; R-75, J-4, at 78). The JHAs detailed the work activity, the steps involved in that activity, the hazards associated with the activity, and the control measures to address those hazards. (Tr. 151, 573, 726; Exs. C-13, C-21 & 23, at ¶ 6; R-17 to 24, R-27, R-34, at 22; R-29, R-75). Subcontractors were required to review the JHAs with their employees prior to beginning the work activity described in the JHA. (Tr. 324-25, 355-56; R-34, at 20-22). In addition to submitting written JHAs for each of their activities, subcontractors were also required to fill out a "pre-task plan" (PTP) form, namely the two-sided "Daily Site Inspection/Daily Huddle Pre-Task Safety Plan" form,[21] for each new work activity conducted on the Casino worksite. (Tr. 230, 308-09, 574, 724-25; Exs. C-14, R-34, at 21; J-4, at 78). The "Daily Site Inspection" side of the form set forth a variety of workplace hazards while the "Daily Huddle" side of the form required foremen to describe the nature of the day's task, possible hazards associated with it, and "control measures" designed to address those hazards. (Tr. 357; Ex. C-14). While JHAs were more general, PTPs were meant to be completed for each new task a

[20] PENTA submitted a blank copy of the quiz that each employee was required to take following the PowerPoint presentation with question 11 highlighted, which reads: "It is acceptable to work onsite alone? a. True b. False." (Ex. R-72). The Court does not find this wording specific enough to communicate the policy that someone from *PENTA* had to be onsite before starting, only that *someone* had to be onsite so that no employee was working alone. In any event, the policy was otherwise conveyed to the workers on the Casino site by way of the PowerPoint presentation and signed acknowledgement.

[21] As the Court detailed above, subcontractors were also required to hold "Daily Huddle" safety meetings, during which this form was also completed and discussed with the subcontractors' employees. *See* Section IV(C)(ii), *supra*.

subcontractor performed each day. (Tr. 574, 726-28; R-34, at 21). PENTA issued a booklet of PTP forms to each foreman and leadman and required them to keep it on their person while onsite. (Tr. 230, 618-19, 724-25; R-34, at 21). During their safety walks, PENTA's supervisors, including Sherrod and Carrol, would "spot check" various subcontractors to ensure they had properly filled out the required PTPs. (Tr. 574, 686, 724-26; *see, e.g.*, R-39, at 1). If a subcontractor was found to have not completed the requisite PTP, or if the PTP was otherwise found deficient, work would be stopped until a PTP was properly completed for the task being performed. (Tr. 724-26; *see, e.g.*, Ex. R-39, at 1).

vii. Inspections and Discipline

As detailed above, PENTA's IIPP required several individuals to conduct regular inspections of the Casino worksite, including weekly documented inspections by PENTA's Superintendents. (Section IV(C)(i), *supra*; Tr. 732-37; Exs. R-38 to 59). PENTA submitted twenty-one inspection reports for various dates in November demonstrating thorough inspections of the Casino worksite.[22] (Exs. R-38 to R-59). Additionally, PENTA employees, including Rodarte, Sherrod, and Carrol, took at least daily inspection walks of the Casino worksite to look for and correct any safety hazards. (Tr. 469, 577-78, 723-24).

[22] Using one report as an example of the thoroughness of these inspections, each report contains a list of "Findings" under various workplace hazard-related headings, including "Administrative," "Electrical Safety," "Forklifts," "Ladders/Stairs," "MWP's (Scissor Lifts)," "Tools (Hand & Power)," and "Welding & Cutting (Hot Work)." (Ex. R-39). Under each heading is a list of findings related to that category and whether the PENTA employee performing the inspection found compliance with an OSHA standard or PENTA policy (a "Positive Finding") or found noncompliance (a "Negative Finding"). (*Id.*). For example, in Exhibit R-39, created for an inspection performed by an individual named Alex Ortega on November 2, 2020, a subcontractor was found to not have completed a PTP prior to starting work. (Ex. R-39, at 1). Thus, this item was marked as a "Negative Finding" and a photograph of the incomplete PTP is included in the report. (*Id.*). The report also lists how the negative findings were corrected and assigns each negative finding a "severity" level from "Advisory (negligible impact)" to "Critical/Catastrophic." (*Id.*). In this same report, under the "Electrical Safety" heading, "flexible cords [were] maintained in good condition" in compliance with "[29 C.F.R. §]1926.416," and so this item was marked as a "Positive Finding." (*Id.* at 2). At the conclusion of each report is a summary of the total number of findings and how many were positive and negative. (*Id.* at 3). The positive findings are listed as a percentage of all findings in the report. (*Id.* at 3). The reports also take into account the severity of the negative findings, with "Serious/Extreme" reducing the "Percent Positive" score by five percent and "Critical/Catastrophic" reducing the score by ten percent. (*Id.*).

As to PENTA's discipline of subcontractors on the Casino worksite, under Exhibit D to PENTA's subcontracts, if a subcontractor "fail[ed] to adequately and promptly abate any safety issue … [PENTA] reserve[ed] the right to implement a progressive disciplinary action program which could include an individuals' or company's remove from the [Casino] site." (Exs. C-21 & 23, at ¶ 15). Exhibit D provided for a range of possible penalties for safety violation, ranging from monetary fines to dismissal from the worksite, depending on the nature and seriousness of the violation.[23] (*Id.* ¶¶ 15 & 16; *see also* Ex. R-34, at 8).

D. <u>NLS's Activities on the Casino Worksite</u>

i. NLS's Onboarding

PENTA contracted with NLS, a sole proprietorship owned and operated by an individual named Ricardo "Rick" Sotelo, in September of 2020 to manufacture and install the Gate to control access to the entrance of the loading dock of the Casino. (J. Stip. ¶ A (12); Tr. 415-17; Ex. C-20). Part of the subcontract between PENTA and NLS included Exhibit D, "Safety Requirements and Procedures," which required NLS's employees to adhere to all PENTA's safety policies and procedures, as set forth in more detail above. (J. Stip. ¶ A (30); Tr. 88-89, 706-07; Ex. C-21; *see also* Section IV(C)(ii)). As part of PENTA's onboarding process for new subcontractors on the Casino worksite, Sotelo was required to attend a pre-mobilization meeting led by Carrol, as

[23] The record contains some evidence of enforcement of this disciplinary policy. On one occasion, on September 1, 2020, a Raymond employee was issued a disciplinary notice for "[f]ailure to follow proper protocol when it comes down to above ceiling work," a fall protection violation, and was required to take a "re-training and orientation on PENTA protocol/safety." (Tr. 738-39; Ex. R-60). On another occasion, on September 10, 2020, two Raymond employees were issued disciplinary notices, one for "improper protocol failed to notify PENTA for above ceiling work, lack of PPE for employee" and the second for "working above ceiling without fall protection. Failed to notify PENTA with proper protocols." (Tr. 740-42; Ex. R-61). The first employee was required to take a "retraining on protocols and redo orientation," and the second was suspended for two days and also required take a retraining and orientation. (Tr. 740-42; Ex. R-61).

described above.[24] (Tr. 705-06; Exs. C-21, at 2; R-32; *see also* Section IV(C)(ii)).

NLS's pre-mobilization meeting was originally scheduled for October 13, 2020,[25] with Carrol and Sherrod present. (Tr. 567-68, 707-08; Ex. R-32). However, as Carrol began reviewing the Meeting Agenda, she realized Sotelo had not brought any of the paperwork PENTA required from subcontractors under Exhibit D to its subcontracts, including an IIPP or JHAs. (Tr. 567-68, 707-08; Ex. R-32). Carrol therefore had to reschedule NLS's premobilization meeting until October 22, at which point Sotelo submitted the required paperwork. (Tr. 708-09, 712-13; Exs. R-32, R-63).

ii. NLS Installs the Gate

After going through the remainder of PENTA's onboarding process and following a series of delays,[26] NLS began installing the Gate on November 20, 2020, and had mostly finished installing the Gate by November 21, 2020. (J. Stip. ¶¶ A (14) & (15); Tr. 95, 121, 523-34, 579, 609-10, 832-33; Exs. C-26, at 16; C-35). Sherrod was onsite on November 21, 2020, when NLS installed the Gate panels but did not observe the entire process of the installation. (J. Stip. ¶ A (21);

[24] Carrol explained PENTA normally requested "the Superintendent, Safety Manager if they were available, Foreman and usually a [project manager]" to attend these meetings. (Tr. 705). If other NLS employees in fact attended this meeting, that attendance is not reflected on the signed Meeting Agenda, which was only signed by Sotelo. (Ex. R-32).

[25] The original date was crossed out on the Pre-Mobilization Meeting Agenda and is somewhat ambiguous. (Ex. R-32). No witness clarified what this date was. The Court best discerns the original meeting was held on October 13. The Court places no material weight on the exact date of the first scheduled pre-mobilization meeting between PENTA and NLS.

[26] The Gate was originally meant to be manufactured and installed by November 7, 2020. (J. Stip. ¶ A (13); Tr. 417, 776, 825-26; Ex. C-26, at 1). However, as evidenced in a series of emails between Church, Sotelo, and another NLS employee (Augustine "Butch" Valendra), the installation was delayed until November 20. (J. Stip. ¶¶ A (13) & (14); Tr. 506-11, 774-87, 790-93, 826-30; Ex. C-26, at 1-7, 17-19). This delay was due to a dispute over NLS's scope of work under its subcontract. Ultimately, the Gate was intended to be operated by an electric motor and chains. (Tr. 61-63, 936-41; Exs. C-25, C-27, C-32). The motorization of the Gate required the installation of electric conduit and a concrete "slab" upon which the motor would sit. (Tr. 63-64, 208-09, 425, 427, 506-11, 587, 826-27, 841-42; Exs. C-2, at 22; C-26, at 1-7, 17-19). PENTA and NLS disputed who was responsible for the installation of the electric conduit and concrete slab, as well as who was responsible for cutting into the concrete for the installation of "safety loops" to control the operation of the Gate. (Tr. 63-64, 94-95, 114-15, 208-11, 439-41, 506-11, 826-28; Ex. C-26, at 1-7, 17-19). PENTA and NLS never resolved this dispute, and thus neither had performed the work needed to motorize the Gate by the time of the accident. (Tr. 64-65, 163, 261-62, 542-44; Ex. C-2, at 22, 23).

Tr. 523-24).

The Gate was a large, telescoping metal gate composed of two panels: the north panel and the south panel.[27] (J. Stip. ¶ A (12); Tr. 190-91, 461-62, 597, 881; Exs. C-2, at 2, 3, 11, 12, 20, 24, 33, 34; C-24, C-27; R-6, R-9, R-14, R-15). Each Gate panel was large and heavy, measuring approximately 25 feet long by 10 feet high and weighing approximately 3,000 pounds. (J. Stip. ¶ A (14); Tr. 52, 436; Exs. C-24, at 13). Each gate panel also had wheels on its bottom edge that allowed the panel to be moved along one of two metal tracks installed in the ground. (J. Stip. ¶ A (15); Tr. 53-54, 60-62, 65, 67, 354, 881-82; Exs. C-2, at 8, 11, 12, 18, 21, 24 & 34; C-24, at 11; R-2, at 1, 2, 10). The track for the south panel extended from the cubby area across the loading dock entrance to a wall that served as an endpoint when the Gate was fully extended. (Tr. 50-55, 58, 64-65; Exs. C-2, at 1, 2, 5, 9, 10, 13, 14 & 23; R-5, R-10). The track of the north panel, meanwhile, only extended from the cubby area to approximately halfway across the loading dock entrance.[28] (Tr. 55-56, 61-64, 67; Ex. C-2, at 12, 19, 20, 23, 33, & 34). The north panel had a "roller guide" attached to the top of it through which the south panel ran and which, when the south panel was extended out of the cubby, served as the sole support for keeping the south panel upright. (Tr. 54, 66, 67, 941, 953; Exs. C-2, at 11, 26-28, 32; C-24, at 11; R-4, R-9, R-11, R-14, R-15). Thus, if the south panel were pulled past this roller guide, as it was on the date of the accident, it had no other means of staying upright and would immediately fall over because of its enormous weight. (Tr. 54, 66, 67, 137-38, 961-62; Exs. C-2, at 2-7, 12, 33, 34; C-37, at 1:00:10 to

[27] The two panels ran parallel to one another and opened in a westerly direction. (Tr. 52-54, 66, 67; Ex. C-2, at 6, 11, 28; *see, e.g.*, C-36, at 11:45 to 11:50; 43:15 to 43:30). Thus, the parties have referred to the two panels as the "north panel" and the "south panel" based on their relative geographic locations.

[28] The two Gate panels were intended to move in tandem until about halfway across the loading dock entrance, at which point the north panel would stop moving and the south panel would continue along its track until it reached the endpoint. (Tr. 61-63, 936-41; Exs. C-27, C-32). Thus, the track for the north panel did not need to extend across the entirety of the loading dock entrance.

1:00:25; C-38, at 1:00:16 to 1:00:31).

After NLS had installed the Gate panels on November 21, 2020, NLS's employees fully extended the Gate across the loading dock entrance.[29] (J. Stip. ¶ A (16); Tr. 108-09, 343-44, 366; Ex. C-27; Ex. C-36, at 01:15:40 to 01:18:40). No one from PENTA testified they observed the Gate in this state.[30] (Tr. 472-73, 524, 657-58, 803, 833-34). However, PENTA Superintendent Sherrod spoke with Sotelo on November 21, 2020, after the Gate had been installed and the panels had been pushed back into the cubby. During this conversation, Sotelo told Sherrod something to the effect of "Don't mess with the Gate." (Tr. 245-46, 527-28, 586-87). Sherrod did not inquire further as to what Sotelo meant by this admonition and did not relay it to anyone else at PENTA; however, he did tell Foreman Michael from Raymond not to paint or "mess with the Gate until we let you know…." (Tr. 246, 431-32, 545, 553-54, 586-87).

Before leaving the Casino worksite on November 21, NLS pushed both Gate panels back into the cubby. (J. Stip. ¶ A (17); Tr. 107, Ex. C-36, at 01:38:28 to 01:39:45). While in the cubby, the Gate panels "did not pose a crush-by or struck-by hazard." (J. Stip. ¶ A (20); *see also* Tr. 163-64, 269, 947-48, 954-55; Exs. C-43, at ¶ 4.2 ("Gates shall be designed, constructed, and installed to not fall over more than 45 degrees from the vertical plane, when a gate is detached from the supporting hardware."); C-45, at 4 ("Gates must have fall over protection to prevent the gate from falling when it is detached from supporting hardware.")). As evidenced by the fatal accident in this

[29] To accomplish this, the Gate panels had to be moved in a "leapfrog" fashion, such that the south panel was never pulled beyond the roller guide on the north panel and could therefore remain upright. (Tr. 104-07, 948-49; Ex. C-36, at 01:15:40 to 01:18:40).

[30] In portions of the deposition of Trujillo designated by the parties, Trujillo stated he had once seen the Gate fully extended. (Ex. J-4, at 44-45). However, he also stated he was not at the Casino worksite on November 21, 2020, the only date in the record where the Gate is alleged to have been fully extended, and further stated he had no occasion to walk into the loading dock area after November 21, including November 23, the only other day NLS worked on the Gate. (*Id.* at 45-49). Without the benefit of being able to observe Trujillo testifying in person, the Court does not credit Trujillo's conflicting testimony on this subject.

case, however, pulling the Gate panels out too far from the cubby area *did* pose a crush-by or struck-by hazard. (Tr. 947-48). Even still, neither NLS nor PENTA placed any warning signs, caution tape, cones, or other markers on or near the Gate to indicate that pulling it out from the cubby could pose a crush-by or struck-by hazard. (Tr. 175, 315-16, 361, 431, 435-36, 530, 631, 648-49, 665-66, 813, 835-36, 856).

NLS employees returned to the Casino worksite one final time, on November 23, 2020, when they "performed welding operations" on the Gate, including installing an approximately four-inch metal stop on the top of the west end of the south panel.[31] (J. Stip. ¶ A (23); Tr. 55-56, 941-42, 949-50, 961, 970-71; Exs. C-2, at 12; R-13). The Gate was then left in the cubby, again without any warning signs, caution tape, or other markers that pulling it from the cubby could constitute a hazard. (Tr. 175, 315-16, 361, 431, 435-36, 530, 631, 648-49, 665-66, 813, 835-36, 856). NLS did not return to the Casino worksite after November 23, 2020, or perform any further work on the Gate after this date. (J. Stip. ¶ A (24); Tr. 97, 196, 535). Thus, although the Gate was intended to be motorized, it was left in an unfinished state from November 23, 2020, until December 7, 2020, the date of the accident. (J. Stip. ¶ A (24); Tr. 61-65, 97, 163, 196, 261-62, 535, 542-44, 649-50, 936-41, 946; Exs. C-2, at 22 & 23; C-25).

On November 24, 2020, the entirety of the Casino project went "dark," i.e., no construction work was being performed and therefore few, if any,[32] subcontractors were to be present onsite,

[31] CSHO Donnald and Gerard Schiller, PENTA's expert witness, agreed the function of this particular stop was to prevent the south panel from going too far into the cubby, passing the roller guide on the north panel in an easterly direction, and falling over inside the cubby. (Tr. 55-56, 961). Mr. Schiller went on to explain a total of four stops should have ultimately been placed on the Gate to ensure its safe operation. (Tr. 941-42, 960-61). It is not clear to the Court from Mr. Schiller's testimony where exactly these stops should have been placed. However, Mr. Schiller did make clear that, had a stop been placed on the opposite side of the south panel from the one NLS did install (i.e., east, top), this stop would have prevented the south panel from traveling past the roller guide on the north panel when it was pulled outward. (Tr. 941-43, 960-62). In other words, the missing stop on the opposite end of the south panel meant that "the accident [giving rise to the Citation] would have occurred sooner or later." (Tr. 943).

[32] Rodarte explained a few interior contractors did work during this dark period to address issues related to the opening of the Casino but no exterior contractors, like NLS or Raymond, were onsite during this time. (Tr. 437).

in preparation for the opening of the Casino to the public the weekend after Thanksgiving. (Tr. 115-16, 121, 124-25, 386-87, 436-37, 530-32, 824; Ex. C-17). Work resumed on the exterior of the Casino on November 30, 2020, and continued until the date of the accident, December 7, 2020. (Tr. 116, 122, 388; Ex. C-17).

iii. PENTA's Inspections of the Gate

From the time the Gate was partially installed on November 21, 2020, until the date of the accident, December 7, 2020, several PENTA employees on several different occasions inspected the loading dock area or the Gate as follows:

Rodarte conducted daily walkaround inspections of the Casino worksite, which had increased in frequency to twice daily (once in the morning and once in the afternoon) as the Casino was being prepared to open to the public. (Tr. 469). Rodarte conducted his inspections with other PENTA employees and representatives from the Casino. (Tr. 469-70).

On November 21, 2020, Rodarte and a representative from the Casino conducted a walkaround inspection of the Casino worksite; however, this occurred before NLS had installed the Gate panels. (Tr. 429, 471-72). On the morning of November 23, 2020, Rodarte conducted another walkaround inspection of the Casino worksite, including the loading dock area and the Gate, with Sherrod, a second PENTA Superintendent, and a representative from the Casino. (Tr. 429-30, 473-76). During this inspection, Rodarte observed both Gate panels in the cubby. (Tr. 475, 477, 482). He and the others spent approximately five minutes in the loading dock area discussing the progress of the work in that area and safety issues that might need to be addressed specifically with regard to the Gate. (Tr. 474-75, 477, 481-82). Rodarte informed the Casino representative the Gate was incomplete and would not be operational for the opening of the Casino. (Tr. 430, 475-76, 478). Although Rodarte and the others "wanted to make sure the Gate was secured," no one

thought the panels could be moved from the cubby due to their weight and thus no one perceived a safety hazard regarding the incomplete Gate. (Tr. 474-76, 481-82).

Rodarte conducted a second walkaround inspection of the Casino worksite in the afternoon of November 23, 2020, but he did not spend a significant amount of time in the loading dock area or focus on the Gate. (Tr. 487-88). Rodarte also conducted a walkaround inspection of the worksite the morning of November 24, 2020, during which he observed no NLS employees were working on the Gate. (Tr. 488).

Sherrod conducted daily walkaround inspections of the Casino worksite. (Tr. 577-78). On November 21, 2020, he conducted a walkaround inspection in the morning, at which time NLS had not yet arrived onsite. (Tr. 580). However, he later observed NLS in the process of installing the Gate. (J. Stip. ¶ A (21); Tr. 581-82).

Once both Gate panels were installed and NLS had left the worksite, Sherrod returned to the loading dock area to inspect the Gate. (J. Stip. ¶ A (22); Tr. 529-30, 580). During this inspection, Sherrod was able to look over the shorter wall of the cubby and observed the motor and chains for the Gate had not yet been installed. (J. Stip. ¶ A (22); Tr. 529-30, 593-94). He also saw both panels had been pushed into the cubby and did not perceive the Gate posed any hazard while in this position because the roller guide and walls of the cubby would keep the panels upright. (Tr. 549-50, 594-95).

Sherrod again inspected the Gate on November 23, 2020, along with Rodarte and a representative of the Casino. (Tr. 532-33). During this inspection, an NLS employee was finishing up some "tack welds" on the Gate. (Tr. 533). Otherwise, the Gate's condition had not changed in that it was "secured" in the cubby and was still unfinished from lack of motorization. (Tr. 533). No one present during this inspection raised any safety concerns regarding the Gate in this

condition. (Tr. 600). After the NLS welders left, Sherrod returned to re-inspect the Gate and found NLS had still not finished its work on the Gate. (Tr. 601-02).

During one of his inspections, on either November 21 or November 23, Sherrod recalled seeing one of the Gate's panels out "a few feet" and that it did not move when he applied pressure to it. (Tr. 537-38). After returning to the Casino worksite on November 30, 2020, following the opening of the Casino to the public, Sherrod did not recall if he inspected the Gate again. (Tr. 535).

Ros did not inspect the Gate with any particularity when he took over Sherrod's responsibilities following Sherrod's departure from the Casino worksite on November 30, 2020. (Tr. 640). However, whenever Ros walked by the loading dock area, he observed the Gate always in the cubby area and thus perceived no hazard posed by the Gate. (Tr. 640-42).

Carrol conducted daily walkaround inspections of the Casino worksite. (Tr. 723-24). Carrol was on vacation when NLS installed the Gate but returned to the Casino worksite on November 30, 2020. (Tr. 438, 504, 670-71). Upon returning to the worksite, Carrol conducted a walkaround inspection with Sherrod so he could "catch [her] up on what was going on, on the site" and "mak[e] sure everyone's working safely …." (Tr. 687). During this walkaround inspection, Carrol observed the Gate with both panels pushed into the cubby area, although the south panel was protruding a couple of feet.[33] (Tr. 674-75, 748-50). Since nothing "stood out" to Carrol about the Gate while it was upright in the cubby, and she did not believe getting any closer would have revealed any safety hazards, she did not approach the Gate for a closer inspection. (Tr. 677, 701-02, 757-58).

[33] This would be consistent with Sherrod's testimony that on either November 21 or November 23 he saw the south panel outside the cubby a few feet. Carrol, along with Sherrod, did a walk around and she observed the south panel extended a few feet. The Court concludes that Sherrod likely saw the south panel extended a few feet from the cubby on November 23rd since the Casino project went dark form November 24 to November 30 when Carrol and Sherrod did their walk-by inspection, and the south panel was extended a few feet.

Luquin inspected the Gate the morning of November 23, 2020. (Tr. 834-35, 849-50, 852). During this inspection, he physically touched the Gate and looked around the cubby area, observing the wiring intended for the Gate's motor. (Tr. 834-35, 849-52). Although he did not try to move the Gate, he did observe it was heavy and did not believe anyone could move the panels by themselves. (Tr. 851). After November 23, Luquin did not closely inspect the Gate again but did observe it when he walked through the loading dock area. (Tr. 836-37).

E. Raymond's Activities on the Casino Worksite

i. Raymond Tasked to Paint the Gate

PENTA originally subcontracted with Raymond in July of 2020 to perform framing, drywall, fireproofing, and insulation at the Casino. (J. Stip. ¶¶ A (25) & (26); Tr. 292-93; Ex. R-28, at 2, 70). Part of the subcontract between PENTA and Raymond included Exhibit D, "Safety Requirements and Procedures," which required Raymond's employees to adhere to all PENTA's safety policies and procedures, as set forth in more detail above. (J. Stip. ¶ A(30); Tr. 88-89; Ex. C-23).

ii. Raymond Prepares to Paint the Gate

As the Casino project was winding down, PENTA added exterior painting to Raymond's scope of work and so a smaller crew of Raymond employees remained onsite to paint certain exterior features of the Casino, including handrails and eventually the Gate. (J. Stip. ¶¶ A (26) & (31); Tr. 459-61). In the week preceding the accident, November 30, 2020, to December 4, 2020, Raymond employees had been painting exterior features in the loading dock area. (Tr. 149-50, 298-99, 348). According to Michael, when arriving in the mornings during this time Raymond employees found the south panel of the Gate extended from the cubby approximately 10 to 15 feet from the cubby, and the Raymond employees would have to manually push the panel back into

the cubby to accommodate delivery traffic into the loading dock. (Tr. 348-52). If this in fact occurred,[34] no one from Raymond ever relayed these occurrences to anyone from PENTA. (Tr. 436, 603-04, 657-58, 683-84, 703, 799, 803).

On December 4, 2020, at 9:59 a.m., Charpentier sent an email to three PENTA employees, Ros, Church, and Trujillo, stating: "Employee entrance 12/7 Monday only. Loading dock work 12/7 - 12/9." (Tr. 310-11, 330, 389; Exs. C-18, at 1; J-4, at 91). After receiving a follow-up phone call requesting more information from James, Charpentier sent a second email at 10:50 on December 4, clarifying that on "Monday 12 /7 [Raymond intended to] finish painting handrails at employee entrance" and on "12/7 - 12/9 [Raymond intended to] Finish painting handrails and walls at loading dock and start painting [the] rolling gate." (Tr. 311-12, 330-32, 389-90; Exs. C-18, at 1; J-4, at 92-95). After receiving this email, at 11:51 a.m. on December 4, Trujillo sent an email stating: "Thank you! We will get started on these disruption notices now."[35] (Tr. 287-88,

[34] No further evidence, including security camera footage that was demonstrably available to the Secretary (*see* Tr. 68, 191; Exs. C-31 to C-38), was submitted to corroborate Michael's claim in this regard even though the Secretary had video from a camera located at the loading dock which filmed the accident on December 7th. Charpentier, the only other Raymond employee to testify at trial, never observed this occurring, although he believed Michael had told him about it. (Tr. 302). None of the other witnesses who were questioned on the subject personally observed this happening. (Tr. 282, 436, 603-04, 657-58, 683-84, 703, 799, 803; *see also* Tr. 1119-21 (Schiller's testimony that nothing he reviewed corroborated Michael's account)). The testimony from Sherrod and Carrol supports a finding that on November 23 and November 30 the south panel was extended a couple of feet – not 10 to 15 feet as Michael testified. In addition, Michael did not testify how many of Raymond's employees it took to push the south panel back into the cubby each day since it would likely involve more than one person considering the weight of the south panel and the testimony of Sherrod that he could not push the south panel in when he tried on November 23. The Court does not find a preponderance of the evidence establishes Raymond's employees found the south panel extended out 10 to 15 feet in the mornings preceding the accident. Even if this did in fact occur, however, what the preponderant evidence *does* establish is no one from PENTA was made aware it was occurring. (Tr. 436, 603-04, 657-58, 683-84, 703, 799, 803).

[35] Following the opening of the Casino to the public on the weekend following Thanksgiving in 2020, PENTA would send "disruption notices" to representatives from the Casino alerting them where PENTA's subcontractors planned on working so that the Casino could plan accordingly. (Tr. 277-79, 310-11, 467, 820-22; Exs. C-15, C-16, C-18, at 2 & 3). Although the apparent intention was to have these notices approved by a Casino representative (either Lopez, the Casino's Director of Facilities, or Michael Facenda, the Casino's General Manager) before the work commenced (Tr. 390, 404-05, 467, 822-23; Ex. J-4, at 56-58, 103), according to Lopez: "A lot of the time these notices would come in. They would not be approved. I would not respond to them. And the work would take place anyway." (Tr. 278-79; *see also* Tr. 285-86). The Court notes the disruption notices contained in Exhibit C-18, which were filled out for Raymond's painting activities in the loading dock area the week of December 7, 2020, contain no notations in the

399; Exs. C-18, at 1; J-4, at 95). Ros did not see Charpentier's emails about Raymond's plans to paint the Gate because he was at a golf tournament sponsored by PENTA and did not check his work emails that day. (Tr. 399, 643-45, 659). Moreover, no one on the email chain, or anyone else from PENTA, contacted Ros to inform him Raymond intended to paint the Gate. (Tr. 645-46, 650). Church did not see Charpentier's emails because he was also at the golf tournament and did not check his work emails. (Tr. 804-06, 811-13).

After his phone call with Charpentier, James prepared two disruption notices, numbers 42 and 43, one for the painting to be performed in the employee entrance and one for the painting to be performed in the loading dock area. (Tr. 390, 402-403; Ex. C-18, at 2 & 3). He sent these disruption notices to Lopez and the Casino's general manager, Michael Facenda. (Tr. 390). Only Mr. Facenda replied to this email, saying "he was okay with the work as long as the loading dock manager of the casino was okay with the work." (Tr. 391). The loading dock manager, an otherwise unidentified individual, was cc'd on this email chain and responded, "All good." (Tr. 391). Before leaving the Casino worksite on December 4, James verbally relayed this "green light" information to Charpentier telling him Raymond was "okay to start on Monday." (Tr. 391-92).

After James's verbal "go-ahead" to Charpentier, no one from PENTA further contacted anyone from Raymond about its intended plans to start painting the Gate the following week, and no specific instructions were provided to anyone from Raymond about the incomplete state of the Gate or how to safely move the panels from the cubby. (Tr. 156-62, 313-14, 359-60, 363-64, 372-73, 395-96, 541-42, 560, 645-46, 650, 686-87, 806-07; Ex. J-4, at 99-102). Likewise, "Raymond did not inquire with PENTA or [NLS] on how to move and extend the panels of the Gate." (J. Stip.

"Approvals" box at the bottom of the notices. (Tr. 279-80; Ex. C-18, at 2 & 3). According to James, who prepared these disruption notices, he "got a response from Michael Facenda, and he told me that he was okay with the work as long as the loading dock manager of the casino was okay with the work." (Tr. 391).

¶ A(36)).

F. The Accident

Early in the morning on December 7, 2020, at approximately 5 a.m., Raymond's employees arrived at the Casino worksite intending to paint the Gate. (J. Stip. ¶ A (31); Tr. 133, 300, 319, 347). After conducting a safety meeting at a Conex in the parking lot near the Casino, four Raymond employees walked to the loading dock area to start painting the Gate: Charpentier, Michael, another Raymond Foreman named Alfredo Sanchez, and [redacted].[36] (J. Stip. ¶¶ A (28), (31), (32); Tr. 301-02, 324-28, 347, 729-30; Exs. C-13, at 12-13; C-14; Ex. C-37, at 57:50 to 59:30). At this point in time, no one from PENTA was onsite and thus the Raymond employees were working in contravention to PENTA's policy that no work be conducted until a representative from PENTA was onsite. (J. Stip. ¶ A (11) & (37); Ex. R-77, at 5).

The Raymond crew planned to start by painting the south panel. To do so, the panel needed to be moved out from the cubby. (J. Stip. ¶ A (33); Tr. 316-17). Three of the Raymond employees, Michael, Sanchez, and [redacted], started manually pulling the south panel out from the cubby along its track. (J. Stip. ¶ A (33); Tr. 133-35, 316-17; Exs. C-37, at 1:00:06; C-38, at 1:00:14). Once the south panel passed the roller guide of the north panel, approximately 15 seconds after the crew started moving it, it no longer had any support to keep it upright and therefore immediately fell over due to its enormous weight. (J. Stip. ¶ A (34); Tr. 137; Exs. C-37, at 1:00:21; C-38, at 1:00:29). [redacted] was crushed by the falling south panel and died from his injuries. (J. Stip. ¶ A (34)).

G. OSHA's Investigation and Citation

Following a report of the accident, OSHA sent CSHO Donnald to investigate the same day.

[36] 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).

(J. Stip. ¶ A (40); Tr. 48-49; Exs. C-3 & C-4). CSHO Donnald held an opening conference with representatives from Raymond, PENTA, and the Tribe; conducted interviews and took statements from various employees, the coroner, and individuals from law enforcement; inspected the site of the accident; took photographs of the Gate and loading dock area; and pulled security video footage of the loading dock area. (Tr. 49-56, 58-70; Exs. C-1 to C-4; C-9 to C-12; C-35 to C-38; R-16). After conducting his investigation of the Casino worksite, CSHO Donnald also requested various safety-related documents from PENTA. (Tr. 84-85).

CSHO Donnald concluded PENTA had failed to conduct frequent and regular inspections of the Gate in violation of 29 C.F.R. § 1926.20(b)(2). (Ex. C-5). The CSHO's conclusion in this regard was based on the last known inspection of the Gate being conducted by Mr. Sherrod on November 23, and no further inspections being conducted by anyone from PENTA until the date of the accident. (Tr. 143-44; Ex. C-5). The CSHO concluded no inspections had been conducted despite the fact the "conditions of the [G]ate were changing" because "s]omebody was manipulating it every night" such that Raymond employees "were pushing the [G]ate in" to the cubby in the mornings. (Tr. 144). In the CSHO's opinion, a reasonable and prudent person[37] would have gone to the Gate to "make sure that this [G]ate is safe to maneuver before … allow[ing] somebody to go work on it or paint it." (Tr. 145). Despite Mr. Sherrod's intention that no one paint the Gate until it was fully installed, the CSHO concluded Mr. Sherrod never passed this intended plan on to anyone from PENTA when he transitioned out of working at the Casino worksite and so no inspections were conducted on the Gate despite its changing condition. (Tr. 145-46).

CSHO Donnald further concluded PENTA had failed to instruct employees in the

[37] The Court infers by this testimony the CSHO was analyzing this case using a duty of care which applies to exposing employers. As discussed below, the reasonable and prudent employer doctrine is not the correct doctrine to apply to a controlling employer. The CSHO also applied the reasonable and prudent employer doctrine when discussing the reasons for the issuance of Citation 1, Item 2.

recognition and avoidance of the unsafe condition posed by moving the Gate in violation of 29 C.F.R. § 1926.21(b)(2). (Ex. C-6). The CSHO's conclusion in this regard was based on his belief that PENTA, by way of Mr. Sherrod, knew the incomplete condition of the Gate but did not relay this information to Raymond. (Tr. 155-56). He believed a "reasonable prudent person would have told [Raymond] how to manipulate the [G]ate [to paint it] because the [G]ate was an incomplete product." (Tr. 157). Because PENTA required all communications between subcontractors to go through PENTA, it was PENTA's responsibility to acquire this information from NLS and relay it to Raymond, or at the very least to have Raymond contact NLS about safely moving the Gate for painting. (Tr. 157-59). However, "there was not one email communication or phone call that … discussed the [G]ate not being touched or an order in which the [G]ate needed to be opened. (Tr. 163).

Finally, CSHO Donnald further concluded PENTA had failed to display caution signs against potential hazards posed by the Gate. (Ex. C-7). The CSHO's conclusion in this regard was based on his view the hazard posed by rolling the south panel past the roller guide on the north panel was an "obvious" hazard "in plain view." (Tr. 162). Nevertheless, the Gate had no "engineering controls … no outriggers or chains or anything to prevent [the Gate] from being extended out" and further had "no administrative controls, no caution tape, no red tape, and no signs." (Tr. 163). No one from PENTA explained why no caution signs had been placed by NLS or why PENTA had not stepped in to place such signs using its authority under Exhibit D to its subcontract with NLS, which allowed it to address safety hazards on the Casino worksite that were otherwise left unaddressed by NLS. (Tr. 168-69; Ex. C-21).

V. Applicable Law

For most standards the Secretary is not required to prove the existence of a hazard each

time a standard is enforced since, by the wording of the standard, the hazard is presumed. *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978) (Secretary not required to prove violation related to walking and working surfaces constituted a hazard). However, in all the standards cited in this case, the Secretary must establish what hazard or unsafe work condition was present: (i) which frequent inspections could have identified (29 C.F.R. § 1926.20(b)(2)); (ii) which should have been communicated (29 C.F.R. § 1926.21(b)(2)); and (iii) that warranted a warning or caution sign (29 C.F.R. § 1926.200(c)(1)). In addition, as with any standard, the Secretary's burden is to prove: (i) the cited standard applies; (ii) the terms of the standard were violated; (iii) employees were exposed to or had access to the violative condition; and (iv) 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); *JPC Grp., Inc*., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The Secretary must establish each element of her 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.

Preponderance of the Evidence, BLACK'S LAW DICTIONARY (10th ed. 2014).

The Court will set forth the controlling legal principles for each of the *prima facia* elements above, which the Secretary must prove by preponderance of the evidence. Doing so will: (i) avoid repeating this law when discussing each Citation Item; (ii) make the Court's findings of facts clearer to apply to the law; and (iii) promote ease of understanding.

A. Element One – Does the Regulation Apply

Under Commission precedent to establish the cited standard applies, "the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *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*, 703 F.3d 367 (7th Cir. 2012); *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.") *aff'd*, 142 F. App'x 662 (4th Cir. 2005) (unpublished).

B. Element Two - Was the Cited Standard Violated.

For the Secretary to establish the cited standard was violated, she must: (i) determine and define the proper duty of care under which to analyze PENTA's responsibilities as a controlling employer; and (ii) apply the proper duty of care to determine if the standard was violated.

i. Controlling Employers and Performance Standards

Before determining whether PENTA, as a controlling employer, has violated the cited standards, a determination must be made as to what is the correct legal test to apply and the factors to weigh to determine whether the cited standards were violated. This is particularly important regarding two of the violations alleged: Item 1 alleging a violation of 29 C.F.R. § 1926.20(b)(2), and Item 2 alleging a violation of § 1926.21(b)(2). For both standards,[38] the Commission has adopted the "reasonably prudent employer" test to determine what safety measures employers are required to adopt to protect their own employees with regard to inspection programs and hazard identification and training. *See, e.g.*, *W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1235 (No. 99-0344,

[38] Because standards like 29 C.F.R. §§ 1926.20(b)(2) and 21(b)(2) "require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them," without identifying any particular method of abatement, the Commission has referred to standards like these as "performance standards." *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC at 2287.

2000) ("Under § 1926.20(b)(1), the Commission has held that "an employer may reasonably be expected to conform its safety program to any known duties and that a safety program must include those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt."), *aff'd*, 285 F.3d 499 (6th Cir. 2002); *Capform, Inc.*, 19 BNA OSHC 1374, 1376 (No. 99-0322, 2001) ("Under § 1926.21(b)(2), an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware."), *aff'd*, 34 F. App'x 152 (5th Cir. 2002).

However, three recent Commission cases, discussed below, compels the Court to find, in the context of a controlling employer's liability on a multi-employer worksite, the "reasonably prudent employer" test has been supplanted by the lesser "reasonable care" test.

First, in *Suncor Energy (U.S.A.) Inc.* the employer was cited as a controlling employer following the injury of a subcontractor's employee on a scaffold due to lack of fall protection. *Suncor Energy (U.S.A.) Inc.*, No. 13-0900, 2019 WL 654129, at *3 (O.S.H.R.C., Feb. 1, 2019). In analyzing the employer's liability for failure to ensure the use of fall protection on its worksite, the Commission first held a "controlling employer's duty to exercise *reasonable care* is less than what is required of an employer with respect to protecting its own employees."[39] *Id.* at *4 (emphasis added). The Commission went on to hold: "Determining whether a controlling employer has met its duty to exercise reasonable care involves analyzing several factors: those that relate to the alleged violative condition itself and those that relate to the employer's duty to monitor or inspect." *Id.* at *5. The Commission then set out several factors, discussed more fully below, and

[39] The Court notes this appears to be the Commission's first time adopting the term "reasonable care" in the context of its own multi-employer worksite doctrine. The case quoted in *Suncor* for the use of the term is *Summit Contractors*, that simply noted that the Multi-Employer MEP was "to the same effect" as the Commission's standard for controlling employer liability without fully adopting the use of the term "reasonable care." *Summit Contractors*, 22 BNA OSHC at 1781.

emphasized the "secondary [safety] role of a controlling employer" on a multi-employer worksite. *Id.* at *10. Ultimately, the Commission determined the Secretary had failed to demonstrate a lack of reasonable care on the part of the controlling employer. *Id.*

Next, in *StormForce of Jacksonville, LLC,* the controlling employer was again cited for fall protection violations committed by a subcontractor on one of the employer's worksites. *StormForce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530, at *1 (O.S.H.R.C., March 8, 2021). After concluding the employer did not have actual knowledge of the subcontractor's violations, the Commission turned to "whether StormForce met its obligations as a controlling employer to exercise *reasonable care*, i.e., to take reasonable measures to prevent or detect the violative conditions." *Id.* at *8 (emphasis added). The Commission again noted "reasonable care" in this context must consider a controlling employer's "secondary role … in light of objective factors – the nature of the work, the scale of the project, and the safety history and experience of the contractors involved." *Id.* Again, as in *Suncor*, the Commission found the Secretary had failed to demonstrate a lack of reasonable care on the part of the controlling employer. *Id.* at *10.

In *Summit Contracting Grp.* (*Summit*),[40] the Commission was again confronted with a

[40] *Summi*t was decided by the Commission after the trial of this case had concluded but before post-trial briefs had been filed by the parties. The Court, in an Order date June 14, 2022, directed the parties to discuss *Summi*t and whether it was consistent with Commission case law in effect prior to the trial. As discussed below, *Summitt* relied and unscored the factors it enunciated in *Suncor Energy* and *Stormforce.* The Commission issued a fourth case after the briefing period had closed. The Court did not apply its holdings to the current case. Most recently in *Fama Construction, LLC*, the Commission stated: "It is well established that a controlling employer has a 'secondary safety role' [on a multi-employer worksite] and therefore its duty to exercise reasonable care is *less than* what is required of an employer with respect to protecting its own employees." *Fama Constr., LLC*, No. 19-1467, 2023 WL 2837610, at *2 (O.S.H.R.C., March 29, 2023). In *Fama*, the Commission held "[i]t is well-established that a controlling employer has a secondary safety role [on a multi-employer worksite] and therefore its duty to exercise reasonable care is *less than* what is required of an employer with respect to protecting its own employees." *Fama*, 2023 WL 2837610, at *2 (emphasis in original). The Commission further found the judge had erred in his analysis of the employer's liability as a controlling employer under the multi-employer worksite doctrine because he "held Fama to the more stringent standard required of an employer whose own employees are exposed to the alleged violative conditions." *Id.* Citing the portions of *Summit* and *Suncor*, the Commission remanded the case back to the judge to determine "Fama's liability as a controlling employer under the correct legal standard." *Id.*, citing *Summit*, 2022 WL 1572848l at *4; *Suncor*, 2019 WL 654129, at *7.

controlling employer's liability for fall protection violations committed by subcontractors on one of its worksites. *Summit Contracting Grp.*, No. 18-1451, 2022 WL 1572848 (O.S.H.R.C., May 10, 2022). Like in *StormForce*, the Commission noted a controlling employer's liability turns on whether it exercised "reasonable care" and again emphasized a controlling employer has a "secondary safety role" at a multi-employer worksite. *Id.* at *4, *7.

Based on this line of cases, the Court will apply the duty of reasonable care test to determine whether PENTA violated the standards charged in the Citation. *See Summit*, 2022 WL 1572848, at *5 n.8. (emphasizing that ALJs should not rely on cases involving an employer's own employees being exposed to a hazard when evaluating a controlling employer's liability on multi-employer worksites).

ii. The Factors in Determining Standard of Reasonable Care

Having determined the reasonable care duty is the proper test to evaluate PENTA's conduct under the standards issued, the Court must now determine what factors figure into an evaluation of whether the standards were violated by PENTA not exercising reasonable care.

a. General Legal Principles

Whether an employer "acted reasonably is ordinarily a question for the trier of fact." *Christensen v. Ga. -Pac. Corp.*, 279 F.3d 807, 813 (9th Cir. 2002). "The term is always relative, depending on the particular circumstances." *Care – Reasonable Care*, *Black's Law Dictionary*. In determining whether PENTA exercised reasonable care, the Court must "consider all attendant circumstances when determining what is reasonable." *Palla v. L M Sports, Inc.*, 388 F. Supp. 3d 1191, 1203 (E.D. Cal. 2019), *aff'd in pertinent part* (2020 WL 3243987). The Commission has provided the attendant factors to consider in ascertaining whether PENTA's conduct lacked reasonable care. Those factors will be discussed below.

The Court has also considered "the specific knowledge and skills" of those involved, i.e., the knowledge and skills of a general contractor. *Sasser Elec. & Mfg. Co.*, 11 BNA OSHC 2133, 2136 (No. 82-178, 1984) notes that:

> [W]hen some of the work is performed by a specialist, an employer is justified in relying upon the specialist to protect against hazards related to the specialist's expertise so long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely.

b. Commission Caselaw on Reasonable Care

With an eye toward the attendant factors that should be weighed to determine PENTA acted with reasonable care, the Court will analyze the three recent cases which have addressed this issue.

Most comprehensively, in *Suncor*, the Commission set forth the following factors:

> 1) nature, location, and duration of the violative condition (*Suncor*, 2019 WL 654129, at *5-6);
>
> 2) the controlling employer's duty to monitor and inspect, which the Commission emphasized is "*less than* what is required of an employer with respect to protecting its own employees." (*Id.* at *6-7 (emphasis in original));
>
> 3) the nature of the work, including the roles and obligations of the various contractors engaged in the work itself (*Id.* at *7-8);
>
> 4) the scale of the project, with the Commission noting a controlling employer's safety efforts should be measured against "the size, complexity, and … time frame associated with the project." (*Id.* at *8); and, finally,
>
> 5) the safety history and experience of the subcontractors on the worksite, with the Commission noting "less frequent inspections by a controlling employer may be appropriate if its contractor has a demonstrated history of compliance and sound safety practices." (*Id.* at *9); *see also Sasser Elec. & Mfg. Co.*, 11 BNA OSHC at 2136.

In *StormForce*, the Commission noted a controlling employer's reasonable care must be measured "in light of objective factors – the nature of the work, the scale of the project, and the safety history and experience of the contractors involved." *StormForce*, 2021 WL 2582530, at *8.

Because of several concessions made by the Secretary, the Commission mainly focused on the "open and obvious" nature of the violative conditions at issue. *Id.* at *9; *accord Suncor*, 2019 WL 654129, at *5-6 (discussing the "nature, location, and duration" of the violative conditions).

In *Summit*, the Commission borrowed heavily from both *Suncor* and *StormForce* and set forth the factors for reasonable care as follows:

> In the absence of actual knowledge, the pertinent inquiry is whether the controlling employer met its obligation to exercise reasonable care, i.e., to take reasonable measures to prevent or detect violations. This inquiry requires an assessment of the nature, location, and duration of the violative conditions, as well as objective factors relating to the controlling employer's role at the worksite and its relationship with other onsite employers. In other words, in assessing the extent of a controlling employer's duty to detect violative conditions not involving its own employees, the Commission takes into account that the controlling employer has a secondary safety role at the worksite.[41]

Summit, 2022 WL 1572848, at *4 (internal citations omitted).

In each of the Commission's cases, it emphasized a controlling employer's "lesser duty" and "secondary role" concerning safety over a multi-employer worksite must be considered when evaluating reasonable care. *Summit*, 2022 WL 1572848, at *4; *StormForce*, 2021 WL 2582530, at *7-8; *Suncor*, 2019 WL 654129, at *10. In each of the Commission cases discussing reasonable care, it did not include knowledge of, or compliance with, industry standards – which is typically a consideration in an exposing employer performance standard context.[42] *See Walmart Distrib.*

[41] Though the Commission's formulation of the reasonable care test in *Summit* is certainly more succinct than in *Suncor*, which more comprehensively listed factors to consider in determining reasonable care, the Court does not read it to have altered the *Suncor* factors. The "nature, location, and duration of the violative conditions" is common to both decisions. *Compare Suncor*, 2021 WL 654129, at *5-6, *with Summit*, 2022 WL 1572848, at *4. *Summit*'s phraseology of "objective factors relating to the controlling employer's role at the worksite and its relationship with other onsite employers" comfortably includes the remaining *Suncor* factors of: the controlling employer's duty to monitor and inspect the worksite (*Id.* at *6-7); the nature of the work, including the roles and obligations of the various contractors engaged in the work itself (*Id.* at *7-8); the scale of the project, with a controlling employer's safety measures being commensurate with "the size, complexity, and … time frame associated with the project." (*Id.* at *8); and, finally, the safety history and experience of the subcontractors on the worksite. *Id.* at *9.

[42] It can be argued if a controlling employer complied with industry standards it acted with reasonable care. But that decision remains for another day.

Ctr., #6016, 25 BNA OSHC 1396 (No. 08-1292, 2015); *see also, Brennan v. Smoke Craft Inc*., 530 F.2d 843, 845 (9th Cir. 1976).

c. Multi-Employer MEP Guidance on Reasonable Care

The Multi-Employer MEP, which the Commission cited approvingly in all three of the above cases applying the reasonable care standard,[43] offers the following definition of reasonable care:

> 2. Step 2: Actions Taken: A controlling employer must exercise reasonable care to prevent and detect violations on the site. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.

(Multi-Employer MEP, at ¶¶ 7).

The Multi-Employer MEP provides clarification of factors to consider in determining what constitutes reasonable care in a specific setting. These factors may clarify the Commission's holdings when it adopted some or all the Multi-Employer MEP in its Decisions. The factors are:

> 3. Factors Relating to Reasonable Care Standard. Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include:
>
> a. The scale of the project;
>
> b. The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses;

[43] *See Summit*, 2022 WL 1572848, at *5 n.8, *6 n.12, *StormForce*, 2021 WL 2582530, at *3, *6, *8; *Suncor*, 2019 WL 654129, at *4, *6, *7. The Court is mindful the Multi-Employer MEP remains separate from the Commission's own multi-employer worksite doctrine, and the Court does not purport to conclude the Commission has adopted the Multi-Employer MEP's contents wholesale with a few approving citations. However, given the Commission has cited the Multi-Employer MEP rather authoritatively in its recent decisions involving controlling employers and reasonable care, and indeed in *Suncor* adopted many of the same factors from the Multi-Employer MEP for determining reasonable care, the Court finds it offers some useful guidance in applying the reasonable care test in factual contexts not yet addressed by the Commission. *Compare Suncor*, 2019 WL 654129, at *6-10, *with*, Multi-Employer MEP, at ¶¶ 7-8; *cf. also Union Tank Car Co.*, 18 BNA OSHC 1067 (No. 96-0563, 1997) (OSHA interpretations offer some guidance in applying OSHA standards).

c. How much the controlling employer knows about the safety history and safety practices of the employer it controls and about that employer's level of expertise;

d. More frequent inspections are normally needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may also be needed, especially at the beginning of the project, if the controlling employer had never before worked with this other employer and does not know its compliance history; and

e. Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts. The most important indicator of an effective safety and health effort by the other employer is a consistently high level of compliance. Other indicators include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsite safety meetings and safety training.

(*Id.* at ¶7).

The Multi-Employer MEP goes on to offer three additional factors[44] to consider in evaluating reasonable care:

4. Evaluating Reasonable Care. In evaluating whether a controlling employer has exercised reasonable care in preventing and discovering violations, consider questions such as whether the controlling employer:

   a. Conducted periodic inspections of appropriate frequency (frequency should be based on the factors listed in G.3);[45]

   b. Implemented an effective system for promptly correcting hazards;

   c. Enforces the other company's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.

[44] Arguably, the first factor identified in this section of the Multi-Employer MEP could be wrapped up in the "duty to monitor and inspect" from *Suncor*. However, the Court cannot reconcile the Multi-Employer MEP's reference to section "G.3." *See* note 45, *infra*. Therefore, the Court cannot make a definitive finding as to whether this is a novel factor. It is clear from Commission precedent the two other factors identified in this section are distinct from those already articulated by the Commission.

[45] It is not clear to the Court what "G.3" is referencing since the section of the Multi-Employer MEP setting out OSHA's multi-employer policy only contains subsections up to "F." (MEP, at¶ i).

(*Id.* at¶ 8).

d. Conclusion – The Factors in Determining Reasonable Care

Taken together, the above-consulted sources require PENTA's duties to its contractors to be primarily framed by the cited performance standards. The Court will consider, as relevant, attendant factors. *Summit*, 2022 WL 1572848, at *4; *StormForce*, 2021 WL 2582530, at *10; *Suncor*, 2019 WL 654129, at *4; *Palla*, 388 F. Supp. 3d at 1203. The Court will also consider, if relevant: (1) the "nature, location, and duration of the violative conditions"; and (2) "objective factors relating to the controlling employer's role at the worksite and its relationship with other onsite employers." *Summit*, 2022 WL 1572848, at *4. These "objective factors" referred to in *Summit* are factors (2) through (5) the Court has identified in *Suncor*, laid out in detail above. *Suncor*, 2019 WL 654129, at *6-9. In every case involving a controlling employer, the controlling employer's "secondary safety role" on the worksite is also a relevant factor to be considered. *Summit*, 2022 WL 1572848, at *4; *StormForce*, 2021 WL 2582530, at *7-8; *Suncor*, 2019 WL 654129, at *10.

C. Element Three – Exposure

The third element of the Secretary's *prima facia* case is to establish exposure. "Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 n.6 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). The Secretary may prove employee exposure by showing that, during the course of their assigned working duties, their personal comfort activities on the job or their normal ingress-egress to and from their assigned workplaces, there has been either actual employee exposure or that it is reasonably predictable that they will be in the zone of danger. The zone of danger is determined by the hazard presented by the violative condition and

is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Constr.*, *Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995); *Gilles & Cotting, Inc*., 3 BNA OSHC 2002, 2003 (No. 504, 1976).

D. Element Four – Knowledge

The next element of the Secretary's *prima facia* case is for the Secretary to establish knowledge of the hazard or unsafe work conditions by PENTA. In *Summit*, the Commission explained that "[i]f a controlling employer has actual knowledge of a subcontractor's violation, the controlling employer has a duty to take reasonable measures to obtain abatement of that violation . . . [and] [i]n the absence of actual knowledge, the pertinent inquiry is whether the controlling employer met its obligation . . . to exercise reasonable care, i.e., to take reasonable measures to prevent or detect the violative conditions." *Summit*, 2022 WL 1572848, at *4.

Actual knowledge is established when a supervisor directly sees a subordinate's misconduct. *See, e.g., The Kansas Power & Light Co.,* 5 BNA OSHC 1202, 1204 (No. 11015, 1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent"). Actual knowledge is also present when a supervisor has engaged in the misconduct himself. When a controlling employer has actual knowledge, the controlling employer has a duty to act to correct the deficiency and its failure to do so demonstrates a lack of reasonable care. *Summit*, 2022 WL 1572848, at *4.

To find constructive knowledge in a controlling employer context, the pertinent inquiry is whether the controlling employer met its "obligation . . . to exercise reasonable care, i.e., to take reasonable measures to prevent or detect the violative conditions." *Suncor*, 2019 WL 654129, at *7. In essence, what the Commission has held is if a controlling employer is found to have violated a cited standard because the employer failed to exercise reasonable care that finding is the

equivalent to a finding the controlling employer had constructive knowledge. The Commission has therefore "interlinked" the findings at Step Two and Step Four of the Secretary's *prima facia* case.[46]

Once knowledge has been established, the knowledge of a controlling employer's supervisory employees is imputable to the controlling employer. *R. Williams Constr. Co. v. Occupational Safety & Health Review Comm'n*, 464 F.3d 1060, 1064 (9th Cir. 2006) (finding knowledge where supervisor "had reason to know that its employees would enter the trench on the day of the cave-in and had actual knowledge that two of its employees entered the trench prior to the cave-in"); *Dover Elevator Co.*, 16 BNA OSHC at 1286; *see also Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012).

E. Element Five – Presence of a Hazard or Unsafe Work Condition

As noted above, in most specification standards the Secretary does not need to prove a hazard because the hazard is presumed. *See Bunge Corp. v. Sec'y of Labor*, 638 F.2d at 834; *Greyhound Lines-West v. Marshall*, 575 F.2d at 762. However, since the standards cited are performance standards, the existence of a hazard cannot be presumed since the cited standards do not focus or identify a specific hazard. Therefore, the Secretary must establish the presence of a hazard or an unsafe work condition. *Joseph J. Stolar Constr. Co*., 9 BNA OSHC 2020, 2024 n.9 (No. 78-2528, 1981). A hazard is defined as those practices, procedures or conditions that increase the likelihood of an explosion, accident or injury. *FMC Corp*., 12 BNA OSHC 2008, 2009-2010 (No. 83-488,

[46] Such an interlink is not a new concept as the Commission has used this analysis to find constructive knowledge in an exposing employer context. As an example, for purposes of a violation of 29 C.F.R. § 1926.21(b)(2), an employer's knowledge of the violation rises or falls on the same factors as noncompliance with the standard. *See Bardav, Inc.*, 24 BNA OSHC 2105, 2112 (No. 10-1055, 2014) (knowledge established by the mere fact no training was provided); *Compass Envt'l, Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010) (basing knowledge finding on the "reasons discussed above" concerning noncompliance and hazard recognition) *aff'd*, 663 F.3d 1164 (10th Cir. 2011); *Pressure Concrete Constr.*, 15 BNA OSHC 2011, 2018 (No. 90-2668, 1992) ("The fact that [the employer] had failed to train the project Superintendent in the recognition and avoidance of dangerous conditions establishes that it had at least constructive knowledge of the inadequacy of its training program.").

1986) (consolidated).

VI. Findings of Fact – Cited Standards

The standards frame the relevant duties of PENTA toward its subcontractors at the Casino worksite as a controlling employer, namely a duty to maintain inspection programs (section 1926.20(b)(2)); a duty to ensure subcontractors' employees are instructed in unsafe conditions and how to avoid them (section 1926.21(b)(2)); and a duty to place caution signs around the Gate (section 1926.200(c)(1). The Court will now proceed to analyze the facts, make Findings of Fact and apply the legal precedent discussed above to reach a decision on each of the cited standards.

a. Citation 1, Item 1 – The Alleged Inspection Violation

The Secretary alleged a serious violation of 29 C.F.R. § 1926.20(b)(2) as follows:

> 29 CFR 1926.20(b)(2): The employer did not initiate and maintain programs which provided for frequent and regular inspections of the job site, materials and equipment to be made by a competent person(s):
>
> Agua Caliente Casino: On and before 12/07/2020, the employer did not conduct inspections of the rolling gate on the Northeast loading dock, exposing employees to struck by and crush-by hazards.[47]

The cited standard provides: "Such programs [as required by 29 C.F.R. § 1926.20(b)(1) to comply with this part] shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers." The Secretary must establish PENTA did not act with reasonable care because: (i) it had no inspection program

[47] The Court is mindful of the Stipulation and the various times during the trial where it was affirmed while the Gate was in the cubby it did not constitute a hazard. (J. Stip. ¶ A (20); *see also* Tr. 163-64, 947-48, 954-55; Exs. C-43, at ¶ 4.2; C-45, at 4). As stated above, PENTA was not told by any subcontractor the Gate was extended in the morning on numerous days prior to the accident ten to fifteen feet, instances which the CSHO heavily relied on in making his conclusions. (Tr. 436, 603-04, 657-58, 683-84, 703, 799, 803). PENTA's employees testified they had never seen the Gate outside the cubby. (Tr. 282, 436, 603-04, 657-58, 683-84, 703, 799, 803). The Gate did not become a hazard until it was extended beyond its rollers and outside the cubby, which would then result in the Gate falling from an upright position because there was no structure or mechanism in place to hold it up. (Tr. 54, 66-67, 941, 953; Exs. C-2, at 11, 26-28, 32; C-24, at 11; R-4, R-9, R-11, R-14, R-15).

or it was deficient; (ii) it did not perform frequent and regular inspections; (iii) the inspections were not done by a competent person; and (iv) the inspections failed to detect a recognizable hazard.[48] Where an employer has established an inspection program, the Secretary can establish a violation of the standard by demonstrating the employer's program was inadequate for the worksite. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207 (No. 87-2059, 1993); *cf. Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1823 (No. 78-5159, 1986) (where an employer has an existing safety program, it is the Secretary's burden to demonstrate the inadequacy of that program). Additionally, the Secretary can establish a violation of the standard by showing the actual inspections performed by competent persons pursuant to the employer's program failed to detect a "recognizable" hazard. *DiGioia Bros. Excavating*, 17 BNA OSHC 1181, 1184 (No. 92-3024,1995); *see also Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1022 (No. 94-200, 1997), *aff'd*, 158 F.3d 583 (5th Cir. 1998).

i. The Standard Applies

The parties have stipulated the cited standard applied to the work being performed at the Casino worksite. (J. Stip. ¶ B (2); Tr. 22). The Court finds the cited standard applies. (Tr. 22); *see also* 29 C.F.R. § 1926.20(a) (subpart applies to "construction, alteration, and/or repair, including painting and decorating …").

ii. The Standard Was Not Violated

29 C.F.R. § 1926.20(b)(2) requires employers to maintain a program providing for "frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons …." The Secretary argues a violation occurred for both an inadequate

[48] The Secretary does not allege Sherrod, Ros, Rodarte, and Carrol were not competent persons as required by the standard to conduct inspections. The competent person requirement of the standard is, therefore, not in dispute. Another PENTA employee, Luquin conducted an inspection of the Gate, but he is not deemed to be a competent person.

inspection program and for deficient inspections made by PENTA's competent persons. The Court addresses each issue in turn.

a. PENTA's Inspection Program was Adequate and Frequent

The Secretary argues PENTA's inspection program was deficient because its competent persons, namely Sherrod, Carrol, and Ros, failed to make frequent and regular inspections of the Gate. (Sec'y's Br. 18). Although 29 C.F.R. § 1926.20(b)(2) does not define "regular" or "frequent," the Commission has given "regular" its ordinary meaning of "consistent or habitual in action" or "recurring at set times" and "frequent" to be based on how often "a reasonable person familiar with the size of the worksite and the magnitude of the ongoing construction activity would understand … inspections would have to be conducted to keep track of safety hazards at the site." *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2206-07.

The Act also does not define the term "inspection," nor do OSHA's construction regulations generally. *See* 29 C.F.R. § 1926.32. Neither party's brief provided the Court with an operational definition of what constitutes an "inspection." However, in arguing the last inspection was performed by Sherrod on November 23, and in discounting the subsequent actions of Ros and Carrol, the Secretary appears to argue an "inspection" requires some form of physical touch, operation of the Gate or the inspection last for a minimum amount of time. The Court disagrees. The Commission has "ma[de] it clear that an undefined term's meaning can be determined by consulting a contemporaneous dictionary." *Roy Rock, LLC*, No. 18-0068, 2021 WL 3624785, at *3 (O.S.H.R.C., July 20, 2021). Dictionaries contemporaneous to this regulation[49] define

[49] Identical to its current wording, 29 C.F.R. § 1926.20(b)(2) was first promulgated in 1979. *See* Identification of General Industry Safety and Health Standards (20 CFR Part 1910) Applicable to Construction Work, 44 Fed. Reg. 8,577, 8,568 (Feb. 9, 1979) (to be codified at 29 C.F.R. Part 1926). Thus, the Court has consulted dictionaries contemporaneous with the original promulgation of the standard. *See Roy Rock, LLC*, 2021 WL 3624785, at *3 (consulting a 1986 dictionary for a regulation promulgated in 1988).

"inspect" as simply "to *look* carefully at or over"[50] and "to *view* closely or critically."[51] The Court finds a physical examination or movement of the Gate was not necessary to constitute an "inspection" under the standard and solely visual inspection can satisfy the standard. *See, e.g.*, *Superior Custom Cabinet Co.*, 18 BNA OSHC at 1022 (equating failure to "check the upstairs" prior to working with a lack of an inspection).

In arguing PENTA's inspections of the Gate were not "frequent and regular," the Secretary focuses on what she deems to be the last inspection date, which was November 23, by Sherrod, despite subcontractors working onsite for a week prior to the accident.[52] (Sec'y's Br. 18-19). The Secretary's position does not recognize the activity of Ros, Rodarte and Carrol as inspections. The Secretary's argument is flawed as it fails to account for PENTA's inspection program on the Casino worksite as a whole, which includes the activities of Ros, Carrol, and Rodarte as inspections. Finally, the Secretary's argument does not account for background factors against which PENTA's employees made their inspections. The Court addresses each issue in turn.

I. PENTA's Safety Program is Adequate

PENTA's safety and inspection program, as outlined above, is appropriate to determine whether the inspections of the worksite were "frequent and regular" and otherwise in compliance with the standard. *See Suncor*, 2021 WL 654129, at *6-7; Multi-Employer MEP, at ¶¶ 7-8.

PENTA's IIPP provided a variety of daily inspections by its personnel, including its Project Manager, Safety Managers, and Superintendents. (Ex. R-34, at 3-4). The IIPP also required PENTA's Superintendents to "conduct formal, documented safety inspections of their work areas

[50] *Inspect*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 736 (1971) (definition 1) (emphasis added).

[51] *Inspect*, WEBSTER'S THIRD NEW INT'L DICTIONARY 1170 (1971) (definition 2:1) (emphasis added).

[52] The Secretary provided no evidence as to the identity of these other subcontractors and if they were near the zone of danger.

on at least a weekly basis." (Ex. R-34, at 9; *see also* Tr. 732-37; Exs. R-38 to 59). PENTA's Project Manager, two Superintendents, and the Safety Manager specifically inspected the Gate, sometimes multiple times, from the time NLS started to install it on November 21 and continued to work on the Gate on November 23 and up until the date of the accident on December 7. (J. Stip. ¶ A (22); Tr. 429-30, 473-76, 488, 529-30, 580, 532-33, 601-02, 674-75, 748-50, 834-35, 849-50, 852). All these inspections were required under PENTA's IIPP. PENTA's inspection program is adequate to meet the requirements of the standard.

II. PENTA Employees Conducted Frequent and Regular Inspections of the Gate

The Secretary's second argument fails to account for the inspections conducted by PENTA employees and to account for the background against which PENTA's inspections were made. *See J.A. Jones Constr. Co.*, 15 BNA OSHC at 2206-07 (adequacy and frequency of inspections based on how "a reasonable person familiar with the size of the worksite and the magnitude of the ongoing construction activity would understand … inspections would have to be conducted to keep track of safety hazards at the site.").

With its conduct measured against a duty of reasonable care, PENTA was required to inspect "*less than* what is required of an employer with respect to protecting its own employees." *Suncor*, 2019 WL 654129, at *6-7. The scale of the Casino project had shrunk significantly by the time the Gate was installed. As the Commission noted in *Suncor*, another factor in determining reasonable care is the scale of the project, with a controlling employer's safety efforts being measured against the "the size, complexity, and … time frame associated with the project." *Suncor*, 2019 WL 654129, at *8. By the time of the accident the Casino project was approximately ninety-five (95) percent complete, meaning there were far fewer subcontractors working onsite. (J. Stip. ¶ A (39); Tr. 120, 231-32, 262-63, 427, 482-83, 521-23 636-38, 655, 799-800; Exs. C-28 & C-29).

Most of the work being done in the week before the accident was in the interior of the Casino to complete the interior "punch list." (Tr. 656, 661, 799-800; Ex. C-29). The record does not reflect the number of other subcontractor employees other than Raymond who was working in the loading dock area where the Gate was located.[53] (Tr. 149-50, 217, 298-99, 348; Ex. C-29). Raymond's activities in the loading dock in the week before the accident did not involve the Gate; rather, its employees were mainly painting handrails. (Tr. 149-50, 298-99, 348). Thus, PENTA had no reason to expect nor did it schedule a large number of workers, if any, to be working on or near the Gate from November 30 to December 7. As to Raymond, who PENTA *did* know would be working in the loading dock located in the vicinity of the Gate during this timeframe, Sherrod had instructed Foreman Michael not to mess with the Gate and not to paint the Gate until it received approval from PENTA. (Tr. 246, 431-32, 545, 553-54, 586-87). Based on this instruction, PENTA, at the times of the inspections, did not expect anyone to be in a "zone of danger." The reduced size and scope of the Casino project, particularly the lack of any reason for PENTA to believe work would be performed on or near the Gate, lessened PENTA's duty to conduct more frequent or thorough inspections of the Gate by its competent persons. *Suncor*, 2019 WL 654129, at *8; Multi-Employer MEP, at ¶¶ X(E)(3)(a) & (b). This reduction in the scale of the project lowered the number of subcontractors on the Casino worksite, the areas needing to be inspected, the frequency with which PENTA was required to inspect, and lessened PENTA's safety duties as whole. *Suncor*, 2019 WL 654129, at *8; Multi-Employer MEP, at ¶ X(E)(3)(a).

[53] On the "Completion List," only four contractors were specifically designated to be working in the loading dock area: Raymond, NLS, "CESG," and "McKendry." (Ex. C-29). NLS never returned to the Casino worksite after November 23, and CESG, an electrical subcontractor, could not perform its work without NLS completing its work. (J. Stip. ¶ A (24); Tr. 97, 196, 419-25, 535). Thus, neither of these subcontractors would have had employees working in the loading dock area at the time of the accident. Whether the subcontractor McKendry performed any work in the loading dock area is not clear from the instant record.

Against this backdrop, the following occurred. NLS installed the Gate's panels on November 21, 2020, and returned only once more to the Casino worksite on November 23, 2020. (J. Stip. ¶ A (14), (23), (24); Tr. 97, 196, 535). Sherrod inspected the Gate both times after NLS had finished working on it, in the afternoons of November 21 and November 23. (J. Stip. ¶ A (22); Tr. 529-30, 593-94, 601-02). On the morning of November 23, prior to NLS arriving at the Casino worksite, Rodarte and Sherrod inspected the Gate for approximately five minutes along with a Casino representative. (Tr. 532-33, 429-30, 473-76). Rodarte conducted a final walkaround inspection on the morning of November 24, where he observed no NLS employees were working on the Gate that day. (Tr. 488).

Following the series of inspections after the Gate's installation, from November 24 to November 30, 2020, the Casino project went dark, and no work was being performed on the Casino worksite, or the Gate, as the Casino was being prepared to open to the public. (Tr. 115-16, 121, 124-25, 386-87, 436-37, 530-32, 824; Ex. C-17). When the Casino worksite did reopen on November 30, Carrol returned from vacation and again inspected the Gate with Sherrod. (Tr. 438, 504, 670-71, 674-75, 687, 748-50). From the reopening of the Casino worksite on November 30, until the date of the accident on December 7, no additional work was performed on the Gate. (J. Stip. ¶ A (24); Tr. 97, 196, 535). During this period PENTA's competent persons always saw the Gate within the cubby and had no knowledge the Gate was being moved as alleged by Raymond employees. During this time period, Ros had taken over for Sherrod. (Tr. 637-38, 655). Although, as the Secretary argues, Ros did not perform a physical examination of the Gate during this time period, he did observe it on multiple occasions, always in the cubby, where it posed no safety hazard. (J. Stip. ¶ A(20); Tr. 640-42).

Accounting for these particular facts and accounting for PENTA's "secondary safety role"

at the Casino worksite, the Court finds the frequency and regularity of PENTA's inspections to be adequate under a reasonable care test. *Dade Builders Contractors, Inc.*, No. 19-0988, 2020 WL 2612201, at *7 (O.S.H.R.C.A.L.J., April 13, 2020) (noting "the standard does not set a specific schedule for the inspections, does not require inspections to be documented, and does not require the competent person maintain a continuous presence on the site.").

Based on the foregoing, the Secretary has failed to meet her burden in demonstrating any inadequacy in PENTA's inspection program and it failed to exercise reasonable care in the frequency of the inspections. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2207; *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1389 (No. 88-0282, 1991).

b. Conducting Inspections; Detecting Recognizable Hazards

The remainder of the Secretary's arguments focus on whether the crush-by hazard posed by moving the unfinished Gate out of the cubby and past the rollers on which the panels stood constituted a recognizable hazard that PENTA's competent persons should have been able to detect during their inspections. (Sec'y's Br. 19). Whether a particular inspection was adequate for purposes of 29 C.F.R. § 1926.20(b)(2) in detecting a recognizable hazard is based on the "totality of the evidence," including the experience of the employees conducting the inspection and the circumstances of the particular worksite. *Superior Custom Cabinet Co.*, 18 BNA OSHC at 1022. A recognized hazard is a condition that is known to be hazardous and is known not necessarily by each individual employer but is known taking into account their knowledge and experience. In other words," whether or not a hazard is recognized is a matter for objective determination."). *See also* 145 Cong. Rec. H1817 (daily ed. Apr.12, 1999) (statement of Rep. Pease). Moreover, PENTA's inspections are measured against its duty of reasonable care, relying on those relevant factors identified in Section V(B)(ii), *supra.* A number of those factors were present during

PENTA's inspections of the Gate.

While the Gate was in the cubby, no hazard existed. (J. Stip. ¶ A (20)). During all the inspections conducted by PENTA, the Gate was in the cubby and there was no recognizable hazard. The unfinished Gate solely within the confines of a cubby does not present a crush-by hazard alleged in the Citation. (J. Stip. ¶ A (20); *see also* Tr. 163-64, 947-48, 954-55; Exs. C-43, at ¶ 4.2; C-45, at 4).

Mr. Schiller testified an uncompleted project such as the Gate, in and by itself, does not mean a recognizable hazard existed. (Tr. 931, 947-48). He testified that on construction sites it is normal for a project to be left in an incomplete state. (Tr. 931). Mr. Schiller further testified NLS, knowing it could not complete the Gate, left the incomplete Gate solely within the cubby where it was not a hazard. (Tr. 947-48, 973). Indeed, as Mr. Schiller persuasively explained, it was not until the morning of December 7, when the Raymond employees actually started moving the Gate's south panel from the cubby with the potential to move past the roller guide, the Gate posed a crush-by hazard at all. (Tr. 947-78).

i. Nature, Duration, and Location of Condition

The nature, duration, and location of the alleged hazard plays a key role in determining whether PENTA exercised reasonable care in its inspections to identify a recognizable hazard. As to location and duration, NLS left the Gate in the cubby on November 23, and it remained there, albeit in an unfinished state, until the accident on December 7. (J. Stip. A (24); Tr. 61-65, 97, 163, 196, 261-62, 535, 542-44, 649-50, 936-41, 946; Exs. C-2, at 22 & 23; C-25). During the inspections conducted by PENTA's employees there was no work scheduled to be done on the Gate after November 23, 2020, to alter its condition (J. Stip. ¶ A (24); Tr. 97, 196, 535); therefore, no change in work conditions involving the Gate took place from November 24 through December

7th. Had there been work on the Gate during this period then PENTA would have had an obligation to conduct an inspection as to the work performed. Thus, under the Secretary's reasoning, PENTA employees performing inspections on the Gate would have had to anticipate a hazard that simply was not present or recognizable with their lack of knowledge of gate installation when they inspected the Gate in its idle state in the cubby area. It is not reasonable for the Secretary to argue the Gate should have been thoroughly inspected every day because the Casino worksite was open even though the Gate was not being worked on and no one was scheduled to work near the Gate. The Secretary has cited no case law which states this is required under the standard. The CSHO's characterization that the work on the Gate was "evolving" and "changing" from November 23 to December 7, an assumption on which he relied on in issuing the Citation, is undermined by the facts above.

The actual recognizable crush-by hazard only existed for approximately fifteen seconds on the morning of December 7. That constituted the time from when Raymond employees started moving the south panel until it passed the roller guide on the north panel fifteen seconds later. (Exs. C-37, at 1:00:06 to 00:15; C-38, at 1:00:14 to 00:29). The crush-by hazard, which came into being when the south panel was pulled too far out of the cubby, did not exist for a sufficient time for PENTA to gain knowledge of it. The short duration of the crush-by hazard associated with moving the Gate weighs against the Secretary's arguments. *See Summit*, 2022 WL 1572848, at *6; *Suncor*, 2019 WL 654129, at *5-6. *Kaspar Wire Works, Inc*., 18 BNA OSHC 2178, 2196-97 (No. 90-2775, 2000) (concluding that "in the absence of any evidence indicating how long the violative conditions had been in existence, we are unable to evaluate whether [the employer] could have known of them even if it had been reasonably diligent in inspecting its equipment"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

The actual nature or factors which created the crush-by-hazard were not "open" or "obvious", as argued by the Secretary, but were instead quite obscure and unexpected. Even though the Gate was unfinished most of the remaining items to be installed on the Gate served no safety function. According to Mr. Schiller, the motor, chain, and safety loops which had yet to be installed were for the operation of the Gate and not the safety features of the finished Gate, at least vis-à-vis the crush-by hazard alleged in the standard. (Tr. 946-47, 951-53, 1027-28; Ex. C-43, at ¶ 4.2). For the Gate to operate safely, four metal "stops" needed to be installed on the panels – which stops were not even identified on the blueprints submitted to PENTA by NLS. So even if PENTA's employees could view and understand the blueprints and compare them to the work done on the Gate, there was nothing in those blueprints to place PENTA on notice of the missing stops which created the crush-by hazard. Once installed, these stops, along with the roller guides, would have kept the two panels upright and linked together when moving, thus allowing for the safe movement of the Gate. (Tr. 56-58, 176-82, 940-41, 960-62; Exs. C-43, at ¶¶ 6.1.4, 6.2.2; C-45, at 4). However, NLS installed only a single four-inch stop on the top of the west end of the south panel, which served only to prevent the south panel from rolling too far into the cubby. (J. Stip. ¶ A (23); Tr. 55-56, 941-42, 949-50, 961, 970-71; Exs. C-2, at 12; R-13). NLS never installed the remaining three stops, including the stop that would have prevented the south panel from extending past the roller guide on the north panel as it did on December 7. (Tr. 941-42; Ex. C-24).

Thus, to uncover the hazard posed by moving the Gate, PENTA's employees inspecting the Gate would have had to: (i) realize the four stops were intended to be installed on the Gate, in spite of the fact these stops were not even included on the architectural drawings for the Gate; and (ii) thoroughly inspect the Gate area to reveal only one of the four stops had in fact been installed. (Tr. 949, 950-52, 958-59, 962-65; Ex. C-24). All the above would require PENTA's employees to

have specialized knowledge of gate installation, which the Secretary did not establish. Mr. Schiller opined even an experienced gate installer might have to inspect for "about an hour or two on the site, crawling all over, to find out what's there and what's not." (Tr. 951). The lack of stops on the Gate, which created the crush-by hazard to which the Raymond employees were exposed, were not "open" or "obvious" as alleged by the Secretary.

ii. P*ENTA's Employees Lacked Specialized Knowledge, Expertise, or Experience*

The obscured nature of the crush-by hazard was particularly acute considering the lack of knowledge and experience of PENTA's employees who inspected the Gate. *See Superior Custom Cabinet Co.*, 18 BNA OSHC at 1022; *Palla v. L.M. Sports, Inc.*, 388 F. Supp. 3d at 1203; *see also Sasser Elec. & Mfg. Co.*, 11 BNA OSHC at 2136. None of PENTA's employees who inspected the Gate had any specialized knowledge, expertise, or experience in telescoping, rolling gates like the Gate, or even in large, industrial gates generally. (Tr. 500, 597-98, 662-63). None of these employees expressed any knowledge of the industry standards governing rolling gates. (Tr. 485-86, 551-52). None of these employees observed the Gate extended by any significant measure from the cubby. (Tr. 475, 505-06, 524, 529, 592-95, 656-58, 758-59, 833-34). Lacking any special knowledge or experience with the Gate or gates generally, PENTA's employees' failure to recognize the hazard posed by the missing stops can only be weighed against what an ordinary general contractor employee working in the construction industry would recognize as a hazard as it relates to the Gate. *Superior Custom Cabinet Co.*, 18 BNA OSHC at 1022.

In Mr. Schiller's opinion, no one in PENTA's position, a general contractor managing a construction worksite, would have discovered the lack of stops on the Gate or recognized moving

the Gate without the stops could pose a crush-by hazard.[54] (Tr. 949, 950-51, 958-59, 962-65). PENTA hired NLS, who had specialized knowledge and training in the manufacture and installation of the Gate, and in doing so PENTA acted reasonably when it hired NLS to manufacture and install the Gate. The underlying purpose of the Act and the regulations recognize in areas where an employer lacks the skills, education, and training to safely complete a job task an employer acts reasonably when such employers hire experts with specialized knowledge to perform those tasks. *See Sasser Elec. & Mfg. Co.*, 11 BNA OSHC at 2136. When employers have no reason to doubt the ability of a subcontractor it retains to perform the job task safely, the employer acts with reasonable care in relying on the subcontractor. *See Suncor*, 2019 WL 654129, at *9; *Sasser Elec. & Mfg. Co.*, 11 BNA OSHC at 2136. Under the above circumstances, PENTA acted with reasonable care in hiring NLS to manufacture and install the Gate. *Cf. Suncor*, 2019 WL 654129, at *7; *Sasser Elec.*, 11 BNA OSHC at 2136.

iii. PENTA Reliance on NLS

PENTA reasonably relied on the expertise of NLS in constructing and installing the Gate. *See Summit*, 2022 WL 1572848, at *6-7; *Suncor*, 2019 WL 654129, at *9; *Sasser Elec.*., 11 BNA OSHC at 2136; Multi-Employer MEP, at ¶¶ X(E)(3)(d) & (e). In *Suncor*, the Commission held "less frequent inspections by a controlling employer may be appropriate if its contractor has a demonstrated history of compliance and sound safety practices." *Suncor*, 2019 WL 654129, at *9. And in *Summit*, the Commission required affirmative evidence that the general contractor's reliance on a subcontractor was unreasonable. *Summit*, 2022 WL 1572848, at *6 (finding reliance reasonable where "[n]othing in the record shows that this reliance was unreasonable."); *see also*

[54] Indeed, Mr. Schiller opined even an experienced gate installer might have to inspect for "about an hour or two on the site, crawling all over, to find out what's there and what's not." (Tr. 951).

Sasser Elec.., 11 BNA OSHC at 2136 ("[W]hen some of the work is performed by a specialist, an employer is justified in relying upon the specialist to protect against hazards related to the specialist's expertise so long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely."). The Secretary failed to establish with affirmative evidence PENTA's reliance on NLS was unreasonable.

Here, the extensive onboarding process NLS was required to complete before starting work on the Casino worksite demonstrates the due diligence of PENTA. *See* Section IV(B)(ii) to (iv), *supra.* Only two facts slightly weigh against PENTA's reasonable reliance on NLS following those safety practices: 1) NLS's initial failure to have its safety documentation prepared to submit to Carrol during its pre-mobilization meeting on October 13, 2020; and 2) NLS's delays in fabricating and installing the Gate from November 7 to November 20, 2020. Neither undermines PENTA's reasonable reliance here.

As to the former, NLS eventually submitted the required safety documentation, and no affirmative evidence in the record suggests it did not follow the safety procedures required of it when installing the Gate. (Tr. 708-09; 712-13; Exs. R-32, R-62, R-63, R-75). NLS, when it took steps to install the Gate, did so safely. When NLS left the Casino worksite both times it was working on the Gate installation, it made sure the Gate was in the cubby as the project was incomplete. NLS also advised PENTA not "to mess with the Gate."

As to the second factor, as the Court detailed in note 26, *supra*, NLS's delay in installing the Gate was the result of a contract dispute over its scope of work and was not attributable to any safety-related issues. Any delays following NLS's activities on November 23 until the date of the accident appear to be attributable to Sotelo contracting COVID during that time, not any safety-related issues. (Tr. 129-30, 425-26, 852-54).

The Secretary argues PENTA's reliance on NLS's performance was unreasonable because "[b]y November 30, Rodarte and Sherrod were fully aware of … Sotelo's poor record of performance." (Sec'y's. Br. 28). However, as the Court just recounted, any "poor record of performance" on the part of NLS was not attributable to any known safety issues, which is the focus of a controlling employer's reliance on its subcontractors. *Cf. R.P. Carbone Constr. Co. v. Occupational Safety & Health Rev. Comm'n*, 166 F.3d 815, 820 (6th Cir. 1998) (reliance unreasonable where general contractor failed to inform itself as to subcontractor's safety measures); *Blount Int'l Ltd.*, 15 BNA OSHC 1897, 1900 (No. 89-1394, 1992) (reliance unreasonable where there was no evidence controlling employer took any precautionary measures to protect workers and no evidence on how subcontractor was selected as competent).

PENTA required NLS to implement extensive safety measures before it could begin work on the Casino worksite, and nothing in the record undermines PENTA's reasonable reliance on NLS following those practices. Accordingly, PENTA reasonably relied on the expertise and safety practices of NLS such that increased inspections were not warranted. *Summit*, 2022 WL 1572848, at *6; *Suncor*, 2019 WL 654129, at *9; *Sasser Elec. & Mfg. Co.*, 11 BNA OSHC at 2136; Multi-Employer MEP, at ¶ 7 X(E)(3)(e).

The Secretary failed to carry her burden: (i) to establish PENTA did not have an inspection program; (ii) to establish the inspections conducted under PENTA's inspection program were inadequate and not frequent or regular; (iii) to establish PENTA's lack of reasonable care in detecting a recognizable hazard; and (iv) PENTA's reliance on NLS was not reasonable. The Court finds in each of the above areas the Secretary failed in her burden to prove PENTA did not act with reasonable care in complying with the requirements of the cited standard. The standard was not violated. Accordingly, Citation 1 Item 1 is VACATED.

b. Citation 1, Item 2 – The Alleged Hazard Instruction Violation

The Secretary alleged a serious violation of 29 C.F.R. § 1926.21(b)(2) as follows:

> 29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:
>
> Agua Caliente Casino, on and before 12/07/2020, the employer did not ensure employees working near the loading dock gate were trained on the recognition and avoidance of crushing hazards from the gate falling when being pulled past the guide end point.

The cited standard provides: "The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury."

i. The Standard Applies

The parties have stipulated the cited standard applied to the work being performed at the Casino worksite. (J. Stip. ¶ B (3); Tr. 22). The Court finds the cited standard applies. (Tr. 22); *see also* 29 C.F.R. § 1926.20(a) (subpart applies to "construction, alteration, and/or repair, including painting and decorating …").

ii. An Unsafe Work Condition and Potential Hazard Existed

Although the Gate did not pose a hazard while stationary in the cubby, the Secretary has nonetheless proven the existence of an unsafe condition and potential hazard which PENTA was required to communicate to Raymond. Namely, once Raymond's employees started to move the Gate, they were exposed to the crush-by hazard demonstrated by the fatal accident in this case. (J. Stip. ¶¶ A (33) & (34); Tr. 147-48, 163-64, 942-43, 947-48). The Secretary has proven this element of her *prima facia* case.

iii. The Standard was Violated

Typically, "[u]nder § 1926.21(b)(2), an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Capform, Inc.*, 19 BNA OSHC at 1376 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) . However, in the case of a controlling employer, the question is whether PENTA acted under the lesser test of reasonable care in instructing subcontractors' employees in the recognition and avoidance of potential hazards or unsafe work conditions. *See* Section V(B)(i), *supra.* This requires the Court to determine whether PENTA acted reasonably under all the facts and circumstances presented by this case, while accounting for PENTA's "secondary safety role" on the Casino worksite. *Summit*, 2022 WL 1572848, at *4.

a. PENTA's Informational Role on the Casino Worksite

One particular fact about the Casino worksite frames the Court's analysis for purposes of this violation. Namely, as the CSHO noted at trial, the record establishes most, if not all, communications from subcontractors on the Casino worksite were "vertical to PENTA" and then "funneled out [from] PENTA to the [other] subcontractors." (Tr. 157-58). Indeed, there is a dearth of evidence in the record to suggest there was regular coordination between the subcontractors on the Casino worksite and PENTA. PENTA's Project Engineers served as the "information hubs" for the subcontractors and were responsible for gathering and conveying information from and between the subcontractors, the architect, and representatives from the Casino. (Tr. 384-85, 403-05, 417-18, 424-25, 462-65, 521-23, 770-73, 807-11; Exs. C-15 to 18, C-24 to 26, C-28). The Project Engineers worked closely with the Superintendents on the ground to schedule and coordinate work among the subcontractors onsite. (Tr. 511-13, 521-23, 808-11; Exs. C-17, C-18, C-28). The Superintendents then held weekly safety meetings with representatives from the

subcontractors working onsite, and one of the express purposes of these meetings was to address and discuss any new safety issues. (Tr. 571, 723, 728-29, 855-56; Ex. R-34, at 3, 9, 17). Thus, for a subcontractor to learn of a new condition which might constitute a hazard or an unsafe work condition on the Casino worksite, PENTA was uniquely situated to gather and disseminate that information, either by way of a Project Engineer or one of its Superintendents. With this unique role in mind, the Court finds several instances in which PENTA failed to act with reasonable care: (i) in instructing Raymond's employees in the recognition and avoidance of hazards associated with moving the unfinished Gate; (ii) in violating its own work practices and communication rules; and (iii) its failure to have an effective policy in place to address the prompt and correct handling of matters when a manger is not on the worksite. *See Summit*, 2022 WL 1572848, at *4 (reasonable care analysis must account for the "the controlling employer's role at the worksite and its relationship with other onsite employers.").

b. Sotelo's Admonition of "Don't Mess with the Gate"

First, the Court finds PENTA failed to act with reasonable care following the Gate's installation on November 21, 2020. On that date, after the Gate had been installed, Sotelo told Sherrod "Don't mess with the Gate." (Tr. 245-26, 527-28, 586-87). However, Sherrod made no follow-up inquiry as to the meaning of this statement or if it could potentially have implications for worker safety. (Tr. 245-46, 553-54). A simple follow-up inquiry as to Sotelo's meaning was a reasonable means of ascertaining any unsafe work condition or the crush-by hazard posed by moving the unfinished Gate. *Cf. Carlisle Equip. Co. v. U.S. Sec'y of Labor*, 24 F.3d 790, 793 (6th Cir. 1994); *Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1146 (5th Cir. 1976) (reasonableness includes the "simple expediency … of making inquiry"). And although Sherrod did instruct Michael, Raymond's Foreman, not to "mess with the Gate until we let you know," he did not do so with the

intent to warn Michael of the hazards associated with moving the unfinished Gate. (Tr. 246, 431-32, 545, 553-54, 586-87). This communication to Michael does not even mention the unfinished nature of the Gate which may have alerted Raymond's employees to further inquire "why?" Indeed, Sherrod could not have warned Michael of the hazards associated with moving the unfinished Gate because he himself did not know of the hazard at that time due to his failure to inquire further. Rather, PENTA did not want Raymond to paint the Gate until it was fully installed so it did not have to pay Raymond multiple times to paint the Gate. (Tr. 515-17, 544-45 ("There is nothing worse than paying to do something two or three times.")). Whatever PENTA's motive, however, the Court finds PENTA's Superintendent, Sherrod, should have made a simple follow-up inquiry as to what Soleto meant by warning him not to "mess with the Gate" and should have made it clear to Raymond employees the Gate was not to be painted until it was completed and PENTA approved them to do so. Finally, Sherrod's admonition to Michael to "not mess with the Gate until we let you know" does not contain any importation of an unsafe work condition or potential hazard. In addition, such communication must be accompanied with the regulations applicable to the work environment to control or eliminate the crush-by hazard. The communication certainly does not contain this content, nor can it be inferred.

Ros also did not exercise reasonable care when he took over as Superintendent on November 30th. Sherrod and Ros went through the punch-list prepared by Sherrod of projects which needed to be completed. One of the items on the punch list was the unfinished Gate. While informed that Gate should not be completed until the Gate was finished, Ros did not have further discussions with Sherrod as to whether anything needed to be done about the Gate except to wait to have it finished by NLS. Ros did not communicate with NLS as to when the Gate might be finished nor if PENTA needed to do anything about the Gate. Ros did not communicate with

Raymond to make sure Raymond's employees knew the status of the Gate and when they could be expected to be able to paint the Gate. It is not reasonable for a Superintendent to take over a worksite from another Superintendent without making inquiries as to whether a hazard existed due to the unfinished nature of the Gate, to contact NLS to ascertain the status, or communicate with Raymond to make sure everyone was on the same page as to the Gate.

Sherrod's and Ros' testimony indicated it was their intent not to have Raymond paint the Gate until the Gate was fully installed and operating safely. By not informing Raymond of the unfinished Gate, signals to the Court some recognition of a potential hazard in moving the unfinished Gate which neither of them wanted to address because the Casino project was winding down. (Tr. 541-42, 560-61, 666).

c. Failure to Mention the Unfinished Gate at Weekly Meeting

PENTA again failed to act with reasonable care in instructing Raymond's employees on the potential hazard or unsafe work condition associated with the unfinished Gate the week before Raymond started painting the Gate. Raymond was onsite this week and would have been required to attend the weekly subcontractor meeting held that week. (Tr. 298-99, 814-15; Ex. C-23, at ¶ 7). Yet, there is no evidence to suggest the unfinished status of the Gate or Soleto admonishment were discussed at the subcontractors' meeting, despite this meeting being the primary method for conveying new safety issues to subcontractors. (Tr. 571, 723, 728-29, 814-15, 838-39, 855-56; Ex. R-34, at 3, 9, 17). The discussion of the unfinished Gate and the hazard of pulling the Gate outside the cubby would have been a reasonable, straightforward method of at least putting Raymond on notice of potential hazards associated with the unfinished Gate along with the other subcontractors. *See Chadd*, 794 F.3d at 1123 (the "burden of precautions to eliminate or reduce the risk" factors into reasonable care).

d. Breakdown in Communication after Charpentier's Email

PENTA again failed to act with reasonable care in instructing Raymond's employees of the potential hazard or unsafe work condition associated with pulling the Gate from the cubby following Charpentier's emails to Ros, Church, and Trujillo on December 4, 2020. In that series of emails, Charpentier specifically informed these individuals of Raymond's plan to start painting the Gate at some point the following week. (Tr. 310-12, 330-32, 389-90; Exs. C-18, at 1; J-4, at 92-95). Raymond, in sending the email, followed PENTA's own policy since PENTA would have to approve the subcontractor's work, make sure everything relating to the proposed work was good to go. Also, this request, and its approval, would let PENTA know which subcontractor(s) were going to be at the Casino worksite during that time. (Tr. 246, 311, 384-86, 399-400, 422-25, 432-33, 466, 493-94, 545, 553-54, 586-87; Exs. C-17, C-18, C-24, C-25, J-4, at 64-65, 103-04). A fourth PENTA employee, James, was also informed of these plans in a follow-up phone call to Charpentier. (Tr. 311-12, 330-32, 389-90). However, for various reasons, none of these individuals instructed Raymond not to paint the Gate until it was completely installed, as was the intended plan, let alone provided any information to Charpentier, or anyone else at Raymond, about the potential hazards or unsafe work conditions associated with painting the unfinished Gate. (Tr. 422-25, 432-33, 642-43). The record is devoid of any evidence showing Sherrod communicated to Church, Trujillo, or James the information regarding the unfinished Gate. The record is devoid of any evidence showing Sherrod communicated to Ros, Church, Trujillo or James the caution Sotelo provided him. If Sherrod had done so, then these individuals would have also had the necessary information to inform Raymond of the unsafe work condition or the potential hazard of pulling the Gate too far from the cubby and that the Gate was still unfinished and their request to start work on December 7th was not approved. (Tr. 396, 646-47, 796; Ex. J-4, at 34-35, 83, 99-102).

There is also evidence in the record that Rois would have known the Gate was unfinished and the Gate was not to be painted until it wss finished. When Sherrod stopped working at the Casino worksite on November 30, 2020, Ros took over the responsibility of completing the final "punch list" of outstanding items, including the installation, and painting of the Gate. (Tr. 637-38, 655; Ex. C-29). Sherrod testified that he went over the punch list with Rois. There is no evidence in the record which indicates that Rois told Church, Trujillo, or James the information regarding the unfinished Gate. This is another breakdown in PENTA's own communication structure.

Therefore, PENTA's two supervisors who had knowledge of the unfinished Gate and the Gate should not be painted until it was complete and yet failed to inform its own employees who deal with the subcontractors daily. Had either of them done so, the email from Raymond regarding the date they would start painting the Gate on December 7th could have been handled in a much different fashion with a much different outcome. PENTA's Superintendent's failing to inform its own Project Engineers, who were mainly responsible in coordinating the work of subcontractors onsite and two of which onsite when the Raymond email was received, the Gate was unfinished, and the Gate should not be pulled from its cubby because of a potential hazard, did not act with reasonable care. In this case, merely having Sherrod or Ros inform the Project Engineers of the unfinished Gate, the hazard of pulling the Gate fully from the cubby and that the Gate was not to be painted until it was finished was not an unreasonable communication to have been made.

Ros, who was also at the PENTA-sponsored golf tournament the morning of December 4, did not check his emails at all that day or indeed until he arrived at the Casino worksite on December 7, after the accident had already occurred. (Tr. 399, 643-45, 659). The Court does not find this was reasonable, especially where Ros was responsible for the "punch list" work being completed on the Casino and subcontractors were still scheduled to be working onsite the

following week. (Tr. 637-38, 655, 661; Ex. C-29); *cf. Capform, Inc.*, 19 BNA OSHC at 1377 (supervisor should have further instructed employees when he knew they would be working in an area he had recently inspected). In the absence of Ros, no other Superintendent or manager was left on the Casino worksite on December 4.[55] In the absence of any manager at the Casino worksite, the primary coordination of the remaining subcontractors' work was apparently left to PENTA's Project Engineers. Of the three Project Engineer's informed by Charpentier of Raymond's plans to paint the Gate the following week only James and Trujillo were onsite. (Tr. 389). Church, meanwhile, was also at the PENTA-sponsored golf tournament, and, like Ros, did not check his emails while he was away. (Tr. 804-06, 811-13). None of the Project Engineers had been told by any PENTA Superintendent or the Project Manager that Raymond should wait for the final installation of the Gate before painting it. (Tr. 396, 646-47, 796; Ex. J-4, at 34-35, 83, 99-102). PENTA not having any individual recognized as a manager on the Casino worksite or making sure if the manager was offsite, they were readily available or they regularly check emails or call in to those employees left at the worksite did not act with reasonable care.

Even though they lacked this information, Trujillo and James evidently had the ability to give Charpentier the "go-ahead" to proceed with painting the loading dock area, including the Gate. Trujillo delegated the responsibility of preparing the "disruption notices" for Raymond's intended painting activities to James. (Ex. J-4, at 98; *see also* note 35 (describing the disruption notice process)). After preparing the disruption notices, James obtained approval for the work to start from the Casino's general manager, Michael Facenda. (Tr. 391). Later that day, James gave a verbal "green light" to Charpentier, indicating it was "okay to start on Monday." (Tr. 391-92).

[55] No evidence in the record suggests another Superintendent was onsite on December 4 while Ros was at the PENTA-sponsored golf tournament. The whereabouts of Rodarte, the senior project manager for the Casino, are unaccounted for on December 4, except that he apparently had some communication with Luquin about when the Gate would be finished, at which time he learned Sotelo had contracted COVID. (Tr. 425-26).

This process occurred without any involvement of PENTA Superintendents or Project Manager, including Ros or Rodarte, who likely would have instructed Raymond not to start painting the Gate until it was fully installed. (Tr. 422-25, 432-33, 642-43). This also occurred with neither Trujillo nor James themselves being informed the Gate was unfinished and a potential hazard. (Tr. 396, 646-47, 796; Ex. J-4, at 34-35, 83, 99-102).

e. PENTA's Arguments Rejected

PENTA makes several arguments in contravention to the Court's conclusion it failed to exercise reasonable care in recognizing and instructing Raymond's employees on the hazard posed or the unsafe work condition by moving the Gate from the cubby.[56] The Court finds they all lack merit.

First, PENTA argues no one from PENTA actually knew moving the Gate constituted a crush-by hazard. (Resp't's Br. 29-30). However, 29 C.F.R. § 1926.21(b)(2) is concerned with hazards of which PENTA, acting with reasonable care, "would have been aware." *Capform, Inc.*, 19 BNA OSHC at 1376; *A. P. O'Horo Co.*, 14 BNA OSHC 2004, 2009 (No. 85-369, 1991) ("Section 1926.21(b)(2) requires employers to instruct employees concerning safety hazards which would be known to a reasonably prudent employer …"). Especially given PENTA's unique role in gathering and disseminating information about new hazards or unsafe work conditions at the Casino worksite, and given, as noted above, a single follow-up question from Sherrod to Sotelo would have alerted him to the any hazard or unsafe work condition posed by moving the Gate, the Court does not find PENTA's lack of actual awareness of the hazard or unsafe work practice

[56] As noted below, the Commission considers the same factors for determining noncompliance with 29 C.F.R. § 1926.21(b)(2) as it does for determining knowledge of the violation. *See* Section V(B)(v), *infra*. The Court thus addresses the relevant arguments PENTA made in both parts of its post-trial brief.

dispositive for purposes of this violation.[57] *See Summit*, 2022 WL 1572848, at *4 (reasonable care analysis must account for the "the controlling employer's role at the worksite and its relationship with other onsite employers."). An activity or practice may be a recognized hazard even if the employer is ignorant of the existence of the activity or practice or its potential for harm. *National Realty & Constr. Co. Inc v OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973). *Also, Titanium Metals Corp. v Usery*, 579 F2d 536 (9th Cir. 1978). The Court would conclude an employer, acting with reasonable care, when told "not to mess with the Gate" would ask "why?" Sherrod, seeing the Gate was unfinished, being told "not to mess with the Gate," and having the ordinary knowledge of a Superintendent and competent person in the construction industry, should have deduced the reason for Sotelo's admonishment could be safety-related and therefore follow-up with the simple question of "Why?"

Also, Sherrod, even if he did not ask Soleto the follow-up question, could have consulted with Carrol, PENTA's Safety Manager or other safety representative available if the unfinished Gate could be a potential hazard or unsafe work condition but did not. He could have obtained their expertise as to what Soleto may have meant by the statement through communication with PENTA's safety managers. Sherrod had internal resources he could have consulted to obtain the clarification needed. And finally, Ros, when he took over from Sherrod as Superintendent, when informed of the unfinished Gate could have done the same thing.

Second, PENTA argues no supervisor from PENTA had any knowledge Raymond

[57] The Court recognizes this is somewhat at odds with its conclusion regarding the violation of 29 C.F.R. § 1926.20(b)(2). However, while a physical inspection of the Gate by Penta's competent persons might not have revealed the hazard associated with moving it because of the lack of specialized knowledge, training or skills involving the Gate, this does not mean PENTA did not have alternative methods to discover the hazard. Inspection involves observation. This standard does not deal with observation but communication. Here, the Gate represented new equipment on the Casino worksite, and as such PENTA had a duty to exercise reasonable care in instructing other subcontractors, including Raymond, of the hazards associated with the Gate which may not have been recognized from an inspection but would have been recognized by communication to Soleto as to what he meant by his statement. (Ex. R-34, at 9, 17).

intended to start painting the Gate on December 7 and "[t]he only *non-management* employee who had any knowledge that Raymond intended to paint the gates *at some point* during the week of December 7, 2020 was [James]." (Resp't's Br. 15-16). As noted above, on November 21, Sherrod was advised by Sotelo not to "mess with the Gate." (Tr. 245-46, 527-28, 586-87). It was on this date Sherrod should have inquired "why?" Once learning the "why," he should have timely communicated to Raymond, other PENTA supervisors and employees, and other subcontractors at the weekly meeting or other means of communication available the Gate was unfinished and the hazard of moving the Gate. Or as noted above, Sherrod could have consulted with PENTA's own safety personnel as to their position as to whether the unfinished Gate could pose a potential hazard or an unsafe work condition in light of Soleto's admonishment. PENTA's argument, which presumes that somehow December 7th (or December 4th) are the only operable dates for communication of the potential hazard or unsafe work condition posed by moving the Gate, is unreasonable on its face.

Sherrod was a Superintendent on both days NLS showed up to work on the installation of the Gate. Sherod was PENTA's Superintendent when he received the information from Sotelo.

Ros, who took over as Superintendent was advised the Gate was unfinished and not to have Raymond paint the Gate until it was completed. He also made no follow-up inquiries of Soleto or consulted with PENTA's own safety representatives as to the unfinished Gate. A reasonable person new to the worksite and being told the above information should have made further inquiries. Ros, as a PENTA's supervisor for the Casino worksite on December 4th, was given actual notice of Raymond's intention to start painting the Gate on December 7th when Charpentier included him on the email alerting the Project Engineers of Raymond's plans. (Ex. C-18). As the sole remaining Superintendent on the Casino worksite, Ros would have been alerted to Raymond's plans if he had

acted reasonably in checking his email when he knew subcontractors would be working onsite the following week or called in a checked with the Project Engineers as to any pending issues.

Based on the above findings, Sherrod and Ros are found to have constructive knowledge as neither of them did what a reasonable person would have done with the information they had been given. An " 'employer … [that] could have known with the exercise of **reasonable diligence** of the conditions constituting the violation' " has constructive knowledge by not acting as a reasonable person would. *Contour Erection & Siding Sys., Inc.,* 22 BNA OSHC 1072, 1073, 2004-09 CCH OSHD ¶ 32,943, p. 53,787 (No. 06-0792, 2007) (citation omitted).

The Court finds Sherrod as well as Ros are PENTA's "management" officials for purposes of this violation. PENTA does not dispute Sherrod and Ros were management officials. Knowledge of PENTA's supervisory employees is imputable to PENTA. *R. Williams Constr. Co. v. Occupational Safety & Health Review Comm'n*, 464 F.3d at 1064; *Dover Elevator Co.*, 16 BNA OSHC at 1286.

Under the above circumstances, for PENTA to have met its duty of reasonable care, it should have had a policy or procedure in place to ensure the Casino worksite always had a management official onsite or readily available to address issues which arose, as in this case. The reason the two Project Engineers on-site did not call Ros at the golf tournament is unclear from the record. Also, in today's work environment, emails are readily retrievable on an iPhone, Android, iPad, or other technology to which PENTA managers have access.

The Court cannot conclude PENTA acted reasonably by not having policies in place requiring its Superintendents and managers to check their emails or to have a manager readily available to contact on issues which may arise in their absence, especially when it knew the only Superintendent remaining at the Casino worksite and any other manager with information about

the Gate and its condition was at its sponsored golf event. *Cf. Calpine Corp.*, No. 11-1734, 2018 WL 1778958 (O.S.H.R.C., April 6, 2018) (where "five supervisors knew of the opening on December 21 … their absence in the early morning hours of December 22, when the cited opening still existed, does not magically erase that knowledge), *aff'd*, 774 F. App'x 879 (5th Cir. 2019) (unpublished); *La.-Pac. Corp.,* 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (employers are expected to "maintain "orderly procedures for handling important documents or communications"). PENTA failed to have two reasonable policies aimed at promoting safety and health in place. On this basis PENTA itself had constructive knowledge. *See, New York State Elec. & Gas Corp*., 88 F.3d 98, 103, 105-06 (2d Cir. 1996) (citations omitted) with the rationale being that --- in the absence of such a program --- the misconduct was reasonably foreseeable. *PSP Monotech Indus*., 22 BNA OSHC 1303, 1306 (No. 06-1201, 2008); *see also Daniel Int'l Corp. v. OSHRC*, 683 F.2d 361, 364 (11th Cir. 1982).

Finally, PENTA argues "Raymond was under an obligation not to work on the [Casino] site unless a PENTA representative was also onsite." (Resp't's Br. 16). However, the relevant focus for purposes of this Citation, issued to PENTA, is not Raymond's activities on the Casino worksite, but whether PENTA, as the controlling employer, acted reasonably under the circumstances.[58]

For all the foregoing reasons, the Court finds the Secretary has met her burden and established PENTA failed to instruct Raymond on the avoidance and recognition of the unsafe work condition and hazard of moving the Gate completely from the cubby, a potential hazard or unsafe work condition of which, if it had acted with reasonable care, it would have been aware. In

[58] In any event, it is not at all clear this rule was ever enforced against Raymond. According to Michael, in the week before the incident, Raymond had consistently started working around 5 a.m., and no one from PENTA would arrive onsite until around 6:30 a.m. or 7 a.m. (Tr. 351).

finding noncompliance with this standard, the Court again highlights the role PENTA played on the Casino worksite in gathering and disseminating information between subcontractors, and its unique position to both learn of the hazard from NLS or its own Safety Manager and relay this information to Raymond and other subcontractors under its established communication protocols. The Secretary has met her burden in establishing the cited standard was violated.

iv. There was Employee Exposure

Here, it is uncontroverted "[redacted] was fatally injured when the Gate's south panel fell onto" him and thus was actually exposed to the "crushing hazards" alleged in Item 2 of the Citation. (J. Stip. ¶ A (34)). PENTA has made no salient argument against this element of the Secretary's case. The Secretary has met her burden in establishing there was employee exposure.

v. PENTA had Knowledge

The Commission set forth the requirements to find knowledge of a controlling employer in *Suncor* and *Summit*, in which it held that "[i]f a controlling employer has actual knowledge of a subcontractor's violation, the controlling employer has a duty to take reasonable measures to obtain abatement of that violation . . . [and] [i]n the absence of actual knowledge, the pertinent inquiry is whether the controlling employer met its obligation . . . to exercise reasonable care, i.e., to take reasonable measures to prevent or detect the violative conditions." *Suncor*, 2019 WL 654129, at *7 (controlling employer's duty should be assessed "in light of objective factors—the nature of the work, the scale of the project, and safety history and experience of the contractors involved"); s*ee also Summit*, 2022 WL 1572848, at *4.

For purposes of a violation of 29 C.F.R. § 1926.21(b)(2), PENTA's knowledge of the violation rises or falls on the same factors as noncompliance with the standard. *Suncor*, 2019 WL 654129, at *7; *Summit*, 2022 WL 1572848, at *4. *See Bardav, Inc.*, 24 BNA OSHC 2105, 2112 (No.

10-1055, 2014) (knowledge established by the mere fact no training was provided); *Compass Envt'l, Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010) (basing knowledge finding on the "reasons discussed above" concerning noncompliance and hazard recognition); *Pressure Concrete Constr.*, 15 BNA OSHC 2011, 2018 (No. 90-2668, 1992) ("The fact that [the employer] had failed to train the project Superintendent in the recognition and avoidance of dangerous conditions establishes that it had at least constructive knowledge of the inadequacy of its training program."). The Court therefore finds the Secretary has established PENTA had constructive knowledge for the reasons discussed above for noncompliance with the standard. The Secretary has met her burden in establishing knowledge by PENTA. Imputation of the constructive knowledge of PENTA itself, Sherrod and Rois to PENTA is also discussed in the noncompliance section above.

In conclusion, the Secretary has met her burden to establish her *prima facia* case that PENTA violation of the cited standard. Citation 1, Item 2 is AFFIRMED.

vi. The Violation was Serious

The Secretary classified the violation of 29 C.F.R. § 1926.21(b)(2) 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). The Secretary 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, [redacted] died as a result of the crush-by hazard posed by moving the Gate from the cubby area. (J. Stip. ¶ A (34)). As discussed above, PENTA failed to exercise reasonable care in instructing the Raymond employees on the crush-by hazard associated with moving the Gate. *See* Section VI(B)(ii), *supra*. [redacted]'s death demonstrates the violation was serious. *Coleco Indus.*, 14 BNA OSHC 1961, 1964 (No. 84-546, 1991). The Secretary has met her burden in

establishing the violation of 29 C.F.R. § 1926.21(b)(2) was serious.

c. Citation 1, Item 3 – The Alleged Caution Sign Violation

The Secretary alleged a serious violation of 29 C.F.R. § 1926.200(c)(1) as follows:

> 29 CFR 1926.200(c)(1): Caution signs were not used to warn against potential hazards or to caution against unsafe practices:
>
> Agua Caliente Casino, on and before 12/07/2020, the employer did not ensure that caution signs were posted on the Northeast loading dock rolling gate, which was incomplete and had no safety features applied. Employees were unaware of the hazard(s) associated with the gate. This condition exposed employees to struck by/crushing hazards.

The cited standard provides: "Caution signs shall be used only to warn against potential hazards or to caution against unsafe practices and shall follow the specifications illustrated in Figure 4 of ANSI Z35.1–1968 or in Figures 1 to 13 of ANSI Z535.2–2011, incorporated by reference in § 1926.6."[59]

i. The Standard Applies

The Parties have stipulated the cited standard applied to the cited conditions present on the Gate. (J. Stip. ¶ B 5); Tr. 22). The Court finds the cited standard applies. (Tr. 22); *see also* 29 C.F.R. § 1926.200(a) ("Signs and symbols required by this subpart shall be visible at all times when work is being performed and shall be removed or covered promptly when the hazards no longer exist").

ii. A Potential Hazard or Unsafe Work Condition Existed

Although the Gate did not pose a hazard while stationery in the cubby, the Secretary has

[59] As the Court discusses more fully below, PENTA's violation of this standard stems from the lack of any caution signs warning against potential hazards associated with the Gate, not from signs that failed to comport with the specifications in the ANSI standards incorporated in 29 C.F.R. § 1926.6 (particularly §§ 1926.6(e)(24) & (29)). *See* Section VI(C)(iii), *infra*. The Court therefore finds no reason to further expound on these specifications except to find that, when read as a whole, the incorporation of the ANSI standards into the regulation makes this a performance regulation.

nonetheless proven the existence of an unsafe condition and potential hazard which required caution signs to warn employees. Namely, any individual who manually moved the Gate was exposed to the crush-by hazard demonstrated by the fatal accident in this case. (J. Stip. ¶¶ A (33) & (34); Tr. 147-48, 163-64, 942-43, 947-48). The Secretary has met her burden on this element of her *prima facia* case.

iii. The Standard was Violated

The evidence at trial established, without contradiction, no warning signs, caution tape, cones, or other markers were placed on or near the Gate to indicate pulling it from the cubby could pose a struck-by or crush-by hazard. (Tr. 175, 315-16, 361, 431, 435-36, 530, 631, 648-49, 665-66, 813, 835-36, 856). The evidence further established no one from PENTA, as the controlling employer of the Casino worksite, made *any* effort to ensure NLS's compliance with this standard or take the action itself as provided under Exhibit D to the Subcontractor's Agreement. In failing to do so PENTA failed to exercise "reasonable care" in ensuring its compliance.

The only arguments PENTA have made with regard to this violation is the Gate did not pose a hazard while housed in the cubby area, and no one from PENTA recognized the Gate posed a potential hazard if it were to be moved. (Resp't's Br. 30). To address these arguments the Court incorporates its analysis and findings which it made under Citation 1, Item 2 on whether that standard was violated since PENTA raised the same arguments to Citation 1, Item 2 as it does here. The findings incorporated herein support a finding PENTA did not exercise reasonable care in its efforts to identify a recognizable hazard or unsafe work condition. Had it done so, PENTA would have known of the crush-by hazard potential; therefore, imposing upon it the obligation to comply with the standard cited in Citation 1, Item 3.

The standard requires signage against even "potential hazards." 29 C.F.R.

§ 1926.200(c)(1). As Mr. Schiller explained, the unfinished Gate, particularly because of its missing stops, meant moving the Gate *was* hazardous and posed a crush-by hazard to the Raymond employees. (Tr. 942-43, 947-48). [redacted]'s death from moving the Gate certainly underscores this point. Moreover, the fact Sherrod and Ros planned to wait for the Gate to be finished before Raymond painted it signals to the Court some recognition of a potential hazard in moving the unfinished Gate. (Tr. 541-42, 560-61, 666).

Further still, Sherrod was directly told by Sotelo "don't mess with the Gate" but inquired no further as to why or what hazards could be potentially associated with the unfinished Gate. (Tr. 245-46, 527-28, 553-54, 586-87). PENTA would have acted with reasonable care if Sherrod would have simply asked a follow-up question as to Sotelo's meaning of "don't mess with the Gate." Sotelo's response likely would have revealed the existence of the potential crush-by hazard associated with moving it and thereby made obvious the need for caution signs to warn against that hazard under 29 C.F.R. § 1926.200(c)(1). Even accounting for PENTA's secondary safety role on the Casino worksite, the Court finds Sherrod failed to exercise reasonable care. *See Summit*, 2022 WL 1572848, at *4); *Suncor*, 2019 WL 654129, at *10. The Secretary has met her burden in establishing noncompliance with this standard.

iv. There was Employee Exposure

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC at 1079 n.6. Here, it is uncontroverted "[redacted] was fatally injured when the Gate's south panel fell onto" him and thus was actually exposed to the "struck by/crushing hazards" alleged in Item 3 of the Citation. (J. Stip. ¶ A (34)). PENTA has made no salient argument against this element of the Secretary's case. The Secretary has met her burden to establish employee exposure.

v. PENTA had Actual and Constructive Knowledge of the Violation

For purposes of a violation of 29 C.F.R. § 1926.21(b)(2), PENTA's knowledge of the violation rises or falls on the same factors as noncompliance with the standard. *Suncor*, 2019 WL 654129, at *7; *Summit*, 2022 WL 1572848, at *4. "[I]f a controlling employer has actual knowledge of a subcontractor's violation, the controlling employer has a duty to take reasonable measures to obtain abatement of that violation. *Id*. Sherrod and Rois had observed the Gate, knew NLS had not finished its work on it, and had actual knowledge NLS had not placed any caution signs or other markers on the Gate or taken actions themselves to place caution signs. (Tr. 529-30, 541-42, 560-61, 648-49, 666). When a controlling employer has actual knowledge of a violation it has a duty to ensure compliance. Failure to ensure compliance constitutes a lack of reasonable care. *Suncor*, 2019 WL 654129, at *7; *Summit*, 2022 WL 1572848, at *4. The Secretary has established actual knowledge by PENTA.

In the absence of actual knowledge, the pertinent inquiry is whether the controlling employer met its obligation . . . to exercise reasonable care, i.e., to take reasonable measures to prevent or detect the violative conditions." *Suncor*, 2019 WL 654129, at *7 (controlling employer's duty should be assessed "in light of objective factors—the nature of the work, the scale of the project, and safety history and experience of the contractors involved"); s*ee also Summit*, 2022 WL 1572848, at *4. Alternatively, the Secretary has established Sherrod's and Ros' constructive knowledge based on the Court's finding above that PENTA violated this standard. PENTA's failure to ensure compliance constitutes a lack of reasonable care. *Suncor*, 2019 WL 654129, at *7; *Summit*, 2022 WL 1572848, at *4.

Sherrod and Ros had general supervision over worker safety, and thus were supervisors for the purpose of imputing their knowledge to PENTA. *R. Williams Constr. Co. v. Occupational Safety & Health Review Comm'n*, 464 F.3d at 1064; *Dover Elevator Co.*, 16 BNA OSHC at 1286;

Rawson Contractors, Inc., 20 BNA OSHC at 1080; *Access Equip. Sys., Inc.*, 18 BNA OSHC at 1726. The knowledge of Sherrod and Ros is inputted to PENTA. The Secretary has met her burden in establishing PENTA's knowledge.

The Secretary has met her burden to establish her prima facia case that PENTA violated the cited standard. Citation 1, Item 3 is AFFIRMED.

vi. The Violation was Serious

The Secretary has classified the violation of 29 C.F.R. § 1926.200(c)(1) as serious. Here, [redacted] died as a result of the crush-by hazard posed by moving the Gate from the cubby area. (J. Stip. ¶ A(34)). It is uncontroverted no caution signs were in place to warn him or the other Raymond employees of the hazard associated with moving the Gate. (Tr. 175, 315-16, 361, 431, 435-36, 530, 631, 648-49, 665-66, 813, 835-36, 856). [redacted]'s death demonstrates the violation was serious. *Coleco Indus.*, 14 BNA OSHC 1961, 1964 (No. 84-546, 1991). The Secretary has established the violation of 29 C.F.R. § 1926.200(c)(1) was serious.

VII. Penalty

When OSHA issues a Citation, it may include a proposed penalty amount. *See* 29 U.S.C. § 659(a). OSHA has published a Field Operations Manual (FOM) to, among other things, act as a guide for its CSHOs in proposing penalties. FOM at 1-1, 6-1. FOM, Directive No. CPL-02-00-163 (eff. Sept. 13, 2019). However, the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *See Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0293, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995); *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975). In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Court to give due consideration to four criteria: (1) the size of the employer's

business; (2) the gravity of the violations; (3) the good faith of the employer; and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2214.

Because the Court VACATES Item 1 of the Citation, only the penalty amounts for Item 2 and Item 3 remain at issue. For each of these Items, the Citation proposed a penalty of $13,653, for a total proposed penalty of $27,306. For both violations, the CSHO calculated the penalties using the formula provided in OSHA's FOM. (Tr. 152-53, 156, 168). The CSHO calculated the severity to be "high" based on "the ability for an employee to be killed …" (Tr. 153, 156, 168; Exs. C-6, at 1 & 3; C-7, at 1 & 3). The CSHO calculated the "probability" to be "greater" because "on more than one occasions [sic] the [G]ate was being manipulated. It would have the potential for an employee to be exposed to those hazards." (Tr. 153, 156, 168; Exs. C-6, at 1 & 3; C-7, at 1 & 3). The combination of the high severity and greater probability led to an assessment of "high" gravity for both violations. (Tr. 152-53, 156, 168; Exs. C-6, at 1; C-7, at 1; FOM, at 6-3 to 6-5).

The CSHO did not reduce the penalty for PENTA's size because "PENTA exceeded the allowable percentage for reduction" by having "251 or more employees." (Tr. 171; Ex. C-3, at 6; FOM, at 6-10). Likewise, the CSHO did not reduce the penalty for good faith because "a fatality had occurred in this instance." (Tr. 171; Ex. C-3, at 6; FOM, at 6-8 ("No reduction shall be given for high gravity serious violations.")). Finally, the CSHO did not reduce the penalty based on PENTA's history because "there was other OSHA inspections within the last five years for citations being issued." (Tr. 171; Ex. C-3, at 6 ("[T]he employer was issued a serious citation on 06/01/2020."); FOM, at 6-7 to 6-8). Based on these considerations, the CSHO ultimately calculated

a penalty of $13,653 for each serious Item remaining.

The Secretary asks the Court to assess the penalties as proposed in the Citation. (Secy's Br. 31). PENTA has made no arguments with regard to the proposed penalties. The Court agrees with the proposed penalties and therefore assesses them for each remaining Item. Particularly as to gravity, which the Court must give primary consideration, the Court agrees the violations of 29 C.F.R. § 1926.21(b)(2) and § 1926.200(c)(1) were of high gravity. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2214 (gravity is the primary consideration in assessing penalties). PENTA's failure to exercise reasonable care in instructing Raymond's employees in the hazard posed by moving the Gate and failure to ensure caution signs were placed on the Gate caused Raymond's employees to be unaware of the hazard and therefore contributed to the fatal accident in this case. *Nat'l Eng'g & Contracting Co.*, 18 BNA OSHC 1075, 1081 (No. 94-2787, 1997) (gravity high where the violation directly resulted in the death of one employee and the serious injury to another), *aff'd*, 181 F.3d 715 (6th Cir. 1999). The Court finds no basis in the record to reduce the penalties based on PENTA's size, history or good faith, and PENTA has advanced no argument in favor of a reduction on any of these bases.

The Court therefore assesses a penalty of $13,653 for Citation 1, Item 2 and a penalty of $13,653 for Citation 1, Item 3.

ORDER

The foregoing Decision constitutes the Court's 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:

1. Citation 1, Item 1 is VACATED.

2. Citation 1, Item 2 is AFFIRMED as a serious violation and a penalty of $13,653 is

ASSESSED.

3. Citation 1, Item 3 is AFFIRMED as a serious violation and a penalty of $13,653 is ASSESSED.

SO ORDERED.

Patrick B. Augustine
Patrick B. Augustine
First Judge – Denver OSHRC

Date: July 3, 2023
Denver, CO