United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. E&N CONSTRUCTION, INC., Respondent.	OSHRC DOCKET NO. 15-1835

APPEARANCES:

Margaret A. Temple, Esquire,
Department of Labor, Office of the Solicitor,
New York, New York
For the Secretary

Daniel R. Bevere, Esquire,
Piro Zinna Cifelli Paris & Genitempo, LLC
Nutley, New Jersey
For Respondent

BEFORE:

Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act). On Saturday, April 18, 2015, Compliance Officer (CO) Chester Lloyd[1] noticed

[1] CO Lloyd had been employed at OSHA for more than 15 years at the time of the inspection at issue. Before that, he was a safety supervisor at Raytheon Engineers and Hudson-Bergen Light Rail. CO Lloyd has a Bachelor's

what appeared to be employees working from a scaffold without fall protection at a construction worksite on Glenwood Avenue in Bloomfield, New Jersey (worksite). CO Lloyd opened an OSHA inspection for E&N Construction, Inc. (E&N). E&N was installing brick veneer on the columns of the garage for a large apartment building under construction. (Tr. 151).

On September 18, 2015, OSHA issued a citation and notification of penalty (Citation) to E&N. The Citation alleged five serious violations of OSHA's scaffold standard for a total proposed penalty of $35,000. (Stipulations of fact and law (Stip.) No. 4, Joint Pre-Hearing Statement (Jt Pre-Hr'g Stmt), 3-4; Tr. 15). E&N timely contested the citation. (Stip. No. 5, Jt Pre-Hr'g Stmt, 3-4; Tr. 15).

A one-day trial was held in Newark, New Jersey on December 6, 2016. Three witnesses testified at the hearing: CO Lloyd and Assistant Area Director (AAD) Brian Flynn[2] for the Secretary, and Shawn Roney for Respondent.

The five citation items alleged that: Respondent had not adequately planked the scaffold's working platforms, employees were climbing the scaffold's frame to access the scaffold, a pre-shift inspection of the scaffold was not conducted, employees were working over 10 feet above ground without fall protection, and cross-braces were missing from the scaffold.

Jurisdiction

Based upon the record, the Court finds Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5).[3] (Answer ¶¶ I-III; Stip. No. 2, Jt Pre-Hr'g Stmt, 3-

[2] AAD Flynn is the AAD for the Parsippany Area Office. He has served in that capacity since 2011. Before that, he served as a safety and health manager with the United States Postal Service. (Tr. 104).

[3] Respondent admitted and stipulated it was engaged in a business affecting interstate commerce and was an

4; Tr. 14). The Court finds the Commission has jurisdiction over the parties and subject matter in this case. (Stip. No. 1, Jt Pre-Hr'g Stmt, 3-4; Tr. 14).

Background

E&N is a concrete and masonry company in Passaic, New Jersey owned by Neil Kokel and Elio Ferrara. (Tr. 150-51, 182). E&N contracted with construction management group Avalon Bay Properties to install brick veneer on the outside of a large 4-story apartment building that was roughly the size of a city block in Bloomfield, New Jersey (Bloomfield project). (Tr. 22, 152). Avalon Bay Properties was the general contractor for the Bloomfield project. (Tr. 22, 152). E&N had been working at the Bloomfield project for about five to six months and April 18, 2015 was E&N's last day of work at the worksite that required scaffolding. (Tr. 153, 174).

CO Lloyd drove by the Bloomfield project after conducting an inspection at another worksite. (Tr. 21-22). The CO observed employees working from a scaffold platform[4] without fall protection and he stopped to investigate in accordance with OSHA's local area emphasis fall protection program. (Tr. 22-23). As a result of the inspection, the CO recommended issuance of five serious citation items related to fall protection and scaffolding violations. (Stip. No. 4, Jt Pre-Hr'g Stmt, 3-4; Tr. 14-15, 25). His supervisor, AAD Flynn, recommended the maximum $7,000 penalty for each item. (Tr. 35).

Relevant Testimony

CO Chester Lloyd

CO Lloyd conducted an inspection of Respondent's worksite on Saturday, April 18, 2015.[5] (Tr. 20, 81-82). CO Lloyd opened the inspection after observing employees working

[4] "Platform means a work surface elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated planks, fabricated decks, and fabricated platforms." 29 C.F.R. § 1926.450(b) Definitions.
[5] The CO had completed a fall protection inspection of a masonry company called Concrete Systems at the same site approximately 14 months before, when the Bloomfield Project was at an early construction stage. (Tr. 21, 77-78).

from a two-tier scaffold over ten feet above ground with no apparent fall protection. (Tr. 22-23, 54).

CO Lloyd arrived at the worksite mid-afternoon — around 2:00 or 3:00 p.m. — and was there for about an hour. (Tr. 24, 76-79). CO Lloyd pulled into a parking lot west of the worksite and took photographs of employees working from a tubular welded frame scaffold. (Tr. 22). He saw a man, identified as Manuel "Manny" Martins, looking toward the scaffold watching employees work. (Tr. 23-25, 32, 34, 74; Ex. 1, p. 10 at "A").

After the CO identified himself, Mr. Martins[6] told the CO that he was E&N's worksite foreman for the Bloomfield Project.[7] (Tr. 23, 32, 48, 61, 80). The CO opened the inspection with Foreman Martins and explained he had stopped at the worksite under the OSHA local fall protection emphasis program because he observed employees working from the scaffold without fall protection. (Tr. 22-23). Foreman Martins told the CO the employees working on the scaffold were employees of E&N. (Tr. 98). He also told the CO he reported to the "big boss" Shawn Roney. (Tr. 23, 82).

When the CO arrived, it was the end of the work day and employees were getting ready to go home. (Tr. 81, 86). The CO took "a lot of photos." He took photographs for twenty minutes from the time he arrived at the worksite. He also took photographs later during his visit to the worksite. (Tr. 26, 85-86; Ex. 1). When he realized the scaffold was being dismantled as he talked to Foreman Martins, the CO took a measurement of the distance from the ground to the plank on the scaffold's second-tier platform at the middle column. (Tr. 33-34, 86-87).

[6] During cross examination, the CO stated (in response to a question about Foreman Martins' English language skills) that he did not recall having any problems understanding or conversing with Foreman Martins. (Tr. 80)
[7] CO Lloyd testified that he had previously met Foreman Martins at a Best Construction Inc. (Best Construction) job site in Norton, New Jersey in March 2014. (Tr. 23, 32).

When the CO asked about the scaffold's condition, Foreman Martins told him that he was not sure why the guardrails were down—maybe because the guys wanted to get home early. (Tr. 34). When the CO asked the foreman if he knew employees were working without fall protection, Foreman Martins did not directly answer. Instead, he stated employees wanted to finish because it was the end of the day on a Saturday, and go home. (Tr. 25, 46, 66).

The CO interviewed two employees during his inspection, Messrs. Pedro Cedillo and Arnoldo Pinheiro. Both workers told him that they were employed by E&N. (Tr. 36-37, 82). Other employees left the worksite before he was able to interview them. (Tr. 37). By the end of the hour, the scaffold was completely dismantled. (Tr. 24, 74, 81, 86). The CO photographed the area after the scaffold was completely dismantled. (Tr. 86). Foreman Martins was onsite during the hour-long inspection. (Tr. 74, 81-82).

During his testimony, the CO described what he had observed and photographed at the worksite. The CO saw that between the scaffold's uprights, planks were missing from the scaffold's working platforms. There were several areas of missing planks on the second-tier platforms where employees were working at the time of the OSHA inspection. (Tr. 27-31; Ex. 1, p. 3, at "B"-"D", 4 at "B"). He photographed employees, including Mr. Pinheiro, working on the second-tier of the platform where planks were missing. Mr. Pinheiro was photographed several times while working from the scaffold's second-tier where planks were missing. (Tr. 28-38, 59, 61; Ex. 1, pp. 2-4, 6-8, 10-13, 15, 18-24).[8] The CO also photographed an employee he identified as Mr. Cedillo standing or working on the scaffold's second-tier.[9]

[8] The Court finds that the photographs at Ex. 1, pp. 2-3, 5, 8, 22-23, are identical, but varying in scope shown. The Court also finds that the photographs at Ex. 1, pp. 4 and 6, are identical.

[9] The Court finds that the CO correctly identified the employee at Ex. 1, pp. 4 & 6, at "A", 7 at "C", 8 at "E", as Mr. Cedillo, who is shown wearing a white shirt. (Tr. 37, 59, 194). The Court finds that the CO incorrectly identified the employee shown wearing a yellowish shirt on the second-tier platform at Ex. 15, at "A", as Mr. Cedillo. (Tr. 62). The worker wearing the yellowish shirt is otherwise unidentified in the record by name. Mr. Cedillo and the unidentified worker wearing the yellowish shirt are both shown at Ex. 1, p. 7, with Mr. Cedillo at "C" climbing the side of the scaffold frame and the unidentified worker at "E" working atop the second-tier platform.

Employees on the second-tier of the scaffold were doing rub-down work on bricks on two columns (the "middle" one and "one to the east") at the entrance to the building's garage.[10] (Tr. 29-34, 55-66, 83, 192; Ex. 1, pp. 2-3 at "A" [Pinheiro], 5 at "B" [Pinheiro], 7 at "D" [Pinheiro], 8 at "A" [Pinheiro], 10 at "B" [Pinheiro], 11-13 at "A" [Mr. Pinheiro], 18-20 at "A" [Pinheiro], 21 at "B" [Pinheiro], 22-24 at "A" [Pinheiro]; 2 at "D", 3 at "G", 5 at "D", 8 at "C", [unidentified by name] wearing red hat; 7 at "E" [unidentified by name] wearing yellowish shirt; 10 at "C", 17 at "B", 18 at "B", [unidentified by name] wearing yellow hat and blue in color shirt). CO Lloyd stated that Exhibit 1, page 8, shows an employee doing rub-down work on the brick veneer—not engaged in dismantling the scaffold. (Tr. 192). He said the workers on the second-tier of the scaffolding were "clearly working and not dismantling." (Tr. 95, 193).

The CO witnessed employees climbing the scaffold's frame to access the platforms. (Tr. 39-42, 45, 166-67; Ex. 1, pp. 3 at "E", 4 at "C", 5 at "A", 6 at "B", 7 at "C"). He noted there were no guardrails or other fall protection in use for the employees working from the second-tier of the scaffold. (Tr. 54-56, 61; Ex. 1, pp. 2, 10). The CO believed that guardrails could have been placed on the scaffold frame to provide fall protection for employees while they were rubbing down the walls. He said Subpart L of § 1926 of OSHA's Scaffolding standards also provides for a 14-inch space to allow employees to perform work in front of them. *See* 29 C.F.R. § 1926.451(b)(3). (Tr. 191-93).

The CO also noticed that cross-braces that support the scaffold's frame were missing. (Tr. 68-72, 91-92, 197; Ex. 1, pp. 3 at "H", 4, at "D" & "F", 7 at "F", 8 at "D"). The CO stated that cross-braces should not be removed while employees were still working from the scaffold's top tier. He said the photograph at Ex. 1, p. 4 at "F", showed that a set of cross-braces were not

[10] CO Lloyd testified that he saw "a large piece of plywood with mortar on it so they were probably filling in maybe some sections after they had placed the brick." (Tr. 95).

attached to the scaffold when it should have been attached because workers were still working on the second-tier platform. He stated that workers were exposed to the 29 C.F.R. § 1926.452(c)(2) hazard because the cross-braces were not intact at the time. (Tr. 29-30, 68-69, 192, 197-98; Ex. 1, pp. 2 at "A", 3 at "A", 4 at "D" and "F", 5 at "B", 8 at "A", 23 at "A", 24 at "A").

Shawn Roney

Mr. Shawn Roney[11] has been a manager at E&N for about three years. He is one of two managers at E&N. He has no ownership interest in E&N. (Tr. 151, 182). As manager, he negotiates contracts, talks to site foremen, and negotiates with vendors, among other things. (Tr. 151). For the Bloomfield project, Mr. Roney worked on the bids for the project, assisted the foreman, and was generally on site at least once a week. (Tr. 153). He testified that he was the project manager for the project at the worksite. (Tr. 175). Mr. Roney said he believed that April 18, 2015 was E&N's last day of work at the Bloomfield project that required scaffolding. (Tr. 153. 174). Mr. Roney was not at E&N's worksite during the OSHA inspection or at any time on April 18, 2015. (Tr. 159-62).

Scaffolding had been used continuously by E&N employees to apply the brick veneer to the large multi-story apartment building project. (Tr. 153-56). A mast-climbing scaffold rented from Advanced Scaffolding was used by workers for most of the project.[12] (Tr. 156-58). On April 18, 2015, a tubular welded frame scaffold was used to install brick veneer on columns by the building's garage entrance.[13] (Tr. 157). A tubular welded frame scaffold was used here

[11] Throughout various filings and documents in the record, Mr. Roney's name is spelled a variety of ways: Sean Rooney, Sean Roney, and Shawn Roney. Because the attorneys for the Respondent consistently spell his name as "Shawn Roney" and the notarized "DECLARATION THAT E&N CONSTRUCTION DOES NOT HAVE ANY PARENT OR AFFILIATE ENTITIES" that was signed by Mr. Roney, also spells his name as "Shawn Roney," the Court uses the spelling of "Shawn Roney."

[12] Mr. Roney testified that a mast-climbing scaffold system was "a lot safer and what it would consist of is two tower units and there's towers that are tied back into the building. And it elevates up. It just keeps on moving up the entire building at a level and it's all enclosed at the same time." (Tr. 156-57).

[13] The tubular welded frame scaffold was also referred to as a "pipe" scaffold in the record. (Tr. 157). A fabricated frame scaffold (tubular welded frame scaffold) is defined as "a scaffold consisting of platform(s) supported on

because the column area configuration did not support a mast-climbing scaffold. (Tr. 157). Mr. Roney testified that pipe scaffolding was used because E&N workers had to work completely around the columns. This was the final area of brick veneer installed at the project. (Tr. 157).

Mr. Roney testified that as the brick is applied to the building's walls, cement splashes off the scaffold's toe boards onto the brick face of the building. (Tr. 160-61). He said the brick mason removes the scaffold's toe boards and planks next to the brick veneer and cleans, or rubs-down, the brick veneer as the scaffold is dismantled. Mr. Roney stated "as you're going down you just clean it up a little bit, you take a trowel, you cut the joints in them areas out and you have to rub it down as you're dismantling the scaffold." He testified that he has "been doing this since [he] was 14 years old and that's the only way I know."[14] He further said it was standard practice and procedure not to provide any fall protection when scaffolding is being dismantled at a height of 13 feet, 4 inches and workers are doing the rubdown on the wall. He testified that "it's just not practical" because you need something to attach to. He said Foreman Martins made the decision not to use fall protection while the scaffolding was being dismantled. (Tr. 161-64).

When the CO arrived at the worksite, the employees were completing the rub-down work on the brick veneer at the garage entrance. Mr. Roney stated the photographs verify that all the brick veneer had been installed. (Tr. 160-61; Ex. 1).

With respect to employee access to the scaffold platforms, Mr. Roney stated the photographs show the ladder that was available to access the scaffold. (Tr. 165-67; Ex. 1, pp. 2 at "E", 3 at "J"). Mr. Roney admitted employees were doing things that they should not have been doing when climbing the scaffold frame instead of using the ladder and that Foreman Martins should have stopped them.[15] (Tr. 167).

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[14] Mr. Roney "dropped out of high school" at age 14. (Tr. 220).

[15] Mr. Roney opined that E&N's employees knew not to climb on the scaffold and doing so "would be more of an employee misconduct." (Tr.167-68). However, as discussed below, this defense was not raised by Respondent, thus

According to Mr. Roney, fall protection equipment had been provided for employees to use at the site. (Tr. 163). However, Mr. Roney also believed it was not practical to use the equipment and that Foreman Martins must have decided to not use fall protection during the dismantling of the scaffold. (Tr. 163-64, 217). He said it was E&N's practice to have the site foreman inspect scaffolding at the beginning of each workday. (Tr. 169).

Mr. Roney believed there was only one brace missing, not two as alleged by CO Lloyd in Citation 1, Item 5. He believed the missing cross-brace had been in place on the scaffold earlier that day and had just been removed because the scaffold was being dismantled. From looking at the photograph at Ex. 1, p. 4, Mr. Roney believed that a piece leaning, from apparently the ground, against a platform in a diagonal position was a brace CO Lloyd said was missing[16] [Ex. 1, pp. 3 at "H", 4 at "D", 7 at "F", 8 at "D"]. (Tr. 170-74, 197; Ex. 1, p. 4 at "F"). He also said that some cross-braces, already removed from the scaffold, were placed atop a pallet to be removed from the worksite. (Tr. 174; Ex. 1, p. 4 at "G").

Mr. Roney had previously worked for other construction companies, including Best Construction as a manager, Innovative Masonry, and J&S Concrete. He owned Innovative Masonry at one time and J&S Concrete. He said Best Construction was owned by Lydia Ferrerra and his wife, Diana Roney. He said Best Construction had been closed for quite a few years. (Tr. 182-84).

Mr. Roney had an OSH 30-hour training card, a scaffold erectors card, and scaffold users card. (Tr. 154). Foreman Martins was responsible for running the project on a day-to-day basis. Mr. Roney testified that Foreman Martins was OSHA trained and certified. (Tr. 155). Foreman Martins was the "competent person"[17] and certified erector for the worksite. (Tr. 46, 80-81,

[16] To clarify, Mr. Roney never marked Ex. 1, p. 4, with an "E". (Tr. 171-73).
[17] "Competent person means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to

158). Mr. Roney believed most of E&N's employees were OSHA trained. (Tr. 154-55).

Mr. Roney testified that E&N received the OSHA citations because he was the project manager. (Tr. 175). Thereafter, he spoke to several OSHA personnel, including the Area Director and AAD Flynn. He said AAD Flynn told him because of his [Roney's] association with other companies where there were other OSHA violations, the company he was now working for as an employee was "going to pay the penalty." Mr. Roney accused AAD Flynn of "discriminating against" him, abusing his power as a government official, and inaccurately stating he owned companies when he did not.[18] (Tr. 177-80).

According to Mr. Roney, a site-specific safety plan had been required as a part of E&N's subcontractor agreement with Avalon Bay Properties. (Tr. 218). Mr. Roney also stated that he thought the employees may have been disciplined for not using the ladder at the worksite; however, he had no records with him to support this.[19] (Tr. 184-85).

AAD Brian Flynn

AAD Flynn's testimony focused on the basis for the proposed penalties. He applied no reductions to the $7,000 per item statutory maximum because of his history with Shawn Roney. (Tr. 106-07, 120).

AAD Flynn did not know who owned E&N Construction. (Tr. 124-25). AAD Flynn stated it did not matter whether Mr. Roney was an owner; the fact that Mr. Roney was in a management role and was the company representative that contacted OSHA was important. (Tr. 139). AAD Flynn had interacted with Mr. Roney five or six times when Mr. Roney was

[18] Mr. Roney denied ever having any ownership interest in Salem Masonry, Best Construction, or Dunbar. (Tr. 179). In rebuttal, AAD Flynn denied he had any "personal vendetta" against Mr. Roney. He also denied using any harsh language during his brief informal conference with Mr. Roney in this matter. He said he always gave Mr. Roney "very fair, reasonable, I [AAD Flynn] think generous settlements in the past." (Tr. 200-02). The Court deals with any allegations of discrimination and abuse of power in its discussion of the "Penalty Amount" hereinafter.
[19] Mr. Roney said he could get paperwork showing he disciplined E&N employees. (Tr. 184-85).

affiliated with Best Construction. (Tr. 107, 117). AAD Flynn stated that Mr. Roney had been the management representative at Best Construction from 2005 to 2011. (Tr. 111-12).

AAD Flynn believed all his conversations with Mr. Roney focused on the penalty amount, not employee safety. (Tr. 109). He decided a larger penalty was necessary to provide a deterrent effect and promote compliance with requirements for worker safety. (Tr. 140).

AAD Flynn compiled a history of OSHA inspections[20] for multiple companies that he believed Mr. Roney had either been a representative or owner. (Tr. 107, 145). These companies included Salem Masonry, Dunbar Construction Services, Best Construction, and Innovative Masonry. (Tr. 122). AAD Flynn made the connection between the companies through Google searches, not through the New Jersey Secretary of State's website. (Tr. 122). He admitted E&N's address did not match the address of any of these companies. (Tr. 124). AAD Flynn referred to the OSHA citation history of these companies as a basis for his penalty assessment for E&N's violations. (Tr. 113-14).

Over the course of several years, AAD Flynn had formed the opinion that Best Construction and Salem Masonry Company were interchangeable names for the same employer. (Tr. 113). However, he had no information that Mr. Roney had an ownership interest in any of the companies. (Tr. 123-24). AAD Flynn found Mr. Roney's wife was the owner of Salem Masonry Company, Best Construction, and Dunbar Construction Services. (Tr. 123).

Further, AAD Flynn believed E&N had not been cooperative during the inspection and had not made efforts to minimize the harm to employees at the site. (Tr. 210-11).

THE CITATIONS

Secretary's Burden of Proof

[20] AAD Flynn referred to a document marked as Exhibit 2 for identification throughout his testimony. Respondent objected to the admission of this document on the basis of relevancy in that there was no connection between these companies and E&N. (Tr. 141-43). This document was not admitted into evidence. (Tr. 145).

To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited condition. *Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

Citation 1, Item 1

The Secretary cited Respondent for a serious violation of 29 C.F.R. § 1926.451(b)(1), which requires:

> (b) *Scaffold platform construction.* (1) Each platform on all *working levels* of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows:
>
> (i) Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).
>
> (ii) Where the employer makes the demonstration provided for in paragraph (b)(1)(i) of this section, the platform shall be planked or decked as fully as possible and the remaining open space between the platform and the uprights shall not exceed 9 ½ inches (24.1 cm).
>
> Exception to paragraph (b)(1): The requirement in paragraph (b)(1) to provide full planking or decking does not apply to platforms used solely as walkways or *solely by employees performing scaffold erection or dismantling*. In these situations, only the planking that the employer establishes is necessary to provide safe working conditions is required. (emphasis added).

The Secretary alleged that on or about April 18, 2015, employees were exposed to falls of 13 feet, 4 inches to the ground below because the working levels of the tubular welded frame scaffolds were not fully planked or decked between the scaffold's uprights and the guardrail

supports. The Secretary asserts that the violation "pertains to those workers at the top tiers of the scaffold thirteen feet four inches above the ground, who were clearly working and not dismantling." (Citation and Complaint; S. Br. 5).

The standard is applicable

E&N asserts the standard's exception applies because employees were dismantling the scaffold. (R. Br. 4). The Secretary asserts that employees were working on the brick veneer from the scaffold platform, not engaged in dismantling work. (S. Br. 4-5, 10-11, 13).

An employer seeking the exception to a standard's requirements has the burden to show the exception is applicable. *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001) (citations omitted). To qualify for the exception in the cited standard, employees working on the scaffold must be "solely. . . performing scaffold erection or dismantling" work. 29 C.F.R. § 1926.451(b)(1).

The Commission squarely addressed this issue in *Smoot Constr.*, 21 BNA OSHC 1555 (No. 05-0652, 2006). There, employees were erecting the scaffold while other employees were on the scaffold constructing the building's formwork. *Id.* at 1556. The Commission found that "additional work done or performed while the employees are on the scaffold renders the exception inapplicable." *Id.* The dismantling exception did not apply because other work was being done from the scaffold.

Similarly here, the Court finds Respondent does not qualify for the dismantling exception to the standard's requirements. There is no dispute that employees on the scaffold's second-tier platform were not solely dismantling the scaffold, they were engaged in the finishing rub-down work on the brick veneer of two columns. (Tr. 78, 83, 160-63). Respondent admitted "the only work being performed at the time of the inspection was the dismantling of the scaffolding and

the concomitant rub down work being performed." (R. Br. 4). Based on photographs and testimony, the Court finds that one employee, Mr. Cedillo, on the scaffold was engaged in dismantling work. Mr. Cedillo was photographed removing a plank from the scaffold's first level[21] as Mr. Pinheiro worked on the brick veneer from the second level.[22] (Tr. 193; Ex. 1, pp. 2-3, 5, 8 at "E", 22-23). Photographs also show at least three other employees doing rub-down or brushing work on the brick veneer from the scaffold's second-tier platform near where planks were missing from the platform. (Tr. 29-34, 55-66, 83, 192-93; Ex. 1, pp. 2 at "D", 3 at "G", 5 at "D", 8 at "C", [unidentified by name] wearing red hat; 7 at "E" [unidentified by name] wearing yellowish shirt; 10 at "C", 17 at "B", 18 at "B", [unidentified by name] wearing yellow hat and blue in color shirt).

The Court finds Respondent does not qualify for the exception because employees were engaged in rub-down work from the scaffold's platform. Thus, the requirements of the cited standard apply

Employees were exposed to the hazard

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996).

Here, employees were actually exposed to the hazard from the inadequately planked

[21] CO Lloyd testified that "all Scaffold first tiers are approximately six feet to six feet, six inches" above the ground level. (Tr. 194). CO Lloyd said that the worker [Mr. Cedillo] shown standing on the first tier bringing the plank down in the photograph at Ex. 1, p. 8, at "E" was "obviously" engaged in dismantling. He said it was "fine" for Mr. Cedillo to be "dismantling like that" at a level less than 10 feet without fall protection. (Tr. 191-94). He also said, where feasible, fall protection was required when workers were engaged in dismantling activities at a level "over ten feet". He said that it was "feasible" for E&N to provide fall protection to its workers at the jobsite that were engaged in rubbing or brushing down the bricks while standing on the second-tier platform. CO Lloyd said that "nowadays it's very hard for" an employer to show that it was "infeasible to use fall protection" given the available fall protection equipment and the "state of the art fall protection [that is] out there." (Tr. 194, 205).

[22] The photograph at Ex. 1, p. 8 at "A", shows Mr. Pinheiro working on the brick veneer from the scaffold's second-tier. (Tr.192; Ex. 1, p. 8 at "A").

platforms. *See Gilles & Cotting, Inc.,* 3 BNA OSHC 2002, 2004 n. 4 (No. 504, 1976) (finding that if employee was actually in the zone of danger and exposed to the hazardous condition, the element of exposure is established).

CO Lloyd testified that four or five employees were exposed to the hazard. (Tr. 27-38; S. Br. 4). The photographs at Ex. 1, pp. 2-3 at "A" [Pinheiro], 5 at "B" [Pinheiro], 7 at "D" [Pinheiro], 8 at "A" [Pinheiro], 10 at "B" [Pinheiro], 11-13 at "A" [Mr. Pinheiro], 18-20 at "A" [Pinheiro], 21 at "B" [Pinheiro], 22-24 at "A" [Pinheiro], all show Mr. Pinheiro working on the second-tier platform in areas where planks are missing. Photographs also show that at least three additional unidentified employees were working while standing on the second platform tiers near where planks are missing. (Tr. 34; Ex. 1, pp. 2 at "D", 3 at "G", 5 at "D", 7 at "E" wearing yellowish shirt, 8 at "C", wearing red hat, 10 at "C", 17 at "B", 18 at "B", wearing yellow hat and blue in color shirt). The Court finds at least four employees, including Mr. Pinheiro, were working from scaffold platforms that were not fully planked. Employee exposure is proved.

The standard was violated

Respondent argues the scaffold platforms cannot be fully planked while employees complete the rub-down work on the bricks—the work can only be done while the scaffold is being dismantled. (Tr. 160; R. Br. 4, 6).

The Court rejects Respondent's argument for three reasons. First, other than a bare assertion that a scaffold cannot be fully planked during rub-down work, Respondent provided no persuasive evidence about what platform configuration is or is not possible when doing rub-down work. Second, the brick veneer was next to the scaffold's inner perimeter; planks were missing from the platform's outer perimeter, which was not next to the face of the brick veneer. (Tr. 27-31; Ex. 1, pp. 3, at "B"-"D", 4 at "B"). Third, it appears Respondent is asserting an

infeasibility defense, which is not supported.

Infeasibility is an affirmative defense for which the employer has the burden of proof. *See Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993) *aff'd*, 28 F.3d 1213 (6th Cir. 1994). Commission Rule of Procedure 34(b)(3) requires an employer to raise an affirmative defense in its answer. *See Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1387 (No. 92-262, 1995) (citations omitted). An employer may be able to assert the defense later if it can show the issue has been tried by the consent of both parties. *Id.*

To succeed in an infeasibility defense, an employer must "prove that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection." *Id.*

Here, there was no attempt by Respondent to assert or support this possible defense. Respondent did not assert the affirmative defense of infeasibility in its answer or any subsequent pleading. Further, the Court finds the defense of infeasibility was not tried by the parties. Finally, the Court finds that Respondent did not provide sufficient evidence to support an infeasibility defense. Thus, the Court finds Respondent's assertion the rub-down work could not be done with a fully-planked scaffold is unsupported and has no merit.

At least four employees worked from the scaffold's second-tier platforms doing rub-down work. The Secretary identified several areas on the scaffold where the platforms were not fully planked. These areas were along the outer perimeter of the scaffold. CO Lloyd stated that an employee could "inadvertently back up or step off the planks" and fall through the gaps

created where planks were missing from the platforms. (Tr. 31-33; Ex. 1, pp. 3 at "B", "C" & "D", 4 at "B", 7 at "A" & "B"; S. Br. 4). Photographs taken by the CO show planks were missing from the second-tier platforms where employees stood while working on the brick veneer. (Ex. 1, pp. 3 at "B"-"D", 4 at "B"). Respondent did not rebut the Secretary's assertion that planks were missing there.

The Court finds the scaffolds were not fully planked and Respondent did not comply with the requirements of the cited standard.

Knowledge

The Secretary has the burden to establish the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Contour Erection & Siding Syst., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007) (*Contour*). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079-80. It is not necessary to show that the employer knew or understood the condition was hazardous. *Id.* Knowledge is imputed to the employer "through its supervisory employee." *Am. Eng'g & Dev. Corp.,* 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (citations omitted) (AEDC).

The Secretary asserts Respondent had actual knowledge of the violative condition through its foreman, Manny Martins.[23] (S. Br. 4). When the CO arrived at the worksite he saw Foreman Martins watching the employees. CO Lloyd testified that Foreman Martins was standing at the worksite "looking at scaffold defects and fall protection issues" and did nothing to correct them. (Tr. 23, 32-33, 43, 46, 48-49). The CO observed and photographed employees working from the scaffold's platforms. (Tr. 33-34; Ex. 1). One photograph shows Foreman Martins watching employees as they worked from the inadequately planked second-tier scaffold.

[23] Respondent offered no argument as to whether it had knowledge of the violative condition.

(Tr. 32-33, 43; Ex. 1, p. 10 at "A"). The Court finds actual knowledge of the violative condition is established.

The Court also finds constructive knowledge is established. Constructive knowledge can be established by showing the employer "with the exercise of reasonable diligence could have known of the violative condition." *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1265 (No. 06-1416, 2008) (citations omitted) (*KS Energy*). "Whether an employer was reasonably diligent involves consideration of several factors, including an employer's obligation to inspect the work area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations." *Shaw Areva Mox Servs., LLC*, 23 BNA OSHC 1821, 1825 (No. 09-1284, 2012) (citations omitted) (*Shaw Areva*). In evaluating these factors, the Commission has considered "how long the violative condition [ ] had been in existence, and whether the condition was readily apparent." *Id*.

There is insufficient evidence in the record to show that Respondent took adequate steps to inspect the work area in the hours before the inspection, anticipate hazards, or make an effort to prevent employees from working from inadequately planked second-tier platforms during the early afternoon of April 18, 2015. The foreman was observing employees at work at the time of the inspection; but there is no evidence that he took any steps to ensure the scaffold was fully planked at the second-tier. Respondent did not demonstrate reasonable diligence.

Constructive knowledge can also "be found where a supervisory employee was in close proximity to a readily apparent violation." *KS Energy*, 22 BNA OSHC at 1265-66. As the CO arrived onsite, he saw Foreman Martins looking toward the scaffold. (Tr. 23, 32-33, 43). The CO photographed the foreman watching the employees working on the inadequately planked platform. (Tr. 32-33; Ex. 1, p. 10 at "A"). Manny Martins was in the area where employees

worked from the scaffold and the lack of planking on the scaffold was easily observed. Because Foreman Martins was near the scaffold and the violative condition was readily apparent, the Court finds that with reasonable diligence Foreman Martins would have known the scaffold platforms were not fully planked.

Thus, the Court finds Respondent had constructive knowledge.

With respect to imputation of the foreman's knowledge, there is no dispute that Manny Martins was Respondent's foreman at the worksite. Under Commission precedent Mr. Martins' knowledge as foreman is imputable to the Respondent. *See AEDC,* 23 BNA OSHC at 2095 (knowledge is imputed through an employer's supervisory employee).

Nonetheless, this case arises in the Third Circuit, which does not follow the Commission's precedent for imputing knowledge to the employer from a foreman or supervisor. When the law of the circuit where a decision may be appealed differs from Commission precedent, the Commission applies the law of that circuit. *See, e.g., Deep S. Crane & Rigging Co*., 23 BNA OSHC 2099, 2102 (No. 09-0294, 2012); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067-71 (No. 96-1719, 2000).

Third Circuit precedent requires the Commission to prove foreseeability[24] in order to impute knowledge from a supervisor who had knowledge of or participates in the violative conduct. *Pa. Power & Light Co v. OSHRC*, 737 F.2d 350, 357-58 (3rd Cir. 1984) (*PP&L*). The Third Circuit requires the burden of proof for the knowledge element to remain with the Secretary; however, it does allow consideration of whether the employer has "undertaken reasonable safety precautions" when evaluating employer knowledge. *Id.*

The Commission set forth three factors to determine whether a violation was foreseeable

[24] The Secretary also asserted the violative condition was foreseeable based on AAD Flynn's prior experience with Mr. Roney for citations issued to other employers. (S. Br. 14). This assertion is not supported and fails. The Court finds Mr. Roney's alleged conduct at prior employers is not relevant to the knowledge analysis in the instant case.

under Third Circuit precedent: (1) whether supervisors were adequately trained in safety matters, (2) whether reasonable steps were taken to discover safety violations committed by supervisors, and (3) whether the company had a consistently enforced safety policy. *Kerns Bros. Tree Serv.*, 18 BNA OSHC at 2068-71.

Respondent's sole evidence of a safety program is Mr. Roney's testimony.[25] (Tr. 154-55, 185, 218). Mr. Roney testified that Foreman Martins was OSHA trained and certified.[26] (Tr. 155). Mr. Roney also stated that he thought employees may have been disciplined for not using the ladder at the worksite; however, no disciplinary records or documentation were provided for the record. (Tr. 184-86). According to Mr. Roney, a site-specific safety plan had been required as a part of E&N's subcontractor agreement. (Tr. 218). Nonetheless, Respondent did not submit documentation to support Mr. Roney's general testimony that E&N had a safety program, that its employees were trained in safety matters, or that employees had been disciplined for not using the ladder to access the scaffold.

Other than Mr. Roney's unsupported statement, there is no evidence in the record to show that Foreman Martins was ever trained in safety matters, whether Respondent had a consistently enforced safety policy, or that Respondent took any steps to determine if its supervisors were complying and enforcing safety rules. Respondent presented no documentary evidence of work rules or safety practices it utilizes at worksites.

Respondent is uniquely able to present information and documentation about its safety program. *See generally, N. Landing Line Constr. Co.,* 19 BNA OSHC 1465, 1473 (No. 96-0721, 2001) (finding the safety program is within the control of the employer and any "evidentiary

[25] During his testimony, AAD Flynn referred to OSHA's file and found a safety program for Avalon Bay Properties, but did not see a safety program with E&N's name on it. The only safety-related documents with E&N's name were some toolbox talks that had been submitted to OSHA. (Tr. 22, 208-09).
[26] Mr. Roney also testified that, to the best of his knowledge, most of E&N's employees were OSHA trained and certified. (Tr. 154).

deficiencies" are the responsibility of the employer once the Secretary has requested the information).

Because there is insufficient evidence that Respondent provided "reasonable safety precautions" for its worksite through oversight of its supervisors, training of its supervisors, or a consistently enforced safety policy, the Court finds it was foreseeable Foreman Martins would allow the violative condition to occur at the worksite. Thus, Foreman Martins' knowledge can be imputed to Respondent.

The Court finds the cited standard applies, employees were exposed, its terms were violated, and Respondent had the requisite knowledge. Citation 1, item 1 is affirmed.

Citation 1, Item 2

The Secretary cited Respondent for a serious violation of 29 C.F.R. § 1926.451(e)(1), which requires:

> (e) *Access*. This paragraph applies to scaffold access for all employees. *Access requirements for employees erecting or dismantling supported scaffolds are specifically addressed in paragraph (e)(9) of this section.*[27]
> (1) When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. *Crossbraces shall not be used as a means of access.* (emphasis added).

The Secretary alleged that on or about April 18, 2015, "[e]mployees were exposed to falls up to 13 feet, 4 inches to the ground below as cross-braces and scaffold frames not made for climbing were used for access to the scaffold platforms." (Citation and Complaint).

Respondent asserts that a ladder was provided and available for use by employees. (Tr. 146-47; R. Br. 4, 7). Further, Respondent asserts that employees involved in dismantling the

[27] 29 C.F.R. § 1926.451e(9)(iv) states: Effective September 2, 1997, access for employees erecting or dismantling supported scaffolds shall be in accordance with the following: … (iv) *Cross braces on tubular welded frame scaffolds shall not be used as a means of access or egress*. (emphasis added).

scaffold were allowed to use the scaffold's frame for access in lieu of the ladder. (Tr. 147).

The cited standard is applicable

Respondent asserts the cited standard does not apply because its employees were dismantling the scaffold.[28] (R. Br. 6). Respondent argues the cited standard's access requirements do not apply to employees dismantling the scaffold; instead the requirements at 29 C.F.R. § 1926.451(e)(9) are applicable.[29] As discussed above, most of the employees working from the scaffold were not engaged in dismantling work. The evidence shows that only one employee, Mr. Cedillo, was actually engaged in dismantling work at the time of the inspection. (Ex. 1, pp. 3, 5, 8 at "E").

Thus, the Court finds the cited standard is applicable.

Employees were exposed to the hazard

The Secretary asserts the photographs show "[a]pproximately four of Respondent's employees improperly" using the scaffold frame instead of the ladder for access. (S. Br. 6). However, a review of the photographs shows just three employees climbing the sides of the

[28] "(9) Effective September 2, 1997, access for employees erecting or dismantling supported scaffolds shall be in accordance with the following:
(i) The employer shall provide safe means of access for each employee erecting or dismantling a scaffold where the provision of safe access is feasible and does not create a greater hazard. The employer shall have a competent person determine whether it is feasible or would pose a greater hazard to provide, and have employees use a safe means of access. This determination shall be based on site conditions and the type of scaffold being erected or dismantled…." 29 C.F.R. § 1926.451(e)(9).

[29] "Paragraph (e)(9) of the final rule sets access requirements for employees erecting or dismantling supported scaffolds. The introductory language of paragraph (e)(9) requires employers to comply with final paragraphs (e)(9)(i)-(iv) starting on September 2, 1997. OSHA has delayed implementation of this paragraph (as well as paragraph (g)(2)) so that affected employers have sufficient time to develop and implement the necessary measures. In addition, the delayed implementation allows time for OSHA to complete work on non-mandatory Appendix B, discussed below, which will provide examples of considerations that employers complying with paragraphs (e)(9) and (g)(2) would take into account. Paragraph (e)(9)(i) provides that the means of access for erectors or dismantlers shall be determined by a competent person, based on specific site conditions and the type of scaffold being erected. As discussed in relation to the introductory text of final rule paragraph (e), while the Agency originally proposed to exempt erectors and dismantlers working on supported scaffolds from requirements for safe access, careful review of the record has led OSHA to the conclusion that a competent person is the appropriate individual to decide what the appropriate means of access for scaffold erectors and dismantlers is on any particular job, based on specific site conditions." Safety Standards for Scaffolds Used in the Construction Industry, 61 Fed. Reg. 46026, 46508 (Aug 30, 1996) (to be codified at 29 C.F.R. § 1926).

scaffold frame. Mr. Pinheiro is shown climbing the side of the scaffold frame in two of the same photographs. (Tr. 39- 42, 45; Ex. 1, pp. 4 at "C", 6 at "B"). A second unidentified employee is shown climbing the side of the scaffold frame in two of the same photographs. (Tr. 39-41; Ex. 1, pp. 3 at "E", 5 at "A"). Mr. Cedillo is also shown climbing the side of the scaffold frame in the photograph at Ex. 1, p. 7 at "C". (Tr. 42-45; Ex. 1, p. 7 at "C"). Respondent does not dispute that its "employees may have been climbing up and down on the scaffolding itself" and that its "workers may have been climbing in the scaffolding." (R. Br. 4, Proposed Finding of Fact #31, R. Br. 7).

As discussed above, only Mr. Cedillo was engaged in dismantling work on the scaffold. The other two employees were not dismantling the scaffold. Mr. Pinheiro was doing rub-down work on the bricks from the scaffold's platform. (Ex. 1, pp. 2-3 at "A", 5 at "B", 7 at "D", 8 at "A", 10 at "B", 11-13 at "A", 18-20 at "A", 21 at "B", 22-24 at "A"). The Court finds the other unidentified employee shown climbing the scaffold frame was also not engaged in dismantling work. There is also insufficient evidence in the record showing that any competent person, including Foreman Martins, decided what the appropriate means of access for scaffold erectors and dismantlers was at the worksite, based on the specific site conditions of April 18, 2015. 29 C.F.R. § 1926.451e(9)(iv) also states that cross-braces on tubular welded frame scaffolds shall not be used as a means of access or egress during the dismantling of supported scaffolds. Thus, the Court finds that no dismantling exception to the cited standard applied to Mr. Cedillo at the time of the OSHA inspection. Consequently, the Court finds that Messrs. Cedillo, Pinheiro, and the unidentified employee were subject to the requirements of the cited standard and exposed to the hazard. The Secretary has proved exposure for the cited standard.

The standard was violated

Respondent also asserts it did not violate the requirements of the standard because it provided a ladder. (Tr. 168; R. Br. 4, 7). The Secretary does not dispute that a ladder was present; instead, the Secretary asserts employees used the scaffold's frame instead of the ladder. (Tr. 88).

Respondent's assertion the cited standard simply requires the employer to provide a ladder is incorrect. Respondent mischaracterizes the cited standard by asserting that "[t]he violation that was cited was with regard to the ladder access." (Tr. 168; R. Br. 7). The plain language of the cited standard states that a safe means of access, such as a ladder, "shall be used." 29 C.F.R. § 1926.451(e)(1). It further states that "[c]rossbraces shall not be used as a means of access." *Id.* Respondent's assertion that the cited standard only requires the ladder to be present is rejected.

The CO agreed the ladder could have been used to access the scaffold; however, he saw workers climbing the scaffold frame instead of using the ladder. (Tr. 88). He testified that while talking with Foreman Martins, he saw "a worker climbing down the frame of the scaffold." CO Lloyd said the scaffold's side frames "are not meant for climbing." (Tr. 39). The photographic evidence supports the CO's testimony. As discussed above, three employees, including Messrs. Pinheiro and Cedillo, used the scaffold's frame as access instead of using the ladder. (Tr. 39-45; Ex. 1, pp. 3 at "E", 4 at "C", 7 at "C").

The Court finds the requirements of the cited standard were violated.[30]

[30] The Secretary argues that Respondent may attempt to assert the affirmative defense of employee misconduct to this citation item, which the Secretary notes was not raised in Respondent's answer or other subsequent pleading. (S. Br. 7-8). *See L & L Painting Co., Inc.,* 23 BNA OSHC 1986, 1996 (No. 05-0055, 2012) (Employer "waived the unpreventable employee misconduct affirmative defense because it failed to raise the defense in its answer as required by Commission Rule 34(b)(3)"). Secretary states that allowing this affirmative defense would be prejudicial to his case and objects to any attempt Respondent may make to introduce the defense. (S. Br. 7-8). The Secretary is correct. Respondent did not raise this affirmative defense in its answer, subsequent pleadings, or post-

Knowledge

The Secretary must establish the employer knew, or with reasonable diligence, could have known of the violative condition. *Contour,* 22 BNA OSHC at 1073. Knowledge is imputed to an employer through a supervisory employee. *AEDC,* 23 BNA OSHC at 2095.

The CO observed and photographed Foreman Martins watching employees work from the scaffold. (Tr. 33-44, 55; Ex. 10 at "A"). Employees were climbing the sides of the scaffold frame in direct view of the foreman. (Tr. 39-44; Ex. 1, pp. 3 at "E", 4 at "C").

CO Lloyd testified that Mr. Martins "was right there looking at this." (Tr. 43). The Court finds Foreman Martins had actual knowledge employees were climbing the sides of the scaffold frames for access instead of using the ladder.

Constructive knowledge is also established. Constructive knowledge can be shown where the supervisor could have known of the violative condition through reasonable diligence or where the condition was readily apparent. *Shaw Areva*, 23 BNA OSHC at 1825. There is insufficient evidence in the record to show that Respondent took adequate steps to inspect the work area in the hours before the inspection, anticipate hazards, or make an effort to ensure employees used a ladder for access during the early afternoon of April 18, 2015. There is no evidence the foreman attempted to stop or reprimand employees that were climbing the scaffold frame instead of using the ladder. Respondent did not demonstrate reasonable diligence. *See Id.* (reasonable diligence by an employer includes work area inspection, anticipation of hazards, and actions to prevent violations).

As with item 1 above, it was also foreseeable that Foreman Martins would not prevent the occurrence of the violative condition due to Respondent's lack of training for, or oversight of, its supervisors. *See PP&L,* 737 F.2d at 357-58 (Third Circuit requires foreseeability to impute

supervisor's knowledge). Further, Mr. Roney's testimony that it was not practical to keep employees from climbing the scaffold, demonstrates a general inattention to promoting safety compliance. (Tr. 167).

The Court finds both actual and constructive knowledge is properly imputed to Respondent through Foreman Martins, thus, the knowledge element is proved.

The Court finds the cited standard applies, employees were exposed, its terms were violated, and Respondent had the requisite knowledge. Citation 1, item 2 is affirmed.

Citation 1, Item 3

The Secretary cited Respondent for a serious violation of 29 C.F.R. § 1926.451(f)(3), which requires:

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

The Secretary alleged that on or about April 18, 2015, "[m]asonry employees were exposed to injury from falls due to: lack of scaffold fall protection and proper planking, lack of suitable access to platforms and from scaffold collapse as the competent person had not inspected site scaffolds for visible defects prior to work beginning on April 18th." (Citation and Complaint; Tr. 49).

The standard is applicable

There is no question that a scaffold was in use at the worksite and Respondent was responsible for insuring that a competent person had inspected the scaffold for visible defects

before the April 18, 2015 work shift. The Court finds the standard is applicable.

Employees were exposed to the hazard

Employees worked from the scaffold after the start of the work shift on April 18, 2015. CO Lloyd counted 12 employees at the job site. (Tr. 52, 97-98). The element of employee exposure to the hazard would be proved provided a competent person did not inspect the scaffolding and scaffolding components at the start of the April 18, 2015 work shift. The Secretary failed to prove that an inspection was not performed by a competent person at the start of the April 18, 2015 work shift. The Secretary has failed to prove that any employees were exposed to the hazard.

The standard was not violated

The Secretary's sole evidence that the scaffold had not been inspected the morning of April 18, 2015 by a competent person is the scaffold's condition when the CO arrived at about 2:00 p.m.[31] The Secretary asserts E&N's "foreman could not have performed a competent inspection and allow[ed] employees to work despite the obvious and visible defects of the scaffold." (S. Br. 9). CO Lloyd testified that Foreman Martins did not provide an "answer" to his questions, including whether or not he was aware that the scaffolding and scaffolding components were not inspected that morning by a competent person. (Tr. 52-53). The Secretary relies solely on the scaffold's condition in the afternoon to presume and speculate that an inspection had not been performed that morning. More is required to prove that the standard was violated. The scaffold's condition that afternoon is not proof of whether it had been inspected prior to the work shift that morning. Whether an inspection occurred must be independently determined.

Mr. Roney testified that it was the practice and procedure of E&N's on-site foreman to

[31] CO Lloyd testified that Foreman Martins had the training and credentials to serve as a competent person. (Tr. 84).

inspect the scaffolding at the beginning of each workday to make sure that it was in compliance with OSHA standards. (Tr. 169). CO Lloyd testified that Foreman Martins told him during the inspection "that he was the competent person, you know, for scaffolding and he understood what that meant." (Tr. 46-48, 80-81). E&N asserts the CO was not present the morning of April 18, 2015, so he did not know the scaffold's condition at the start of the work shift. (R. Br. 6-7). CO Lloyd agreed that he had "no knowledge of what the foreman inspected or didn't inspect or what he saw and what he didn't see that morning?" (Tr. 89).

The Court finds the Secretary's evidence does not support his assertion the scaffold had not been inspected by a competent person before the April 18, 2015 work shift. Violation of the cited standard has not been proved.

Knowledge

The Secretary must establish the employer knew, or with reasonable diligence, could have known of the violative condition. *Contour,* 22 BNA OSHC at 1073. Knowledge may be imputed to an employer through a supervisory employee. *AEDC,* 23 BNA OSHC at 2095. Complainant has not shown that E&N knew, or with reasonable diligence, could have known that Foreman Martins had not inspected the scaffolding before the April 18, 2015 work shift began. It was E&N's practice and procedure for its on-site foreman to inspect the scaffolding at the beginning of each workday to make sure that it was in compliance with OSHA standards. There is insufficient evidence showing that E&N deviated from its usual practice the morning of April 18, 2015. Actual or constructive knowledge has not been proved.

The Court finds the cited standard applies. However, the Secretary did not prove the cited standard was violated, employees were actually exposed to the hazard, or that E&N had knowledge of the alleged violation.

Citation 1, item 3 is vacated.

Citation 1, Item 4

The Secretary cited Respondent for a serious violation of 29 C.F.R. § 1926.451(g)(1)(vii), which requires:

> (g) *Fall protection*. (1) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. *Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers*. (emphasis added.)
>
> . . . (vii) For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.
>
> (2) Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

The Secretary alleged that "[m]asonry employees working on the tubular welded frame scaffolding were exposed to falls of up to 13 feet 4 inches to the ground below as fall protection in the form of guardrails or personal fall arrest systems were not being used." (Citation and Complaint).

The standard is applicable

The Respondent asserts the fall protection requirements do not apply because the scaffold was being dismantled. (R. Br. 6). As discussed above in item 1, only one employee, Mr. Cedillo, was engaged in dismantling work. At least four other employees working on the scaffold's second-tier, who were not engaged in dismantling activities, were subject to the fall

protection requirements in the cited standard.

The scaffold in use was a tubular welded type scaffold, thus the requirements at 29 C.F.R. § 1926.451(g)(1)(vii) are applicable because it is not one of the scaffold types specified at paragraphs (g)(1)(i) through (g)(1)(vi).

The Court finds the cited standard applies.

Employees were exposed to the hazard

Respondent asserts that the cited standard does not apply because the scaffolding was being dismantled at the time of OSHA's inspection. (R. Br. 6). Mr. Roney testified that Foreman Martins must have decided to not use fall protection during the dismantling of the scaffold. (Tr. 163-64, 217). Foreman Martins did not testify at the trial and Mr. Roney's assertion is mere speculation.[32] The Court has found that only Mr. Cedillo was engaged in dismantling activities during the inspection. Although Mr. Roney believed it was not practical to use fall protection equipment while dismantling the scaffolding, there is insufficient evidence showing that Foreman Martins determined the feasibility and safety of providing fall protection for employees dismantling the scaffolding on April 18, 2015 at the worksite. In the absence of any such evidence, E&N was required to provide fall protection to all its employees either working at the worksite or engaged in dismantling activities on April 18, 2015.

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079. Here, there is evidence of actual employee exposure to the hazard. The CO photographed employees working on the scaffold's second-tier platforms, which were 13 feet, 4 inches above the ground, with no fall protection.[33] The Secretary asserts that approximately five

[32] *See Lee Builders, Inc.*, 2010 WL 5699196, at *4 (No. 10-1510, December 10, 2010) (ALJ) (citation for failing to provide fall protection to employees erecting scaffolds affirmed where competent person did not take the necessary steps to determine whether a fall arrest system was feasible or created a greater hazard).

employees were exposed to fall hazards. The Court agrees with the Secretary and finds four employees, including Mr. Pinheiro, were doing brick veneer work from the scaffold's second-tier and thus exposed to the fall hazard without protection. (Tr. 33-34, 56-66; Ex. 1, pp. 2-3 at "A" [Pinheiro], 5 at "B" [Pinheiro], 7 at "D" [Pinheiro], 8 at "A" [Pinheiro], 10 at "B" [Pinheiro], 11-13 at "A" [Mr. Pinheiro], 18-20 at "A" [Pinheiro], 21 at "B" [Pinheiro], 22-24 at "A" [Pinheiro]; 2 at "D", 3 at "G", 5 at "D", 8 at "C", [unidentified by name] wearing red hat; 7 at "E" [unidentified by name] wearing yellowish shirt; 10 at "C", 17 at "B", 18 at "B", [unidentified by name] wearing yellow hat and blue in color shirt; S. Br. 11). The Court also finds that Mr. Cedillo was exposed to the hazard when he was shown standing on the platform's second-tier without any fall protection.[34] (Tr. 37; Ex. 1, pp. 4 at "A", 6 at "A").

The Court finds employees were exposed to the violative condition.

The standard was violated

The Secretary asserts that Respondent provided neither guardrails nor personal fall arrest systems for its exposed employees.

Mr. Roney testified that it was not feasible to use a guardrail as fall protection because the scaffold must be dismantled to reach the brick veneer for the final rub-down work. (Tr. 216-17). However, Mr. Roney did not explain why a guardrail on the exterior perimeter of the scaffold could not be in place as the employees worked on the brick veneer wall next to the

[34] These five employees do not include other, unidentified employees shown on the scaffold's second-tier, in whole or in part, in photographs who also were not protected by the use of personal fall arrest systems or guardrail systems; e.g. Ex. 1, pp. 2 at "C", p.3 at "F", p. 4 at "A", p. 5 at "C", p. 6 at "A", p. 8 at "B", p. 12 at "B" & "C", p. 13 at "B" & "C", p. 16 at "A", p. 20 at "B" & "C", p. 21 at "A", p. 23 at "B". There is also insufficient evidence that the employees shown at Ex. 1, pp. 9, 17, were working on the second-tier of the scaffold.

interior edge of the scaffold platform. Further, Respondent did not provide an adequate explanation why other fall protection, such as a personal fall arrest system, was not in use.

The standard requires fall protection for heights above 10 feet when on a scaffold. The height of the second-tier scaffold platform employees that worked from was 13 feet 4 inches from the ground. (Tr. 33-34, 55-56, 87; Ex. 1, p. 2 at "B"). The Court finds Respondent did not provide fall protection to at least four employees engaged in brick work over 10 feet above ground; as well as to Mr. Cedillo, and thus the cited standard was violated. (Tr. 205).

Knowledge

The Secretary must establish the employer knew, or with reasonable diligence, could have known of the violative condition. *Contour,* 22 BNA OSHC at 1073. Knowledge is imputed to an employer through a supervisory employee. *AEDC,* 23 BNA OSHC at 2095.

Foreman Martins watched employees working from the second-tier platforms of the scaffold above 10 feet without any kind of fall protection. (Tr. 43-44, 55; Ex. 1, p. 10 at "A"). The Court finds Foreman Martins had actual knowledge employees were working from the second-tier of the scaffold without fall protection.

Constructive knowledge is also established. Constructive knowledge can be shown where the supervisor could have known of the violative condition through reasonable diligence or where the condition was readily apparent. *Shaw Areva*, 23 BNA OSHC at 1825.

There is no evidence in the record that Respondent took adequate steps to inspect the work area before the OSHA inspection, anticipate hazards, or make an effort to ensure fall protection was used by the employees at the worksite during the early afternoon of April 18, 2015. The foreman was present and observed employees working without fall protection. There is no evidence the foreman made any effort to have employees use fall protection on the scaffold.

See Id. (reasonable diligence by an employer includes work area inspection, anticipation of hazards, and actions to prevent violations).

As with item 1 above, it was also foreseeable that Foreman Martins would not prevent the occurrence of the violative condition due to the employer's lack of training or oversight of its supervisors in safety matters. *See PP&L,* 737 F.2d at 357-58 (Third Circuit requires foreseeability to impute supervisor's knowledge).

The Court finds both actual and constructive knowledge is properly imputed to Respondent through Foreman Martins, thus, the knowledge element is proved.

The Court finds the cited standard applies, employees were exposed, its requirements violated, and Respondent had knowledge of the violative condition. Citation 1, item 4 is affirmed.

Citation 1, Item 5

The Secretary cited Respondent for a serious violation of 29 C.F.R. § 1926.452(c)(2), which requires:

> (c) *Fabricated frame scaffolds* (tubular welded frame scaffolds) ….
> . . .
> (2) *Frames and panels shall be braced by cross, horizontal, or diagonal braces, or combination thereof*, which secure vertical members together laterally. The cross braces shall be of such length as will automatically square and align vertical members so that the erected scaffold is always plumb, level, and square. All brace connections shall be secured. (emphasis added.)

The Secretary alleged that on or about April 18, 2015, that "[m]asonry employees were exposed to falls of up to 13 feet 4 inches from scaffold collapse given that one tubular welded frame scaffold was missing 2 cross braces." (Citation and Complaint).

The standard is applicable

Respondent asserts this requirement does not apply because the scaffold was being

dismantled. (Tr. 146; R. Br. 6). Respondent asserts the two braces had been in place earlier that day, but had been removed because the scaffold was being dismantled. (R. Br. 5-6).

However, the standard does not provide an exception to the removal of a scaffold's structural component while employees are still working from the scaffold platform.[35]

The Court finds the standard applies.

The standard was violated and an employee was exposed to the hazard

The CO stated one set of cross-braces (the two missing braces created a single set of cross-braces) in a bay was missing on one of the scaffolds. The other scaffold areas were fully cross-braced. The photographic evidence shows the missing set of cross-braces. (Tr. 68-72, 91-92, 197; Ex. 1, pp. 3 at "H", 4 at "D" & "F", 7 at "F", 8 at "D"). The photographs also show Mr. Pinheiro working from the scaffold platform just above the missing set of cross-braces. (Tr. 29-30, 68-69, 192, 197; Ex. 1, pp. 2 at "A", 3 at "A", 5 at "B", 8 at "A", 23 at "A", 24 at "A").

The Court finds the scaffold was not cross-braced as required by the standard and an employee was exposed to the hazard.

Knowledge

The Secretary must establish the employer knew, or with reasonable diligence, could have known of the violative condition. *Contour,* 22 BNA OSHC at 1073. Knowledge is imputed to an employer through a supervisory employee. *AEDC,* 23 BNA OSHC at 2095.

As discussed above, Foreman Martins watched employees work from the scaffold with the missing set of cross-braces.[36] (Tr. 43-44; Ex. 10 at "A"). The missing set of cross-braces was readily apparent and existed under the foreman's direct observation. The Court finds the

[35] In the preamble to the 1996 scaffolding final rule, OSHA noted "cross braces are designed to provide diagonal stability to the scaffold." 61 Fed. Reg. at 46058.

[36] CO Lloyd testified that he did not know whether or not Foreman Martins was aware that the set of cross-braces was missing. But he did say that he "probably explained that out to him [the foreman]", although he did not recall actually pointing that out to him. (Tr. 73).

Secretary established that E&N had either actual and/or constructive knowledge that the set of cross-braces was missing while Mr. Pinheiro was working directly above on the second-tier of the scaffolding platform. (Ex. 1, pp. 2 at "A", 3 at "A", 5 at "B", 8 at "A", 23 at "A", 24 at "A").

Constructive knowledge is also established. There is insufficient evidence in the record that shows Respondent took adequate steps to inspect the work area before the OSHA inspection, anticipate hazards, or make an effort to ensure the cross-braces stayed in place while employees worked from the scaffold during the early afternoon of April 18, 2015. The foreman made no effort to keep cross-braces installed or stop employees working from the non-compliant scaffold. *See Shaw Areva*, 23 BNA OSHC at 1825 (reasonable diligence by an employer includes work area inspection, anticipation of hazards, and actions to prevent violations).

As with item 1 above, it was also foreseeable that Foreman Martins would not prevent the occurrence of the violative condition due to Respondent's lack of training or adequate oversight of one of its supervisors in safety matters. *See PP&L,* 737 F.2d at 357-58 (Third Circuit requires foreseeability to impute supervisor's knowledge).

The Court finds both actual and constructive knowledge is properly imputed to Respondent through Foreman Martins. Thus, the knowledge element is proved.

The Court finds the cited standard applies, employees were exposed, its terms were violated, and Respondent had knowledge of the violative condition. Citation 1, item 5 is affirmed.

Serious Characterization

The Secretary classified all cited violations as serious in nature. A violation is classified as serious under section 17(k) of the Act if "there is a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). *See also Pete Miller, Inc.,* 19 BNA OSHC

1257, 1258 (No. 99-0947, 2000) (Serious characterization requires a finding that "a serious injury is the likely result should an accident occur").

For item 1, the lack of a fully planked platform created the hazard of a fall up to 13 feet 4 inches to the ground below. If a fall occurred, it could result in serious injury or death. (Tr. 34-35). For item 2, the use of the sides of the scaffold frame for climbing and access instead of a ladder created a hazard of fall to the ground below. A fall could result in serious injury or death. (Tr. 42-44). For item 4, the lack of fall protection may cause a fall up to 13 feet 4 inches to the ground below, which could result in serious injury or death. (Tr. 65). For item 5, a missing cross-brace undermines the structural stability of the scaffold, which could result in a scaffold collapse. (Tr. 73). The resulting fall could result in serious injury or death. (Tr. 73).

The Court finds the serious characterization for each item is appropriate due to the likelihood of serious injury or death if an accident occurred.

Penalty Amount

Respondent asserts the penalty proposed by the Secretary was excessive and the maximum penalty levied simply because Mr. Roney was E&N's management contact. (Tr. 147; R. Br. 7-8). The Court agrees.

"Once a citation is contested, the Commission has the sole authority to assess penalties." *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) (citation omitted), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). The penalty amount proposed in the citation is given no deference. *See Hern Iron Works,* 16 BNA OSHC 1619, 1621 (No. 88-1962, 1994).

Section 17(j) of the Act requires the Commission to give due consideration to four

criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Valdak,* 17 BNA OSHC at 1138.

The maximum penalty for a serious citation is $7,000.[37] 29 U.S.C. § 666(b). The Secretary proposed the maximum penalty for each cited violation. OSHA assessed the gravity for each cited violation as high based on a determination of high severity and greater probability. (Tr. 35, 44, 53, 66-67, 73). The CO stated that violations for fall hazards are typically assessed as high gravity because of the risk of significant injury. (Tr. 44). Good faith was considered but no discount was provided due to the high severity of the violations. (Tr. 206-11). The Court agrees with the Secretary's assessments for gravity and good faith.

E&N had 20 employees. (Tr. 52, 129). Generally, an employer of this size receives a sixty percent penalty reduction. (Tr. 129-30). AAD Flynn used his discretion and chose to not apply the penalty reduction for size. (Tr. 106-08, 115, 132). AAD Flynn also did not adjust the penalty for E&N's inspection history. (Tr. 34, 106-08, 115, 130-31). E&N was inspected in 2013 where no citations were issued.[38] (Tr. 126). AAD Flynn stated that a 10% penalty reduction was generally applied when an employer had a prior inspection resulting in no citations. (Tr. 135). Here, no discount or increase was applied to the proposed penalty. (Tr. 130-31). AAD Flynn admitted a 60% reduction for size and a 10% reduction for a positive

[37] The Court notes that OSHA's statutory maximum penalties were increased pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). OSHA established new penalties effective August 1, 2016 for violations occurring after November 2, 2015. 81 Fed. Reg. 43430 (July 1, 2016). The violation in the instant case occurred prior to November 2, 2015, thus the statutory maximum of $7,000 applies here.

[38] OSHA issued a proposed citation to E&N following an inspection opened on April 8, 2015 relating to a powered industrial truck violation at an unrelated, different worksite. Because this citation for an alleged violation was not a final order as of April 18, 2015, it was not considered in the Court's penalty assessment. (Tr. 125-26, 130-31, 134-35, 214). *See Payton Roofing, Inc.,* No. 16-1161 (consolidated), www.OSHRC.gov/decisions at *21 (A.L.J. O.S.H.R.C. October 30, 2017) (A prior citation that is not final cannot be used by the Secretary to impose a 10% increase in the penalty amount based upon history). No violations were issued to E&N after an inspection was conducted by OSHA's Hasbrouck Heights Area Office in 2013. (Tr. 126). AAD Flynn testified that if E&N did not have a citation that was final issued to it before April 18, 2015, he would have given E&N a 10% reduction based upon history had Mr. Roney not been involved in this case. (Tr. 131).

OSHA inspection history would have been applied but for Mr. Roney's involvement in the case. (Tr. 107-08, 128-131, 138).

AAD Flynn stated that he had previously dealt with Mr. Roney many times related to OSHA inspections at other employers. (Tr. 107, 117). AAD Flynn admitted he chose to propose the maximum penalty because of past interactions when Mr. Roney worked for other companies—not at E&N. AAD Flynn stated had Mr. Roney not responded to the OSHA violations on behalf of E&N in this case, "[t]hen it's likely I [AAD Flynn] wouldn't do it", *i.e.* not allow penalty reductions for size and history. (Tr. 107-08). In other words, AAD Flynn did not allow these penalty reductions because Mr. Roney, an E&N employee at the time, responded to these alleged OSHA violations.[39] (Tr. 131-37, 205). AAD Flynn testified that he had the final say in recommending the issuance of these violations to E&N along with their proposed penalties. (Tr. 128, 131-32).

Several of AAD Flynn's interactions with Mr. Roney were related to Best Construction. (Tr. 107). Based on his experience, AAD Flynn had formed the opinion that Best Construction and Salem Masonry Company were interchangeable names for the same company. (Tr. 113).

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[39] AAD Flynn testified:
Judge Phillips: And are you saying you considered the size of the company, but you decided to exercise your discretion and not do a reduction because of Mr. Roney's involvement in the matter?
The Witness: Yes. (Tr. 129).
AAD Flynn further testified:
Judge Phillips: Okay, so aside from Mr. Roney being involved in this case, take that out. Now, would you have given a company other than E&N, with Mr. Roney not involved somehow, a ten percent reduction in history because he [it] had no prior final violation?
The Witness: Yes. (Tr. 135).
AAD Flynn further testified during rebuttal:
Q. And I believe you did testify earlier in response to my question on cross examination that had someone other than Mr. Roney been the one to contact you, you would have given a reduction, correct?
A. I believe we were speaking in terms of affiliation so if a company didn't have Mr. Roney affiliated in any capacity, whether it be owner, manager, or anything of that nature, yeah, this would be a completely different case.
…
Q. So the answer to my question is, yes, this company was treated differently than you may have treated another company because of Mr. Roney's involvement, correct?
A. Of his affiliation, yes, and his capacity as a manager in the company. (Tr. 205-06).

Using a google search to find other companies connected to Best Construction, AAD Flynn compiled a list[40] of approximately 20 OSHA inspections for companies, including Salem Masonry, Best Construction, Salem Construction, and Dunbar Construction Services, that he believed Mr. Roney was an owner or management representative of, many with scaffold violations.[41] He testified that he "used these documents to determine why not to give this company a reduction." (Tr. 107-116). The Court finds that AAD Flynn's basis of setting the penalties based solely on a possible relationship of these companies to Mr. Roney appears to be an attempt to penalize E&N as an alter ego for Mr. Roney.[42] The Commission has found that "[p]iercing the corporate veil [] enables an individual's complete OSH Act violation history to be taken into account when determining an appropriate penalty." *Altor, Inc.*, 23 BNA OSHC 1458, (No. 99-0958, 2011). Regardless, the Secretary has not argued nor presented evidence that Mr. Roney is an alter ego of the companies AAD Flynn alleged he was affiliated with, or of E&N.

The Court finds it was not proper to consider the OSHA citation history of other unaffiliated employers where Mr. Roney previously worked when assessing penalties for E&N's violations.

AAD Flynn stated that the penalty would have been $2,800 per violation after the application of a 60% size reduction for a company with 20 employees. (Tr. 137-38). Further, an

[40] AAD Flynn referred to a summary document he had compiled when making his decision that Mr. Roney had been affiliated with other companies historically inspected by OSHA. (Tr. 107-115). This document was not admitted into evidence due to Respondent's objection that the citation history of other companies was not relevant to the citations issued to E&N. (Tr.141-45).

[41] On cross examination, AAD Flynn admitted that he did not have any personal knowledge that Mr. Roney had an ownership interest in these companies, including Salem Masonry, Best Construction, Salem Construction, and Dunbar Construction Services. (Tr. 123-24).

[42] AAD Flynn testified that he did not know who the owners of E&N are. (Tr. 124). He further testified that it did not matter whether Mr. Roney was only an employee, and not an owner of E&N, "[t]he fact he was in a managerial role and the person that was sent to deal with me to speak for the company is very relevant to determining the appropriateness of the penalty and whether or not the reduction should have been afforded to him." (Tr. 139). AAD Flynn admitted that OSHA's Field Operations Manual provided no direct guidance on whether OSHA should consider the fact that an employee responding to pending alleged violations previously worked at other companies to whom other OSHA citations had been issued years ago. (Tr. 139).

additional 10% reduction would have been applied for positive OSHA inspection history, reducing the amount even further to $2,520 per item. (Tr. 137-38; R. Br. 8).

The Court applies the usual reduction of 60% reduction for the company's small size and 10% for E&N's prior citation-free inspection. When applied to the statutory maximum of $7,000 per item, this results in a per item penalty amount of $2,520 for Citation 1, Items 1, 2, 4, and 5. Because of the inappropriateness of AAD Flynn not allowing these penalty reductions because Mr. Roney responded to these alleged OSHA violations on behalf of E&N, the Court is further reducing the per item penalties for Citation 1, Items 1, 2, 4, and 5, by an additional 25% resulting in Court assessed per item penalties in the amount of $1,890 for Citation 1, Items 1, 2, 4, and 5.[43] The Court assesses a total amount of $7,560 for these four violations.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

1. Citation 1, item 1, alleging a serious violation of 29 C.F.R. § 1926.451(b)(1) is AFFIRMED, and a penalty of $1,890 is assessed.

2. Citation 1, item 2, alleging a serious violation of 29 C.F.R. § 1926.451(e)(1) is AFFIRMED, and a penalty of $1,890 is assessed.

3. Citation 1, item 3, alleging a serious violation of 29 C.F.R. § 1926.451(f)(3) is VACATED.

4. Citation 1, item 4, alleging a serious violation of 29 C.F.R. § 1926.451(g)(1)(vii) is

[43] There is no place for spitefulness when assessing penalties under the Act.

AFFIRMED, and a penalty of $1,890 is assessed.

5. Citation 1, item 5, alleging a serious violation of 29 C.F.R. § 1926.452(c)(2) is AFFIRMED, and a penalty of $1,890 is assessed.

/s/_____
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: January 16, 2018
Washington, D.C.