United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Heaslip Engineering, LLC, Respondent.	OSHRC Docket No. **20-0567**

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Heaslip Engineering, LLC, is a civil and structural engineering firm located in Metairie, Louisiana. It designed the concrete and structural steel framing for the building intended to be the Hard Rock Hotel at 1031 Canal Street in New Orleans, Louisiana. On October 12, 2019, the building partially collapsed while under construction, killing three people and injuring more than a dozen others. Following a fatality investigation by the Occupational Safety and Health Administration, the Secretary issued a three-item Citation and Notification of Penalty to Heaslip on March 26, 2020, alleging two serious (Citation No. 1) and one willful (Citation No. 2) violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (Act).[1]

Heaslip timely contested the Citation. Now before the Court is Heaslip's motion for summary judgment (*Motion*) and supporting memorandum (*Memorandum*), filed April 13, 2022. Heaslip seeks summary judgment because, it contends, the Hard Rock Hotel construction site (worksite) was not a "place of employment" for any Heaslip employee within the meaning of the Act; the Secretary improperly incorporated industry consensus standards in the items citing

[1]Item 1 of Citation No. 1 alleges a serious violation of § 5(a)(1), the general duty clause, for exposing a Heaslip employee to the hazard of being struck by falling materials. The hazard allegedly resulted from design flaws in the structural engineering plan that affected the building's structural integrity.

Item 2 of Citation No. 1 alleges a serious violation of 29 C.F.R § 1926.20(b)(1) for exposing employees to "various safety and health hazards" by failing to initiate and maintain necessary accident prevention programs.

Item 1 of Citation No. 2 alleges a willful violation of § 5(a)(1) for exposing a Heaslip employee to the hazards of falling materials and building collapse. The hazards allegedly resulted from "inadequately designed, reviewed or approved" structural steel connections that affected the structural integrity of the connections.

Heaslip for violations of § 5(a)(1); and Heaslip was not engaged in "construction work" at the worksite within the meaning of the Act.

On May 27, 2022, the Secretary filed a response (*Response*) to Heaslip's motion, arguing genuine issues of material fact exist regarding each of Heaslip's contentions. Heaslip replied (*Reply*) on June 8, 2022, alleging the Secretary committed procedural errors and relied on inadmissible evidence in his response. On June 16, 2022, the Secretary filed a sur response *(Sur Response*) disputing Heaslip's allegations.[2]

Upon review of the documents and exhibits filed by the parties, the Court finds genuine issues of material fact exist regarding whether the worksite was a "place of employment" for Heaslip's employee and whether Heaslip's level of engagement at the worksite constituted "construction work." The Court finds Heaslip is not entitled to judgment as a matter of law on the issue of the incorporation of industry consensus standards in the citations alleging violations of § 5(a)(1). The Court concludes Heaslip is not entitled to summary judgment and, therefore, **DENIES** Heaslip's motion.

BACKGROUND

The following narrative is taken from a document attached to Heaslip's *Motion*, captioned *Statement of Uncontested Material Facts* [3]:

The company 1031 Canal Development, LLC, owns the land on which the Hard Rock Hotel project was to be built (at 1031 Canal Street in New, Orleans, Louisiana).[4] Three companies own 1031 Canal: Kailas Companies, LLC (90% ownership); All-Star Electric, LLC (5% ownership); and design-builder Citadel Builders, LLC (5% ownership).

[2] Heaslip's *Reply* and the Secretary's *Sur Response* were filed in contravention of Commission Rule 40 which allows for neither. Federal Rule of Civil Procedure 56 contains no provision for filing either responsive document. Neither party moved to strike the opposing parties' filing. In the interest of due process, the Court will consider both filings.

[3] Despite the title of Heaslip's document, the Secretary contests several of the "material facts" in his *Response.* The Court's use of the document to develop the background narrative does not signify a finding all statements in the document are factual.

[4] Initially, the intent was to design and build the "1031 Canal Street Hotel, Apartments, and Condominiums." Later, it was designated as the Hard Rock Hotel project (*Statement of Uncontested Material Facts*, ¶ 3).

James B. Heaslip II is a professional civil and structural engineer. He founded and is the sole owner of Heaslip Engineering, LLC, located in Metairie, Louisiana.[5] Citadel, as the design-builder for the construction project at 1031 Canal Street, entered into a contract with Heaslip on January 15, 2016, under which Heaslip agreed to provide structural engineering services for the project. The contract includes a section titled *Evaluations of the Work Related to the Engineer's Portion of the Project*, which requires the following of the structural engineer:

> Visit the site on behalf of the Design-Builder at intervals appropriate to the stage of construction, or as otherwise agreed by the Design-Builder and the Engineer, to become generally familiar with the progress and quality of the Work related to the Engineer's Portion of the Project completed, and to determine in general if the Work related to the Engineer's Portion of the Project completed, is being performed in accordance with the Contract Documents. However, the Engineer shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the portion of the Work related to the Engineer's Portion of the Project completed, and report to the Design-Builder (1) known deviations from the Contact Documents and from the most recent construction schedule submitted by the Contractor (2) defects and deficiencies observed in the Work related to the Engineer's Portion of the Project (3) recommendations for further inspection and testing of the Work, and (4) recommendations to reject the Work.

(Exh. C of Heaslip's *Motion*, ¶ 3.42)

The original design of the project envisioned an all-concrete 17-floor structure. Retail space would be located on the first two floors, a parking garage on floors 3 through 7, a hotel on floors 8 through 15, and condominiums on floors 16 and 17. At some point in 2017, 1031 Canal, through Kailas, requested Heaslip to change the design so that floors 9 through 17 would be built with structural steel framing rather than concrete, and the roof of floor 17 would be a roof-top bar, comprising the 18th floor.

On December 20, 2017, at Kailas's request, Heaslip provided a fee proposal to perform professional engineering services for the new design. Heaslip proposed to "[c]omplete the new concrete structure up the 8th floor transfer slab plus steel upper floors" and "[c]reate new steel framing plans, column schedule, column base plate and anchor bolt details and connection details," with all structural work to conform to "IBC [International Building Code] 2012 and ACSE [American Society of Civil Engineers] 7-10 Minimum Design Loads for Building and Other Structures." (Exh. D of Heaslip's *Motion*) Heaslip also proposed to "perform pre-pour

[5] For clarity, in this order "Heaslip" refers to Heaslip Engineering, LLC. James Heaslip will be referred to as Mr. Heaslip.

inspections, framing inspections, pay application reviews, RFI [request for information] responses and shop drawing reviews." (*Id.*) Kailas accepted the proposal. Citadel entered into a subcontract agreement on August 27, 2018, with Suncoast Projects, LLC, dba Hub Steel, to fabricate all structural steel and metal components of the project.

After the proposed design of the project changed, Mr. Heaslip assigned an engineer (referred to herein as the Engineer) to design the new structural steel framing for floors 9 through 18, under Mr. Heaslip's review and supervision. Mr. Heaslip and the Engineer made periodic visits to the worksite to observe and evaluate the work for conformance to Heaslip's structural design. When the project reached the stage for construction of the structural steel framing for floors 9 through 18 to begin, the Engineer made periodic visits to the worksite to perform visual inspections of the pre-pour and steel framing to evaluate conformance with the structural design drawings. His last visit to the worksite was on September 30, 2019. He was not present at the worksite the day the building partially collapsed, October 12, 2019.

The building remained in a collapsed state for over a year before demolition began. It was demolished in January of 2021 (*Statement of Uncontested Material Facts*, §§ 3, 5-9, 16, 21-24, 27, 29, 33).

PRELIMINARY MATTERS

The Secretary's *Response* (and attached exhibits) to Heaslip's *Motion* and *Memorandum* elicited a number of objections from Heaslip in its *Reply*, which the Court now addresses.

Applicability of Local Rules

First, Heaslip contends the Secretary failed to comply with the applicable procedural rules in his *Response* and he is, therefore, prohibited from disputing the material facts put forth by Heaslip in its *Statement of Uncontested Material Facts*. Commission Rule 40(j) provides, "The provisions of Federal Rule of Civil Procedure 56 apply to motions for summary judgment." 29 C.F.R. § 2200.40(j). Under Rule 56(a) of the Federal Rules of Civil Procedure "[a] party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought."

The *Statement of Uncontested Material Facts* Heaslip attached to its *Motion* sets out 38 "uncontested facts." Heaslip argues that because the Secretary failed to attach a statement of contested facts to his *Response* corresponding numerically to Heaslip's *Statement,* Heaslip is entitled to have the "uncontested facts" deemed admitted. Heaslip bases this argument on Local

Rule 56.2 of the U.S. District Court for the Eastern District of Louisiana, which requires the non-moving party to "include a separate and concise statement of the material facts which the opponent contends present a genuine issue. All material facts in the moving party's statement will be deemed admitted, for the purposes of the motion, unless controverted in the opponent's statement."

Presumably Heaslip cites the local rules for the Eastern District of Louisiana because New Orleans, the site of the building collapse, is located in that district. However, federal district courts have no jurisdiction over OSHA proceedings, and the local rules do not apply. Jurisdiction is conferred on the Commission under § 10(c) of the Act. "[A] timely notice of contest establishes jurisdiction with the Commission." *Sharon & Walter Constr., Inc,* No 00-1402, 2010 WL 4792625, at *11, n. 2 (OSHRC Nov. 18, 2010).

After a hearing, the presiding administrative law judge renders a decision and order, which the Commission may in its discretion review. Whether it becomes a final decision and order of the administrative law judge or the Commission, the parties may appeal it to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office. The employer also may appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in New Orleans, Louisiana, in the Fifth Circuit. Heaslip's principal place of business is also located in the Fifth Circuit.[6] Therefore, the Court of Appeals for the Fifth Circuit is the court to which it is most likely an aggrieved party would appeal. The local rules of the U.S. District Court of the Eastern District of Louisiana are irrelevant to this proceeding.

Fed. R. Civ. P. 56(c) establishes the procedures parties are to follow in supporting their asserted material facts. Rule 56(c)(1) provides:

> (1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations,

[6] Where it is highly probable that a case will be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case, even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv*., No. 96-1719, 2000 WL 294514, at *4 (OSHRC March 16, 2000). In this proceeding, the Court will apply the precedent of the Fifth Circuit where it differs from the Commission's precedent. The parties cite several circuit court opinions outside of the Fifth Circuit in support of their arguments. The cited case law is not binding precedent in this proceeding but will be considered for persuasiveness.

> stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Nothing in the applicable rule requires the non-moving party to submit an itemized list of contested facts corresponding to the moving party's list of material facts. The Secretary complied with the applicable procedural rule. The Court denies Heaslip's request to deem its 38 "uncontested material facts" admitted.

Statement of The Engineer

In his *Response,* the Secretary refers to a statement given by the Engineer to OSHA. He attached a copy of the statement as Exhibit H. Heaslip characterizes the statement as "handwritten notes taken by the OSHA interviewer" that "were never signed or verified by [the Engineer]." (*Reply*, p. 2)[7] Heaslip asserts the statement is hearsay and requests the Court to strike it.

> Under Fed. R. Evid. 801(d)(2)(D),
>
> A statement that meets the following conditions is not hearsay:
> . . .
> (2) The statement is offered against an opposing party and:
> . . .
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed[.]

The Secretary is offering the statement against Heaslip, his opposing party. The Engineer was working on behalf of Heaslip at the time he made the statement to OSHA, and his statement concerns his visits to the worksite, a matter within the scope of his relationship with Heaslip.[8] *See, Regina Constr. Co.,* No. 87-1309, 1991 WL 104227, at *3 (OSHRC May 15, 1991). The Engineer's statement is not hearsay, and it is not stricken from the record.

[7] According to an email thread attached as Exhibit J to Heaslip's *Reply*, Heaslip's counsel was present at the interview of the Engineer and refused to let a stenographer record the interview.

[8] Heaslip asserts the Engineer was a "1099 independent contractor" but does not argue his contractor status excludes the Engineer from being considered an "agent or employee" of Heaslip within the meaning Fed. R Evid. 801(d)(2)(D) (*Statement of Uncontested Material Facts*, ¶ 11).

Transcript of Interview with Citadel's Superintendent

The Secretary also attached to his *Response* a transcript of an unsworn[9] interview with Citadel's superintendent, as Exhibit I. Heaslip objects to this exhibit on the ground it is hearsay. The Secretary contends the statement may be considered by the Court because the contents of Citadel's superintendent's statement can be presented in a form admissible in evidence, such as through live testimony. It is not necessary for the Court to resolve this difficult issue because other evidence presented by the Secretary is sufficient to establish the existence of a dispute of material fact.

OSHA's Violation Worksheets

Exhibit J to the Secretary's *Response* is a copy of OSHA's *Violation Worksheets* completed as part of its inspection of Heaslip. It comprises 45 pages of information compiled by OSHA as justification for its allegations that Heaslip violated the three cited standards. The worksheets quote extensively from statements taken from Mr. Heaslip and the Engineer (Exh. J, at DOL 27-37; DOL 48-52; DOL 59-63). The *Violation Worksheets* also include quotations from statements of various employees working for other employees, including Citadel, Hub Steel, Koogle Engineering, and Harry Baker Smith Architects II (Exh. J, at DOL 37-38; DOL 50-52; DOL 63-64).

As noted above, the statements of Mr. Heaslip and the Engineer, as agents of Heaslip, are not hearsay and are admissible. The statements of employees of other employers do not meet the "agent or employee" hearsay exception under Fed. R. Evid. 801(d)(2)(D) but do qualify as non-hearsay under the records exemptions found in Fed. R. Evid. 803(6) and (8). Fed. R. Evid. 803 provides in pertinent part:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
> . . .
> *(6) Records of a Regularly Conducted Activity***.** A record of an act, event, condition, opinion, or diagnosis if:
>
> (A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

[9] At the outset of the interview, Citadel's superintendent is told that knowingly making a false statement during the interview would be a "criminal offense" under 29 U.S.C. §666(g) and 19 U.S.C. §1001. (Exhibit I to *Response,* at p. 1) He was not sworn, nor did he sign the statement under penalty of perjury.

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.
. . .
(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Fed. R. Evid. 902(11) provides:

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
. . .
(11) *Certified Domestic Records of a Regularly Conducted Activity*. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

Mark Moravits, assistant area director for OSHA's Austin Area Office, submitted a *Declaration Pursuant to 28 U.S.C. § 1746* in compliance with Fed. R. Evid. 902(11), certifying the *Violation Worksheets* meet the requirements of records of a regularly conducted activity (*Response,* Exh. C). The *Violation* Worksheets also meet the requirements of public records. The

Court finds the statements of non-Heaslip employees in the *Violation Worksheets* are not hearsay and are admissible.

Heaslip also objects to consideration of Exhibit J on the ground the Secretary failed to provide it with notice he intended to offer the statements contained therein, citing Fed. R. Evid. 807(b). [10] That rule provides:

> The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement--including its substance and the declarant's name--so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing--or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Heaslip objects to Exhibit J because it

> was never made aware of what individuals OSHA was interviewing during its investigation. Given the nature of the investigation, Heaslip certainly had no notice before the citations were issued or in this proceeding that OSHA had plans to use its interviews of Citadel personnel as evidence Heaslip's alleged violations of the OSH Act.

(*Reply*, p. 3)

Fed. R. Evid. 807(b), by its own terms, applies to notice that must be provided in writing "before the trial or hearing." The motion before the Court is for summary judgment, not hearing. Heaslip's objection is denied.

ANALYSIS

Legal Standard for Summary Judgment

Fed. R. Civ. P. 56(a) provides

> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine

[10] Fed. R. Evid. 807(a) provides:

> a) Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:
>
> (1) the statement is supported by sufficient guarantees of trustworthiness--after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

dispute as to any material fact and the movant is entitled to judgment as a matter of law.

The party moving for summary judgment has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962).

The Commission has held,

> The requirements for granting summary judgment are well established: there must be no genuine dispute as to any material fact, and a party must be entitled to a judgment as a matter of law. . . . In reviewing a motion for summary judgment, a judge is not to decide factual disputes. . . . Rather, the role of the judge is to determine whether any such disputes exist. . . . When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. . . . Thus, not only must there be no genuine dispute as to the evidentiary facts, but there must also be no controversy as to the inferences to be drawn from them.

Ford Motor Co.--Buffalo Stamping Plant, No. 10-1483, 2011 WL 3923734, at *1 (OSHRC Aug. 30, 2011) (citations omitted).

The Fifth Circuit has set out the stringent guidelines for summary judgment.

> The party seeking summary judgment bears the exacting burden of demonstrating that there is no actual dispute as to any material fact in the case. . . . In assessing whether the movant has met this burden, the courts should view the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing the motion. . . . All reasonable doubts about the facts should be resolved in favor of the non-moving litigant. . . . A court must not decide any factual issues it finds in the record, but if such are present, the court must deny the motion and proceed to trial. . . . Summary judgment may be inappropriate even where the parties agree on the basic facts but disagree about the factual inferences that should be drawn from these facts. . . . If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment.

Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., Inc., 669 F.2d 1026, 1031 (5th Cir. 1982) (citations omitted).

Summary Judgement and Burdens of Proof

When moving for summary judgment,

> [Respondent] may affirmatively offer evidence which undermines one or more of the essential elements of the [Secretary's] case; or [Respondent] may simply demonstrate that the evidence in the record falls short of establishing an essential

> element of the [Secretary's] case. . . . Under this latter option, [Respondent] need not produce evidence of its own because it is the [Secretary] that will bear the burden of proof at trial. . . . In response to a properly supported motion, the [Secretary] comes forward with evidence of [his] own establishing each of the challenged elements of [his] case. Because factual disputes may not be resolved on motion for summary judgment, the [Secretary] need not offer all of the evidence tending to support [his] case[.]

Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264 (5th Cir. 1991).

Item 1 of Citation No. 1 and Item 1 of Citation No. 2 allege violations of § 5(a)(1) of the Act, known as the general duty clause. Section 5(a)(1) provides: "Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" 29 U.S.C. § 654(a)(1).[11]

Item 2 of Citation No. 1 alleges a violation of § 1926.20(b)(1), found in 29 C.F.R. Part 1926 (*Safety and Health Regulations for Construction*). The constructions standards are covered by § 5(a)(2) of the Act, which provides: "Each employer . . . shall comply with occupational safety and health standards promulgated under this Act." 29 U.S.C. § 654(a)(2).

The Secretary's burden of proof for § 5(a)(1) violations differ from his burden for § 5(a)(2) violations. For violations alleged under § 5(a)(1), the Secretary must establish that:

> (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). The Secretary must also show that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-0469, 1992).

UHS of Westwood Pembroke, Inc., No. 17-0737, 2022 WL 774272, at *2 (OSHRC Mar. 3, 2022).

[11] "[T]he purpose of the general duty clause is to provide protection against recognized hazards where no duty under a specific standard exists, and that specific, promulgated standards will preempt the general duty clause, but only with respect to hazards, conditions or practices expressly covered by the specific standards." *Con Agra, Inc.,* No. 79-1146, 1983 WL 23849, at *5 (OSHRC Jan. 31, 1983). Here, Heaslip has not identified more specific standards that apply to the conditions cited in Item 1 of Citation No. 1 and Item 1 of Citation No. 2.

> For violations alleged under § 5(a)(2) of the Act, the Secretary must establish that
>
> [1] the cited standard applies, [2] there was a failure to comply with the standard, [3] employees were exposed to the violative condition, and [4] the employer knew or should have known of the violative condition with the exercise of reasonable diligence. *See Briones Utility Co.*, 26 BNA OSHC 1218, 1219 (No. 10-1372, 2016); *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

AJM Packaging Corp., No. 16-1865, 2020 WL 13178960, at *3 (OSHRC Sept. 8, 2020).

Here, Heaslip's arguments in support of summary judgment do not address the elements of compliance, employee exposure to hazardous conditions, recognized hazards, or employer knowledge—they focus only on related aspects of applicability of the cited standards: whether the worksite was a "place of employment" for Heaslip's employees; whether the consensus standards the Secretary incorporated in the items citing § 5(a)(1) violations are enforceable; and whether Heaslip's employees were engaged in "construction work."

The Court, therefore, addresses the related applicability issues. First, Heaslip argues the worksite at issue was not a "place of employment" for any Heaslip employee.

(1) "Place of Employment"

Section 5(a)(1), cited in Item 1 of Citation No. 1 and Item 1 of Citation No. 2, requires employers to furnish "a place of employment" to employees free from recognized hazards. Section 1926.20(b)(1), cited in Item 2 of Citation No.1, is found in the Part 1926 construction standards. Section 1910.12(a) provides in pertinent part that the Part 1926 standards shall apply "to every employment and place of employment of every employee engaged in construction work."

Heaslip argues the worksite was not a place of employment for Mr. Heaslip and the Engineer, relying heavily on *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1 (1st Cir. 1993) (*SGH*). In that case, the First Circuit affirmed the Commission's decision (finding the cited construction standards did not apply to SGH, the cited engineering firm, because its onsite activities were not sufficiently related to construction work) but on different grounds.

> Section 1910.12(a) requires "each employer" to "protect the employment and *places of employment of each of his employees*...." (emphasis added). The dispositive question, in our opinion, is whether the construction site . . . was a "place[ ] of employment" which SGH had a duty under OSHA to protect. The record reveals that SGH employees were not on the jobsite on a daily or even weekly basis. SGH did not have an office or a trailer at the site. On the date of the accident, there were no SGH employees on the site[.] . . . Under these

> circumstances, we do not think that the . . . construction site is a "place[ ] of employment" which SGH had a duty under OSHA to protect.

Id. at 5 (emphasis in original).

The opinion of the First Circuit is not binding on the Commission and is contrary to Commission precedent.[12] *See, Access Equip. Sys., Inc.,* No. 95-1449, 1999 WL 261237, at * 4 (OSHRC Apr. 27, 1999) (The administrative law judge, referring specifically to *SGH,* "correctly stated in his decision that the First Circuit's decisions are not controlling precedent in this case.").

OSHA is authorized "to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment *where work is performed by an employee of an employer*" to inspect and investigate. 29 U.S.C. § 657 (a)(1), (2) (emphasis added). The Commission has taken an expansive approach in determining the spaces to which the phrase "place of employment" refers.

> Although the terms "employment" and "place of employment" are not defined in the Act, . . . for purposes of the general duty clause, these terms have been construed liberally, and the broad definition of "workplace" can include customers' homes, hospitals, restaurants, and public spaces extending beyond the walls of an employer's physical office or plant. *See Usery v. Marquette Cement Mfg.*, 568 F.2d 902, 904-05 (2d Cir. 1977) (employer violated Act although employee injured in alley between employer's buildings); *Clarkson Constr. Co. v. OSHRC*, 531 F.2d 451, 458 (10th Cir. 1976) (employer liable for unsafe conditions on public highway); *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1085 (7th Cir. 1975) (Act places primary responsibility on employers because they have control); *see also* S. Rep. No. 91-1282, at 9 (1970), *reprinted in* Legislative History at 149-50 (employers have primary control of work environment and should insure that it is safe and healthful); H.R. Rep. No. 91-1291, at 21 (1970), *reprinted in* Legislative History at 851 (employers bound by common duty to bring no adverse effects to employees because they have primary control over work environment). In *Clarkson*, the court noted that the broad construction of "employment" and "place of employment" is consistent with the broad remedial purposes of the Act. 531 F.2d at 458 (drawing narrow boundaries on worksite would defeat purpose of Act).

Integra Health Mgmt., Inc., No. 13-1124, 2019 WL 1142920, at *25 (OSHRC Mar. 4, 2019) (MacDougall, Chairman, concurring).

The determination of whether the worksite at issue constituted a place of employment for Heaslip is dependent on the extent of the Engineer's presence at the site. Heaslip contends the

[12] The Commission's case history relating to design professionals cited under the construction standards is examined in greater detail in the section addressing Item 2 of Citation No. 1, alleging a violation of § 1926.20(b)(1).

Engineer made "no more than six site visits in 2019 to visually inspect steel construction[.]" (*Statement of Uncontested Material Facts*, ¶ 34) The Secretary disputes that number, arguing the Engineer visited the worksite on at least 20 occasions, "with at least 10 times during steel erection." (*Response*, Exh. J, at DOL 23) The disagreement regarding the number of times the Engineer visited the worksite and the amount of time he spent there constitutes a genuine issue of material fact.

Viewing the factual inferences from the evidence in the light most favorable to the Secretary, as the non-moving party, the Court finds Heaslip is not entitled to summary judgement on the issue of whether the worksite was its place of employment.

(2) Industry Consensus Standards Cited in Item 1 of Citation No. 1 and Item 1 of Citation No. 1

The two items cited under § 5(a)(1) refer to industry consensus standards. Heaslip argues consensus standards "are not standards of workplace safety. They have never been adopted as workplace safety standards Under 29 C.F.R. § 1910(5)(a) and they are not enforceable as *per se* violations of incorporated standards of workplace safety under 29 C.F.R. § 1910.6(a)(1)." (*Memorandum*, p. 13) Heaslip misconstrues the significance of the inclusion of industry consensus standards in the items cited under § 5(a)(1).

Consensus standards are not cited in the alleged violation descriptions of the items alleging § 5(a)(1) violations. Rather, the Secretary cites selected consensus standards under the abatement sections of the items. Establishing a feasible means of abatement for violations alleged under the general duty clause is part of the Secretary's burden of proof.

> "The Secretary must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly*, 19 BNA OSHC at 1190, 2000 CCH OSHD at p.48,981. Feasible means of abatement are established if "conscientious experts, familiar with the industry" would prescribe those means and methods to eliminate or materially reduce the recognized hazard. *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2032, 1995-97 CCH OSHD ¶ 31,301, p. 44,014 (No. 89-0265, 1997), *citing National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).

Arcadian Corp., No. 93-0628, 2004 WL 2218388, at *13 (OSHRC Sept. 30, 2004).

> For Item 1 of Citation No. 1, the Secretary proposes the following:
>
> Among other methods, feasible and acceptable means of abatement include, but are not limited to:

(1) Recalculate beam movement and load capacity to ensure each beam is designed to meet or exceed the anticipated loads.

(2) Follow 2015 International Building Code, Section 1604.2; . . .Follow ANSI/AISC 360-10 Specification for Structural Steel Buildings, Section B. 3 Design Basis, Item 4. Design for Strength Using Allowable Strength Design (ASD);

(3) Follow guidance from the manufacturer for the use of their product, specifically a) Concrete density of 145pcf for engineering calculations, b) Not to exceed the maximum cantilever deck span of 5-feet 5-inches, and c) Dead load of 74psf for engineering calculations;

(4) Refer for independent peer review of the engineered plans, designs, and details to confirm the accuracy and validity of the calculation and results.

For Item 1 of Citation No. 2, the Secretary proposes the following:

Among other methods, feasible and acceptable means of abatement include, but are not limited to:

(1) Recalculate shear strength of connection detail to ensure the number and size of bolts for the connection is designed to meet or exceed the anticipated loads.

(2) [Follow] 2015 International Building Code, Section 1604.2;

(3) Follow ANSI/AISC 360-10 Specification for Structural Steel Buildings, Section B.3 Design Basis, Item 6. Design of Connections;

(4) Follow ANSI/AISC 303-16, Code of Standard Practice for Steel Buildings and Bridges, Section 3.1.1;

(5) Follow AISC Steel Construction Manual, 14th Edition, Table 7-1, Available Shear Strength of Bolts;

(6) Refer for independent peer review of the engineered plans, designs, and details to confirm the accuracy and validity of the calculations and results.

For Item 1 of Citation No. 1, the Secretary proposes four methods of abatement, one of which incorporates a consensus standard. For Item 1 of Citation No. 2, the Secretary proposed six methods of abatement, four of which incorporate consensus standards. The Commission has held that when the Secretary proposes alternative abatement methods, implementing any one of the proposed alternatives would constitute abatement of the alleged violation.

> [W]e must first determine whether the Secretary proposed each measure as an alternative means of abatement, in which case implementing any one of them would constitute abatement of the alleged violation, or as a component of a single means of abatement, in which case all of the measures must be implemented to abate the violation. If the former, the Secretary can prevail on this element only if he proves that [the employer] implemented none of the measures. . . .If the latter, he need only show a failure to implement one of them.

A.H. Sturgill Roofing, Inc., No. 13-0224, 2019 WL 1099857, at *9 (OSHRC Feb. 28, 2019).

Here, the Secretary begins the abatement sections with the words, "Among other methods, feasible and acceptable means of abatement include, but are not limited to." The Commission has held this language indicates the Secretary is proposing alternative means of abatement. Implementation of any one of the alternatives would constitute abatement of the alleged violation.

> The abatement portion of the citation . . . begins with a sentence that uses and references the plural word "methods": "Feasible and acceptable *methods* to abate this hazard include, but are not limited to: ...," suggesting that each measure is an alternative means of abatement. (emphasis added).

Id. at *9, n. 17 (emphasis in original).

Heaslip is mistaken in its belief the Secretary is seeking to enforce consensus standards "as *per se* violations of incorporated standards." Heaslip may demonstrate it abated the alleged violation by establishing it met any of the proposed alternative methods of abatement (including the methods that do not refer to consensus standards), or that its own method of abatement was equally effective. *See, Waldon Health Care Ctr.,* No. 89-3097, 1993 WL 119662, at *14 (OSHRC Apr.2, 1993) ("[A]n employer may defend against a general duty clause citation by demonstrating that it was using an abatement method that is as effective as the one suggested by the Secretary.")

Heaslip's consensus standard argument does not involve an issue of material fact—it is an issue of law about which Heaslip is mistaken. The Court finds Heaslip is not entitled to summary judgment on this issue.[13]

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[13] In the section of its *Memorandum* addressing consensus standards, Heaslip suggests the Commission is not the proper forum for this proceeding:

> [The standards of skill and care for engineers] are standards of professional practice governed by Louisiana State law, not by the general duty standard of workplace safety under the OSH Act. . . . With respect, [Civil District Court in Orleans Parish], not this Review Commission, is the appropriate forum to adjudicate any fault and liability Heaslip may have in connection to its

(3) Engineering Firms and "Construction Work"

Item 2 of Citation No. 1 alleges:

> 29 CFR 1926.20(b)(1): The employer did not initiate and maintain accident prevention program as necessary to comply with this part.
>
> On or about 30 September 2019, and at times prior thereto, the employer did not initiate and maintain a safety and health program, exposing employees to various safety and health hazards.

Section 1926.20(b)(1) provides: "It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part."

The cited standard was adopted in accordance with § 1910.12, found in Subpart B (*Adoption and Extension of Established Federal Standards*) of the general industry standards. Section 1910.12 provides:

> (a) The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.
>
> (b) For purposes of this section, Construction work means work for construction, alteration, and/or repair, including painting and decorating. See discussion of these terms in § 1926.13 of this title.

Heaslip contends that none of its employees were engaged in "construction, alteration, and/or repairs" at the worksite, and Heaslip provided no supervision or direction of construction work to the actual construction workers. Heaslip argues OSHA's construction standards do not apply to design professionals such as architects and engineers, and cites three cases in support of its argument: *Skidmore, Owings & Merrill*, No. 2156, 1977 WL 8018 (OSHRC Aug. 26, 1977) (*SOM)*; *Simpson, Gumpertz & Hager, Inc.*, No. 89-1300, 1992 WL 224829 (OSHRC Aug. 28,

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> professional engineering design and construction phase services that may have contributed to the collapse of the Hard Rock Hotel on October 12, 2019.

(*Memorandum*, pp. 14-15)

Jurisdiction over this proceeding was conferred on the Commission when Heaslip timely filed its notice of contest, under § 10(c) of the Act. The Commission has a statutory duty, enacted by Congress, to preside over this proceeding.

1992, *aff'd on other grounds*, 3 F. 3d 1 (1st Cir. 1993) (*SGH*); and *CH2M Hill Central, Inc.,* 192 F. 3d 711 (7th Cir. 1999) (*CH2M*).

In *SOM*, respondent, an architectural and engineering firm, was hired by Sears Roebuck to inspect the work of various contractors (constructing the building long ago known as the Sears Tower) to ensure that design specifications were met. The general contractor on the project was Diesel. The Commission described the degree of SOM's presence on the site.

> [R]espondent employed four field representatives to observe the work as it was performed and review the results of tests performed by independent testing companies. If the work was determined by SOM not to conform to the specifications and was unacceptable to the owner, respondent would meet with representatives of Diesel or the responsible subcontractor and, if necessary, direct that the work be redone or repaired. Although respondent's field representatives performed no actual physical labor, their work necessitated their movement throughout the construction site.

SOM, at *1. The administrative law judge affirmed items alleging violations of construction standards, and the Commission granted review of the proceeding.

The Commission surveyed prior cases where it had held construction standards applied to employers who provided construction managers for worksites. The construction managers did not perform actual construction work, "but were performing work directly and vitally related thereto." *Id.* at *2. "Although they performed no actual physical construction, each retained substantial supervision over the progress of the work and the safety program at the worksite." *Id.* at *3. The Commission distinguished the work performed by construction managers from the work performed by SOM and its field representatives.

> In contrast, the architect engineer in this case has more limited functions and authority over the work. And we note that this is generally true in assessing the role of an architect both in the traditional arrangement where, as here, the architect works directly for the owner, who has contracted with a general contractor to perform the actual construction work, and in the construction management arrangement where the architect is a part of the construction management team.

Id.

The Commission vacated the cited items and, in its holding, formulated the "substantial supervision" test for not-trade employers on construction sites.

> [T]o be within section 1910.12 an employer must perform actual construction work or exercise substantial supervision over actual construction. Although SOM exercises some supervision over construction, we would not characterize it as substantial in the sense that supervision by a construction manager is substantial.

Id.

The Commission pointed out, however, that its conclusion in *SOM* did not preclude the applicability of the construction standards to architects and engineers.

> Finally, we note the obvious point that this decision is not to read as holding that architects and engineers not presently subject to Part 1926 are exempt from the requirements of the Act. Other issues concerning such duties are not presented in this case.

Id.

In *SGH*, respondent, an engineering company, entered into a contract with the architect of a building to provided design and consulting services. After a portion of metal decking at the worksite collapsed as concrete was being poured, OSHA investigated the incident and issued SGH a citation for violations of the construction standards. SGH argued the construction standards did not apply to it because it did not perform construction work. SGH moved for summary judgment, which the administrative law judge granted.

On review, the Secretary argued SGH was subject to the construction standards because it gave advice and instruction to the general contractor regarding the concrete pour and because SGH and other engineers were engaged in construction work "as a matter of course because the activities they contract to perform are inseparable from construction operation." *SGH*, at *1.

The Commission disagreed with the Secretary.

> We find no basis for creating an exception to the long-standing principles governing construction worksites by holding that design or engineering firms may be held responsible simply because their activities are related to the overall construction project, without regard to the extent to which they actually perform or supervise the construction work itself. No authority to suggest such a holding has been cited to us, and, indeed, the case law suggests the contrary. There is a long-standing body of case law which has consistently held that "construction work" within the meaning of § 1910.12 refers "only to actual construction or to related activities that are an integral and necessary part of construction work." *Royal Logging Co.,* 7 BNA OSHC 1744, 1747 & n. 7, 1749–50, 1979 CCH OSHD ¶ 23,914, pp. 28,993 & n. 7, 28,996 (No. 15169, 1979), *aff'd,* 645 F.2d 822 (9th Cir.1981), and cases cited therein. It is clear however, that under the established precedent, activities sufficiently "related" to construction work to come within the construction standards are those which involve the performance

of physical labor.

Id. at *9.

The Secretary appealed the Commission's decision to the First Circuit, which, as previously noted, affirmed on different grounds, stating, "The dispositive question, in our opinion, is whether the construction site . . . was a 'place[ ] of employment' which SGH had a duty under OSHA to protect." *SGH,* 3 F. 3d at 5. The court concluded the answer to its dispositive question was negative, finding SGH's presence at the worksite was minimal.

In *CH2M,* the administrative law judge, relying on the Commission's decision in *SGH*, found the construction standards cited by the Secretary did not apply to CH2M, a consulting engineer hired by the Milwaukee Metropolitan Sewerage District (MMSD) for a project involving the construction of eighty miles of sewer tunnels. Three employees of an MMSD subcontractor were killed in a methane explosion while working on the project. On review, the Commission reversed, finding the construction standards applied to the consulting engineer, and remanded the decision to the administrative law judge to determine whether CH2M had violated the cited standards.

In its decision, the Commission once again surveyed prior cases involving employers whose employees did not perform construction work but exercised some oversight at the worksite and in some manner directed the contractor employees.

> [I]n those cases in which we held that the construction standards apply to entities which do not perform physical trade labor, . . . the cited employers all had broad administrative and coordination responsibility at the worksite. Conversely, those employers whom we found not covered by the construction standards were those having only limited contractual responsibility, *SOM* (contract to inspect work for conformity to specifications) and *SGH* (prepare specifications and inspect work). Implicit in our precedent is the recognition that the more extensive the involvement of a professional engineer or consultant in the activities at the site, the more likely that those activities will necessarily encompass safety issues.

CH2M, at *9.

The Commission articulated a new test, comprising two factors, for determining whether the construction standards apply to an employer performing non-trade or professional services. The factors are

> [1] the extent to which the employer is involved in the multitude of different sorts of activities that are necessary for the completion of the typical construction project and [2] the degree to which it is empowered to direct or control the actions

> of the trade contractors. We consider our construction manager cases . . . as illustrating the type of far-reaching or global responsibility for diverse activities at the site which would satisfy the first criterion. Conversely, in the cases in which we have held the construction standards inapplicable, *SOM* and *SGH*, we did so because the cited employers lacked any global responsibility but instead had limited functions only to prepare contract specifications and inspect for conformity thereto.

Id. at *10.

Upon review of the record, the Commission found CH2M "had broad and comprehensive responsibility in many aspects of a very complex and extensive construction project," and the tasks undertaken by CH2M were "similar in character to those performed by the employers" in the prior construction manager cases where the Commission found the construction standards applied. *Id.* The Commission concluded,

> CH2M possessed the broad, global set of responsibilities for the Project characteristic of those employers whom we have previously held subject to the construction standards. While it did not have responsibility for the "means and methods" of construction, neither did those employers whom we have found to be subject to the construction standards as "construction managers." In terms of contractual authority actually to direct trade contractors—as opposed to the exercise of moral suasion or the conveyance of instruction from the owner—CH2M possessed certain types of authority not routinely granted to all those whom we have held to covered by those standards, specifically the rights to interpret and enforce contract schedules, to resolve conflicts between contractors, and to reject or obtain correction of defective work.

Id. at *13.

After an administrative law judge duly resolved the citation items on remand, CH2M appealed the decision to the Seventh Circuit after the Commission declined to review it. The appellate court was not impressed with the Commission's reasoning and reversed, finding that, while construction standards could apply to non-trade professionals involved in construction projects, they did not apply to CH2M's work for the MMSD. It noted its concern regarding the Commission's new two-factor test, specifically,

> the Commission's decision to ignore contract language in evaluating to whom the regulations apply. While perfunctory language that does not represent the true responsibilities of a particular employer should not absolve it from complying with the regulations, language exempting an employer from particular responsibilities that the facts confirm the employer does not actually retain cannot be casually thrown aside.

*Id.*at 721.

The Seventh Circuit stated that "whether or not the construction standards apply has previously been a fact-specific inquiry that appears to turn on the responsibilities assumed by the firms in question." *Id.* at 719. After reviewing the record, the court concluded,

> The Commission, in its evaluation of CH2M Hill, appears to have not only departed for no apparent reason from the "substantial supervision" test but also from its own precedent, which clearly supports the original ALJ's findings that CH2M Hill was not engaged in construction work. We find with all due deference to the Commission that its findings cannot be supported by the record, especially in light of its previous decisions on the subject.

Id. at 724.

Heaslip argues the Commission's decisions in *SOM* and *SGH*, and the appellate opinions in *SGH* and *CH2M*, support its position that the Part 1926 construction standards do not apply to architects and engineers. Heaslip contends it did not exercise substantial supervision over the worksite. The only Heaslip representatives to visit the worksite were Mr. Heaslip and the Engineer, and those were "periodic site visits to observe the quality of the work on behalf of the owner for general conformance with the structural design." (*Memorandum*, p. 11) Heaslip argues these visits do not rise to the level of "global responsibility" that the Commission attributed to CH2M but are standard practice in the design industry.

Heaslip asserts:

> When the Project reached the stage of construction of the structural steel framing for floors 9 through 18 to begin, [the Engineer] made periodic site visits to perform pre-pour and steel framing visual inspections to evaluate conformance with the structural design drawings.
>
> [The Engineer] made no more than six site visits in 2019 to visually inspect steel construction on Floors 9, 11, 12, 14, 16, and 18 "to evaluate the conformance to the drawings": April 01, Floor 9; May 18, Floor 11; May 28, Floor 12; July 18, Floor 14; August 26, Floor 16; September 30, Floor 18.
>
> [The Engineer's] last visit to the site was on September 30, 2019; [the Engineer] was not present at the Project site on the date of the building's collapse.

(*Statement of Uncontested Material Facts*, §§33-35)

The Secretary contends the extent of Heaslip's responsibilities and supervision at the worksite is a question of fact. As noted, the Secretary contends the Engineer visited the worksite

on at least 20 occasions, "with at least 10 times during steel erection." (*Response*, Exh. J, at DOL 23) The disagreement regarding the number of times the Engineer visited the worksite and the amount of time he spent there constitutes a genuine issue of material fact.

Furthermore, in his statement to OSHA, the Engineer stated, "I believe Citadel relied on my expertise. . . Yes provided Citadel w/instructions. All/verbal and electronically. Expected Citadel to comply." (Exh. H to *Response,* at DOL 131) Under the Commission's "substantial supervision test" and its two-factor "global responsibility" test, the extent of the design professional's involvement in workplace activities and the degree of its supervisory authority are questions of fact. Heaslip contends its presence and authority on the worksite were minimal, and thus it did not perform "construction work" within the meaning of the Act. The Secretary has adduced evidence that indicates Heaslip's presence and authority on the worksite were more extensive than that claimed by Heaslip.

Viewing the conflicting evidence and factual inferences in the light most favorable to the Secretary, as the non-moving party, and resolving reasonable doubts about the facts in favor of him, the Court finds genuine issues of material fact exist regarding whether Heaslip was engaged in "construction work" at the cited worksite. Heaslip is not entitled to summary judgment on this issue.

CONCLUSION

For the foregoing reasons, Heaslip's *Motion* is **DENIED**.

SO ORDERED.

/s/
First Judge Heather A. Joys
Atlanta, GA

Date: **July 7, 2022**