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. Sean Benschop d/b/a S&R Contracting, and its successors, Respondent.	OSHRC Docket No. 14-0015

APPEARANCES:
Jennifer L. Bluer, Esquire
U.S. Department of Labor, Philadelphia, Pennsylvania
For the Secretary

Sean Benschop, *Pro Se*[1]
Bellefonte, Pennsylvania
For the Respondent

BEFORE:
Covette Rooney
Chief Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission or OSHRC) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act). On November 14, 2013, the Occupational Safety and Health Administration (OSHA) issued a Citation and Notification of Penalty (Citation) to Respondent,

[1] On November 20, 2015, John J. Delany, III, Esq., of Delany McBride, P.S. withdrew as Respondent's counsel from this matter.

Sean Benschop d/b/a S&R Contracting, and its successors (S&R or Respondent). Respondent filed a timely Notice of Contest bringing this matter before the Court.

The alleged violation at issue is related to Respondent's activities at the 2132-2138 Market Street, Philadelphia, Pennsylvania[2] (Market Street worksite) from June 2 to June 5, 2013.

Background

On Wednesday, June 5, 2013, Sean Benschop was using an excavator to demolish a building at the Market Street worksite in center city Philadelphia. A multi-story, freestanding wall of the building under demolition collapsed and fell onto the adjacent one-story Salvation Army thrift store, which had employees and customers inside. Six people were killed, and twelve others injured in the collapse. (Ex. C-18, p. 21).

OSHA compliance officer (CO), Sarah Carle, and OSHA assistant area director (AAD), Nicholas DeJesse, arrived at the accident site that same day and began the OSHA investigation. (Tr. 233-34). OSHA issued a Citation to the Respondent on November 14, 2013.[3] The Citation alleged Respondent had committed a willful violation of 29 C.F.R. § 1926.854(b) when it did not brace a multi-story, freestanding wall at the worksite and proposed a $70,000 penalty for the violation.[4]

Respondent timely filed a notice of contest bringing this matter before the Commission. This case was docketed with the Commission on January 8, 2014.

[2] The address of the Hoagie City building, which is the particular focus of the OSHA citation, is 2136-2138 Market Street, Philadelphia, Pennsylvania.

[3] OSHA hand-delivered the citation package to Mr. Benschop at the Curran-Fromhold Correctional Facility where Benschop was held at that time. (Tr. 373).

[4] The Citation issued on November 14, 2013 also included two alleged serious violations of OSHA's demolition standard. *See Complaint.* The alleged serious violations were withdrawn by the Secretary at the start of the hearing (Tr. 9-10).

On January 31, 2014, in accordance with Commission Rule 9, this case was consolidated with OSHRC Docket No. 14-0061, *Secretary v. Griffin Campbell d/b/a Campbell Construction*.[5] *See* 29 CFR § 2200.9. Docket No. 14-0061 was consolidated with the instant case because the cases involved common issues of laws and facts. *See Id*.

On March 10, 2014, the consolidated cases were stayed pending the resolution of the state's criminal prosecutions of Sean Benschop and Griffin Campbell related to the June 5, 2013 building collapse.

On July 21, 2015, Sean Benschop entered a guilty plea before Judge Glenn B. Bronson of the Philadelphia County Court of Common Pleas. Mr. Benschop pled guilty to six counts of involuntary manslaughter, twelve counts of recklessly endangering another person, one count of causing a catastrophe, one count of criminal conspiracy, and one count of aggravated assault. (Exs. C-18, C-19). On January 8, 2016, Mr. Benschop was sentenced to 7 1/2 to 15 years in prison. (*See* Jan. 21, 2016 Update from Secretary). Mr. Benschop was subsequently incarcerated at SCI Rockview in Bellfonte, Pennsylvania.

On October 19, 2015, a jury found Griffin Campbell guilty of six counts of involuntary manslaughter, twelve counts of recklessly endangering another person, one count of causing a catastrophe, one count of criminal conspiracy, and one count of aggravated assault; he was found not guilty for six counts of third-degree murder. (S. Br. 2; *See* Oct. 23, 2016 Status Report from Secretary).

On November 5, 2015, the undersigned issued an order lifting the March 10, 2014 stay of proceedings for this matter.

[5] Commission Rule 9 sets forth: "Cases may be consolidated . . . where there exist common parties, common questions of law or fact or in such other circumstances as justice or the administration of the Act requires." 29 C.F.R. § 2200.9.

On January 6, 2016,[6] a settlement was reached between the Secretary and Griffin Campbell for Docket No. 14-0061, which was then removed from consolidation with the instant matter.

A two-day hearing for the instant case was held on October 25-26, 2016. The hearing was held in the Commission's hearing room in Washington, D.C. Complainant's counsel and witnesses were present in the hearing room. Mr. Benschop participated remotely via video teleconferencing equipment[7] from the state correctional institution where he was incarcerated.[8]

Darryl Alston was subpoenaed to appear at the hearing in the instant case but did not respond. In lieu of his testimony, the undersigned allowed the admission of Alston's October 5, 2015 sworn testimony from the Campbell criminal trial in the Court of Common Pleas (hereinafter referred to as October 5, 2015 Alston testimony). (Tr. 13-14; Ex. C-32 (CCT-A[9])).

Because Mr. Benschop indicated he was unable to read English effectively, several exhibits were read into the record. (Tr. 16-18). These exhibits were Darryl Alston's June 4, 2013 OSHA signed statement[10] (Tr. 274-299; Ex. C-16), the transcript of October 5, 2015 Darryl Alston testimony from Griffin Campbell's criminal trial[11] (Tr. 18-74; Ex. C-32 (CCT-A)), excerpts of Sean Benschop's October 8, 2015 sworn testimony from the Campbell criminal trial

[6] The settlement became a final order of the Commission on February 8, 2016.

[7] Mr. Benschop was incarcerated at SCI Rockview in Bellefonte, Pennsylvania at the time of the hearing.

[8] During a March 2, 2016 conference call, Respondent demonstrated that he was fluent in speaking and understanding English to the undersigned. Mr. Benschop's prison counselor later informed the undersigned that Respondent's ability to read pleadings in English was deficient. Thus, pleadings thereafter were presented in both English and Spanish. However, at the hearing, Mr. Benschop indicated that his ability to read any language was limited. (Tr. 16-18). Thus, this Decision and Order is issued in English with no translation.

[9] Citations to Darryl Alston's testimony at the Campbell criminal trial will also be noted with the designation "CCT-A."

[10] OSHA Compliance Officer Sarah Carle took notes during her June 14, 2013 interview with Mr. Alston, which Mr. Alston then signed. (Tr. 259, 262).

[11] The jury trial was before the Honorable Glenn B. Bronson in the Court of Common Pleas, First Judicial District of Pennsylvania, Criminal Trial Division, *Commonwealth v. Griffin T. Campbell*, CP-51-CR-0001793-2014 (Campbell criminal trial).

(Tr. 130-172; Ex. C-17 (CCT-B[12])), and the transcript of Sean Benschop's July 21, 2015 plea hearing and signed plea agreement.[13] (Tr. 81-94, 99-122; Exs. C-18, C-19).

The record includes photographs of the accident site taken by CO Carle, AAD DeJesse, and members of the public. (Exs. C-1, C-4 to C-14). A video from a camera on a city SEPTA bus that showed the moment of building collapse was entered into the record. (Ex. C-29). Two video recordings taken by Darryl Alston using his mobile phone on June 5, 2013, were also admitted into the record during the hearing. (Exs. C-21, C-23).

Mr. Benschop called no witnesses to testify at the hearing. However, he requested additional time to submit evidence in the form of two written witness statements as exhibits to include in the record. (Tr. 399, 411). At the close of the hearing, the undersigned granted Respondent's request to submit post-hearing evidence in the form of written statements from Eric Sullivan[14] and his wife, Tynisha Gregory-Benschop.[15] (Tr. 393, 414). Because Mr. Benschop was *pro se* in the instant matter and incarcerated during the litigation of this case, the Court allowed the record to stay open for a week, until November 2, 2016, so Respondent could submit these two written statements. (Tr. 396-97, 414).

During his cross-examination of AAD DeJesse, Mr. Benschop requested the notes Mr. DeJesse had taken during his June 5, 2013 interview of Griffin Campbell. (Tr. 383, 385, 388-89). The undersigned asked the Secretary's counsel to produce the notes from the June 5, 2013

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[12] Citations to Sean Benschop's testimony at the Campbell criminal trial will also be noted with the designation "CCT-B."

[13] The plea proceeding was before the Honorable Glenn B. Bronson in the Court of Common Pleas, First Judicial District of Pennsylvania, Criminal Trial Division, *Commonwealth v. Sean Benschop*, CP-51-CR-0001791-2014 and CP-51-CR-0001792-2014.

[14] Eric Sullivan routinely assisted Mr. Benschop on demolition jobs. (Tr. 188-89; Ex. J-1). Mr. Benschop was introduced to Griffin Campbell by Mr. Sullivan. (Tr. 75).

[15] Mrs. Benschop-Gregory started S&R with Sean Benschop and maintained the accounting and other administrative functions of the business. (Tr. 179, 411-12).

Campbell interview, which would be admitted as Exhibit J-1. (Tr. 405, 408). Mr. Benschop stated that he had no objection to the notes being entered into the record.[16] (Tr. 387). The notes were subsequently received and entered into the record as Exhibit J-1.

On November 1, 2016, the undersigned received an email submission from Tynisha Gregory-Benschop (Respondent's Exhibit 1, Ex. R-1) with two documents attached. The first document was a hand-written statement dated October 26, 2016, with the signature of Eric M. Sullivan. (Respondent's Exhibit 2, Ex. R-2). The second document was a typed statement from Tynisha Gregory-Benschop dated October 28, 2016 (Respondent's Exhibit 3, Ex. R-3). The Secretary did not object to the admission of these documents into evidence.

On November 7, 2016, in response to the admission of Mr. Sullivan's post-hearing handwritten statement, the Secretary filed a motion requesting Mr. Sullivan's prior sworn deposition statement[17] of August 14, 2013, be admitted in lieu of conducting a new deposition. The August 14, 2013 deposition was designated as Complainant's Exhibit 33 (Ex. C-33). The Respondent filed no objection to the admission of Mr. Sullivan's August 14, 2013 deposition. *See* November 30, 2016 Order.

In an order dated November 30, 2016, the undersigned admitted into evidence the following exhibits and closed the record: R-1, R-2, R-3, and C-33. Subsequently, the Secretary filed a post-hearing brief. The Respondent did not file a post-hearing brief.

For the reasons that follow, the willful citation is affirmed and a penalty of $56,000 is assessed.

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[16] Specifically, Mr. Benschop stated: "I don't have no objection with it. I don't have no objection with it because I know it's not true. I was not the subcontractor." (Tr. 387). Exhibit J-1 was not read into the record.

[17] Eric Sullivan was deposed at Department of Labor's Philadelphia, PA office by Complainant's attorneys, Michael P. Doyle and Jennifer L. Klimowicz on August 14, 2013. (Ex. C-33).

Findings of Fact

On June 5, 2013, OSHA CO Carle and AAD DeJesse arrived at the accident site to open an investigation. (Tr. 233-34). Emergency response personnel were still onsite and searching the collapse area for victims. (Tr. 236-37). CO Carle and AAD DeJesse interviewed employees of Campbell Construction, Griffin Campbell, and other witnesses from the general public. (Tr. 238, 255). The following day, they returned to the accident site to collect more information and CO Carle interviewed Sean Benschop in his hospital room.[18] (Tr. 241-42).

Sean Benschop had experience doing demolition work since 1996 as both a laborer and machine operator. (Tr. 131; Ex. C-17, pp. 5-6 (CCT-B, pp. 6-7)). Mr. Benschop owned two pieces of heavy equipment, a backhoe he purchased in 2006 and a hydraulic excavator he purchased in 2007. (Tr. 131; Ex. C-17, pp. 6-7, (CCT-B, pp. 7-8); C-18, p. 19). S&R was a demolition company formed by Sean Benschop and his wife, Tynisha Gregory-Benschop in 2012. (Tr. 179). S&R had been placed on the city of Philadelphia's master demolition list in 2013. (Tr. 132-33; Ex. C-17, p.8 (CCT-B, p. 9)). S&R had completed 4 demolition projects for the city of Philadelphia in the first five months of 2013. (Tr. 132-33, 179; Ex. C-17, p. 8 (CCT-B, p. 9). In June 2013, S&R had not received payment from the city for these projects. (Tr. 133-34).

The property's owner, STB Investments, hired Griffin Campbell of Campbell Construction as the contractor to demolish the buildings at the Market Street worksite. (Tr. 113; Ex. C-18, p. 19; Ex. J-1, p. 1). Campbell had done a little demolition work before, but the Market Street job was bigger than any of his previous jobs. (Ex. J-1, p.4).

[18] William Hobson, identified as Mr. Benschop's attorney, was present for most of CO Carle's interview with Mr. Benschop. (Tr. 256).

In May 2013, Mr. Campbell discussed the Market Street project with Mr. Benschop. (Tr. 182-84). The Market Street worksite consisted of the four-story Hoagie City building and 2 shorter buildings adjacent to the Hoagie City building's east side. (Ex. C-1). The Hoagie City building's west wall was shared with the adjacent one-story Salvation Army thrift store, which sat at the corner of Market Street and 22nd Street. (Exs. C-1, C-18 pp. 19-20).

At the instant hearing, Mr. Benschop stated that he had offered to be the subcontractor for the demolition work at the Market Street worksite. (Tr. 182-83). Mr. Benschop told Mr. Campbell the best way to demolish the 4-story Hoagie City building would be to dismantle it floor-by-floor from the roof downward by "walking the wall."[19] (Tr. 182-83). Mr. Benschop proposed a cost of about $11,000 per floor plus the cost of renting high-reach equipment that would be needed as a work platform. (Tr. 183).

Mr. Campbell did not subcontract the Market Street project to Mr. Benschop because the cost was too high. Instead, Mr. Campbell told Mr. Benschop his own employees would take care of the demolition at the Market Street site. (Tr. 183-84).

In June 2013, Mr. Campbell asked Mr. Benschop to demolish the Hoagie City building; Mr. Benschop agreed to use his excavator to demolish the Hoagie City building for $800 day. (Ex. C-18, p. 19; Tr. 182). The two shorter buildings at the Market Street worksite had already been demolished. (Ex. C-33, pp. 13, 33).

On Sunday, June 2, 2013, Darryl Alston drove Mr. Benschop to the Hoagie City building to begin work.[20] (Tr. 187). Mr. Alston had worked for S&R for 4-6 weeks before the Market Street job. (Tr. 23; Ex. C-16, p. 1; Ex. C-32, pp. 8-9 (CCT-A, p. 8-9)). Mr. Alston had performed

[19] Mr. Benschop explained that when demolishing by hand from the top down, a hole of about 10 feet, which is roughly 10 feet in from the wall, is made in each floor creating a chute for the bricks to be dropped through to the basement as they are removed floor-by-floor. (Tr. 138, 182-83; Ex. C-15, p. 22 (CCT-B, p. 22)).

[20] As discussed below, the undersigned finds that Darryl Alston was an employee of Respondent.

a variety of tasks for Mr. Benschop during his six weeks of employment, including getting diesel and hydraulic oil for the equipment, cutting beams, driving Mr. Benschop to and from a worksite, making repairs, and running errands at the direction of Mr. Benschop. (Tr. 24, 260, 338-39; Ex. C-16, pp. 1, 6; Ex. C-32, p. 42 (CCT-A, p. 42)). Mr. Alston did not have a set schedule of work; he waited for Mr. Benschop's call. (Tr. 276-77). Mr. Alston met Mr. Benschop through Eric Sullivan, who also worked for Mr. Benschop at demolition sites. (Tr. 275; Ex. C-16, p. 1). In addition to driving Mr. Benschop to the Market Street worksite, Mr. Alston sometimes worked as a fill-in at the site for Eric Sullivan, who usually assisted Mr. Benschop with demolition projects.[21] (Tr. 274; Ex. C-16, p. 1). Mr. Benschop generally supervised Mr. Alston's demolition work, but, sometimes Mr. Sullivan did.[22] (Tr. 277; Ex. C-16, p. 3).

Before Mr. Benschop began using the excavator to demolish the building on Sunday, Mr. Benschop instructed Mr. Alston to enter the building to cut the top floor's center beam with a chain saw. (Tr. 33, 145; Ex. C-16, pp. 3-4; Ex. C-17, pp. 22-23 (CCT-B, pp. 31, 34); Ex. C-32, pp. 17-18 (CCT-A, pp. 17-18)). Mr. Alston cut the beam on the top floor as instructed and while inside noticed a lot of big holes in the building's floors and several missing joists. (Tr. 30; Ex. C-32, pp. 14-15 (CCT-A, pp. 14-15)). Mr. Alston told Mr. Benschop about the building's interior condition and that he did not feel safe; Mr. Benschop told him to not go back inside the building.

[21] Mr. Sullivan had worked for Respondent about 1 ½ years and was an assistant and foreman at demolition worksites. (Ex. C-33, pp. 16, 24, 49). Prior to June 2, 2013, Sullivan had worked for Mr. Campbell doing demolition work on other buildings at the Market Street worksite for about 3 weeks in May 2013. (Ex. 33, pp. 13, 33-34). Mr. Sullivan did some minimal work to demolish the Hoagie City building the Friday or Saturday before the collapse; he argued with Mr. Campbell about the plan to demolish the building. Mr. Sullivan did not return to the worksite after his argument with Mr. Campbell. (Ex. C-33, pp. 41, 44-45, 86).

[22] Mr. Alston explained that because Mr. Benschop was from Guyana and had an accent, it was difficult to understand his instructions. In those situations, Mr. Sullivan explained the task. (Tr. 277; Ex. C-16, p. 3).

(Tr. 264; Ex. C-16, p.7). Mr. Alston believed Campbell had already removed many of the building's joists to sell as salvage. (Tr. 282-83; Ex. C-16, p. 4).

That day, Mr. Benschop removed the front of the building and a portion of the building's east wall; Mr. Alston stood near the building's west wall and used a water hose to keep the dust down while Mr. Benschop used the excavator. (Tr. 34, 187; Ex. C-18, pp. 20-21; Ex. C-32, pp. 19-20 (CCT-A, pp. 19-20)).

By the end of the day on Sunday, June 2, 2013, the excavator had demolished enough of the building that the wall adjacent to the Salvation Army building had become a multi-story, freestanding wall. (Tr. 152, 189-190; Ex. C-5; Ex. C-17, p. 44 (CCT-B, pp. 96)). Mr. Benschop confirmed that the photograph at Exhibit C-5 accurately showed the freestanding wall that had developed. (Tr. 189-90; Ex. C-5).

No demolition work was done at the site on Monday, June 3, because of rain. (Tr. 35-36; C-32, p. 21 (CCT-A, p. 21)). However, Mr. Benschop did visit the worksite on Monday to check on his excavator, which he had left at the Market Street site. (Tr. 194). Mr. Benschop confirmed that a photograph taken on June 3 accurately reflected the worksite as it existed when he stopped by to check on his equipment that day. (Tr. 194-95; Ex. C-4). Because no work had been done at the site on June 3, the photograph also shows the site's condition as it was at the end of the work day on Sunday, June 2 and the beginning of the work day on June 4, when work at the site resumed. This photograph shows that about 25% of the wall that stood next to the Salvation Army had become an unsupported, freestanding wall. (Ex. C-4).

On Tuesday, June 4, 2013, Mr. Alston again drove Mr. Benschop to the Market Street worksite.[23] (Tr. 36, 287-89; Ex. C-16, p. 6; Ex. C-32, pp. 21-22 (CCT-A, pp. 21-22)). Mr.

[23] Mr. Alston was at the Market Street worksite from 8:00 A.M. to 6:00 P.M. on Sunday, 1:30 P.M. to 5:00 P.M. on Tuesday, and 7:30 A.M. to 10:30 A.M. on Wednesday. (Tr. 287-88, 293; Ex. C-16, pp. 6, 8).

Benschop then instructed Mr. Alston to go to S&R's previous demolition worksite on Page Street to repair a damaged fence and gate. (Tr. 36; Ex. 32, pp. 21-22 (CCT-A, pp. 21-22)). Mr. Alston worked at the Page Street site for about 5 hours and returned to the Market Street worksite around 1:30-2:00 P.M.[24] (Tr. 36, 287-89; Ex. C-16, p. 6; Ex. C-32, p. 22 (CCT-A, p. 22)). Mr. Benschop told Mr. Alston to stay at the Market Street worksite and wait for him. (Tr. 292; Ex. C-16, p. 6). Mr. Alston waited at the worksite until they left around 5:00 P.M. (Tr. 287-88, 292-93; Ex. C-16, pp. 6, 8).

A photograph, Exhibit C-6, taken by a member of the public during the day on Tuesday, June 4, 2013, showed that the freestanding wall above the Salvation Army had grown in size; about 50% of the wall next to the Salvation Army had become unsupported and freestanding. (Tr. 198; Ex. C-6). Mr. Benschop confirmed that it was his excavator in the photograph at Exhibit C-6 and the photograph accurately portrayed the worksite on Tuesday, June 4, 2013. (Tr. 199; Ex. C-6). Another photograph taken at the end of the day June 4, 2013, showed the entire front portion of the building had been removed except the west wall of the building shared with the adjacent Salvation Army building, which was still almost fully intact for 3-4 stories and was not supported.[25] (Tr. 202-03; Ex. C-8). Approximately 30-35 feet of the multi-story wall adjoining the Salvation Army was exposed and towered above the one-story Salvation Army building. (Tr. 292-93).

[24] Mr. Benschop testified at the hearing for the instant case that on Tuesday, June 4, Alston had stayed at the Market Street worksite; Alston had not gone to the Page Street worksite work there was completed. (Tr. 196-97). This directly contradicts Mr. Alston's sworn testimony at the Campbell criminal trial (Tr. 36, 287-89; Ex. 32, p. 22 (CCT-A, p. 22)) and Alston's statement to OSHA nine days after the accident. (Ex. C-16, pp. 6, 8). No weight is given to Mr. Benschop's assertion at the hearing that Alston did not work at the Page Street worksite on Tuesday, June 4, 2013. The undersigned finds Mr. Alston did go to Page Street as reflected in his sworn testimony and signed OSHA interview statement.

[25] The photograph was taken by the project's architect, Plato Marinakos. (Tr. 202).

When Mr. Benschop expressed his concern about the unsupported, free-standing west wall, Mr. Campbell told him his guys would take care of it. (Tr. 147, 187-88, 352; Ex. C-32, p. 24 (CCT-A, p. 24)). Mr. Benschop assumed that meant Mr. Campbell was going to have his employees take down the wall manually (without machine) overnight -- because no one would be around to get hurt during that time. (Tr. 147-48).

On Wednesday, June 5, Mr. Alston drove Mr. Benschop to the Market Street worksite and arrived about 7:30 A.M. (Tr. 288; Ex. C-16, p. 6). Most of the west wall next to the Salvation Army building was still there; very little had been removed after Mr. Alston and Mr. Benschop left at 5:00 P.M. the prior evening. (Tr. 151). Mr. Benschop told Mr. Alston to wait at the Market Street site for instructions on some window repair work to be done at the Page Street worksite. (Tr. 288; Ex. C-16, p. 6).

Mr. Benschop admitted that he knew it would have been safer to take the wall down manually (not with heavy equipment); but, Mr. Campbell had indicated the property owner wanted the demolition project completed quickly. (Tr. 153-54). Mr. Benschop had told Campbell "over and over" that the Hoagie City building was dangerous. (Tr. 171). Nonetheless, Mr. Benschop felt it was necessary to continue to work so that he could be paid – he stated he needed to feed his family and to pay to have his excavator hauled from the worksite.[26] (Tr. 160; Ex. C-17, p. 40 (CCT-B, p. 92)).

Mr. Benschop began chipping away at the Hoagie City building's east wall, using an I-beam in the excavator's jaws, at about 8:30 A.M., the morning of June 5, 2013; he was planning to have the wall fall toward the east into the adjacent empty lot. (Tr. 153, 288; Ex. C-16, p. 6). By this time the building's structure had been demolished to the extent that the interior of the

[26] Benschop indicated that he needed the money because he had not yet been paid by the city for jobs he had completed earlier that year. (Tr. 179, 187).

building was essentially a V-shape – there was very little structure remaining inside the building. (Tr. 153-54, 376).

While he was waiting, Mr. Alston observed Mr. Benschop demolishing the building. (Tr. 45; Ex. C-32, p. 25). At about 10:25 a.m., Mr. Alston used his phone to film two short videos of the excavator chipping away at the east wall. (Tr. 289; Ex. C-16, p. 6; Exs. C-21, C-23). Mr. Alston was standing in the adjacent empty lot next to the Hoagie City building. (Tr. 49-50; Ex. C-32, pp. 34-35 (CCT-A, pp. 34-35)).

At about 10:42 A.M. on Wednesday June 5, 2013—as Mr. Benschop was using the excavator to chip away at the east wall—the east wall collapsed and fell westerly into the Hoagie City building. (Tr. 154-56; Ex. C-18, p. 21; Ex. C-17, pp. 31-34 (CCT-B, pp. 45, 47-49)). When the east wall fell inward, it took out the remaining interior structure of the building. The entire Hoagie City building then collapsed, with the three-four story freestanding west wall falling onto the adjacent Salvation Army store. (Tr. 156, 375-76; Ex. C-18, p. 21; Ex. C-17, pp.48-49 (CCT-B, pp. 33-34). Bricks, mortar, and wood from the Hoagie City building's multi-story west wall fell onto the Salvation Army thrift store causing it to collapse onto customers and employees, killing six people and injuring 12 others.[27] (Ex. C-18, p. 21).

Mr. Benschop injured his hand, arm, leg, and shoulder getting out of the excavator after the collapse. (Tr. 156-57; Ex. C-17, pp. 34-35 (CCT-B, pp. 49)). About ten minutes later, Mr. Alston drove Mr. Benschop to the hospital for treatment. (Tr. 157; Ex. C-17, pp. 33-34 (CCT-B, pp. 49-50)).

[27] The Hoagie City building, prior to demolition, was a four-story structure about 40-50 feet high that faced Market Street and extended about 120 feet back from the sidewalk. (Tr. 359-60). An aerial photograph of the site after the collapse shows the area affected after the collapse. The debris was spread across a large area from within the Hoagie City building, covered most of the corner lot where the Salvation Army building had stood and then extended past the sidewalk west onto 22nd Street. (Exs. C-9, C-12).

Respondent was an employer at the Market Street worksite

The central issue in controversy is whether Respondent was an employer with an employee at the Market Street worksite. The Secretary asserts that Darrel Alston was Respondent's employee at the Market Street worksite. (S. Br. 6.)

The OSH Act places duties on "employers" to protect the health and safety of "employees." 29 U.S.C. § 654(a). An employer is defined as "a person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). "Only an employer may be cited for a violation of the Act." *Allstate Painting & Contracting Co*., 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated) (*Allstate*). The Act requires each employer to comply with occupational safety and health standards and regulations promulgated under the OSH Act. *Id.* The Secretary has the burden of proving Respondent is the employer of at least one affected employee at the worksite. *See Allstate*, 21 BNA OSHC at 1035; *Poughkeepsie Yacht Club, Inc*., 7 BNA OSHC 1725, 1727 (No. 76-4026, 1979).

Respondent argues that it was not an employer because it had no employees at the Market Street worksite. Respondent asserts Mr. Benschop was not a subcontractor at the worksite, instead he was Campbell Construction's employee at the worksite and thus could not be an employer. (Tr. 76, 134). Further, Respondent asserts that any demolition-related work by Mr. Alston at the Market Street site was as an employee of Campbell Construction. (Tr. 75-76, 216, 402).

Based on the weight of the credible evidence and analysis under Commission law, the undersigned finds Mr. Alston was an employee of Respondent for the reasons set forth below.

Post-hearing statements do not support Respondent's position

At the hearing for the instant case, Mr. Benschop vigorously asserted that Mr. Alston did not work for him at the Market Street worksite doing demolition work. (Tr. 76, 95, 123, 173, 300, 399, 402). Mr. Benschop asserted Mr. Alston never did demolition work; Alston had simply driven him to worksites, had run errands as needed, and had done repair work for him at another worksite. (Tr. 76, 173, 399). Mr. Benschop also stated that only Griffin Campbell could hire employees at the Market Street worksite. (Tr. 400).

During the hearing for the instant matter, Mr. Benschop objected to the content of Alston's signed OSHA statement and Alston's testimony at the Campbell criminal trial,[28] stating that Mr. Alston lied when he said he had worked for Mr. Benschop at the Market Street site. (Tr. 75, 300). Additionally, Mr. Benschop asserted that Mr. Alston could not be his employee because Mr. Alston was not on the company's workers compensation plan; the city of Philadelphia required him to put employees on the company worker's compensation plan. (Tr. 402-03).

As supporting evidence for the assertion that Mr. Alston was not an employee, Respondent submitted two post-hearing statements from Mrs. Tynisha Gregory-Benschop and Mr. Eric Sullivan. (Tr. 393-95, 414; Exs. R-1, R-2, R-3). Mr. Sullivan's 3-page handwritten, signed statement had been photographed, and sent to Mrs. Gregory-Benschop by phone; it was not notarized or otherwise validated. (Exs. R-1, R-2). In his written statement, Mr. Sullivan asserts that Mr. Alston never helped Mr. Benschop with demolition work. Instead, Mr. Alston only provided transportation for Mr. Benschop and hauled scrap metal. (Ex. R-2). In his post-hearing statement, Mr. Sullivan stated that Mr. Campbell had not allowed independent

[28] Both exhibits were read into the record. (Tr. 75, 300; Exs. C-16, C-32). Mr. Alston was subpoenaed but did not appear at the hearing. (Tr. 13-14).

contractors to work at the Market Street worksite. If Mr. Alston was working at the site he must have been working for Campbell. (Ex. R-2). Additionally, Mr. Sullivan thought Mr. Alston did not have enough demolition experience to work at the Market Street project. (Ex. R-2).

The undersigned finds Mr. Sullivan's statement has no credibility with respect to Mr. Alston's status at the worksite. Mr. Sullivan was not present at the worksite so he had no personal knowledge of what occurred. Further, Mr. Sullivan wrote his statement—neither sworn nor subjected to direct cross examination—over 3 years after the building collapse.

Mrs. Gregory-Benschop also submitted a post-hearing statement, which was neither notarized nor validated. (Exs. R-1, R-3). Mrs. Gregory-Benschop stated that, to her knowledge, Mr. Alston was never hired for demolition work at the Market Street site. (Ex. R-3). As a partner in S&R, she had written checks on behalf of Mr. Benschop for Mr. Alston's services. (Ex. R-3). She stated that Mr. Alston was paid either at the end of the work week or daily as a driver. (Ex. R-3). Mr. Alston had been hired to transport, run errands, and haul scrap metal for Mr. Benschop. (Ex. R-3). She knew Mr. Alston had also been paid to repair a damaged fence at S&R's Page Street worksite. (Ex. R-3). Further, it was her understanding that only Campbell could hire workers at the Market Street site; Campbell ran the worksite, not S&R. (Ex. R-3).

The undersigned finds Mrs. Gregory-Benschop's statement has little credibility with respect to Mr. Alston's role at the Market Street worksite. Mrs. Gregory-Benschop was not at the Market Street worksite. Further, her role in the business was limited to administrative work not onsite work. Mr. Sullivan made his statement over 3 years after the collapse, which was not a sworn statement, nor was it subject to direct or cross examination. Finally, as a partner in S&R, she is not an objective source of information.

The post-hearing statements of Mrs. Gregory-Benschop and Mr. Sullivan are not dispositive in determining whether Mr. Alston was an employee at the Market Street worksite.

Credible evidence shows Alston was Respondent's employee

The weight of the credible evidence shows that Mr. Alston was an employee of Respondent and had been working at the Market Street worksite as Mr. Benschop's assistant. In their various statements and interviews, Mr. Sullivan, Mr. Alston, and Mr. Benschop generally agreed that Mr. Alston had been Respondent's employee prior to the Market Street worksite.[29] (Tr. 22-23, 134-35, 250-51, 258-61, 274, 338-39; Ex. C-16, p. 1; Ex. C-33; Ex. C-17, p. 14 (CCT-B, p. 21); Ex. C-32, p. 8 (CCT-A, p. 8)). The dispute lies in whether Mr. Alston was an employee working at the Market Street worksite.

Mr. Benschop had admitted that Mr. Alston was his employee on several occasions. The day after the collapse, CO Carle interviewed Mr. Benschop in the hospital, where he told her that Mr. Alston had assisted him at the Market Street worksite. (Tr. 250-51, 258-60). Several times during his October 8, 2015 testimony at the Campbell criminal trial, Mr. Benschop consistently referred to Mr. Alston as his assistant and employee. (Tr. 134-35, 143, 145, 165, 169; Ex. C-17, pp. 9, 21, 23, 48, 55 (CCT-B, p. 14, 30, 34, 109, 120)). For example, when asked whether anyone worked for him or was with him at the Market Street worksite, he replied with the following:

> "Question: Did you have anybody that worked for you on that job?
> Answer: Yes.
> Question: Who worked for you?
> Answer: Darryl. I just know him by Darryl. I don't know his last name.
> Question: You're referring to Darryl Alston?
> Answer: Yes."

[29] CO Carle interviewed Mr. Benschop in the hospital on June 6, 2013. (Tr. 239, 242) William Hobson came into the room during the interview with Benschop to act as his attorney. (Tr. 255). CO Carle had met Mr. Hobson the prior day when she interviewed Mr. Campbell. Nonetheless, Mr. Hobson was not Mr. Benschop's attorney in his criminal proceeding or in this matter. (Tr. 255-56).

(Tr. 134-35; Ex. C-17, p. 9 (CCT-B, p. 14)).

"Question: All right. When you arrived on Sunday, June 2, did you bring anybody with you?
Answer: Yes, Darryl.
Question: Darryl Alston?
Answer: Yes.
Question: And what was Darryl's role coming with you?
Answer: Darryl was like the man that take[s] me to get diesel. He go[es] for the diesel. He go[es] for the hydraulic fuel. He drive[s] me around whatever I have -- wherever I have to go.
Question: Okay. So he was your assistant?
Answer: Yes.
Question: And he was your employee?
Answer: Yes, he was.
Question: You paid him?
Answer: Yes, I brought him."
(Tr. 143-44; Ex. C-17, p. 21(CCT-B, p. 30)).

"Question: So you did get a chainsaw and Darryl was able to cut that?
Answer: Yes."
(Tr. 145 Ex. C-17, p. 23(CCT-B, p. 34)).

"Question: Now who was working for you that day, sir?
Answer: Darryl."
(Tr. 165; Ex. C-17, p. 48 (CCT-B, p. 109)).

"The Court: Who drove you to the hospital?
Witness: Darryl.
Mr. Hobson. Question: And Darryl works for you?
Answer: Yes."
(Tr. 169; Ex. C-17, p. 55 (CCT-B, p. 120)).

These examples from Mr. Benschop's sworn testimony show that he considered Mr. Alston his employee at the Market Street worksite.

Additionally, Mr. Alston stated he was an employee of the Respondent. In Mr. Alston's signed statement from his June 14, 2013 OSHA interview, he stated that he had been at the Market Street worksite from 8:00 A.M. to 6:00 P.M. on Sunday, 1:30 P.M to 5:00 P.M. on Tuesday, and 7:30 A.M. to 10:30 A.M. Wednesday, either doing demolition work or awaiting instructions from Mr. Benschop. (Tr. 287-88, 293; Ex. C-16, pp. 6, 8). In Mr. Alston's October

5, 2015 testimony at the Campbell criminal trial, he stated he was paid by Mr. Benschop and had worked for Mr. Benschop at the Market Street worksite. (Tr. 55-56; Ex. C-32, p. 39-40 (CCT-A, p. 39-40)). Mr. Alston consistently stated he was Respondent's employee.

In his August 14, 2013 deposition, Eric Sullivan stated Mr. Benschop hired Mr. Alston to drive Benschop to worksites, to run errands, and to do other small jobs. (Ex. 33, p. 66, 109). In his August 14, 2013 deposition, Mr. Sullivan stated (in stark contrast to his post-hearing statement) that Mr. Alston had worked for Mr. Benschop at the Market Street worksite and that if Mr. Alston had entered a building, it would have been to assist Mr. Benschop with the demolition work. (Ex. 33, pp. 65-66, 108-110). In that same deposition, Mr. Sullivan stated that he did not think of Mr. Alston as a "demolition guy"; instead, Mr. Alston was just supporting Mr. Benschop "in any little way that he could." (Ex. C-33, p. 66). Mr. Sullivan also stated that Mr. Campbell did not pay Mr. Alston, Mr. Benschop paid Mr. Alston. (Ex. 33, p. 109).

Mr. Sullivan's 2013 deposition statements are given greater credibility than his post-hearing statement. At his deposition, Mr. Sullivan was sworn, his statements were officially transcribed, and he was subject to direct questions from the Secretary's counsel. Even so, Mr. Sullivan's deposition statements are given minimal weight because he was not at the worksite when Mr. Alston was there.

The weight of the most credible evidence shows that Mr. Alston was considered to be Respondent's employee at the Market Street worksite. Mr. Alston and Mr. Benschop's sworn testimonies at the Campbell criminal trial show that both believed Mr. Alston was Mr. Benschop's assistant at the Market Street worksite. Further, their testimonies were consistent with their statements to OSHA during the post-collapse investigation.

The evidence supporting Respondent's assertion that Mr. Alston did not work at the Market Street site consists of two post-hearing statements that were not subject to cross or direct examination and not otherwise substantiated made over three years after the accident. Further, Mr. Benschop's testimony at the hearing in the instant manner is given little credibility; it is to his benefit to believe that Mr. Alston was not his employee at the Market Street worksite. Thus, Mr. Benschop's testimony at the Campbell criminal hearing is given greater weight because there he was testifying in a matter not related to his own self-interest. Further, Mr. Benschop's testimony at the criminal trial, that he considered Mr. Alston his assistant and employee, is consistent with the statement he gave to the CO the day after the accident.

In addition to the credible statements that support a finding that Mr. Alston was Respondent's employee, an analysis under the Commission's legal precedent also supports the conclusion Mr. Alston was an employee of Respondent at the Market Street worksite.

Darden Analysis

To determine whether the Secretary has established the existence of an employer-employee relationship, the Commission relies upon an analysis of the *Darden* factors. *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) (*S&W*).

The OSH Act defines an employer as a "person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). Person means "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652(4). An employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(3).

In similarly worded statutes, the Supreme Court has relied on the common law for guidance in determining whether an individual is an employee, or alternatively, the kind of

person the common law would consider an employer. *See Clackamas*, 538 U.S. 440, 444-45 (2003)*; Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (*Darden*).

In *Darden*, the Court sets forth several factors to consider when evaluating the existence of an employment relationship. *Darden*, 503 U.S. at 323-24 (1992). The Commission follows *Darden* and emphasizes the critical factor in this analysis is the "right to control the manner and means by which the product [was] accomplished." *S&W*, 23 BNA OSHC at 1289, quoting *Darden*, 503 U.S. at 323. In addition, the following factors are considered:

> the skill required [for the job]; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work, the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324 (citation omitted).

An analysis of the evidence using the factors set forth in *Darden* shows Mr. Alston was an employee of Mr. Benschop at the Market Street worksite. Mr. Benschop directed and controlled Mr. Alston's work, which is the most significant factor when evaluating employee status.

Darden Factors[30]

Hiring party's right to control the manner and means by which the product is accomplished

Alston's June 14, 2013 signed OSHA statement, Alston's October 5, 2015 testimony, Benschop's October 8, 2015 testimony, and Benschop's June 6, 2013 statement to CO Carle consistently show that Mr. Benschop had control over Mr. Alston's work. (Tr. 22-23, 143-44,

[30] There was no credible evidence in the record for two of the factors: 1) what the hired party's role was in hiring and paying assistants, and 2) the tax treatment and provision of employee benefits.

250-51; Ex. C-16; Ex. C-17, p. 21 (CCT-B, p. 30); Ex. C-32, p. 9 (CCT-A, p. 9)).

Mr. Benschop hired Mr. Alston to drive him to worksites and assist him in demolition-related activities at worksites. (Tr. 22-23, 28-29, 32, 260; Ex. C-16, pp. 4-6; Ex. C-32, pp. 7, 14, 17-18 (CCT-A, p. 7, 14, 17-18)). Mr. Alston drove Mr. Benschop to the Market Street worksite every day. On Sunday, June 2, Mr. Benschop had Mr. Alston assist him at the Market Street worksite by cutting an interior beam to start the machine demolition and using a water hose to keep the dust down. (Tr. 28-29, 32, 282-85; Ex. C-16, pp. 4-5; Ex. C-32, pp. 14, 16-18 (CCT-A, p. 14, 16-18)). On Tuesday, Mr. Benschop sent Mr. Alston to make post-demolition repairs at Respondent's Page Street worksite. (Tr. 36-38, 268, 287-89; Ex. C-16, p. 6; Ex. C-32, pp. 21-22 (CCT-A, p. 21-22)). On Wednesday, Mr. Benschop told Mr. Alston to wait at the Market Street worksite for further instructions about work to be done at the Page Street worksite. (Ex. C-16, p. 6).

Mr. Benschop directed Mr. Alston's work activities – Mr. Alston had no control over when, how, or where to work. Because this is the most significant factor, and other factors do not significantly weigh toward a contrary determination, Mr. Benschop's control over the manner and means of Mr. Alston's works supports finding Respondent was Mr. Alston's employer at the Market Street worksite.

Skill required

Mr. Benschop was experienced in demolition work and was on the city's master demolition list. Mr. Alston had little experience with demolition and was learning on-the-job from Mr. Benschop. Because Mr. Alston did not have the skill required to do demolition work independently, this factor weighs in favor of finding Mr. Alston was an employee of Respondent.

Source of the instrumentalities and tools

Mr. Benschop required Mr. Alston to purchase a hardhat and safety glasses to use while working at the site. (Ex. C-16, p. 5). Mr. Alston did not provide the tools he used at the worksite on Sunday, June 2. Respondent provided a chainsaw; when the chainsaw did not work, Mr. Alston used a chainsaw provided by the site's general contractor, Campbell. (Tr. 32-33, 281-82; Ex. C-16, p. 4-5; Ex. C-32, p. 18 (CCT-A, p. 18)). The excavator at the worksite belonged to Mr. Benschop. (Tr. 131; Ex. C-17, p. 6 (CCT-B, p. 7).

Mr. Alston provided his own hardhat and safety glasses but was not responsible for providing the tools needed to complete the primary work at the site. This factor weighs in favor of finding an employment relationship.

Duration of the relationship between the parties

The record shows Mr. Alston was an employee prior to the Market Street worksite and that he was with Mr. Alston for the entirety of the project at the Market Street worksite. At the time of the June 5, 2013 building collapse, Mr. Alston had worked for Respondent approximately four to six weeks. (Tr. 23, 275; Ex. C-16, p. 1; Ex. C-32, p. 8 (CCT-A, p. 8)). He had started doing demolition work at a previous worksite on 63rd Street and was usually paid $100 per day when he did fill-in demolition work. (Tr. 277; Ex. C-16, p. 2). With respect to the Market Street worksite, the record reveals that Mr. Alston was with Mr. Benschop every day that demolition work was done from June 2 to June 5, 2013. (Tr. 287-88, 293; Ex. C016, pp. 6, 8). During his June 14, 2013 OSHA interview, Mr. Alston referred to himself as an employee of Respondent. (Tr. 259-60, 274-75; Ex. C-16, p. 1). This factor weighs in favor of finding an employment relationship.

Whether the hiring party has the right to assign additional projects to the hired party

Mr. Benschop assigned tasks to Mr. Alston. On Sunday, Mr. Alston was assigned to work

at the Market Street site. On Tuesday, Mr. Benschop had Mr. Alston go to the Page Street site to make repairs. On Wednesday, Mr. Benschop had Mr. Alston wait at the Market Street site for instructions on additional repairs to be made at the Page Street site. Mr. Alston did various tasks as assigned by Mr. Benschop and was subject to Mr. Benschop's call for transportation to and from the worksites and for specific work assignments.

The evidence shows Mr. Benschop had the right to assign additional projects to Mr. Alston. This factor weighs heavily in favor of finding an employment relationship.

Location of the work

Mr. Benschop determined Mr. Alston's work location. Mr. Alston either stayed at the Market Street site or worked at the Page Street site based on Mr. Benschop's daily instructions. (Tr. 287-89; Ex. C-16, pp. 6). This factor weighs in favor of finding an employment relationship.

Extent of the hired party's discretion over when and how long to work

Mr. Alston did not have a set schedule of work; he waited for Mr. Benschop's call. (Tr. 276-77; Ex. C-16, pp. 1-2). Mr. Alston drove Mr. Benschop to the Market Street worksite each day and then Mr. Benschop directed him to work at either the Market Street or the Page Street worksite. (Tr. 33-37, 41, 56, 287-89; Ex. C-16, p. 5; Ex. C-32, pp. 12, 14, 21, 24, 42 (CCT-A, p. 12, 14, 21, 24, 42)). The evidence shows that Mr. Benschop determined when and how long Mr. Alston worked. This factor weighs heavily in favor of finding an employment relationship.

Method of payment

Mr. Benschop paid Mr. Alston by cash or check on a daily or weekly basis. (Tr. 35, 276-278; Ex. C-16, p. 2; Ex. C-32, pp. 20-21 (CCT-A, p. 20-21)). The undersigned finds this factor weighs in favor of finding an employment relationship.

Whether the work is part of the regular business of the hiring party

Respondent is in the business of demolition and the work at the Market Street site was demolition. This factor weighs in favor of finding Respondent was Mr. Alston's employer.

Whether the hiring party is a business

S&R is a demolition company formed by Mr. Benschop and his wife in 2012. (Tr. 179). An excavator and backhoe owned by Mr. Benschop were used for S&R's business. (Tr. 131; Ex. C-17, p. 6 (CCT-B, p. 7)). S&R was an approved demolition contractor for the city of Philadelphia. (Tr. 132-33 Ex. C-17, p. 8 (CCT-B, p. 9)). Because S&R is in the business of demolition and the work at the Market Street worksite was demolition, this factor weighs in favor of finding Respondent was Mr. Alston's employer.

Conclusions Based on the *Darden* Test

Based on the foregoing, and in particular, the key factor – control over Mr. Alston's work activities – I conclude that Mr. Alston was Respondent's employee at the Market Street worksite.

In reaching this conclusion, I have considered Respondent's assertion that Mr. Alston did not engage in demolition work and reject that assertion. The evidence shows that Mr. Alston was onsite all three days Mr. Benschop used the excavator for demolition work at the Market Street site. Mr. Alston assisted Mr. Benschop generally, and in particular, entered the building to cut a joist so the machine demolition could begin. For all three days, Mr. Alston was acting at the instruction of Mr. Benschop for that day's work assignment. The weight of the credible evidence supports finding Mr. Alston was an employee of Respondent.

Credibility Assessments

Generally, the undersigned finds statements made under oath (such as, at the Campbell criminal trial) or closer in time to the date of the collapse have greater credibility and thus are assigned greater weight. In that vein, statements made under oath that were subject to direct and

cross-examination are more credible than sworn statements not subject to cross-examination and thus given greater weight.

Additionally, the post-hearing statements from Mrs. Gregory-Benschop and Mr. Sullivan were not subject to direct or cross examination and not given under oath. Thus, to the extent those statements are not supported by other credible evidence, they are given little weight.

Mr. Benschop consistently asserted that Mr. Alston was not his employee during the hearing for the instant case. This is in stark contrast to Mr. Benschop's sworn testimony at the Campbell criminal trial where he consistently stated that Mr. Alston was his employee and had assisted him at the worksite. (Tr. 134-35, 143, 145, 165; Ex. C-17, pp. 14, 18, 30, 34, 48 (CCT-B, p. 21, 25, 44, 49, 109)).

Because of the vested interest he has in the outcome of the instant matter, the undersigned gives Mr. Benschop's statements during the hearing for the instant manner less credibility than his statements under oath at the Campbell criminal trial. Thus, Mr. Benschop's testimony at the Campbell criminal trial, that Mr. Alston was his assistant and employee, is given greater weight than his statement during the hearing that Mr. Alston was not an employee.

Jurisdiction

Based upon the record, the undersigned finds Respondent, at all relevant times, was engaged in a business affecting commerce[31] 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). The undersigned concludes that the Commission has jurisdiction over the parties and subject matter in this case.

[31] The Commission has found that construction activity, even a small project, affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). Here, Respondent was engaged in demolition at the worksite. Demolition regulations are within OSHA's part 1926, Safety and Health Regulations for Construction. *See 29 C.F.R. 1926, et seq.* the undersigned finds that Respondent was an employer engaged in a business affecting commerce under the Act.

Secretary's Burden Of Proof

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative 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

The Secretary alleges a willful violation of 29 C.F.R. § 1926.854(b), which requires:

> No wall section, which is more than one story in height, *shall be permitted to stand alone without lateral bracing*, unless such wall was originally designed and constructed to stand without such lateral support, and is in a condition safe enough to be self-supporting. All walls shall be left in a stable condition at the end of each shift. (emphasis added.)

The Secretary alleged that, at Respondent's 2136-38 Market Street worksite, Respondent permitted a three-to-four-story exterior masonry wall to stand alone without lateral bracing exposing employees to crushing hazards. *See Citation* and *Complaint.*

The standard is applicable

Mr. Benschop was demolishing the Hoagie City building at the Market Street worksite with an excavator. The wall section without lateral bracing was three to four stories in height. The requirements of the cited standard apply to Respondent.

The standard's requirements were violated.

The evidence shows that by the end of Sunday, June 2, 2013, the excavator had demolished enough of the building that the wall next to the Salvation Army building had become a multi-story, freestanding wall without lateral support. (Tr. 152, 189-190; Ex. C-5; Ex. C-17, p. 44 (CCT-B, p. 96)). Mr. Benschop confirmed the photograph at Exhibit C-5 showed the

freestanding wall as it had developed by the end of the day on Sunday, June 2. (Tr. 189-90; Ex. C-5). About 25% of the wall next to the Salvation Army had become an unsupported freestanding wall by the end of the day Sunday.[32] (Exs. C-4, C-5).

A photograph, Exhibit C-6, taken by a member of the public during the day on Tuesday, June 4, 2013, showed the freestanding wall above the Salvation Army had grown in size; about 50% of the wall adjoining the Salvation Army had become unsupported and freestanding. (Tr. 198; Ex. C-6). Mr. Benschop confirmed that it was his excavator in the photograph at Exhibit C-6 and the photograph accurately portrayed the worksite on Tuesday, June 4, 2013. (Tr. 199; Ex. C-6). Another photograph taken at the end of the day June 4, 2013, shows the entire front portion of the building's right (west) wall next to the Salvation Army, was still almost fully intact for three-four stories and was not supported.[33] (Tr. 202-03; Ex. C-8).

These photographs show, and Mr. Benschop's testimony confirms, the wall adjoining the Salvation Army building was multi-story and unsupported. Respondent did not comply with the cited standard's requirement to laterally support a multi-story wall section. The standard was violated.

An employee was exposed to the hazard's zone of danger.

To prove employee exposure, the Secretary must show that an employee was either actually exposed to the zone of danger, or that exposure was reasonably predictable. *Consol. Grain & Barge Co.,* 23 BNA OSHC 2055, 2065 (No. 10-0756, 2011) (citations omitted). The predictability of exposure can be determined through "evidence that employees while in the

[32] Mr. Benschop confirmed the photograph at Exhibit 4 was an accurate depiction of the worksite on June 3. (Tr. 194-95; Ex. C-4). No work had been done at the site on June 3 due to rain; thus, the photograph showed the site's condition as it was at the end of the work day on Sunday, June 2 and the beginning of the work day on June 4 when work at the site resumed.

[33] The photograph was taken by the project's architect, Plato Marinakos. (Tr. 202).

course of assigned work duties, personal comfort activities and normal means of ingress/egress would have access to the zone of danger." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 n.6 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished).

The zone of danger from the uncontrolled collapse of the three-to-four story freestanding Hoagie City wall was substantial. (Tr. 359-360, 365; Exs. C-9, C-12, C-29). Because the unsupported, freestanding wall at the Market Street worksite could have fallen in either direction, the zone of danger was much larger than the area affected by the June 5 collapse; the zone of danger also included the empty lot to the east of the Hoagie City building and onto Market Street itself, had the building collapsed to the east.

The Hoagie City building, prior to demolition, was a four-story structure about 40-50 feet high that faced Market Street and extended about 120 feet back from the sidewalk. (Tr. 359-60). An aerial photograph of the site shows the area affected after the collapse. The debris was spread across a large area from within the Hoagie City building, covered most of the corner lot where the Salvation Army building had stood and then extended past the sidewalk west onto 22nd Street. (Tr. 236, 358; Exs. C-9, C-12).

A video of the collapse of the Hoagie City building was captured by the surveillance camera of a passing city bus. (Tr. 363; Ex. C-29). The video shows the collapse of the Hoagie City building onto the Salvation Army building, which then collapsed. The video shows pedestrians, that had been walking down the sidewalks, running away from the plume of dust and debris. (Ex. C-29). In addition to covering the corner lot at Market Street and 22nd Street, the plume of dust and debris extended to one lane of Market Street and several lanes of 22nd Street. (Ex. C-29).

The damage shown, in the photographs and video, occurred when the Hoagie City

building collapsed inward and toward the west. Had the building collapsed toward the east instead of the west, the debris would have likely covered the empty lot adjacent to the Hoagie City building to the east and gone further into Market Street. (Tr. 359-60, 365; Exs. C-1, C-21).

The Secretary asserts that Mr. Alston was in the danger zone on Sunday, June 2, and Wednesday, June 5. (S. Br. 22; Tr. 187; Ex. C-5).

At the time of the collapse on June 5, 2013, Mr. Alston was standing just east of the free-standing wall within the security fence on the adjacent empty lot at the Market Street worksite. (Tr. 49-51; 359-60, 365; Exs. C-1, C-6, C-32, pp. 34-35 (CCT-A, p. 34-35)). He had used his phone to video Mr. Benschop using the excavator to demolish the Hoagie City building about 30 minutes before the collapse.[34] (Tr. 289, 345-46; Ex. C-16, p. 6; Ex. C-21; Ex. C-23). Because the zone of danger included the area where Mr. Alston was standing, he was exposed to injury from the collapse of the building.

On Sunday, June 2, 2013, Mr. Alston was standing next to the west wall of the Hoagie City building using a hose to keep the dust down while Mr. Benschop tore off the front of the building. (Tr. 34; Ex. C-17, p. 19-20 (CCT-B, p. 26-27)). On both Sunday and Wednesday, Mr. Alston was standing in the zone of danger from the collapse of the unsupported, multi-story freestanding wall. Further, because of the varied duties Mr. Benschop had Mr. Alston perform at the site, it is reasonably predictable that any time Mr. Alston was at the Market Street worksite between June 2 and June 5, 2013, he was exposed to injury from the collapse of the unsupported, freestanding wall.

The Secretary has established that Mr. Alston was exposed to the hazard of the unsupported, multi-story freestanding wall while at the Market Street worksite. As discussed

[34] The video Mr. Alston took with his phone shows he was standing within the worksite's construction fence and to the east of the Hoagie City building in the adjacent empty lot. (Tr. 222; Ex. C-21).

above, the Secretary proved Mr. Alston was Respondent's employee.

Respondent had knowledge of the hazardous condition.

To prove his prima facie case, the Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing*, 17 BNA OSHC at 1079-1080. It is not necessary to show that the employer knew or understood the condition was hazardous. *Id.*

Here, the Secretary asserts that Mr. Benschop had actual knowledge the unsupported multi-story wall was hazardous. The undersigned agrees.

Mr. Benschop's testimony at the hearing for the instant case and at the Campbell criminal trial both show that he had actual knowledge of the unsupported wall. Mr. Benschop, in demolishing the building from front-to-back and removing the interior structure, created the multi-story unsupported west wall. (Tr. 152-53, 167, 170, 204; Ex. C-17, pp. 30, 50-51, 56 (CCT-B, p. 44, 113-14, 163)).

In his hearing testimony, Mr. Benschop stated the free-standing wall had been created on Sunday, June 2. (Tr. 189-190; Ex. C-5). Mr. Benschop admitted that a photograph from June 3, 2013, also showed the free-standing west wall of the Hoagie City building and that about three-fourths of the façade had been removed. (Tr. 194; Ex. C-4). Further, at the hearing in the instant matter, he stated he had been concerned the wall would fall on the excavator while he was working. (Tr. 204, 210-11; Ex. C-8).

At the Campbell criminal trial, Mr. Benschop stated that he knew the freestanding wall was dangerous and told Mr. Campbell on Tuesday, June 4 he was concerned about the height of the wall. (Tr. 147, 152; Ex. C-17, pp. 25, 30 (CCT-B, p. 39, 44)).

The undersigned finds Mr. Benschop had actual knowledge of the unsupported, multi-story freestanding wall at the Market Street worksite.

The Secretary has proved the elements of his prima facie case for Citation 2, Item 1.

Willful Characterization

The Secretary characterized Citation 2, Item 1 as a willful violation. The Secretary asserts that Respondent exhibited plain indifference to the hazardous condition at the worksite. Further, the Secretary asserts Respondent is collaterally estopped from denying willfulness because of the reckless state of mind related to the charges in his criminal conviction. (S. Br. 10, 26). The undersigned finds the record supports a willful characterization.

A willful violation is one where the employer's state of mind demonstrates an "intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety." *MVM Contracting Corp.,* 23 BNA OSHC 1164, 1167 (No. 07-1350, 2010) (citations omitted). This state of mind is evident where "the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *Id.*

Plain indifference can be established where the employer fails to take appropriate corrective action despite knowing a dangerous condition exists. *See Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2116-17 (No. 07-1578, 2012); *see also, Arcadian Corp.,* 20 BNA OSHC 2001, 2019 (No. 93-0628, 2004) (finding willfulness where employer's approach to employee safety was "reckless"); *Seward Motor Freight Inc.,* 13 BNA OSHC 2230, 2235 (No. 86-1691,

1989) ("Willfulness means an employer demonstrated a reckless disregard for safety."); *A.E. Staley Mfg. Co.,* 295 F.3d 1341, 1350-53 (D.C. Cir. 2002) (Violations are willful where an employer exhibits plain indifference with respect to the violative conditions themselves.)

The undersigned finds Mr. Benschop demonstrated plain indifference to employee safety. Mr. Benschop admitted that he continued to demolish the building even though he believed the freestanding wall was dangerous. On Sunday, June 2, he told his employee, Mr. Alston, to not go back into the building because it was not safe. (Tr. 290-91; Ex. C-16, p.7). Mr. Benschop told Mr. Campbell several times he was concerned about the hazard presented by the freestanding west wall. (Tr. 147, 152, 170, 209; Ex. C-17, pp. 25, 30, 57-58 (CCT-B, p. 39, 44, 164-65)). Mr. Benschop stated that on Tuesday, June 4, he had asked Mr. Campbell about the unsupported right wall and Mr. Campbell had told him to just take down the east wall with the excavator – his employees would take down the west wall adjacent to the Salvation Army building. (Tr. 201).

Mr. Benschop admitted that when he came to the worksite on Wednesday, June 5, he could see very little had changed; most of the multi-story, freestanding west wall was still three to four stories in height. At the Campbell criminal trial, Mr. Benschop stated that he believed it was his chipping away at the east wall that caused the building's collapse. (Tr. 170; Ex. C-17, p. 56 (CCT-B, p. 163)). He also stated that he had told Campbell "over and over and over" that it was dangerous to chip away at the east wall while there were people inside the Salvation Army store. (Tr. 170-71; Ex. C-17, pp. 57-58 (CCT-B, p. 164-65)). And he admitted that, despite this, he used the excavator to chip away at the building's east wall until the building collapsed at 10:42 A.M. on June 5, 2013. (Tr. 170-71; Ex. C-17, pp. 56-58 (CCT-B, p. 163-65)).

The undersigned finds Mr. Benschop knew the wall was unsupported and dangerous, yet he made no effort to correct the hazard and continued to use the excavator to demolish the building until it collapsed. Mr. Benschop exhibited plain indifference to the hazardous condition.

The Secretary has proved the Respondent's actions at the worksite exhibited plain indifference and thus has proved the violation was willful.

Collateral Estoppel

Additionally, the Secretary argues the common law doctrine of collateral estoppel prevents Respondent from claiming his actions were not willful. (S. Br. 25-26). The Secretary asserts Mr. Benschop's guilty plea in the criminal case related to his actions at the Market Street worksite also supports the willful characterization of the violation. (S. Br. 26; Ex. C-18).

The Third Circuit[35] recognizes the right of a quasi-judicial federal agency to use the doctrine of collateral estoppel when considering an issue adjudicated in a prior criminal proceeding. *Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 46-48 (3d Cir. 1981) ("A prior criminal conviction based on the same misconduct is ordinarily premised on the occurrence of the misconduct. There is therefore no logical reason why the prior conviction should not be given collateral estoppel effect to establish this relevant predicate fact."); *see also, Shaffer v. Smith*, 673 A.2d 872, 874-75 (Pa. 1996); *Folino v. Young*, 568 A.2d 171 (Pa. 1990) ("It is well established that a criminal conviction collaterally estops a defendant from denying his acts in a subsequent civil trial.").

The Commission also recognizes the doctrine of collateral estoppel. *See Caterpillar Tractor Co.,* 12 BNA OSHC 1768, 1768 (No. 80-4061, 1986) ("once an issue is actually and

[35] The Commission applies the precedent of the circuit where a decision would probably be appealed, even though it may differ from Commission precedent. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits") (citations omitted).

The party seeking collateral estoppel must prove the following:

> 1) the issue decided in the prior adjudication must be identical with the one presented in the later action; 2) there must have been a final judgment on the merits; 3) the party against whom collateral estoppel is asserted must have been a party or in privity with the party to the prior adjudication; and 4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in question in the prior adjudication.[36]

Witkowski v. Welch, 173 F.3d 192, 199 (3d Cir. 1999) (citations omitted).

Was the issue decided in Benshop's criminal proceeding the same as in the instant case?

The undersigned finds the actions and facts at issue in Mr. Benschop's criminal case are the same as those in the instant case.

The Commonwealth of Pennsylvania charged Mr. Benschop for actions leading to the death of six people and injury of 12 others. (Ex. 18, p. 21). The proceeding was before the Honorable Glenn B. Bronson in the Court of Common Pleas, First Judicial District of Pennsylvania, Criminal Trial Division, *Commonwealth v. Sean Benschop*, CP-51-CR-0001791-2014 and CP-51-CR-0001792-2014.

At issue in Mr. Benshop's criminal case was his culpability for actions at the Market Street worksite from June 2 to June 5, 2013, leading to the collapse of a three-to-four story partially demolished wall onto the adjacent Salvation Army building. (Ex. C-18, pp. 19-22). The instant matter is also about Mr. Benschop's demolition activities at the Market Street worksite from June 2 to June 5, 2013.

[36] The Restatement of Judgements explains: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Witkowski v. Welch*, 173 F.3d 192, 199 (3d Cir. 1999) *citing* Restatement (Second) of Judgments § 27 (1982).

On July 21, 2015, Mr. Benschop pled guilty to six counts of involuntary manslaughter, twelve counts of reckless endangerment of another person, one count of causing a catastrophe, one count of conspiracy to cause a catastrophe, and one count of aggravated assault in the state's criminal case against Mr. Benschop for the June 5, 2013 wall collapse onto the Salvation Army building adjacent to the Market City worksite in Philadelphia, Pennsylvania.

As a part of the guilty plea hearing, Judge Bronson explained to Mr. Benschop that, for several of the counts—i.e., reckless endangerment of another person—the state of Pennsylvania would have to prove the element of recklessness. Judge Bronson explained that recklessness is defined as:

> The defendant's conduct is reckless when he's aware of and consciously disregards a substantial and unjustifiable risk that death would result from this conduct. The nature and degree of the risk being such that it is grossly unreasonable for him to disregard it.

(Ex. C-18 at pp. 12-13, 15).

The underlying facts that supported the Commonwealth's charge of recklessness also support a characterization of willfulness in the instant matter. Here, the Secretary must prove Respondent's actions were done with "intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Burkes Mech., Inc.,* 21 BNA OSHC 2136, 2140 (No. 04-0475, 2007).

As discussed above, the undersigned finds that Mr. Benschop exhibited plain indifference when he continued to demolish the Hoagie City building with the excavator even though he knew it was not the proper way to demolish the building and he believed the building's multi-story, freestanding west wall was dangerous.

The undersigned finds the relevant facts for the issue in the instant matter are the same as the issue in Mr. Benschop's criminal adjudication.

The Respondent was a party in privity with Mr. Benschop.

"A determination by a court in a prior action binds not only parties to that action but also persons in privity to those parties." *Caterpillar Tractor Co*., 12 BNA OSHC 1768, 1768-69 (No. 80-4061, 1986) (internal quotations omitted) (citations omitted); *see also, Toll Bros., Inc. v. Cent. Sur. Co.*, 318 F. App'x 107, 110–11 (3d Cir. 2009) (unpublished) (Privity is such an "identification of interest of one person with another as to represent the same legal right.") (citations omitted).[37]

Mr. Benschop represented Respondent, *pro se*, in the instant matter. Respondent, S&R, was created and owned by Mr. Benschop and his wife. (Tr. 179). Mr. Benschop controlled S&R and was the owner and operator of the excavator used for S&R's demolition work. Thus, Respondent, S&R, is in privity with Mr. Benschop.

There was a final judgement on the merits.

In a proceeding on July 21, 2015, before the Honorable Glenn B. Bronson in the Court of Common Pleas, First Judicial District of Pennsylvania, Criminal Trial Division, *Commonwealth v. Sean Benschop*, CP-51-CR-0001791-2014 and CP-51-CR-0001792-2014, Mr. Benschop pled guilty to six counts of involuntary manslaughter, twelve counts of reckless endangerment of another person, one count of causing a catastrophe, one count of conspiracy to cause a catastrophe, and one count of aggravated assault in the Commonwealth's criminal case against Mr. Benschop for the June 5, 2013 wall collapse onto the Salvation Army building adjacent to the Market Street worksite. (Exs. C-18, C-19).

[37] Under the doctrine of collateral estoppel, a judgment on the merits in a prior suit "precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 326 (1955). Put another way, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States,* 440 U.S. 147, 153 (1979)." *Caterpillar*, 12 BNA OSHC at 1768-69.

The undersigned finds Mr. Benschop's guilty plea was a final judgement on the merits.

There was a full and fair opportunity to litigate the issue in the prior adjudication.

The undersigned finds Mr. Benschop had a full and fair opportunity to litigate the issue in question during his criminal proceedings.[38]

The Third Circuit has found that when "a conviction is the result of a guilty plea, its preclusive effect extends to all issues that are necessarily admitted in the plea." *Anderson v. C.I.R.,* 698 F.3d 160, 164 (3d Cir. 2012) citing *De Cavalcante v. Comm'r,* 620 F.2d 23, 27 n. 9 (3d Cir.1980); *United States v. $448,342.85,* 969 F.2d 474, 476 (7th Cir. 1992); *United States v. Wight,* 839 F.2d 193, 196 (4th Cir.1987); *United States v. Podell,* 572 F.2d 31, 35 (2d Cir. 1978).

The charges, and the elements of proof related to those charges, were carefully explained to Mr. Benschop by Judge Bronson at the guilty plea hearing. Mr. Benschop was represented by counsel and Mr. Benschop told the judge he understood the charges he was pleading guilty to. Further, after the charges had been read to him, Mr. Benschop averred that he had signed the guilty plea colloquy document of his own free will. (Ex. C-18, pp. 8-10). *See generally, Colliton v. Donnelly,* 399 Fed. Appx 619, 620-21 (2d Cir. 2010) (unpublished) (finding Colliton knowingly, and without coercion, entered a plea in which he admitted he was guilty of the offenses).

The undersigned finds the Secretary proved Mr. Benschop was collaterally estopped from denying the behavior at the Market Street worksite that constituted the basis for charges in his criminal proceeding and for the citations at issue in the instant manner.

The undersigned finds the willful characterization is supported by the record as a whole and Mr. Benshop is estopped from denying his underlying reckless and indifferent behavior at

[38] During his plea before Judge Bronson, Mr. Benschop stated that he could understand and speak English, but was unable to read English. (Ex. C-18, p. 8-9).

the Market Street worksite.

The Secretary met his burden

The Secretary has the burden of proving Respondent violated the standard by a preponderance of the evidence. *See Astra Pharm. Prods.,* 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Even though Mr. Benschop asserted throughout the hearing for the instant matter that Mr. Alston was not an employee, the weight of the evidence supports a finding that Mr. Alston was Respondent's employee.

Mr. Alston consistently stated he was working for Mr. Benschop at the worksite, including cutting a beam to start the mechanical demolition process on Sunday, June 2, 2013. Mr. Alston stated that he was an employee of Respondent in his June 14, 2013 OSHA interview and signed statement and during his sworn October 5, 2015 testimony at the Campbell criminal trial. (Exs. C-16, C-32).

Eric Sullivan's August 4, 2013 deposition, under oath, where he stated Mr. Alston worked for and was paid by Mr. Benschop is consistent with Mr. Alston's statement and testimony. (Ex. 33, pp. 65, 108-09).

Finally, in Mr. Benschop's June 6, 2013 OSHA interview and his sworn October 8, 2015 testimony, he consistently stated that Mr. Alston was his employee.

The two post-hearing statements from Mr. Sullivan and Mrs. Gregory-Benschop have been considered and are determined to be less credible because of the time elapsed since the collapse and that neither statement was taken under oath or subject to questioning.

Mr. Benschop's assertions through the instant hearing were also considered. However, the undersigned has determined that his sworn testimony at Campbell's criminal is more credible

because it was closer in time to the collapse (2.5 v. 3.5 years) and because, as the owner, Mr. Benschop has a stake in the outcome of the instant matter against Respondent. Further, Mr. Benschop's October 8, 2015 testimony—where he admitted Mr. Alston was an employee—was consistent with other credible evidence in the record.

Respondent's arguments have been considered but the preponderance of evidence supports the Secretary's assertion that Mr. Alston was an employee of the Respondent.

Penalty

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. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally accorded greater weight. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). The maximum penalty for a willful citation is $70,000. 29 U.S.C. § 666(a).

The Secretary proposed a penalty of $70,000.00. AAD DeJesse testified that the violation was rated as high gravity because the condition posed a risk of death or serious injury (Tr. 369). He also testified that the probability was greater, due to the unsafe nature of the thirty-to-forty-foot high freestanding wall, and the multi-day duration of the condition. (Tr. 369-371). OSHA did not provide any penalty reduction for size, history, or good faith, due to Respondent's willful conduct. (Tr. 366-369).

Once a citation is contested, the Commission and its judges have the authority to assess penalties, *de novo*, based on the facts of each case and the criteria set forth in section 17(j) of the Act. *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995).

The undersigned agrees with the Secretary's assessments for gravity, good faith and history. However, the undersigned believes a discount for employer size should be provided due to the very small size of the Respondent's company.[39] Thus, a 20 percent reduction is applied to the proposed penalty resulting in a final assessed penalty of $56,000.

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**:

1. Citation 1, Items 1 and 2 were withdrawn by the Secretary and thus VACATED.

2. Citation 2, Item 1, alleging a Willful violation of 29 C.F.R. § 1926.854(b), is AFFIRMED, and a penalty of $56,000.00 is ASSESSED.

/s/Covette Rooney
Covette Rooney
Chief Administrative Law Judge

Dated: July 24, 2017
Washington, D.C.

[39] The record shows that Respondent had less than ten employees at any given time.