**United States of America**
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>RAYMOND – SAN DIEGO, INC.,<br><br>Respondent. | OSHRC Docket No. 21-0505 |

Appearances:

Luis A. Garcia, Esq., Department of Labor, Office of Solicitor, San Francisco, California
For Complainant

David W. Donnell, Esq., Donnell, Melgoza & Scates, LLP, Rocklin, California
For Respondent

Before: Judge Christopher D. Helms – U.S. Administrative Law Judge

## DECISION AND ORDER

## I. Procedural History

Early in the morning of December 7, 2020, in Cathedral City, California, four employees of Respondent, Raymond – San Diego, Inc. ("Raymond"), were tasked to paint a large, heavy gate ("Gate") that had been installed to control access to a loading dock area at the Agua Caliente Casino ("Casino"), which is owned and operated by the Agua Caliente Band of Cahuilla Indians ("Tribe"), a federally recognized Native American Tribe.[1] (J. Stipulation Statement ("J. Stip.")

[1] *See generally* AGUA CALIENTE BAND OF CAHUILLA INDIANS, https://www.aguacaliente.org/ (last visited January 10, 2023).

¶¶ A(1)-(3), (11), (17); Tr. 168; Ex. C-44, at 19-20; Ex. D-4[2]). The Gate was composed of two panels, a "North Panel" and a "South Panel,"[3] each measuring approximately 25 feet wide by 9.5 feet tall and weighing approximately 3,000 pounds. (J. Stip. ¶¶ A(9) & (10); Tr. 168; Ex. C-44, at 19-20; Ex. D-4).

The Raymond crew intended to start by painting the South Panel. (Tr. 490, 502). To do so, the South Panel needed to fully slide out along a pre-installed track from a "cubby" area where both Gate panels could be stored when the Gate was not in use. (J. Stip. ¶ A(23); Tr. 392-93, 410, 532-33, 636; Ex. C-2, at 12, 13). Three of the Raymond employees tasked with painting the gate began to slide the South Panel out along its track. (J. Stip. ¶ A(24); Exs. C-38, at 2:42; C-39, at 0:27). Unbeknownst to anyone at Raymond, the Gate, which had been installed by another subcontractor, was not yet fully functional. (J. Stip. ¶¶ A(6)-(9), (26); Tr. 311-12, 461, 493-95, 554, 703, 751-52; Exs. C-12, at 4; C-13, at 6; C-44, at 33-34, 38). Ultimately, the Gate was going to be motorized and would operate in such a way that both panels would roll along their tracks simultaneously. (Tr. 313-15; Exs. C-2, at 24-26, C-44, at 20-21, 33-34, 65; Ex. D-5). However, on December 7, 2020, the motor had not yet been installed. (J. Stip. ¶ A(26); Ex. C-44, at 33-34). When the Raymond crew began sliding the South Panel out, it passed a "roller guide" attached to

[2] A designated portion of the deposition testimony of Ricardo Sotelo, the owner of the subcontractor that installed the Gate, was admitted by stipulation as Exhibit C-44. (Tr. 798-801; Ex. C-44). Accompanying Sotelo's deposition testimony are eleven exhibits, some of which were otherwise not admitted at trial, but which are sufficiently authenticated by the deposition testimony. Neither party has challenged the admissibility or authenticity of the exhibits attached to Sotelo's deposition testimony. The Court deems these exhibits admitted as part of Exhibit C-44 and will refer to them in this decision with the designation of "D-Exhibit Number," meaning "Deposition-Exhibit Number."

[3] The Gate was installed east to west and was intended to open in a westerly direction. (J. Stip. ¶¶ A(14), (31); Tr. 63-65, 91, 166, 314; Ex. C-2, at 6, 9). The two panels comprising the Gate ran parallel to one another, with the North Panel being situated slightly more to the north, and the South Panel situated slightly more to the south. (J. Stip. ¶¶ A (10), (31); Tr. 70, 643-46; Ex. C-2, at 12, 13, 21). The parties have thus referred to the two panels as the North Panel and the South Panel (or sometimes the "north gate" and the "south gate").

the top of the North Panel, which had been keeping the South Panel of the Gate upright. (Tr. 65-66, 434-36; Exs. C-2, at 12 & 13; C-44, at 31-33, 74-76, 79; Ex. D-16, at 1, 2, 6, 10). Once the South Panel passed this roller guide, it immediately fell over. (J. Stip. ¶¶ A(24) & (25); Exs. C-38, at 2:51 to 2:53; C-39, at 0:41 to 0:43). One of Raymond's employees was crushed by the South Panel as it fell and died as a result of his injuries. (J. Stip. ¶¶ A(24) & (25); Tr. 116-17; Exs. C-4, C-11, at 3; C-12, at 3; C-13, at 3 & 4; C-34, C-35).

In response to the employee's death, the Occupational Safety and Health Administration ("OSHA") sent Compliance Safety and Health Officer ("CSHO") Mark Donnald to conduct an inspection of the worksite the same day. As a result of the CSHO's inspection, the Secretary of Labor ("Secretary") issued a two-item, serious Citation and Notification of Penalty ("Citation") to Respondent on May 12, 2021.

Item 1 of the Citation alleged a serious violation of 29 C.F.R. § 1926.20(b)(2) for failing to initiate and maintain programs of frequent and regular inspections of the worksite, materials, and equipment by a competent person. Item 2 of the Citation alleged a serious violation of 29 C.F.R. § 1926.21(b)(2) for failing to instruct employees in the recognition and avoidance of unsafe conditions and the regulations applicable to the work environment to control or eliminate hazards or other exposure to illness or injury. The Citation proposed a total penalty of $19,114 for the two violations.

On May 13, 2021, Respondent filed a timely notice of contest bringing the matter before the Occupational Safety and Health Review Commission (the "Commission").[4] The matter was

[4] The Commission is an independent adjudicatory agency and is not part of the Department of Labor or OSHA. 29 U.S.C. § 661. The Commission was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the OSH Act and has no regulatory functions. 29 U.S.C. § 659(c).

designated for Conventional Proceedings by the Chief Administrative Law Judge and assigned to this Court on June 21, 2021. A trial was held on February 1-3, 2022, via videoconference. The following individuals testified at trial: (1) CSHO Donnald; (2) Alfredo Sanchez, a foreman for Respondent; (3) James Charpentier, a superintendent for Respondent; and (4) Brett Michael, another foreman for Respondent. Additionally, deposition testimony was submitted for Ricardo Sotelo, the owner of No Limit Steel ("NLS"), the subcontractor that had installed the Gate.

Both parties submitted timely post-trial briefs.[5] Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law.

For the reasons discussed, both Citation items are VACATED.

## II. Stipulations & Jurisdiction

The parties stipulated to various facts, applicable law, and the Commission's jurisdiction over this proceeding.[6] *See* J. Stip. (filed Feb. 2, 2022).[7] Based on the Joint Stipulation Statement and the trial record, the Court finds the Commission has jurisdiction over this action pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c). *See* J. Stip. ¶ A(4). Further, the Court obtained jurisdiction over this matter under section 10(c) of the Occupational Safety and Health Act ("Act") upon Respondent's timely filing of a notice of contest. *See* 29 U.S.C. § 659(c); *see also* J. Stip. ¶¶ B(34) & (35). The Court also finds Respondent was an employer engaged in a business and

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

[6] The parties' joint stipulations were received and admitted as a Joint Stipulation Statement and read into the record. (Tr. 22-29). Rather than set forth the Joint Stipulations in their entirety, the Court will reference them as is relevant and appropriate.

[7] Paragraph 31 of the Joint Stipulation Statement was amended by stipulation at trial to make the reference to the "north panel" a reference to the "south panel" instead. (Tr. 29-32).

industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3), (5). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005) (in the aggregate, construction is an industry affecting interstate commerce sufficient to confer coverage under the Act).

## III. Factual Background[8]

### A. Raymond & the Agua Caliente Casino Project

Raymond is a company working in the construction industry, generally performing plastering, fireproofing, waterproofing, and painting services, as well as other services involved in new construction. (J. Stip. ¶ A(16); Tr. 439, 559-60, 620-21, 774). In February of 2020, Raymond subcontracted with general contractor PENTA Building Group, LLC ("PENTA") to provide its services at the Casino worksite. (J. Stip. ¶¶ A(15) & (16); Tr. 377; Exs. C-14, C-32-1[9]). Raymond started work on the Casino project performing plastering and fireproofing and at one point had as many as ninety employees working at the Casino worksite. (Tr. 640). However, by the date of the accident leading to the issuance of the Citation, i.e., December 7, 2020, Raymond's work at the Casino worksite was winding down, mainly consisting of painting exterior fixtures, and only about eleven Raymond employees were onsite. (Tr. 230, 265-68, 319-21, 378, 459, 477-78, 546, 640-41, 646; Ex. C-14).

### B. Installation of the Gate

PENTA had contracted with another subcontractor, NLS, to install the Gate to control access to the loading dock area of the Casino. (J. Stip. ¶¶ (6), (8); Exs. C-23, C-44, at 11). The

[8] The factual background is based on the credible record evidence, as discussed below, and consideration of the record as a whole. Contrary evidence is not credited.

[9] Exhibit C-32 was entered as a single exhibit but contained multiple sub-exhibits, including the subcontract between PENTA and Raymond. (Tr. 163-65). Exhibit C-33, "Respondent's Responses to Complainant's Request for Admissions," authenticates these documents. (Tr. 164).

Gate was composed of two large, heavy panels: a North Panel and a South Panel.[10] (J. Stip. ¶¶ A(9) & (10); Tr 168-69; Exs. C-2, at 2-4, 12-14; Ex. D-4). NLS started installing the Gate on November 20, 2020, and partially completed the installation on November 21, 2020. (Tr. 166, 305, 622-24, 753-54; Exs. C-28, C-36, C-44, at 39-40, 44-46, 65; Exs. D-10 to D-12).

A fuller explanation of the orientation of the Gate panels is necessary to understand how the accident leading to the issuance of the Citation occurred. Each panel had wheels on the bottom, which ran along tracks upon which the panels could be moved. (J. Stip. ¶¶ A(9), (14), (31); Tr. 63-65, 70, 152, 641-42, 670; Exs. C-2, at 8, 9, 20, 21; C-37; C-44, at 44-45; Ex. D-11). The tracks extended across the loading dock entrance to a nearby wall, which was intended to be the Gate's endpoint when fully extended. (J. Stip. ¶ A(14); Tr. 64-65, 67-69; Ex. C-2, at 10, 15-17). The two panels could be stored "side-by-side in a gap between two masonry block walls on the east side of the loading dock entrance."[11] (J. Stip. ¶ A(13); *see also* Ex. C-2, at 12, 13, 25-28). Attached to the top of the North Panel was a roller guide which was the sole support for keeping the South Panel upright. (J. Stip. ¶ A(10); Tr. 65-66, 73-75, 77; Exs. C-2, at 12, 13, 27, 28, 31, 32, 36; C-44, at 31-33; Ex. D-4). Thus, as demonstrated by the fatal accident in this case, if the South Panel was pulled beyond the roller guide attached to the top of the North Panel, the South Panel would immediately fall over due to its enormous weight. (J. Stip. ¶ A(10); Tr. 65-66, 434-36; Exs. C-2, at 12 & 13; C-38, at 2:51 to 2:53; C-39 at 0:41 to 0:43; C-44, at 31-33, 74-76, 79; Ex. D-16, at 1, 2, 6, 10).

[10] As explained in note 3, *supra*, the panels were referred to this way based on their geographic position relative to the direction the Gate was intended to extend. Each Gate panel measured approximately 25 feet long by 9.5 feet tall and weighed approximately 3,000 pounds. (Tr. 168; Exs. C-44, at 19-20; Ex. D-4).

[11] This area was referred to at trial and in the parties' briefs as the "cubby" area. (Tr. 223, 393, 532). The Court adopts the use of that term.

The Gate was ultimately intended to be operated electronically with the installation of an electric motor, chains, keypad, and safety loops.[12] (J. Stip. ¶ A(26); Tr. 70-72, 194-96, 311-12; Exs. C-2, at 22-25; C-26, C-44, at 19, 33-34, 43-44, 65-68; Ex. D-14). The installation of these items, the motor and chains particularly, would have allowed the Gate to fully extend across the loading dock entrance in a safe manner.[13] (Tr. 311-315). However, despite several assurances to NLS from PENTA that it would install the necessary electrical conduits to properly motorize the Gate, PENTA never did so. (Ex. C-44, at 26-29, 33-34, 39-40, 65-68, 81, 83; Exs. D-7, D-10, D-14). Nonetheless, in order to ensure that the Casino could open to the public on Thanksgiving weekend, NLS was directed to partially install the Gate without being able to also install the motor, chains, keypad, and safety loops necessary to make the Gate fully functional as intended. (Ex. C-44, at 42-46). Because PENTA also had not yet installed the concrete "slab" upon which the motor was intended to rest, NLS simply left unattached wiring at the end of the cubby area, near the far end of the North Panel.[14] (Tr. 71-73; Exs. C-2, at 23-26; C-44, at 28-29, 78; Exs. D-7, D-16, at 5).

As NLS left the Gate on November 21, and as it remained until December 7, the South Panel of the Gate could be moved manually out of the cubby approximately 10 to 15 feet without

[12] Sotelo explained that safety loops are devices "put in the concrete so when the car goes forward, [the Gate] closes and opens automatically." (Ex. C-44, at 34).

[13] Although it was never fully explained at trial how the motorization of the Gate would have ensured it could be operated in safe manner, the CSHO, having observed a YouTube video of a similar rolling gate, provided the following explanation: "[A]s I understand the design build there was two – actually two chains, one that manipulated … the north gate, one that manipulated the south gate. And they operated in tandem and the chains were at different lengths so they would slide in tandem to a closed position." (Tr. 313-314). The Court infers the following from the CSHO's explanation: presumably, if the two Gate panels were moved simultaneously or "in tandem" by way of an electric motor and chains, the South Panel would have no occasion to travel beyond the roller guide attached to the North Panel, and thus the Gate could be fully extended with the roller guide of the North Panel ensuring that the South Panel remained upright.

[14] Sotelo explained that, once the motor was installed, this wiring would have gone through the slab and been attached to the motor to energize it. (Ex. C-44, at 28-29, 78; Exs. D-7, D-16, at 5).

falling over. (J. Stip. ¶ A(31); Tr. 152, 222-24, 641-42, 670, 703-04, 763). However, due to its lack of motorization, the Gate could not be fully extended safely unless it was done in a "staggered fashion" so that the South Panel was never pulled beyond the roller guide attached to the North Panel.[15] (Tr. 171-76, 224, 311-15; Exs. C-37, C-44, at 57). NLS fully extended the Gate in this staggered fashion once on November 21, 2020. (Tr. 175; Exs. C-28, C-37, C-44, at 57-58). Although Raymond foreman Brett Michael saw the Gate fully extended on this date, he saw it after it had already been extended and did not observe the process by which it had been accomplished safely. (J. Stip. ¶ A(12); Tr. 625-28, 754-58, 770; Ex. C-28). Likewise, no one from Raymond observed the process by which NLS retracted the Gate back into the cubby before leaving the Casino worksite on November 21. (Tr. 634-36).

Prior to painting the Gate, Raymond employees had been painting other fixtures in the loading dock area, such as handrails, for a few weeks. (Tr. 318-19, 324-26, 377-78, 650-51; Ex. C-18). The North Panel, so far as can be discerned from the trial record, was left in the cubby area by NLS when it left the Casino site on November 21, 2020, and was not pulled out again at any point while Raymond was working in the loading dock area.[16] (Ex. C-44, at 60-61). However, on multiple occasions while working in the loading dock area, Raymond employees found the South Panel of the Gate partially extended out from the cubby area, approximately ten to fifteen feet. (J. Stip. ¶ A(31); Tr. 670, 687-88, 755-56, 763). On certain occasions when this occurred, Raymond employees manually moved the South Panel back into the cubby area to accommodate delivery

[15] Exhibit C-37, an approximately three-and-a-half-minute video, demonstrates this process in its entirety.

[16] As detailed above, NLS fully extended the Gate once on November 21, 2020, but then left the Gate "open" when it left the worksite, which the Court interprets to mean it left both panels in the cubby area so that the loading dock area was open to delivery traffic. (Ex. C-44, at 60-61). Although the Raymond employees moved the South Panel several times to accommodate the entry of delivery trucks into the loading dock area, there is no direct evidence that the North Panel was ever moved after NLS left the Casino worksite.

traffic entering the loading dock area. (J. Stip. ¶ A(31); Tr. 152, 222-24, 641-42, 670, 763). However, no one from Raymond ever fully extended the Gate during this time or observed it fully extended. (Tr. 224, 457-58).

Neither PENTA nor NLS "provide[d] Raymond any instructions on how to move or extend the panels … of the Gate," nor did Raymond inquire as to such instructions. (J. Stip. ¶¶ A(27)-(29)). Until the date of the accident, "the Gate was not chained, blocked or otherwise prevented from being extended westward out of its pocket [i.e., the cubby], and no warning signs or physical barriers prevent[ing] movement had been placed on the [G]ate." (J. Stip. ¶ A(30); Tr. 68, 723-24, 753). Although Sotelo may have made a passing comment to PENTA Superintendent Seth Sherrod in the vein of "Don't touch the gate, cause the gate has to open and close in a certain way," this admonition was never relayed to anyone at Raymond, nor did Sotelo tell anyone directly at Raymond not to touch or move the Gate.[17] (J. Stip. ¶¶ A(27) & (28); Tr. 407, 496, 554, 632-34; Ex. C-44, at 58).

### C. Loading Dock Painting

In the week prior to the accident, November 30 to December 4, 2020, Raymond was nearly finished with its work at the Casino site; indeed, the only work Raymond had left to do was finish painting some exterior fixtures in the loading dock area, including the Gate. (Tr. 265-68, 319-21, 378, 459, 477-78, 546, 640-41, 646; Ex. C-14). Approximately eleven Raymond employees were onsite during this week. (Tr. 230, 641). Of these remaining Raymond employees, four were

[17] In his deposition testimony, Sotelo stated that he believed he told someone from Raymond not to touch the Gate on November 21, 2020, a Saturday. (Ex. C-44, at 58-60, 89-91). The Court does not credit this testimony. Sotelo was only able to provide a vague description of the Raymond employee with whom he allegedly spoke, and that description changed over the course of the deposition. (*Compare* Ex. C-44, at 59 (describing the individual as having dark hair), *with id.* at 90 (describing the individual as having light hair)). Moreover, the uncontroverted testimony from the Raymond employees at trial was that no one from Raymond was at the Casino site on weekends, including Charpentier who apparently most closely met Sotelo's description of the employee with whom he allegedly spoke. (Tr. 472, 561, 708-09, 766-67).

assigned to the Gate when the accident occurred and thus are relevant for purposes of this case: Michael, the foreman of the crew eventually tasked with painting the Gate; Charpentier, the site superintendent and Michael's direct supervisor; Sanchez, another foreman; and [redacted].[18] (J. Stip. ¶¶ A(20) & (21); Tr. 375-76, 438-39, 469-70, 621-22; Exs. C-11 to C-13). Charpentier, Michael, and Sanchez were all designated by Raymond as competent persons for purposes of the painting activities occurring in the loading dock area.[19] (Tr. 146, 380-81, 470-72, 558, 621-22).

Each morning, Michael and Sanchez would conduct a safety meeting at a Conex, a shipping container housing Raymond's tools and supplies, which was located approximately 500 feet from the loading dock area and the Gate.[20] (Tr. 107-08, 384, 473, 775-79; Exs. C-16, C-17). Michael and Sanchez addressed potential hazards first by filling out two forms. The first such form was a Job Specific Safety Plan and JHA [Job Hazard Analysis], which was required to be completed under Raymond's internal safety policies. (Tr. 339-45, 387-90, 657-58, 661, 775-78; Exs. C-16, C-32-3, at 76, 102). The second such form was a two-sided Daily Site Inspection/Daily Huddle form that PENTA required Raymond to complete. (Tr. 147-49, 365-66, 383-84, 661; Ex. C-17). Both forms were designed to detail the hazards associated with the day's tasks as well as methods

[18] The Court has redacted the name of the deceased Raymond employee for privacy purposes.

[19] There was some suggestion at trial that [redacted] may also have been designated as a competent person. (Tr. 381, 638-39). Because he was not tasked with inspecting the Gate, whether this was the case is ultimately immaterial for purposes of the Court's decision.

[20] At trial, the Conex was described as being located both approximately 500 *feet* and 500 *yards* from the loading dock area of the Casino. (*Compare, e.g.*, Tr. 384 (four or five hundred feet), 524 (five hundred feet), *with* Tr. 760 (five hundred yards)). Several witnesses pointed out the location in the first frame of video Exhibit C-38, with Sanchez stating it was "all the way on the right-hand side where … that bright light is …" (Tr. 415), Charpentier stating it was "right over there in the field right there next to the dog park" (Tr. 524), and Michael also stating it was near the bright lights in the top portion of the frame. (Tr. 734). Based on its independent review of Exhibit C-38, the Court concludes that 500 feet better represents the distance from the Conex to the loading dock area, although it places no material weight on this fact.

to address those hazards.[21] (Tr. 339-45, 347, 387-90, 443-44, 519-21, 657-58, 775-78; Exs. C-16 & C-17). During the morning safety meeting, Michael and/or Sanchez, often with Charpentier present, would discuss the information in both forms with the Raymond crewmembers working that day. (Tr. 383-87, 443-44, 519-21, 659-60, 725-26).

**D. <u>Prep Work for Painting the Gate</u>**

In the week preceding the accident, Charpentier and Michael decided to begin painting the Gate the following Monday, i.e., December 7, 2020. (Tr. 488). On December 3, 2020, Michael and Sanchez went to the Gate to inspect it, to determine what materials and equipment would be necessary to start painting the Gate the following Monday, and to assess any safety hazards that might be associated with painting the Gate.[22] (J. Stip. ¶ A(19); Tr. 225, 364, 390-91, 444-45, 460, 489-90, 542-43, 680-82, 764-66). Because the foremen planned to start by painting the South Panel only, the scope of their inspection was limited to where the South Panel started and did not include a thorough inspection of the cubby area where the wiring for the electrical motor had been left by NLS. (Tr. 396-97, 460-61, 682-83, 694-96; Ex. C-2, at 24-26). This inspection took approximately ten minutes. (Tr. 511, 696). Regarding safety hazards, Michael and Sanchez noted that the South Panel was large and heavy, requiring several crewmembers to move, and that it should be moved slowly to avoid pinching hazards. (Tr. 434, 508, 543, 683, 707, 717, 791; Ex. C-17). They also noted that vehicle traffic into and out of the loading dock could pose a safety

[21] For at least the week preceding the accident, and on the date of the accident itself, the JHA form being used by Raymond's foremen was not specifically tailored to the task of painting the loading dock area or the Gate. (Ex. C-16). As the employees explained at trial, Raymond had been wrapping up its work at the Casino site and as a result did not have access to a printer. (Tr. 132, 350, 656). The foremen, therefore, used a pre-printed form which had been generated on October 20, 2020, and which had been filled in with more general hazard assessment information. (Tr. 130-42, 348-51, 656; Ex. C-16).

[22] Michael visited the Gate prior to beginning painting it so that he could assess the Gate for hazards and be able to relay those hazards to the crew tasked with painting the Gate at the morning safety meeting on the day work was actually scheduled to start. (Tr. 543-45).

hazard. (Tr. 490, 683-84, 718; Ex. C-17). They further noted the South Panel had sharp edges, thereby requiring gloves to safely move. (Tr. 489-90, 508, 543, 683, 717; Ex. C-17). Other than these identified possible hazards, Michael and Sanchez found the Gate to be "normal" and "just a regular gate." (Tr. 390, 395-96, 445). Michael briefly inspected the Gate again on December 4 while working in the loading dock area. (Tr. 708, 783).

Sometime during the week before the accident, Michael and Albert Ros, a PENTA superintendent,[23] walked the loading dock area, during which time Ros was informed that Raymond intended on painting the Gate during the coming week. (Tr. 555-58, 771-72). On December 4, 2020, Charpentier sent an email to four supervisors from PENTA alerting them of Raymond's intention for the Gate and received the following response from an individual named Mario Trujillo, another PENTA superintendent: "Thank you! We will get started on these disruption notices now."[24] (Ex. C-18). After this email, no one from Raymond had any further correspondence with PENTA about painting the Gate, received no instruction from anyone at PENTA about moving or painting the Gate, and made no inquiries to PENTA regarding moving or painting the Gate. (J. Stip. ¶¶ A(27) & (29); Tr. 406-07, 458, 503, 506, 585-86, 697, 751). Moreover, no one from Raymond had any correspondence with NLS prior to painting the Gate,

[23] An individual named Seth Sherrod was the main superintendent with whom Charpentier, as Raymond's superintendent, corresponded concerning Raymond's activities on the Casino worksite. (Tr. 540). Starting November 30, 2020, however, Sherrod stopped working at the Casino worksite. (*Id.*). Charpentier was given four new contacts at PENTA, Mario Trujillo, Albert Ros, Greg Church, and Joshua James, who were all notified by email on December 4, 2020, that Raymond intended on painting the Gate the following Monday. (Tr. 483-87, 540-42; Ex. C-18).

[24] Following the opening of the Casino to the public on the weekend after Thanksgiving, i.e., Saturday, November 28, 2020, PENTA would send disruption notices to a representative from the Tribe alerting them where in the Casino subcontractors planned on working so that the Tribe could accommodate the Casino's staff and guests. (Tr. 128-30, 328-32, 483-85, 678-80; Exs. C-18 to C-20).

and Raymond received no instructions from NLS "on how to move and extend the panels or leafs [sic] of the Gate." (J. Stip. ¶¶ A(28) & (29); Tr. 408, 458, 503, 506, 751).

**E. <u>The Accident</u>**

On December 7, 2020, the date of the accident, the Raymond crew arrived at the Casino worksite at approximately 5 a.m. (Tr. 378-79, 415, 523, 651; Exs. C-11, at 5; C-13, at 7). Michael and Sanchez conducted a safety meeting at the Conex shortly after the crew's arrival, incorporating what they had learned from inspecting the Gate the week prior. (J. Stip. ¶ A(22); Tr. 387-90, 403-06, 446-47, 462-63, 501-02, 543-45, 653-55, 765; Exs. C-16, at 22-23[25]; C-17). This safety meeting lasted approximately ten minutes. (Tr. 387, 477, 501, 729). At this safety meeting, "there was no discussion between Foreman Michael and the members of the crew on how to move and extend the panels or leafs [sic] of the Gate" but "the crew's plan … was to manually pull the two panels of the Gate out from the [the cubby area] and extend them toward the west, so the crew could access both sides of the Gate's panels." (J. Stip. ¶ A(22) & (23)). After the safety meeting, Michael, Sanchez, Charpentier, and [redacted] walked over to the Gate to move the South Panel out of the cubby and prepare it for painting. (Tr. 730; Exs. C-11, at 3; C-12, at 3; C-13, at 3; C-38, at 0:00 to 2:12).

After the four Raymond employees arrived at the loading dock area, Sanchez did another short, walkaround inspection of the Gate and found it to be in generally the same position and condition as he had observed during his inspection the week before. (Tr. 408-11, 545-46, 570-71, 737-38, 745-47, 794; Exs. C-38, at 2:24 to 2:39; C-39, at 0:07 to 0:22). Finding no obvious hazard

[25] It was widely acknowledged at trial that this JHA was misdated "9-7-20" when it actually represented the safety meeting that took place on December 7, 2020. (Tr. 349, 440, 712).

in doing so, three of the four crewmembers, Michael, Sanchez, and [redacted],[26] started pulling out the South Panel of the Gate to be painted. (Tr. 493-95, 723, 766, 795-96; Exs. C-11, at 3; C-12, at 3; C-13, at 3; C-38, at 2:43; C-39, at 0:26). The crew slid the South Panel for approximately fifteen seconds before it passed the roller guide attached to the North Panel. (Ex. C-39, at 0:26 to 0:41). Because the roller guide on the North Panel was the only physical restraint keeping the South Panel upright, the South Panel fell outwards from the loading dock area immediately upon clearing the roller guide. (Tr. 65-66, 434-36; Exs. C-2, at 12 & 13; C-38, at 2:51 to 2:53; C-39 at 0:41 to 0:43; C-44, at 31-33, 74-76, 79; Ex. D-16, at 1, 2, 6, 10). Sanchez and Michael were able to move out from under the Panel without getting caught in its fall;[27] however, [redacted] was crushed by the South Panel as it fell. (J. Stip. ¶¶ A(24) & (25); Tr. 116-17, 376; Exs. C-3, C-4, C-11 to C-13, C-34, C-35, C-38, at 2:51-53; C-39, at 0:41-43). Although the remaining members of the Raymond crew, in conjunction with other workers that were nearby, were able to extract [redacted] from under the South Panel, he was pronounced dead at the scene. (J. Stip. ¶¶ A(24) & (25); Tr. 116-17, Exs. C-3, C-4, C-11 to C-13, C-34, C-35).

**F. <u>Inspection & Citation</u>**

[redacted]'s death was reported to OSHA, which sent CSHO Donnald to investigate the same day. (J. Stip. ¶ A(32); Tr. 56-57). CSHO Donnald arrived at the Casino site, conducted an opening conference, inspected the site of the accident, took photographs, and conducted interviews with employees from Raymond, PENTA, and NLS. (Tr. 57-60, 78, 111-12, 121; Exs. C-1 to C-6,

[26] Although Charpentier had intended to help the other three crewmembers with moving the South Panel, in the video footage he can be seen taking a phone call outside the loading dock area and walking into the loading dock area only after the other three crewmembers had started moving the South Panel. (Tr. 418-19, 526-27, 532; Exs. C-38, at 2:05 to 2:42; C-39, at 0:32 to 0:34).

[27] Sanchez's right shoulder blade was scraped by the falling panel, but he was otherwise unharmed. (Tr. 376).

C-11 to C-14). The CSHO ultimately concluded that Respondent had failed to adequately inspect the Gate prior to moving it on December 7 in violation of 29 C.F.R. § 1926.20(b)(2) and further concluded Respondent failed to instruct its crew on how to open the Gate safely in violation of 29 C.F.R. § 1926.21(b)(2). (Tr. 237-50; Exs. C-8 & C-9). Based on the CSHO's inspection, on May 12, 2021, OSHA issued the Citation to Respondent, alleging serious violations of both standards and proposing a penalty of $9,557 for each violation, with a total proposed penalty of $19,114.

## IV. Discussion

### A. Law Applicable to Alleged Violations

To establish a violation of a safety standard under the Act, the Secretary must prove by a preponderance of the evidence: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994); *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1610 (No. 87-2007, 1992); *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-531, 1991).

The Secretary has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361, 1365 (No. 92-3855, 1995). "Preponderance of the Evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

*Preponderance of the Evidence*, Black's Law Dictionary (11th ed. 2019).

### 1. Citation 1, Item 1

Item 1 of the Citation alleged a serious violation of 29 C.F.R. § 1926.20(b)(2), which states: "Such programs [as required by 29 C.F.R. § 1926.20(b)(1) to comply with this part] shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers."

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

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

Citation at 6.

#### a. The Standard Applies

The parties have stipulated, and the record supports, that 29 C.F.R. § 1926.20(b)(1) applied to Respondent's painting activities at the Casino worksite. *See* J. Stip. ¶ B(3); *see also* 29 C.F.R. § 1926.20(a) (subpart applies to "construction, alteration, and/or repair, including painting and decorating …"); *E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553, 1555 (No. 94-1979, 2009) (employer cited under construction standard for removing paint and repainting a bridge).

#### b. Secretary Failed to Establish Noncompliance

Respondent makes a preliminary challenge to the noncompliance element of the Secretary's prima facie case. Respondent argues that the Citation "specifically alleges that Raymond 'did not conduct inspections of the rolling gate'" and that the CSHO's testimony confirms that Item 1 of the Citation was based on his personal belief that Raymond did not conduct *any* inspections of the Gate. Resp't's Br. 9. Respondent goes on to argue that, because the

evidence produced at trial "clearly established that the specific allegation in Item 1 [of the Citation] was erroneous," the Secretary has failed to establish this element of his case. *Id.*

The Court does not read the allegations in the Citation nearly as narrowly as Respondent. The first paragraph of Item 1 clearly alleges a lack of "frequent and regular inspection**s**," and the second paragraph likewise alleges a lack of "inspection**s**" on or before the date of the accident as a basis for the violation. Citation 6. As the Court discusses below, under the cited standard the frequency (or lack thereof) of inspections can potentially be a violation of the standard. The Court therefore finds the Citation has alleged the nature of the violation with sufficient particularity. *See* 29 U.S.C. § 658(a) (a citation must "describe with particularity the nature of the violation"); *Asarco, Inc.*, 8 BNA OSHC 2156, 2162 (No. 79-6850, 1980) (consolidated) ("In a proceeding under the Act, an employer is given notice of the charge and the relief requested by a citation ….").

The CSHO's more narrow understanding of the basis for the violation, i.e., lack of *any* inspection on the Gate, is not binding on either the Secretary or the Court. *See Kaspar Wire Works, Inc.*, 268 F.3d 1123, 1128 (D.C. Cir. 2001) ("the Commission is not bound by the representations or interpretations of OSHA Compliance Officers."); *Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1113 n.6 (No. 11-2559, 2016).

Under 29 C.F.R. § 1926.20(b)(2), an employer is required to maintain a program of regular and frequent inspections that a reasonably prudent employer in its position would maintain to ensure detection of hazards, including safety measures for any specific hazards of which the employer is aware. *See W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1235 (No. 99-0344, 2000), *aff'd*, 285 F.3d 499 (6th Cir. 2002); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205-06 (No. 87-2059, 1993). Although the standard does not define "regular" or "frequent," the Commission has given "regular" its ordinary meaning of "consistent or habitual in action" or "recurring at set

times" and "frequent" to be based on how often "a reasonable person familiar with the size of the worksite and the magnitude of the ongoing construction activity would understand … inspections would have to be conducted to keep track of safety hazards at the site." *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2206-07. Moreover, because 29 C.F.R. § 1926.20(b)(2) "does not specify the means for compliance with its terms, due process requires that the Secretary present evidence showing a feasible method by which the employer can satisfy the standard." *J.A. Jones Constr.*, 15 BNA OSHC at 2207, citing *Granite City Terminals Corp.*, 12 BNA OSHC 1741, 1745-46 & n.11 (No. 83-882-S, 1986).

On the issue of noncompliance with the standard, the Secretary argues that Raymond knew painting the Gate would be part of its work at the Casino worksite and knew from handling the Gate on multiple occasions that the Gate was large and heavy. (Sec'y's Br. 18). Although Michael and Sanchez inspected the Gate on December 3, 2020, they did not inspect the cubby area where the exposed wires would have clearly been seen, did not observe the roller guides on the North Panel which were keeping the South Panel upright, and did not inquire as to "safety catches" for when the North Panel would be fully extended. (*Id.* at 19). Given the relative experience levels of Charpentier, Michael, and Sanchez, Raymond's designated competent persons,[28] "it is incredulous to believe … that the Gate was meant by PENTA to remain in an unmotorized, incomplete state," and Raymond's competent persons should have recognized this fact. (*Id.* at 19-20). Although Michael and Sanchez inspected the Gate on December 3, 2020, this does not

[28] The Secretary makes no argument that the three individuals designated by Raymond to be competent persons did not meet the definition of "competent person" as defined by 29 C.F.R. § 1926.32(f). *See* 29 C.F.R. § 1926.32(f) ("Competent person means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."). Indeed, the Secretary stresses the experience of Raymond's three designated competent persons in making his argument that the standard was violated. (Sec'y's Br. 19-20).

constitute "frequent and regular" inspections of the Gate in compliance with the standard. (*Id.* at 20-21). Moreover, this inspection was insufficient to detect the hazards associated with the Gate because it did not cover the cubby area where the exposed wiring was housed and failed to detect that the roller guide was keeping the South Panel upright. (*Id.* at 20-22). After inspecting the Gate on December 3, Michael and Sanchez "should have made inquiries to PENTA or [NLS] about the Gate's roller guides, safety latches, or general safety features to address the potential hazards associated with moving the panels, given the Gate's obvious uncompleted condition." (*Id.* at 22). Because the foremen's inspection failed to detect a "recognizable hazard," Raymond violated the standard. (*Id.*).

In relevant part,[29] Respondent argues that Michael and Sanchez clearly inspected the Gate on December 3, detected several hazards associated with the task of painting the Gate, and informed the crew of the hazards they detected on the morning of December 7, 2020. (Resp't's Br. 11-12). Respondent also argues that the video evidence demonstrates that another quick walkaround inspection was conducted on the morning of December 7, which revealed that the condition of the Gate had not changed since it was last inspected. (*Id.* at 12). Respondent further argues that the CSHO's inspection was limited to any inspections its employees had conducted on the Gate and failed to account for whether Respondent had conducted frequent and regular inspections for all its activities at the Casino worksite. (*Id.* at 13-14). Finally, Respondent argues that "failure of an employer to identify one particular hazard at a vast construction site over a

[29] In addressing whether the standard was violated, Respondent first points to testimony from CSHO Donnald in which he opined that Respondent violated the standard by not performing a thorough inspection on December 7 and by holding the safety meeting at the Conex, which was 500 feet from the loading dock area, instead of at or near the Gate itself. (Resp't's Br. 10-11). The Secretary has not relied on either of these theories as a basis for noncompliance with this standard, and so the Court finds no need to further address the CSHO's testimony in this regard.

period exceeding 11 months would not establish that the employer failed to conduct regular and frequent inspections at the site." (*Id.* at 14).

The Court finds that the Secretary has not established noncompliance with the standard by a preponderance of the evidence. The Secretary does not materially contest that Raymond had a policy in place which required its employees to conduct daily inspections of jobsites and complete a JHA form, which detailed any identified safety hazards and methods to address those hazards. (Tr. 339-45, 387-90, 657-58, 661, 775-78; Exs. C-16, C-32-3, at 76, 102). The Court finds this satisfies the "regular" element of the standard because it was "consistent or habitual in action" pursuant to Raymond's written safety policy concerning worksite inspections. *See J.A. Jones Constr. Co.*, 15 BNA OSHC at 2206-07; *cf. also David Weekley Homes*, 19 BNA OSHC 1116, 1117-18 (No. 96-0898, 2000) (finding compliance with the standard where safety inspections were conducted pursuant to a written safety manual); *Altor, Inc.*, No. 99-0958, 2002 WL 171642, at *36 (O.S.H.R.C.A.L.J., Feb. 1, 2002) (relying on employer's written safety materials to determine compliance with the standard) *aff'd*, 498 F. App'x 145 (3d Cir. 2012) (unpublished). As to the frequency of Respondent's inspections of the Gate, the Secretary concedes, and the evidence shows, that Michael and Sanchez conducted an inspection of the Gate on December 3, 2020, before Raymond planned on painting it. (J. Stip. ¶ A(19); Tr. 225, 364, 390-91, 444-45, 460, 489-90, 542-43, 680-82, 764-66). The Court further finds that Respondent also conducted an inspection of the Gate on December 4, 2020, when Michael visually inspected it, and again on December 7,

2020, when Sanchez performed a walkaround inspection of the Gate prior to moving it.[30] (Tr. 408-11, 545-46, 570-71, 708, 737-38, 745-47, 764, 783, 794; Exs. C-38, at 2:24 to 2:39; C-39, at 0:07 to 0:22). The Court finds three inspections in three workdays was sufficiently "frequent" to satisfy the standard based on the small size of the worksite, i.e., the area around the Gate, and magnitude of the activity of painting the Gate, which was a small project involving only four employees. *See J.A. Jones Constr. Co.*, 15 BNA OSHC at 2207 (frequency under the standard determined by how often "a reasonable person familiar with the size of the worksite and the magnitude of the ongoing construction activity would understand … inspections would have to be conducted to keep track of safety hazards at the site.") *cf. R & R Builders, Inc.*, 15 BNA OSHC 1383, 1389 (No. 88-0282, 1991) (undisputed that weekly or twice weekly inspections satisfied the standard); *Dade Builders Contractors, Inc.*, No. 19-0988, 2020 WL 2612201, at *6-7 (O.S.H.R.C.A.L.J., April 13, 2020) (concluding that the Secretary failed to demonstrate inspections were not frequent or regular in part based on evidence that a subcontractor conducted inspections weekly or biweekly).

The remainder of the Secretary's arguments for noncompliance share a common thread, namely that Respondent's inspection program was deficient because the actual inspection

[30] The Court makes these findings contrary to the Secretary's contentions otherwise. As to the December 4th inspection, the Secretary argues that Michael "observed" the Gate as opposed to inspecting it. (Sec'y's Br. 20, citing Tr. 708). The Court does not attach any significance to this semantical difference, especially when Michael found the Gate in generally the same condition and position as he had in his more thorough inspection just the day before. (Tr. 708 ,783). As to the inspection on December 7, 2020, the Secretary argues that "the video recordings clearly show no safety meeting at the Gate or an inspection by the crew of the Gate, the panels, or the cubby …" on this date. (Sec'y's Br. 20). However, the standard does not require a safety meeting. On the issue of whether Sanchez inspected the Gate prior to moving it on December 7, the Court agrees with Respondent that the video evidence, particularly Exhibit 39, clearly shows Sanchez walking around the Gate for approximately 15 seconds and visually inspecting it. (Exs. C-38, at 2:24 to 2:39; C-39, at 0:07 to 0:22). The Secretary has not shown that a more thorough inspection would have revealed the tip-over hazard posed by moving the South Panel, especially when Sanchez found the Gate to be in generally the same position and condition as when he last inspected it. (Tr. 408-11).

performed by its competent persons, Michael and Sanchez, failed to detect the hazard posed by moving the Gate. More particularly, the Secretary argues that the inspection performed by Michael and Sanchez failed to include the cubby area with the exposed wiring and failed to reveal that the roller guide was solely responsible for keeping the South Panel upright. (Sec'y's Br. 19-21). As to the cubby area, the Secretary further argues that inspection of this area would have led to the discovery of the exposed wiring, at which point either Michael or Sanchez should have made further inquiries to either PENTA or NLS about the condition of the uncompleted Gate. *Id.* at 21.

In this regard, whether a particular inspection was adequate for purposes of 29 C.F.R. § 1926.20(b)(2) is based on the "totality of the evidence," including the experience of the employees conducting the inspection and the circumstances of the particular worksite. *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1022 (No. 94-200, 1997), *aff'd*, 158 F.3d 583 (5th Cir. 1998). Based on the totality of the evidence in this record, the backgrounds of Michael and Sanchez, and the particular circumstances of the Casino worksite, the Court does not find that the foremen's inspection of the Gate was deficient in the particular ways alleged by the Secretary.

Starting with the lack of inspection of the cubby area, both Michael and Sanchez conceded that they did not thoroughly inspect this area because they planned on painting the South Panel first and thus did not consider the cubby area, where the North Panel was housed, to be within the scope of their work on December 7. (Tr. 396-97, 460-61, 682-83, 694-96; Ex. C-2, at 24-26). However, the Court does not find that the Secretary has proven that a more thorough inspection of this area would have revealed the hazard posed by moving the South Panel or even put Michael and Sanchez on notice that more inquiry was required before moving the South Panel. The Court notes that neither Michael nor Sanchez had ever installed a rolling gate like the Gate at issue here and thus had no particular expertise in how such a Gate was meant to function. (Tr. 439-40,

772-73). The Court further notes the dearth of evidence in the current record as to *how* exactly the motorization of the Gate would have allowed it to extend safely westward across the loading dock area.[31] Thus, even if a more thorough inspection of the cubby area would have revealed the existence of the exposed wiring and even if, as a result of this discovery, Michael or Sanchez had reached the conclusion that the Gate was ultimately meant to be motorized, the Court does not find that either of these facts would have alerted either Michael or Sanchez that further inquiry was required before moving the Gate manually.[32]

Regarding the roller guide, the Court finds the totality of the evidence, including Michael and Sanchez's backgrounds and experiences on the Casino worksite, similarly shows that their inspection was not deficient as the Secretary alleges. Both Michael and Sanchez had either personally moved or observed others moving the South Panel manually without incident on multiple occasions. (J. Stip. ¶ A(31); Tr. 152, 222-23, 641-42, 670, 673). Michael also once saw the Gate fully extended but did not see the process by which this occurred. (J. Stip. ¶ A(12); Tr. 625-28, 754-58, 770; Ex. C-28). This led to Michael's belief, a reasonable belief in the Court's opinion, that full extension of the Gate could be safely accomplished. (Tr. 625-28, 675-76, 754-58, 762-63, 770). Michael's trial testimony also reveals that he did not entirely miss the existence of the roller guide during his inspection of the Gate but simply misconstrued its purpose. His

[31] In note 13, *supra*, the Court surmised from the only available evidence, i.e., the CSHO's testimony of a video he observed on YouTube of a similar gate opening with a motor, as to how this might be accomplished. The Court does not, however, consider this conclusive evidence on the point given: 1) the video the CSHO observed was not entered into evidence and so the Court had no opportunity to view this video itself; and 2) the video the CSHO observed was not even of the Gate involved in this case, but a similar gate that was different in size. (Tr. 313-14).

[32] In this regard, the Court also notes that both Michael and Sanchez had manually moved the South Panel, or observed others moving it, multiple times before the accident occurred. (J. Stip. ¶ A(31); Tr. 152, 222-23, 641-42, 670, 673). This further bolsters the Court's conclusion that their discovery of the exposed wiring would not have reasonably alerted them to any safety issue involved with manually moving the Gate.

understanding of the Gate, based on his previous observation of it being fully extended and personal experience with safely moving the South Panel manually, was that the panels were "interlocking" and that, when pulled out, the North Panel would "follow" the South Panel "to a certain point" and then "latch" onto the South Panel as the Gate was fully extended. (Tr. 676, 718-19). The Court does not find that the nature of the roller guide was so obvious that it should have put Michael or Sanchez on notice that it had a safety purpose rather than simply a functional purpose, especially given both of their limited experience with rolling gates. *Cf. Superior Custom Cabinet Co.*, 18 BNA OSHC at 1021 (concluding that a leadman's personal knowledge and experience of similar jobsites and work hazards should have led him to conduct a more thorough inspection); *cf. also DiGioia Bros. Excavating, Inc.*, 17 BNA OSHC 1181, 1184 (No. 92-3024, 1995) (under a similar inspection-by-competent-person standard, finding noncompliance where the designated competent persons all demonstrated some personal knowledge of trenching and the underlying trenching standards).

Based on the foregoing, the Court finds the Secretary has failed to establish noncompliance with the standard.

c. Employees Were Exposed to the Hazardous Condition.

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 n.6 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Here, it is uncontroverted that "[redacted] was fatally injured when the Gate's south panel fell onto" him and thus was actually exposed to the "struck by and crush by hazards" alleged in Item 1 of the Citation. J. Stip. ¶ A(25). Likewise, both Michael and Sanchez were exposed to the same hazards while moving the gate,

with the latter being struck by the gate panel on his shoulder and leg as it fell. (Tr. 376, 422-23, 738-39; Exs. C-38 at 2:51-53; C-39 at 0:29-39).

The Court finds the Secretary has established employee exposure to the hazard.

d. Secretary Failed to Establish Knowledge

Respondent's knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known, of the violative condition. 29 U.S.C. § 666(k); *Ormet Corp.*, 14 BNA OSHC at 2138. The Secretary can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees.[33] *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). Here, the Secretary does not argue that Respondent's supervisory employees had actual knowledge of the hazard, only that they could have learned of the uncompleted status of the Gate with the exercise of reasonable diligence during their inspection. (Sec'y's Br. 23-24). "In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring." *S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016). Whether an employer has exercised reasonable diligence is a question of fact that will "vary with the facts of each case." *Martin v. OSHRC* (*Milliken*), 947 F.2d 1483, 1485 (11th Cir. 1991).

In arguing that Michael and Sanchez failed to exercise reasonable diligence, the Secretary essentially reincorporates its arguments with regard to noncompliance with the standard, namely

[33] Although the Secretary devotes a portion of his post-trial brief to whether the competent persons designated by Respondent – Charpentier, Michael, and Sanchez – were supervisory employees for purposes of imputation of knowledge, Respondent has not challenged this point. The Court finds that all three were supervisory employees for purposes of imputation of knowledge. (Tr. 375-76, 466, 469, 621-22); *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003) (supervisory status is based on "indicia of authority that the employer has empowered a foreman or other employees to exercise on its behalf.").

that "Foreman Michael and Sanchez failed to take reasonable measures while conducting their inspection of the Gate on December 3 …" (Sec'y's Br. 23). That argument alleged two major deficiencies in the foremen's inspections: 1) failure to inspect the cubby area, which would have led to the discovery of the exposed wires and should have led the foremen to realize the Gate was intended to be motorized; and 2) failure to realize that the roller guide on the North Panel was solely responsible for keeping the South Panel upright and that moving the South Panel beyond the roller guide would lead to it falling. (Sec'y's Br. 21-22).

Respondent argues that its supervisory employees' behavior was "entirely reasonable" based on: 1) their previous observations of and interactions with the Gate in the weeks leading up to the accident; 2) the fact that Respondent was never informed by either PENTA or NLS that the Gate was incomplete and should not be moved; 3) there were no chains, barricades, or other physical controls on the Gate leading up to and on the date of the accident; 4) Raymond had no expertise "designing, installing, or evaluating rolling gates"; and 5) Raymond was instructed to paint the Gate by PENTA. (Resp't's Br. 15).

Based on the particular facts and circumstances of this case, the Court finds that Respondent's supervisory employees, particularly Michael and Sanchez who actually inspected the Gate,[34] acted with reasonable diligence such that they did not have constructive knowledge of the hazardous condition of the Gate. To start, it is undisputed that "[b]etween the date on which the panels of the Gate were installed on November 21, 2020, and the date of the [accident], the Gate was not chained, blocked or otherwise prevented from being extended westward out of its

[34] Charpentier may have been a supervisory employee for purposes of imputation of knowledge; however, because he did not actually inspect the Gate prior to the accident, and because the Secretary is not basing constructive knowledge on some perceived deficiency in Respondent's safety program for which Charpentier may have been partially responsible but rather the actual activities of Michael and Sanchez in inspecting the Gate, the Court does not find Charpentier to be relevant for purposes of constructive knowledge based on lack of reasonable diligence.

pocket, and no warning signs or physical barriers to prevent movement had been placed on the [G]ate." (J. Stip. ¶ A(30); Tr. 68, 723-24, 753). Moreover, Raymond received no instructions or warnings from either PENTA or NLS about moving or extending the Gate's panels.[35] (J. Stip. ¶¶ A(27) & (28); Tr. 503, 585-86). In fact, Michael performed a walkthrough of the loading dock area in the week before the accident with Albert Ros, a PENTA supervisor, during which Ros was informed that Raymond intended on painting the Gate during the coming week. (Tr. 555-58, 771-72). Rather than receive any instruction or warning on moving the Gate, Ros told Michael to "hurry up and get done and get out." (Tr. 557). And again, on December 4, 2020, when four of PENTA's supervisory employees were informed by Charpentier via email that Raymond intended to paint the Gate the following Monday, the only response, from Mario Trujillo, was "Thank you! We will get started on these disruption notices now[,]" with no mention of any hazard associated with moving or painting the Gate. (Tr. 483-87, 540-42; Ex. C-18). Although PENTA's actual or constructive knowledge of the Gate's hazardous condition as a legal matter is not at issue in this case,[36] the point remains that no one with information regarding the uncompleted condition of the Gate ever conveyed that information to Raymond or warned Raymond against moving the Gate, despite being directly informed that Raymond intended to paint the Gate. *See Bland Constr. Co.*, 15 BNA OSHC 1031, 1036 (No. 87-992, 1991) (reasonable diligence is based on "all available, factual information relating to whether hazardous conditions exist, or reasonably could exist,

[35] As noted in note 17, *supra*, the Court does not credit Sotelo's deposition testimony that he spoke with someone at Raymond about the Gate or informed them it should not be moved.

[36] The only direct evidence on this subject in the instant record is Sotelo's deposition testimony that he informed Sherrod, PENTA's superintendent, not to touch the Gate on the date it was installed. (Ex. C-44, at 58). The Court does not purport to resolve the issue of Sherrod's knowledge concerning the Gate for purposes of this case, but instead finds it sufficient to presume that PENTA, as the general contractor of the worksite, and NLS, the subcontractor responsible for installing the Gate, had greater access to knowledge concerning the condition of the Gate than Raymond, which neither had control over the worksite nor responsibility for installing the Gate.

where work is being performed"); *see also Smoot Constr.*, 21 BNA OSHC 1555, 1557 (No. 05-0652, 2006) (noting that an employer responsible for creating a hazardous condition "is obligated to protect its own employees as well as employees of other contractors who are exposed to the hazard."); (Ex. C-44, at 81-83; Ex. D-17 (citation to NLS for failure to display caution signs informally settled)); *Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, 1412 & n.4 (No. 89-1206, 1993) ("[G]enerally speaking, it is primarily the general contractor's responsibility to coordinate the subcontractors.").

Raymond's lack of any notice that the uncompleted Gate constituted a hazardous condition was underscored by its employees' observations and interactions with the Gate in the weeks leading up to the accident. On multiple occasions prior to the accident while Raymond's employees were painting other fixtures in the loading dock area, the employees found the South Panel of the Gate partially extended from the cubby area, approximately ten to fifteen feet. (J. Stip. ¶ A(31); Tr. 670, 687-88, 755-56, 763). On certain of these occasions, the employees manually moved the South Panel back into the cubby to accommodate delivery vehicles without incident. (J. Stip. ¶ A(31); Tr. 152, 222-23, 641-42, 670, 673). With regard to Michael particularly, he actually saw the Gate fully extended without having observed the process by which this occurred. (J. Stip. ¶ A(12); Tr. 625-28, 754-58, 770; Ex. C-28). The Court finds that Michael, who had no particular background in working with rolling gates, reasonably believed that the Gate could be fully extended in a safe manner based on his observations of the Gate being moved on multiple occasions as well as having seen it fully extended. (Tr. 718-20, 762-63, 772-75).

In considering the Secretary's remaining argument, which focuses on perceived deficiencies of the actual inspection conducted by Michael and Sanchez on December 3,[37] the Court notes the above factors constituted the backdrop of Michael and Sanchez's inspections of the Gate. The Secretary argues that Michael and Sanchez failed to exercise reasonable diligence because their inspection failed to cover the cubby area, which would have revealed the exposed wiring for the motor of the Gate and further failed to uncover that the roller guides were solely responsible for keeping the South Panel upright. As to both perceived deficiencies, the Court notes that neither Michael nor Sanchez had any direct experience with the installation and construction of rolling gates like the Gate at issue here. (Tr. 439-40, 772-73). With that and the other aforementioned background factors in mind, the Court does not find the Secretary has shown that either the exposed wiring or the roller guides constituted an obvious hazard vis-à-vis moving the Gate such that any further action was required by Raymond's foremen in exercising reasonable diligence.[38]

As to the lack of inspection of the cubby area and exposed wiring, even assuming the existence of wiring should have alerted Michael and Sanchez that the Gate would eventually be motorized, it is not at all clear from the instant record that the existence of the wiring should have put Michael or Sanchez on notice that moving the Gate manually posed a safety hazard. Indeed,

[37] As noted in note 30, *supra*, the Court finds, contrary to the Secretary's contentions otherwise, that Raymond's foremen also inspected the Gate on December 4 and December 7 for purposes of determining noncompliance with the standard. Because the December 3rd inspection conducted by Michael and Sanchez appears to have been the most thorough one conducted, and because the foremen found nothing new or different with regard to the Gate during their subsequent inspections, the Court will focus on the December 3rd inspection for purposes of discussing the perceived deficiencies raised by the Secretary.

[38] The exposed wiring may have constituted its own electrical hazard, but such hazard was not charged in the Citation against Respondent, only the hazard posed by moving the Gate's panels. *See, e.g.*, *A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995 (No. 92-1022, 1994) (cut electrical cord constituted an electrical hazard).

the Court finds it telling how little evidence in the record actually explains *how* the motorization of the Gate would allow it to extend safely.[39] In any event, it is not at all clear that that Michael and Sanchez, with little to no background knowledge concerning the installation or operation of rolling gates, should have known that motorization of the Gate was not just a functionality issue but also a safety issue if the Gate were "operated" manually. The Court finds this to be particularly so given that the Raymond crew had, without incident, safely operated the Gate manually many times in the weeks preceding the accident. (J. Stip. ¶ A(31); Tr. 152, 222-24, 641-41, 670, 673, 762-63).

Michael and Sanchez's failure to appreciate the function of the roller guide on the North Panel in keeping the South Panel upright presents a closer question, but ultimately the Court finds no lack of reasonable diligence in this aspect of their inspection either. Again, it bears mentioning that neither Michael nor Sanchez had any experience in the installation or functionality of rolling gates. (Tr. 439-40, 772-73). Based on their experience with this particular Gate, there appeared to be no apparent issue with operating the Gate manually; indeed, the Raymond crew had done so many times in the weeks preceding the accident. (J. Stip. ¶ A(31); Tr. 152, 222-24, 641-41, 670, 673, 762-63). As to Michael particularly, his observation of the Gate when it was fully extended, without having observed the process by which it was accomplished, reasonably led him to conclude that full extension of the Gate could be safely accomplished. (J. Stip. ¶ A(12), 625-28, 675-76, 754-58, 762-63, 770). Moreover, as Michael explained at trial, his inspection did not entirely miss the existence of the roller guide. Rather, Michael simply misapprehended how the roller guide functioned in thinking that the panels were "interlocking" and that the North Panel

[39] As noted in note 13, *supra,* the only evidence as to how the motor would operate the Gate came from the CSHO, whose own knowledge only came from viewing a YouTube video of a similar gate opening. (Tr. 313-14).

would "follow" the South Panel "to a certain point" and then "latch" onto the South Panel for the Gate to fully extend. (Tr. 676, 718-19).

Based on their limited background with rolling gates, their interactions and observations with regard to this specific Gate, and further given that the Secretary has not shown that either the exposed wiring or the roller guide on the North Gate posed an obvious safety (as opposed to functionality) issue with regard to manual operation of the Gate, the Court does not find that the Secretary proved a lack of reasonable diligence in Michael and Sanchez's inspection of the Gate. *See Schuler-Haas Corp.*, 21 BNA OSHC 1489, 1493-94 (No. 03-0322, 2006) (discussing reasonable diligence in terms of facts actually known by supervisory employees); *Manganas Painting, Co.*, 19 BNA OSHC 1102, 1104 n.5 (No. 93-1612, 2000) (determining reasonable diligence based on foreman's personal knowledge and observations of the worksite), *aff'd*, 273 F.2d 1131 (DC Cir. 2001); *David Weekley Homes*, 19 BNA OSHC at 1120 (finding reasonable diligence in part because the hazardous condition was "not obvious or in plain view"). Accordingly, the Secretary has failed to prove the element of constructive knowledge.

**2. Citation 1, Item 2**

Item 2 of the Citation alleged a serious violation of 29 C.F.R. § 1926.21(b)(2), which states: "The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury."

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

> 29 CFR 1926.21(b)(2); The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

> Agua Caliente Casino: On or before 12/07/2020, the employer did not ensure that employees priming and painting the loading dock gate were instructed on the recognition and avoidance of crushing hazards from the gate falling when being pulled past the glide end point.
>
> Citation at 7.

a. The Standard Applies

The parties have stipulated, and the record supports, that 29 C.F.R. § 1926.21(b)(2) applied to Respondent's painting activities at the Casino worksite. *See* J. Stip. ¶ B(4); *see also* 29 C.F.R. § 1926.20(a) (subpart applies to "construction, alteration, and/or repair, including painting and decorating …"); *E. Smalis Painting Co., Inc.*, 22 BNA OSHC at 1555 (employer cited under construction standard for removing paint and repainting a bridge).

b. Secretary Failed to Establish Noncompliance

"Under § 1926.21(b)(2), an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Capform, Inc.*, 19 BNA OSHC 1374, 1376 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (table), quoting *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992); *see also El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993) (to prove a violation of § 1926.21(b)(2), Secretary must show that employer "failed to provide the instructions which a reasonably prudent employer would have given in the same circumstances"). "Employees must be given instructions on (1) how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions." *Capform, Inc.*, 19 BNA OSHC 1374, 1376, quoting *Superior Custom Cabinet Co.*, 18 BNA OSHC at 1020.

> In considering whether an employer has met its obligation under this general standard, the Commission has specifically considered whether a reasonable person, examining the generalized standard in light of a particular set of circumstances, can

> determine what is required, or if the particular employer was actually aware of the existence of the hazard and of a means to abate it.

*Compass Envt'l, Inc.*, 23 BNA OSHC 1132, 1134 (No. 06-1036, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011), quoting *W.G. Fairfield Co.*, 19 BNA OSHC at 1235.

The Secretary argues that the standard was violated in that, although Michael and Sanchez inspected the Gate on December 3, they failed to inspect the cubby area and failed to discuss how to move the South Panel, "a task the crew had not previously attempted …." (Sec'y's Br. 25). Further, neither foreman "even attempt[ed] to pull the [S]outh [P]anel partially out to gain an awareness of the roller guides that held the panels upright …." (*Id.* at 26). The Secretary argues that these efforts were not reasonable efforts "to anticipate the struck-by and crush-by hazards the crew would be exposed to if the [S]outh [P]anel was to pull past the roller guide attached to the [N]orth [P]anel." (*Id.*).

Moreover, the Secretary continues, after Charpentier's December 4th email to the PENTA superintendents alerting them that Raymond intended to paint the Gate the following Monday, no one from Raymond contacted anyone from PENTA or NLS about how to move the Gate. (*Id.*). Despite holding a safety meeting the morning of December 7 and filling out a JHA form, the JHA form was "generic and preprinted" and only one JHA form in the week prior mentions the task of painting the Gate. (*Id.* at 27). Although a Daily Site Inspection form was also completed for December 7, it does not mention the hazard posed by moving the Gate, does not provide instructions on how to move the Gate, and was completed 500 feet away from the Gate at the Conex instead of on the actual worksite. (*Id.* at 27-28). Even if certain hazards were discussed with regard to the Gate, like wearing gloves for jagged edges, "there was no discussion with the crew of the struck-by or crush-by hazards …." (*Id.* at 28). Finally, the Raymond supervisors failed to perform an inspection or have a safety meeting when they arrived at the Gate. (*Id.*).

Respondent argues that the Citation narrowly alleges a violation based on Respondent's failure to recognize the tip-over hazard posed by the Gate, which fails to account for the routine inspections and instructions given to its employees "on the recognition and avoidance of hazards at the construction site." (Resp't's Br. 20). In this regard, "[t]he failure to identify one particular hazard at a vast construction site and over a vast period of time should not warrant a violation." (*Id.* at 20-21). Respondent goes on to argue that the record demonstrates that Raymond held a safety meeting every morning to address the requisite JHAs, which were prepared by four competent persons to address painting activities at the Casino worksite. (*Id.*at 21). Additionally, Respondent completed the Daily Huddle form required by PENTA and presented the information in that form to its crew. (*Id.*). More specifically, Respondent completed these forms on December 7 for the task of painting the Gate and reviewed them prior to starting work. (*Id.*). Respondent highlights specific content of the JHA form, including the "Steps," "Hazards," and "Control Measures" sections. (*Id.* 22-23).

The Court finds the Secretary has failed to establish noncompliance with 29 C.F.R. § 1926.21(b)(2) for many of the same reasons he relied on in reaching the same conclusion with regard to 29 C.F.R. § 1926.20(b)(2). As previously articulated, the Secretary is required to demonstrate either that Respondent knew of the tip-over hazard posed by the Gate and failed to adequately instruct its employees on addressing it or else that "a reasonable person, examining the generalized standard in light of a particular set of circumstances" would have recognized the tip-over hazard posed by the Gate and instructed their employees accordingly. *See Compass Envt'l, Inc.*, 23 BNA OSHC at 1134; *see also Capform, Inc.*, 19 BNA OSHC at 1376; *E.L. Davis Contracting*, 16 BNA OSHC 2046, 2048-49 (No. 92-35, 1994). Here, there is no dispute that Respondent's supervisors, particularly Michael and Sanchez, failed to detect the hazard posed by

the Gate after conducting their inspection on December 3 or in their subsequent inspections. As to whether a reasonably prudent employer in Respondent's position should have been aware of the hazard posed by moving the uncompleted Gate, the Court previously found, in Parts IV(1)(b) and IV(1)(d), *supra*, that an employer with Respondent's experience and in Respondent's position would not have reasonably been expected to uncover the hazard posed by manually moving the South Panel past the roller guide of the North Panel.[40] *See Compass Envt'l, Inc.*, 23 BNA OSHC at 1134 ("the Commission has specifically considered whether a reasonable person, examining the generalized standard [of 29 C.F.R. § 1926.21(b)(2)] in light of a particular set of circumstances, can determine what is required …"). The Court therefore rejects the bulk of the Secretary's arguments of noncompliance, which focus on Respondent's failure to note the tip-over hazard posed by moving the Gate in its safety documents or convey this hazard to its employees, a hazard the Court has found was not known or reasonably knowable to Respondent on the morning of December 7.

Moreover, the record demonstrates that Michael and Sanchez's December 3rd inspection of the Gate *did* detect multiple hazards associated with moving and painting the South Panel of the Gate. Particularly, they noted that the Panel was large and heavy such that it would require

[40] In brief, the Court based its findings on Michael and Sanchez's lack of experience in the installation or operation of rolling gates (Tr. 439-40, 772-73); the lack of any clear evidence in the record as to how motorization of the Gate would have allowed it to fully extend safely (*see* note 39, *supra*); the fact that Raymond's employees had previously moved the South Panel of the Gate manually on multiple occasions without incident (J. Stip. ¶ A(31); Tr. 152, 222-23, 641-42, 670, 673); Michael's observation of the Gate in its fully extended state without having seen the process by which this had been accomplished, leading to his reasonable belief that it could be fully extended safely (J. Stip. ¶ A(12); Tr. 625-28, 675-76, 754-58, 770; Ex. C-28); Michael's misapprehension of the function of the roller guide (Tr. 676, 718-19); the lack of any chains, barricades, warnings signs, or physical barriers associated with the Gate (J. Stip. ¶ A(30); Tr. 68, 723-24, 753); and, finally, the lack of notice from anyone with greater knowledge or charge of the Gate, particularly PENTA or NLS, that manually moving the Gate could pose a hazard, despite Raymond twice alerting PENTA's supervisors of its intentions to paint the Gate on December 7, 2020. (J. Stip. ¶¶ A(27)-(29); Tr. 483-87, 540-42, 555-58, 771-72; Ex. C-18).

multiple crewmembers to move and that such movement should proceed slowly to avoid pinching hazards. (Tr. 434, 508, 683, 707, 791; Ex. C-17). They also noted that vehicle traffic coming into and out of the loading dock area could pose a safety hazard. (Tr. 490, 683-84, 718; Ex. C-17). Finally, they further noted that the South Panel had unfinished, jagged edges, thus requiring gloves to move it safely. (Tr. 489-90, 508, 543, 683, 717; Ex. C-17). The documentary evidence submitted, particularly the Daily Huddle form, reflects that Michael and Sanchez noted these hazards and methods to abate them.[41] (Exs. C-16, at p. 12; C-17). The record further establishes that Michael and Sanchez discussed these hazards and abatement methods with Raymond's employees onsite at a safety meeting held on the morning of December 7 prior to commencing work.[42] (J. Stip. ¶ A(22); Tr. 387-90, 403-06, 446-47, 462-63, 501-02, 543-45, 653-55, 765; Exs. C-16, at 22 & 23; C-17).

Based on the foregoing, the Court finds the Secretary failed to establish noncompliance with the standard.

[41] The Secretary faults Respondent for its use of the "generic and preprinted" JHA form, Exhibit C-16, which was more general and not specifically tailored to the task of painting the Gate. (Sec'y's Br. 17). The Court notes that nothing in the standard requires written documentation of any kind. In any event, this document was redundant, given that Raymond was required to complete the Daily Huddle form by PENTA, a document which contained similar information regarding hazards and abatement methods for daily tasks and which *was* filled out specifically for the task of painting the Gate. (*Compare* Ex. C-16, at 12, *with* Ex. C-17; *see also* Tr. 346-48, 383-84, 446-48, 462-63).

[42] The Secretary faults Respondent for conducting its safety meeting at the Conex, 500 feet away from the loading dock area, instead of at or near the Gate itself. (Sec'y's Br. 27-28). The Secretary also faults Respondent for failing to conduct an inspection of the Gate on December 7 prior to moving the South Panel. (*Id.* at 28). Regarding the former argument, Michael sufficiently explained that all hazards ascertained during his inspection on December 3 were incorporated into the morning safety meeting on December 7 (Tr. 543-45), and the Court does not find the Secretary has adequately explained how holding this safety meeting at or near the Gate would have changed the nature or content of the information conveyed to Raymond's employees. Regarding the latter argument, the Court has already rejected the Secretary's contention that no inspection was performed on December 7 prior to moving the Gate. *See* note 30, *supra*.

c. Employees were Exposed to a Hazardous Condition.

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC at 1079 n.6. Here, it is uncontroverted that "[redacted] was fatally injured when the Gate's south panel fell onto" him and thus was actually exposed to the "crushing hazards" alleged in Item 2 of the Citation. (J. Stip. ¶ A(25)). Likewise, both Michael and Sanchez were exposed to the same hazards while moving the gate, with the latter narrowly escaping being crushed by the gate as it fell. (Tr. 376, 422-23, 738-39; Exs. C-38 at 2:51-53; C-39 at 0:29-39).

The Court finds that the Secretary established employee exposure to the hazard.

d. Secretary Failed to Establish Knowledge

For purposes of a violation of 29 C.F.R. § 1926.21(b)(2), Respondent's knowledge of the violation rises or falls on the same factors as noncompliance with the standard. *See Bardav, Inc.*, 24 BNA OSHC 2105, 2112 (No. 10-1055, 2014) (knowledge established by the mere fact that no training was provided); *Compass Envt'l, Inc.*, 23 BNA OSHC at 1136 (basing knowledge finding on the "reasons discussed above" concerning noncompliance and hazard recognition); *Pressure Concrete Constr.*, 15 BNA OSHC at 2018 ("The fact that [the employer] had failed to train the project superintendent in the recognition and avoidance of dangerous conditions establishes that it had at least constructive knowledge of the inadequacy of its training program.").

The Court has considered the Secretary's cursory arguments devoted to this element of the violation and finds none of them novel or persuasive. (Sec'y's Br. 29-30). Thus, as the Court has found the Secretary failed to establish noncompliance, it also finds he failed to establish the knowledge element of the violation.

## ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1, is VACATED, and therefore no penalty is ASSESSED.
2. Citation 1, Item 2 is VACATED, and therefore no penalty is ASSESSED.

SO ORDERED.

*/s/ Christopher D. Helms*

Dated: March 6, 2023
Denver, Colorado

Christopher D. Helms
Judge, OSHRC