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

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MEADOWS CONSTRUCTION COMPANY, LLC,<br><br>Respondent. | OSHRC Docket No. 12-2142 |

ON BRIEFS:

Amy S. Tryon, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Ann S. Rosenthal, Acting Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Stephen P. Kolberg, Esq.; Kolberg & Schneider, PC, Boston, MA
For the Respondent

**DECISION**

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

Meadows Construction Company provides general contracting and subcontracting services, mostly for state, public, and federal housing projects. In July 2012, the Occupational Safety and Health Administration conducted an inspection of a Meadows project at a public school in Lowell, Massachusetts. Following the inspection, OSHA issued Meadows a seven-item serious citation and a two-item repeat citation with a total proposed penalty of $32,800. Administrative Law Judge Dennis L. Phillips affirmed three of the seven serious citation items and both repeat citation items, and assessed a total penalty of $24,400.

The only issue on review is whether the judge erred in denying a motion for summary judgment filed by Meadows seeking the dismissal of all citation items because the compliance

officer who conducted the OSHA inspection presented company officials with an expired credential card.[1] We affirm the judge's decision.

## BACKGROUND

On July 10, 2012, OSHA received a complaint, that included photographs, of employees working on the roof of the Lowell school without fall protection. That same day, the Assistant Area Director assigned a CO to inspect the worksite with the assistance of an OSHA safety assistant.[2] The two OSHA representatives drove to the worksite, parked outside a fenced area, and observed and photographed employees working on the roof without fall protection before proceeding through the fence and onto the school grounds.

Once through the fence, the CO held up his credential card and asked who was in charge; the CO was directed to a co-owner of Meadows and one of the company's foremen. The CO then again presented his credential card, explaining that OSHA was there in response to a complaint, and asked to inspect the worksite. Both supervisors agreed to the inspection, and the foreman and a second foreman accompanied the CO on his walkaround. At the end of the day, after the OSHA representatives had left, the CO's credential card was found at the worksite. The co-owner contacted the CO to return the card, at which point he noticed that the bottom of the card's face read: "Expires: 6/20/2012"—which was almost three weeks before the inspection. At some point after the inspection, the CO obtained an updated credential card.

Before the judge, Meadows argued that because the CO's credential card was expired at the time of the inspection, he lacked the authority to enter the worksite, conduct the inspection, issue the citations, and propose the penalties. The judge rejected this argument, agreeing with the Secretary that although the credential card was expired, the CO's actual authorization to conduct inspections was never suspended, revoked, or expired.

## DISCUSSION

Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), supplies the Secretary's authority to conduct inspections of worksites:

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[1] In his decision, the judge reaffirmed his summary judgment ruling and denied Meadows' request for reconsideration.

[2] It is undisputed that the safety assistant was not a CO and thus did not have any independent authority to conduct the inspection.

> (a) In order to carry out the purposes of this Act, the Secretary, *upon presenting appropriate credentials* to the owner, operator, or agent in charge, is authorized—
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> > (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
> >
> > (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

(Emphasis added.) The OSHA regulation implementing section 8(a) of the Act provides that COs "of the Department of Labor *are authorized to enter* without delay and at reasonable times any . . . workplace . . . ; to inspect and investigate . . . any such place of employment . . . ; to question privately any employer, owner, operator, agent or employee; and to review records . . . ." 29 C.F.R. § 1903.3(a) (emphasis added). Section 1903.7(a) states, "[a]t the beginning of an inspection, [COs] shall *present their credentials* to the owner, operator, or agent in charge at the establishment." (Emphasis added.) Finally, § 1903.22(d) defines a CO as "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections."

We agree with the judge that the CO was properly authorized to enter Meadows' worksite and conduct the OSHA inspection. The Act as well as the regulations establish that a CO's authority to inspect is delegated from the Secretary through OSHA, and derives from this delegation and employment as a CO for the Department of Labor, not from the credential card. In other words, the credential card merely functions to inform an employer that OSHA has delegated inspection authority to the CO—the card itself does not grant that authority. Here, the CO had been employed by OSHA as a CO since 2007 and was so employed by OSHA at the time of the inspection. As a CO, he had the authority to inspect worksites on OSHA's behalf.[3]

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[3] Meadows argues that COs must undergo regular, periodic training to remain certified as COs. In support of its argument, the company cites an OSHA training directive that went into effect over two years *after* the date of the inspection. *See* Occupational Safety and Health Administration, TED 01-00-019, Mandatory Training Program for OSHA Compliance Personnel (2014). This argument lacks merit. First, directives do not have the force and effect of law and convey no important procedural or substantive rights to employers or individuals. *See, e.g., Bethlehem Steel Corp.*, 10 BNA OSHC 1470, 1473 n.3 (No. 79-310, 1982) ("[T]he Secretary's

Thus, the underlying authority represented by the CO's credential card still existed, despite the lapsed expiration date listed on the card.[4] Therefore, we find that Meadows' claim that section 8(a) was violated can only relate to the provision's requirement that the CO "present[] *appropriate* credentials." (Emphasis added.)

Section 8(a) "provides for the presentation of 'appropriate credentials' *for the protection and assurance it provides to employers*." *Usery v. Godfrey Brake & Supply Serv., Inc.*, 545 F.2d 52, 54-55 (8th Cir. 1976) (emphasis added); *see also Marshall v. C.F. & I. Steel Corp.*, 576 F.2d 809, 816 (10th Cir. 1978) (McKay, J., dissenting) ("The presenting of credentials in an OSHA inspection . . . gives notice of the inspection's lawfulness and of the inspector's right to investigate."). In other words, the Act's requirement that a CO present "appropriate credentials" before entering a worksite provides an employer with the means to ensure that the person seeking to inspect the worksite is, in fact, an OSHA CO. Specifically, the employer has an

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internal administrative directives lack the force and effect of law and are thus not binding on the Secretary or the Commission."). Second, neither the directive cited by Meadows, nor the directive in effect at the time of the inspection, states that a CO's authorization to inspect will be revoked if the required training is not completed within the time specified. *See id.*; Occupational Safety and Health Administration, TED 01-00-018, Initial Training Program for OSHA Compliance Personnel (2008). And third, there is no evidence in the record, nor did Meadows attempt to discover or elicit any evidence, showing the CO had failed to complete any required training.

[4] By contrast, in all of the cases cited by Meadows in support of its position on review, the credential or card holder's underlying authority no longer existed. *See United States v. Al-Hamdi*, 356 F.3d 565, 567, 568, 573 (4th Cir. 2004) (25-year-old defendant's diplomatic identification card had expired but he was no longer eligible to claim diplomatic immunity through his father because immunity lapses at age 21); *Guevara v. Holder*, 649 F.3d 1086, 1094-95 (9th Cir. 2011) (citing *Matter of Blancas-Lara*, 23 I. & N. Dec. 458 (BIA 2002) (immigrant admitted into United States with 72-hour border-crossing card and Board of Immigration Appeals determined he was unlawfully present after he remained in country longer than 72 hours)); *Nunez v. Simms*, 341 F.3d 385, 386-87 (5th Cir. 2003) (teacher hired with temporary three-year teaching permit terminated after permit expired because she did not pass exam required to obtain permanent teaching certificate); *Sanger v. Geren*, 539 F. Supp. 2d 24, 28, 34-35 (D.D.C. 2008) (Army doctor's medical credentials revoked and employment terminated because he could no longer practice medicine due to medical condition and failed to apply for reinstatement); *United States v. Hyde*, No. 3:10-CR-169-AKK-JEO, 2012 WL 4734583, at *1, *8 (N.D. Ala. Sept. 27, 2012) (defendant claimed he was "special deputy" with county sheriff's department but defendant was no longer special deputy and "special deputy" card had expired 20 years ago).

opportunity to scrutinize the credential card and determine if the card is "appropriate." When presented with a card bearing an expiration date that has passed, an employer could reasonably question whether the person presenting it has authority to inspect. *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 833-34 (5th Cir. 1975) (explaining that possible harm from entry by an unauthorized individual would be that the individual "looked where he had no right to look" or "filched information to which he was not entitled"). At that point, the employer could contact the local OSHA office for verification, or even refuse entry,[5] requiring OSHA to send a CO with an "appropriate," i.e., unexpired, card. *See Godfrey Brake*, 545 F.2d at 54-55 (employers can verify identity of CO before permitting entry and may do so with phone call to local OSHA office).

Here, Meadows neither scrutinized the CO's credential card nor refused entry. The CO testified that he "entered the site with [his] credential held up, asking for whoever was in charge." After he was directed to the co-owner and the foreman, he "showed [his] credentials and said[] [he was] [t]here for an inspection related to a complaint." The co-owner claims in an affidavit that "[i]nstead of allowing me or anyone else to inspect his credentials, [the CO] summarily flashed the card at us from a distance." But his statement confirms that the card was, in fact, presented prior to entry and there is nothing in the record to suggest that the CO gained entry through "trickery or fraud." *See United States v. Bednarski*, 312 F. Supp. 913, 915 (D. Mass. 1970) (search valid in criminal case where IRS special agents "flashed [their] credentials," but made defendant aware he was subject of "tax investigation," did not engage in trickery or fraud, and defendant "did not look at the credentials carefully or ask for an opportunity to read

[5] An employer can always refuse entry to a private worksite (which this worksite was not) and demand, pursuant to the Fourth Amendment, that OSHA obtain a warrant to enter the worksite to conduct the inspection. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316-20 (1978) (non-consensual OSHA inspections require warrant); *see also* 29 C.F.R. § 1903.4(a). Doing so, however, would not resolve or affect any alleged violation of section 8(a) given that section 8(a) and the Fourth Amendment are not coextensive and that the Act's presentation requirement applies to both public and private worksites. *See L.R. Willson & Sons Inc.*, 17 BNA OSHC 2059, 2061 (No. 94-1546, 1997), *aff'd in relevant part*, 134 F.3d 1235 (4th Cir. 1998) (explaining that provisions of section 8(a) are not coextensive with those of Fourth Amendment because section 8(a) is broader in that paragraph (a)(2) requires an on-site inspection to be conducted at reasonable times, within reasonable limits, and in a reasonable manner, and narrower in that it applies only to physical inspections on the worksite).

them"). Thus, as in *Bednarski*, the Meadows' officials had an opportunity to ask to examine his credential card upon presentation, but did not do so prior to granting the CO entry. *Id.*; *accord Adm'r of FAA v. Glowka*, 3 N.T.S.B. 2353, 2359, 2361 (1980) (adopting administrative law judge's finding that party being inspected is responsible for "look[ing] at the credentials with more perception" even if inspector initially "flashed" credentials).

Under these circumstances, we find that Meadows validly consented to OSHA's inspection, and just as an employer who consents to the inspection of private property without asking for a warrant waives its Fourth Amendment right to privacy, Meadows' failure to object to the CO's credential card at the time of its presentation constitutes a waiver of the "appropriate credentials" requirement under section 8(a).[6] *See Lakeland Enters. of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 745 (7th Cir. 2005) (any Fourth Amendment objection was waived because employer did not object to inspection and request warrant at the scene); *Kropp Forge Co. v. Sec'y of Labor*, 657 F.2d 119, 121-22 (7th Cir. 1981) (since employer's representatives were present at all times during inspection and did not raise any objections, any Fourth Amendment objection was waived); *Lake Butler Apparel Co. v. Sec'y of Labor*, 519 F.2d 84, 88 (5th Cir. 1975) (employer cannot obtain ruling on constitutionality when it did not assert its rights at time of inspection and company president accompanied CO during inspection).

Our dissenting colleague construes the employer's statutory right to demand presentation of appropriate credentials to be un-waivable, i.e., that the employer may raise a failure to present them as a defense in litigation despite the employer's failure to invoke this right at the time of the inspection. We see no basis for this interpretation of the statute. As our colleague states, the evident purpose of the presentation requirement is to "fully arm[]" employers with the ability to prevent "individuals who could intend harm to their employees and property" from entering their

[6] Citing several Supreme Court decisions, our dissenting colleague concludes that the threshold for waiver of the statutory requirement at issue here goes beyond that which is required for waiver of a basic right guaranteed by the Constitution. The two cases involving statutory rather than constitutional issues (*New York v. Hill*, 528 U.S. 110, 114 (2000); *Oubre v. Entergy Operations, Inc*. 522 U.S. 422, 427 (1998)) are inapposite. In *Hill*, the question presented was whether a statutory right to trial within 180 days could be waived by counsel or must be waived by the defendant. And *Oubre* stands for the proposition that, where a statute contains a specific waiver provision and lists several enumerated requirements that must be satisfied to be considered "knowing and voluntary," a release that does not meet those requirements cannot be considered a valid waiver. If anything, *Oubre* would seem to support our reading of section 8(a).

facilities under color of law. But the only way employers can protect themselves from such a threat is to demand and scrutinize credentials when someone shows up at their doorstep to initiate an OSHA inspection—if the employer fails to make use of this tool conferred by the Act, its purpose cannot be effectuated. This is, therefore, hardly the type of right that should be treated as exempt from the normal rules of waiver.

Accordingly, we affirm the judge's decision.[7]

SO ORDERED.

/s/

Cynthia L. Attwood
Commissioner

/s/

James J. Sullivan, Jr.
Commissioner

Dated: February 26, 2018

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[7] Because Meadows waived any objection to the CO's credential card by consenting to the inspection, there is no need to reach Meadows' argument that it was prejudiced by OSHA's alleged failure to comply with section 8(a). *See L.R. Willson*, 17 BNA OSHC at 2061 n.9 (Commission need not determine "whether it is appropriate to require an employer to show actual prejudice before a remedy will be afforded, or to decide what remedy would be appropriate for an intentional violation of section 8(a)" given its conclusion that there was no violation of either the Fourth Amendment or section 8(a) of the Act). In any event, Meadows' complaints about how the CO "gathered and presented the facts" address the CO's conduct *after* being granted entry to conduct an inspection. Thus, these claims do not bear upon the CO's presentation of an expired credential card or show that the company was prejudiced in its ability to present a defense. *See Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071, 1073 (9th Cir. 1976) (declining to dismiss citation for trench hazards where employer's claim of prejudice was based on a conflict in the testimony regarding depth of trench and composition of soil).

MACDOUGALL, Chairman, dissenting:

My colleagues make several mistakes along their way to denying an employer its statutory right in this issue of first impression before the Commission. Their decision today creates the "Rosebud" of *Citizen Kane* for Commission precedent: it is not as simple as you think and upon deeper analysis, there are more questions than answers. While I agree with my colleagues that a CO's credential card itself does not grant a CO the "authority" to inspect, that is not the issue before us. In mistakenly focusing on whether a CO is authorized to conduct inspections, my colleagues fail to give effect to a statutory predicate for *exercising* that authority: the presentation of "appropriate credentials."[1]

## DISCUSSION

### I. Under the Plain Meaning of the Operative Language of Section 8(a) of the Act, a CO with Expired Credentials Lacks "Appropriate Credentials."

I first note that our job is to apply the language of section 8(a) of the Act; not rewrite it as the majority has done. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("We have 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.' When the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' " (citation omitted)); *Arcadian Corp.*, 17 BNA OSHC 1345, 1347 (No. 93-3270, 1995) (" 'In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.' " (citations omitted)), *aff'd*, 110 F.3d 1192 (5th Cir. 1997).

Section 8(a) plays a critical role in OSHA enforcement—it outlines the ground rules Congress requires OSHA to follow in order to conduct an inspection of an employer's premises:

> (a) In order to carry out the purposes of this Act, the Secretary, *upon presenting appropriate credentials* to the owner, operator, or agent in charge, is authorized—
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> > (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

[1] Since the relevant facts are largely undisputed and are set forth in my colleagues' majority opinion, I will not repeat them here.

> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

29 U.S.C. § 657(a) (emphasis added). The central question presented here is not *who* is "authorized"—an issue upon which my colleagues mistakenly place undue focus—but rather the statutory requirement that the authorized person enter the cited employer's premises only "*upon presenting appropriate credentials*." Just because a CO is authorized by the Secretary to conduct inspections does not mean the CO is authorized to conduct inspections under any circumstances. Congress expressly placed several limitations on the exercise of that authority, such as "at reasonable times," and "in a reasonable manner," and—the very first of these limitations as set out in the structure of the statute—the presentation of appropriate credentials. *See Gen. Motors Corp.*, 17 BNA OSHC 1217, 1218 (No. 91-2973, 1995) (consolidated) (finding standard unambiguous based in part on its structure) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)), *aff'd*, 89 F.3d 313 (6th Cir. 1996).

It cannot be reasonably disputed that the CO in the instant case lacked "appropriate credentials." In considering the plain meaning of this operative language, the Secretary himself has determined what information is "appropriate" to include on a CO's credentials and chose to include an expiration date. Accordingly, once a CO's credentials have expired, it is unreasonable, *if not impossible*, to conclude that this meets any ordinary definition or common usage of the term "appropriate," as the majority implicitly acknowledges in its decision.[2] That

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[2] When words used in a statute are not specifically defined, they are generally given their plain or ordinary meaning rather than some obscure usage. *E.g., Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004); *BedRoc Ltd. v. United States*, 541 U.S. 176, 184 (2004). One commonsense way to determine the plain meaning of a word is to consult a dictionary. *E.g., Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2671 (2015); *Carcieri*, 555 U.S. at 387-88; *Mallard v. U.S. Dist. Ct. for S.D. of Iowa*, 490 U.S. 296, 301 (1989); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 10-11 (1989).

Today, as it was in 1971 when section 8(a) became law, "appropriate" is defined as: "suitable, acceptable or correct for the particular circumstances," https://www.oxfordlearnersdictionaries.com/us/definition/english/appropriate_2; "correct or right for a particular situation or occasion," https://dictionary.cambridge.org/us/dictionary/english/apropriate; "suitable or proper in the

should end our inquiry on whether the terms of section 8(a) were violated in this matter.[3] *See Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) (a statute should be construed so that, " 'if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant' " (citations omitted)).

While I need not go further since the plain meaning of section 8(a) compels the conclusion that a CO with expired credentials lacks "appropriate credentials,"[4] the legislative history further illustrates that Congress intended the "appropriate credentials" requirement as a prerequisite to a lawful inspection: "[U]ntil the inspector has presented his credentials, *he is not empowered to enter a business or workplace.*"[5] 116 Cong. Rec. H10687 (daily ed. Nov. 24,

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circumstances," The New Oxford American Dictionary 76 (2d ed. 2005); and "specially suitable," Webster's Third New International Dictionary 106 (1971).

[3] Whether one calls it an impermissible interpretation of the term "appropriate" at *Chevron* step one (in other words, the statute resolves the question), or an unreasonable interpretation or application of the term "appropriate" at *Chevron* step two (in other words, the agency's answer is based on an impermissible construction of the statute), or an unreasonable exercise of agency discretion under *State Farm*, the key point is the same: it is entirely unreasonable for the Secretary to conclude that "appropriate credentials" encompass credentials that have expressly expired. *See Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Motor Vehicle Mfrs. Ass'n of the U. S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42-43 (1983).

[4] "When determining the meaning of a standard, the Commission first looks to its text and structure." *Jesco, Inc.*, 24 BNA OSHC 1076, 1078 (No. 10-0265, 2013) (citing *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003)). "If the wording is unambiguous, the plain language of the standard will govern, even if the Secretary posits a different interpretation." *Id.* (citing *Superior Masonry*, 20 BNA OSHC at 1184; *Blount Int'l Ltd.*, 15 BNA OSHC 1897, 1902 (No. 89-1394, 1992)); *see also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [a statute's] language must ordinarily be regarded as conclusive."); *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))). "The plain meaning of the statutory language being clear, we look to the legislative history only to determine whether there is 'clearly expressed legislative intention' contrary to that language 'which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.' " *Arcadian Corp*., 17 BNA OSHC at 1348 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987)).

[5] The phrase "appropriate credentials" in section 8(a) has only been addressed very briefly by the circuit courts; two courts have explained that the purpose of this language is to assure employers

1970) (statement of Rep. Galifianakis) (emphasis added). While statements by individual legislators should not be given controlling effect, when they are consistent with the statutory language and other legislative history,[6] they stand as evidence of Congress' intent. *Grove City College v. Bell*, 465 U.S. 555, 567 (1984). Here, Congress was concerned enough about employers being subjected to unlawful inspections that it sought, in enacting this provision, to provide employers "protection and assurance" through the requirement of appropriate credentials. *Godfrey Brake*, 545 F.2d at 54-55; *see also Marshall v. Barlow's Inc.*, 436 U.S. 307, 333 (1978) (Stevens, J., dissenting) ("The OSHA inspector's statutory right to enter the premises is conditioned upon the presentation of appropriate credentials." (citing section 8(a) of the Act, 29 U.S.C. § 657(a)(1))).

My colleagues have chosen instead to leap straight to the provision's use of "authorized" without first giving due effect to the operative phrase "upon presenting appropriate credentials" in section 8(a).[7] By mistakenly focusing on this other language in section 8(a)—"the Secretary upon presenting appropriate credentials to the owner, operator, or agent in charge, is *authorized*"—the majority fails to interpret the statutory language as a whole and erroneously concludes that the CO was authorized to conduct an inspection even though he failed to satisfy

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that the individual attempting to gain entry to inspect the worksite is "lawful." *See Usery v. Godfrey Brake & Supply Serv. Inc.*, 545 F.2d 52, 54-55 (8th Cir. 1976) ("The statute provides for the presentation of 'appropriate credentials' for the protection and assurance it provides to employers."); *Marshall v. C.F. & I. Steel Corp*., 576 F.2d 809, 816 (10th Cir. 1978) (McKay, J., dissenting) ("The presenting of credentials in an OSHA inspection likewise gives notice of the inspection's lawfulness and of the inspector's right to investigate.").

[6] *See also* S. Rep. 91-1292, at 11 (1970) *reprinted in* Subcommittee on Labor and Public Welfare, United States Senate, Legislative History of the Occupational Safety and Health Act of 1970, at 151 ("In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment. Section 8(a) therefore authorizes the Secretary, *upon presenting appropriate credentials*, to enter at reasonable times the premises of any place of employment covered by this act.") (emphasis added).

[7] My colleagues frame the issue and resolve it as such: "We agree with the judge that the CO was properly *authorized* to enter Meadows' worksite and conduct the inspection" and then proceed to discount the issue of whether his credentials were "appropriate." (Emphasis added).

this express precondition to the exercise of his authority.[8] In disregarding operative language, my colleagues, instead, are persuaded by the Secretary's red herring and analyze the separate issue of the CO's status—his authority *in general* to inspect. However, the issue of status addresses whether the CO may be given appropriate credentials and what the CO can do *during* the inspection *after* he has crossed the threshold of presenting "appropriate credentials"—not whether he has crossed that threshold in the first place.

More specifically, as set forth in OSHA's implementing regulations on inspections, 29 C.F.R. § 1903.3 (Authority for inspection), COs have the authority "to inspect and investigate," "to question privately," and "to review [required] records." But what the CO can lawfully do during an inspection does not address the statutory prerequisite that "appropriate credentials" must be presented in order *to be empowered*. Indeed, *only upon this showing*, which was not made here, does one even reach the second prong of section 8(a)—what the CO may accomplish during the inspection. The majority's interpretation of section 8(a) violates the well-settled rule that a statute must be read as a whole and construed to give each word operative effect. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). In sum, my colleagues' reading of the statute, which deprives the requirement to present appropriate credentials of its effect as a prerequisite to the exercise of a CO's authority, results in an interpretation unsustainable under rules of statutory construction.

Certainly, any concerns that Congress had nearly 50 years ago about the fraudulent entry of a person onto an employer's premises, which it sought to address through the protection and

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[8] In interpreting a statute, it "must be read as a coherent whole and, if possible, construed so that every word has some operative effect." *Jesco*, 24 BNA OSHC at 1078 (citing *Am Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986); *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1580 (No. 94-1979, 2009); *Summit Contractors, Inc*., 23 BNA OSHC 1196, 1202-03 (No. 05-0839, 2010), *aff'd per curiam*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished))*; see also Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (statute should not be construed in a manner that renders it meaningless); *Hughes Bros., Inc.*, 6 BNA OSHC 1830, 1833 (No. 12523, 1978) (reading standard "as a whole" and construing its provisions all together).

assurance provided in section 8(a), are only greater today.[9] One only has to consider too frequent media accounts of workplace violence, stolen identity, and even threats to homeland security, to conclude that employers must be fully armed with the means to detect and prevent *unauthorized entry* by individuals who could intend harm to their employees and *property*. Thus, I would find that the operative language of section 8(a)—"upon presenting appropriate credentials"—operates as a precondition to a lawful inspection of a place of employment; without it, section 8(a) is violated and OSHA's inspection is unlawful.[10]

## II. Since Section 8(a) Is a Statutory Right, the Affirmative Defense Was Permitted to Be Asserted by the Employer in Its First Responsive Pleading and Was Not Waived.

In seeking to bolster their conclusion, my colleagues' decision claims reliance upon Commission and other precedent, which address a Fourth Amendment right. However, as the majority acknowledges, the Commission has determined that the rights of section 8(a) are not coextensive with the Fourth Amendment. *L.R. Willson & Sons Inc.*, 17 BNA OSHC 2059, 2067 (No. 94-1546, 1997), *aff'd in relevant part*, 134 F.3d 1235 (4th Cir. 1998). By treating this issue as one analogous to the Fourth Amendment, my colleagues reach the conclusion that Meadows waived any right it had by allowing the inspection to proceed. What the majority fails to acknowledge is that section 8(a) provides an express statutory right, not a constitutional one.

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[9] OSHA's internal directive, OSHA Instruction: "Credential Cards Program"—which states that the purpose of the directive is to "establish[] revised policy and procedures for issuing, updating, and controlling OSHA credential cards"—acknowledges that expired cards are not appropriate credentials and sets forth the policy that "[i]t is essential that all old cards are taken out of circulation" and "[o]ld credential cards must be destroyed." Occupational Safety and Health Administration, OFF 1-6.2, OSHA Credential Cards Program at Abstract, ¶ X (Policies). Further, the directive defines "credential" as "the card that is issued to either Compliance Safety and Health Officers, OSHA Officials, or Investigators," *id.* at XII (Definitions), while saying nothing about the "authority" of the inspector once he is appropriately credentialed (i.e., his authority to inspect and investigate, to question privately, and to review required records, etc.).

[10] Therefore, it is irrelevant for the purposes of determining whether there was a violation of section 8(a) to find, as do my colleagues, that "the employer has an opportunity to scrutinize the credential card and determine if the card is 'appropriate.' " When presented with a credential card bearing an expiration date that has passed, the CO has not presented "appropriate credentials" before conducting an inspection under section 8(a)—OSHA is in violation of the Act. It may be that the employer's consent to the inspection when it accepted the "flash" of the CO's card bears upon whether it was prejudiced by any violation, if this showing is deemed necessary for relief from the unlawful inspection.

While both a constitutional right and a statutory right can be waived, how that waiver is accomplished is not one and the same, and it is dependent upon the nature of the right at issue.[11]

Indeed, a party asserting an affirmative defense is required to assert it in its first responsive pleading (and it need not be asserted prior to the inspection), as Meadows did here by raising the validity of the CO's inspection in its Answer.[12] *See* Commission Rule 34(b)(3)-(4), 29 C.F.R. § 2200.34(b)(3)-(4) (requiring answer to "include all affirmative defenses being asserted," and stating that failure to do so may "result in the party being prohibited from raising the defense at a later stage in the proceeding"). Commission Rule 34(b)(3)'s reference to affirmative defenses is to those recognized as such at common law—in other words, assertions raising arguments or new facts that, if proven, defeat a plaintiff's claim even if the allegations in

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[11] My colleagues state that I am mistaken on this point. However, the Supreme Court has often discussed that "[w]hat suffices for waiver depends on the nature of the right at issue." *New York v. Hill*, 528 U.S. 110, 114 (2000) (" '[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.' " (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993))). *Compare Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." (citations omitted)); *with Oubre v. Entergy Operations, Inc*., 522 U.S. 422, 427 (1998) (finding that the Older Workers Benefit Protection Act implements Congress' policy of protecting rights and benefits of older workers "via a strict, unqualified statutory stricture on waivers" and that "[a]n employee 'may not waive' an ADEA claim unless the employer complies with the statute" including that the waiver be "voluntary and knowing" and be subject to a disclosure requirement, a waiting period, and a rescission period). These are just two examples that demonstrate the different procedural safeguards applicable to the waiver process, depending upon the right or privilege at issue. *See generally* Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 282-283, 340-344 (2003) (noting different specific requirements that must be met for a waiver to be considered valid across various contexts, such as "criminal law, . . . insurance law, labor and employment, mediation, property law, civil procedure, contract law, tort law, and fiduciary law" and that with a statute the balance of rights has been determined legislatively) (footnotes omitted); Thomas G. Kelch & Michael K. Slattery, *The Mythology of Waivers of Bankruptcy Privileges*, 31 IND. L. REV. 897, 918-926, 924 (1998) (discussing the law of waiver in both constitutional and statutory contexts and noting that a "statutory privilege may not be waived when there is a strong public policy for the benefit of the general public underpinning the provision"). My colleagues fail to accurately apply this concept as demonstrated by their mistaken focus on distinguishing the specific facts of the cases cited in this footnote from the facts in the case before us.

[12] Meadows' asserted affirmative defense was also the subject of its motion for summary judgment and post-hearing brief.

the complaint are true. *U.S. Postal Serv*., 24 BNA OSHC 2067, 2068 (No. 08-1547, 2014) ("An affirmative defense raises matters extraneous to the plaintiff's *prima facie* case." (*quoting Ford Motor Co. v. Transp. Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986))); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1270-1271 (3d ed. 2004); 61A Am. Jur. 2d Pleading § 279).[13] Thus, I fail see how there has been any waiver of Meadow's affirmative defense that the CO's physical inspection of the worksite was unlawful because he lacked appropriate credentials.

## III. The Issue of Prejudice Should Be Remanded to the Judge for Further Consideration.

Turning to the final issue that must be addressed: if the defense was not waived, must Meadows show prejudice to prevail? Because my colleagues treat the waiver issue as one akin to a waiver of a Fourth Amendment constitutional right, they have chosen to duck the issue of whether Meadows must show it was prejudiced by OSHA's failure to comply with section 8(a) or the judge's finding that prejudice was not shown. It is true that two circuit courts have held that a violation of section 8(a) is a procedural or technical violation of the statute and excluding the evidence or vacating the citation is not an appropriate remedy absent a showing of prejudice by the employer. *Pullman Power Prod., Inc. v. Marshall*, 655 F.2d 41, 42, 44 (4th Cir. 1981); *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 833-34 (5th Cir. 1975).[14] However, federal case

[13] There is another interesting question, which I note but decline to delve into today, of whether it is appropriate to consider the failure to comply with the "appropriate credentials" requirement of section 8(a) as an affirmative defense, rather than a defense that, once invoked, shifts the burden to the Secretary to establish that the statutory prerequisite has been met. *See generally Gad v. Kan. St. Univ.*, 787 F.3d 1032, 1042 (10th Cir. 2015) (citations omitted) (discussing difference between affirmative defense and condition precedent and finding that affirmative defense concedes "that there has in fact been discrimination and then justif[ying] this admitted discrimination"; while with a condition precedent, conversely, the flaw is procedural, not substantive, and it addresses a party's failure to properly comply with the requirements Congress and the agency established); 2 Cal. Affirmative Def. § 47:1 (2d) ("Waiver is an affirmative defense that may be urged against many disparate causes of action since it asserts that the plaintiff has waived whatever right or privilege is essential to the plaintiff's claim. With equitable roots, the concept of waiver is embodied in a number of . . . statutes, reflecting the variety of circumstances in which a waiver may be alleged." (footnote omitted)).

[14] In *Pullman Power*, where there was a dispute about whether the CO had presented his credentials, the Fourth Circuit held that the CO's failure to comply with section 8(a) was a procedural violation that did not operate to exclude evidence or vacate the citation where the

law discussing the issue of prejudice when a party fails to meet a statutory requirement has been inconsistent and taken various approaches: requiring a showing of prejudice when the violation is technical or procedural and not intentional;[15] refusing to permit a lack of prejudice to be shown when the violation is substantive;[16] finding Congress's intent in the statutory requirement was to

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employer could not show prejudice. *Pullman Power*, 655 F.2d at 42, 44. In *Accu-Namics*, the CO verbally identified himself but never presented his credentials to the employer. *Accu-Namics*, 515 F.2d at 831. The Fifth Circuit declined to decide whether the CO's actions violated section 8(a), but it held that "even if the Secretary [had] conducted an illegal inspection (which we assume only for argument's sake), under the circumstances here these violations cannot operate to exclude evidence obtained in that inspection where there is no showing that the employer was prejudiced in any way." *Id.* at 833. The court also refused to "adopt an exclusionary rule which would exclude all evidence obtained illegally, no matter how minor or technical the government violation, and no matter how egregious or harmful the employer's safety violation" because "[t]he manifest purpose of the [OSH] Act, to assure safe and healthful working conditions, militates against such a result." *Id.* at 833.

[15] *See Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071, 1073 (9th Cir. 1976) (holding, where there was "substantial compliance" with sections 8(a) and (e), that "technical violations of the statute, assuming that such violations existed, do not justify any sweeping exclusionary rule in the absence of a showing of substantial prejudice by the petitioner"); *Chicago Bridge & Iron Co. v. OSHRC*, 535 F.2d 371, 377 (7th Cir. 1976) (holding in section 8(e) case that an employer must show prejudice where there has been substantial compliance with the Act and there is only a procedural or technical violation on the part of the Government); *Accu-Namics*, 515 F.2d at 833-34 (same).

[16] In *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970), the Supreme Court held that an agency's failure to follow its own rules and regulations does not always require reversal of the agency's actions. The Court determined that an agency's failure to follow regulations promulgated for the primary purpose of providing the necessary information for the agency's decision did not require reversal of the agency's decision absent a showing of substantial prejudice by the affected party. *Id.* at 538-39; *see also Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993) (concluding "that when a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the INS fails to adhere to it, the challenged deportation proceeding is invalid and a remand to the agency is required. This may well be so even when the regulation requires more than would the specific provision of the Constitution or statute that is the source of the right. On the other hand, where an INS regulation does not affect fundamental rights derived from the Constitution or a federal statute, we believe it is best to invalidate a challenged proceeding only upon a showing of prejudice to the rights sought to be protected by the subject regulation." (citation omitted)).

presume prejudice;[17] and finding Congress's intent was to presume prejudice but allowing a party to rebut the presumption.[18]

One would have to wonder if an employer could ever show prejudice where it consented to the CO's entry after being presented with inappropriate credentials; if not, is this not an indication that Congress intended for the Commission to impose an appropriate sanction for a violation of section 8(a) *without* a showing of prejudice? *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993) (member of armed services need not show that his military service prejudiced his ability to redeem title to his property before he could qualify for the statutory suspension of time; finding that "statutory command in [statutory provision] is unambiguous, unequivocal, and unlimited"); *see also Hartwell*, 537 F.2d at 1073 (Kennedy, J., concurring) (while agreeing that CO had complied with both sections 8(a) and (e), stating that he did "not believe that OSHA investigators are free to ignore sections 8(a) and (e) of the Act" and that any "[f]ailure to follow these provisions is always prejudicial to the property and privacy rights of businessmen, whether or not it is 'prejudicial' in the sense of providing evidence necessary to prove a violation of the Act"); *L.R. Willson*, 17 BNA OSHC at 2067 (Montoya Comm'r, concurring) (suggesting that where a CO deliberately failed to present any credentials prior to initiating inspection, the employer was prejudiced per se; so no showing of prejudice was required); *W. Waterproofing Co.*, 4 BNA OSHC 1301, 1305-07 (No. 1087, 1976) (finding that failure to comply with section 8(e) walkaround right was prejudicial and granting motion to suppress evidence resulting from inspection; noting, in enacting provision, that Congress intended to confer a substantial right on employers, and the failure of OSHA to comply with the right "distracted from the objectives of the Act"), *rev'd on other grounds*, 560 F.2d 947 (8th Cir. 1977).[19]

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[17] *See, e.g., Leslie v. Attorney General of the U.S.*, 611 F.3d 171, 178 (3d Cir. 2010) (finding that violations of regulations promulgated to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief and that "some regulatory violations are so serious as to be reversible error without a showing of prejudice").

[18] *See, e.g., Baumgardner v. Secretary, U.S. Dep't of Housing & Urban Dev.*, 960 F.2d 572, 577-78 (6th Cir. 1992) (agency's failure to follow statutory notice provision did not require reversal when complaining party not substantially prejudiced).

[19] In the *Western Waterproofing* case, Commissioner Montoya drew a distinction between such deliberate conduct and "other cases involving "technical" violations of section 8 that require a

If a showing of prejudice is not required, or if Meadows can meet its burden regarding prejudice, what would be the appropriate sanction?[20] Is the remedy limited to the inspection, not the citation? As stated above, two circuit courts have refused to adopt an exclusionary rule that would exclude all evidence obtained during such an unlawful inspection. *Pullman Power*, 655 F.2d at 44; *Accu-Namics*, 515 F.2d at 833-34. One option might be to exclude the CO's testimony as it relates solely to what he observed following entry with an inappropriate credential. This would permit the CO to testify about any observations of alleged violations made before entry (which are not covered by section 8) and any evidence he gathered after the inspection (e.g., employee interviews, subpoenaed documents). *See L.R. Willson*, 17 BNA OSHC at 2061 ("[Section 8] applies only to physical inspections on the worksite, while the Fourth Amendment may apply to an off-site observation.").

Unlike my colleagues, I would remand this case to the judge for further consideration of these issues and to determine if the requested relief, or any other relief, should be granted for what is a clear violation of section 8(a).

/s/
Heather L.MacDougall
Chairman

Dated: February 26, 2018

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showing of actual prejudice before any type of sanction can apply. *Id.* Here, there is no evidence in the record as to whether the CO was aware his credentials had expired.

[20] There is some Commission precedent, in the context of whether searches were improper, discussing the exclusionary rule and the appropriateness of suppression of evidence. *See, e.g., Smith Steel Casting Co.*, 12 BNA OSHC 1277 (No. 80-2069, 1985) (consolidated) (suppression of evidence may be appropriate sanction where suppression can be expected to deter the Secretary from engaging in similar misconduct in the future; however, evidence from ex parte warrant not suppressed), *aff'd in relevant part*, 800 F.2d 1329, 1334 (5th Cir. 1986) (holding that "the exclusionary rule does not extend to OSHA enforcement actions for purposes of correcting violations of occupational safety and health standards," but does apply "where the object is to assess penalties against the employer for past violations of OSHA regulations" unless "the good faith exception can be applied to the Secretary's actions in obtaining the tainted evidence"); *Penn. Steel Foundry & Mach. Co.*, 12 BNA OSHC 2017 (No. 76-638, 1986) (balancing test applied to determine that there should not be suppression of evidence), *aff'd*, 831 F.2d 1211 (3d Cir. 1987).

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

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MEADOWS CONSTRUCTION COMPANY, LLC,<br><br>Respondent. | : | OSHRC DOCKET NO. 12-2142 |

Appearances: Kevin E. Sullivan, Esquire
U.S. Department of Labor, Office of the Solicitor, Boston, Massachusetts
For the Secretary

Stephen P. Kolberg, Esquire
Kolberg & Schneider, PC, Boston, Massachusetts
For the Respondent

Before: Dennis L. Phillips
Administrative Law Judge

## ***DECISION AND ORDER***

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission" or "OSHRC") pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). On July 10, 2012, upon being notified by email of alleged safety violations by a third party, unidentified complainant ("informer"), the Occupational Safety and Health Administration ("OSHA") inspected a multi-employer worksite at 158 Rogers Street, Lowell, Massachusetts, 01852 ("worksite") where Meadows Construction

Company, LLC ("Respondent" or "Meadows") was performing roofing work on a public school building.[1] As a result of the inspection, OSHA issued Respondent one six-item serious Citation and one two-item repeat Citation, alleging one violation of the Act's general duty clause as well as several violations of OSHA's construction standards, and proposing a total penalty of $32,800.[2] Respondent filed a timely notice of contest, bringing this matter before the Commission.

After the Secretary filed his initial complaint in November 2012 and Respondent filed its answer, the Secretary filed an unopposed motion in March 2013 to amend the complaint with regard to the standard cited in Repeat Citation 2, Item 2, and also to amend the complaint to reflect Respondent's operation of its general construction business as a limited liability company ("LLC") ("First Motion to Amend").[3] The First Motion to Amend was granted, the Secretary filed a second complaint and Respondent filed a second answer. Subsequently in June 2013, the Secretary filed another motion to amend the complaint, this time with regard to the alleged

[1] The informer's email reported to OSHA that he or she had taken photographs of the worksite at about 10:15 a.m., July 10, 2012, and that he or she had observed two men working at a roof opening without tying off. (Ex. R-M, at 4.) The photographs taken by the informer were admitted into the record for the sole purpose of being evidence of what CO Naim and OSHA considered before initiating OSHA's inspection of the worksite. These five photographs were not admitted to establish violations of the citation items at issue in this case. (Tr. 102-122; Exs. CX-21, CX-46, CX-48, CX-63, CX-67.)

[2] Serious Citation 1, Item 1 alleged a violation of § 5(a)(1) ("the general duty clause"), unattended industrial truck, and proposed a penalty of $2,800; Serious Citation 1, Item 2 alleged a violation of 29 C.F.R. § 1926.300(b)(1), machine guarding, and proposed a penalty of $2,800 ; Serious Citation 1, Item 3 alleged a violation 29 C.F.R. § 1926.404(b)(1)(i), ground fault circuit interrupter protection, and proposed a penalty of $2,000; Serious Citation 1, Item 4 alleged a violation of 29 C.F.R. § 1926.451(f)(6), close proximity to energized power line, and proposed a $2,800 penalty; Serious Citation 1, Item 5a alleged a violation of 29 C.F.R. § 1926.453(b)(2)(iv), standing on lift railing, and proposed a penalty of $2,800; Serious Citation 1, Item 5b alleged a violation of 29 C.F.R. § 1926.453(b)(2)(v), no body belt with lanyard; Serious Citation 1, Item 6 alleged a violation of 29 C.F.R. § 1926.25(a), debris in the work areas, and proposed a penalty of $1,600; Repeat Citation 2, Item 1 alleged a violation of 29 C.F.R. § 1926.403(b)(2), relocatable power tap, and proposed a penalty of $4,000; Repeat Citation 2, Item 2 alleged a violation of 29 C.F.R. § 1926.501(b)(1), unprotected side or edge fall protection on a working/walking surface, and proposed a penalty of $14,000.

[3] The Secretary sought to amend Repeat Citation 2, Item 2 to instead allege a violation of 29 C.F.R. § 1926.501(b)(10), unprotected side or edge fall protection on a low-sloped roof.

general duty clause violation in Serious Citation 1 Item 1, alleging in the alternative a violation of a specific standard ("Second Motion to Amend").[4] The Second Motion to Amend was granted, and the Secretary filed a third complaint and Respondent filed a third answer. In all of its answers, Respondent set out the same 14 affirmative defenses.[5] The hearing in this case took place on July 16 and 17, 2013, in Boston, Massachusetts. Both parties have filed post-hearing briefs and Respondent filed a reply brief.

## ***Jurisdiction***

Respondent stipulates that it was a general contractor engaged in interstate commerce at the Lowell worksite. (Resp't Br. at 1; Answer at ¶¶ 2-3.) Based upon the record, the Court finds that Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of §§ 3(3), 3(5) of the Act, 29 U.S.C. §§ 652(3), 652(5). The Court concludes that the Commission has jurisdiction over the parties and the subject matter in this case. (Answer at ¶ 1, where Respondent admits to jurisdiction.)

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[4] The Secretary sought to amend Serious Citation 1, Item 1 to allege, in the alternative, a violation of 29 C.F.R. § 1926.602(c)(1)(vi), requirements of industrial trucks.

[5] The 14 affirmative defenses are summarized as follows: (1) the inspection was conducted without legal authorization or credentials; (2) the alleged violations were due to subcontractor or employee error; (3) the alleged violations were due to subcontractor or employee failure to follow instructions; (4) the alleged violations were by others for whom Respondent was not legally responsible; (5) compliance with standards was infeasible under the circumstances; (6) the alleged violations were due to isolated subcontractor or employee misconduct; (7) Respondent neither caused the alleged hazards to exist, nor did it directly control conditions causing the hazard; (8) compliance was functionally impossible under the circumstances or would preclude performance of required work, and alternative means of protection were unavailable or in use; (9) Respondent did not have knowledge of the alleged violations; (10) the cited equipment was not in use; (11) Respondent's employees did not have exposure to the alleged hazard; (12) a direct and immediate danger to employees or subcontractors did not exist; (13) the correct employer was not cited; and (14) Respondent has been singled out from other employers at the instigation of union representatives, in an ongoing pattern of harassment which has effectively led to repeated OSHA inspections and selective enforcement against the Respondent.

## ***Background***

Meadows is a construction company that provides general contracting and subcontracting services for state, public, and federal housing projects. (Tr. at 386.) In July 2012, Meadows had a contract with the city of Lowell, Massachusetts, and was the general contractor replacing the slate roof at Moody Elementary School, which was occupied with teachers and administrators preparing for the upcoming school year.[6] (Tr. at 77, 392-93; Ex. CX-1 at 2.) At this time, Meadows employed 50-60 people divided among several worksites. (Tr. at 441.) According to Meadows, only two of its supervisory employees and one of its owners were on the Lowell worksite on the day of the OSHA inspection. These individuals were: Michael Meadows, Respondent's joint owner,[7] his son, Jared Meadows, one of the company's supervisors,[8] and Gilson Oliveira, a Meadows foreman.[9] (Tr. at 359-360, 375, 377, 382, 386, 389, 392; Exs. CX-1 at 2, R-G, at 5.) The rest of the workers on the worksite, according to Respondent, were subcontractors to Meadows, and were contracted under the "Massachusetts

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[6] The contract, entered into on April 3, 2012, called for Respondent to "furnish all the necessary labor, equipment, tools, appliances and materials for replacement of the roof at Moody Elementary School in the City of Lowell, …." (Exs. CX-16, at 1, R-B, at 1). Respondent started working at the worksite on June 26, 2012. (Tr. at 413-414.) On September 11, 2012, Respondent applied for its final payment due under the contract that resulted in total payments made to Respondent by the City of Lowell for the project amounting to $928,369.50. (Exs. CX-20, R-J.)

[7] Michael Meadows testified that his duties included attending kickoff and construction meetings. He also stated that he has, or had, construction supervisor licenses in Massachusetts, Florida and North Carolina. (Tr. at 386-387.) He also testified that he would go to the worksite every other day. (Tr. at 437.)

[8] Jared Meadows testified that he worked for Respondent for nearly 10 years and held a construction supervisor license for 7 years. He also testified that he was a licensed asbestos contractor, a hoisting engineer, and a master sheet metal worker. He stated that his supervisory duties included coordinating the crews, organizing setups and deliveries, arranging for dumpsters and pickups, and operating equipment. Jared Meadows further testified that he was the supervisor on site for the job's duration and was at the worksite for eight hours every day. (Tr. 359-360.) Michael Meadows testified that Jared Meadows was also responsible for coordinating with the subcontractors and contractors working directly for the city of Lowell, Massachusetts at the worksite. (Tr. at 393-394.)

[9] Jared Meadows testified that Mr. Oliveira served as a project manager for the job who oversaw some of the workers, including carpenters and roofers employed by LN Construction Co. (Tr. at 380-381.) Michael Meadows testified that Mr. Oliveira was a foreman at the worksite in charge of deliveries, coordinated with Mr. Black, and lifted "stuff up to the guys on the roof." (Tr. at 392.)

file sub-bid law," which filtered the possible subcontractors that Meadows could choose from when awarding its subcontracts. (Tr. at 77-80; Exs. R-D, R-E, R-F.) Netco Management employee, Harold "Bud" Black, contracted by the city as Lowell's "Clerk of Works," would regularly be present on the worksite to observe the work being performed on behalf of the city. (Tr. at 80-81, 317.) Mr. Black was usually present at the worksite for four hours per day, but the record does not establish that he was on the worksite on the day of the OSHA inspection.[10] (Tr. at 318.)

Compliance Officer ("CO") Donald Naim[11] and Safety and Health Assistant Adam Henson[12] arrived at the worksite in the early afternoon around 1:00 p.m., and parked on an unidentified street west of the building. (Tr. at 95, 338.) They walked to the entrance to the worksite and along the way observed workers on the roof of the school building and on an adjacent yellow-in-color, Caterpillar TH83 telehandler's (telehandler) platform without fall protection.[13] (Tr. at 123-128, 225, 229, 275, 282, 290, 296, 407; Ex. CX-23.) The building was four stories high, and 100 feet long by 60 feet wide. (Tr. at 125.) The building's roof had numerous dormers attached to it, and portions of it were steep-sloped and portions were

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[10] Because the record does not establish that Mr. Black was at the worksite on the day of the OSHA inspection, the Court will not consider his testimony as conflicting evidence to what the OSHA inspectors directly observed. The Court finds that Mr. Black was mistaken when he testified that he believed that the only time a lift to house people was being used by Respondent was on the south side of the school building. The Court finds that Respondent used a telehandler to lift workers to the roof on the school building's north side on July 10, 2012. (Tr. 327-328.)

[11] CO Naim testified that he has served as an OSHA compliance officer for six years and before that he was employed as a safety and health inspector with various companies for twenty years. (Tr. at 93-94.)

[12] When he testified at the trial, Mr. Henson was an OSHA Compliance Safety and Health Officer. (Tr. 275.)

[13] The Court uses the term "telehandler" here because that was how it was referred to by Respondent's supervisors at trial. The telehandler was also referred to as a "powered industrial truck," "lull," "rough-terrain forklift," or a "big forklift." This telehandler is the subject of Citation 1, Item 1, and Citation 1, Items 5a & 5b. Respondent owned the telehandler. (Tr. 361; Ex. R-M, at 7.)

low-sloped.[14] (Tr. at 125.) The workers who were on the roof and the telehandler's platform were approximately 60 feet above the ground. (Tr. at 126.) At the time of the OSHA inspection, the workers were accessing the roof from the platform of the telehandler, which was located on the north side of the building. (Tr. at 266; Ex. CX-52.) On the west side of the building, in an alcove, a single power cable was attached to the building about 20 feet below the roof line. (Tr. at 178, 413; Ex. CX-41.) Also near the west alcove was a blue-in-color, Genie telescopic boom lift – Model S-65 (telescopic boom lift) - that Respondent rented from NES Rentals.[15] (Exs. CX-3, CX-12, at 2, CX-41, CX-49, R-L, at 3, R-M, at 8.)[16]

The OSHA inspectors entered the worksite on the east side of the building that was "fairly close" to the telehandler that was around the corner on the north side. (Tr. at 132, 291.) CO Naim held up his credentials and asked to meet with those in charge. (Tr. at 127-128.) CO Naim testified that "every employee that I saw, I asked who was in charge and I was pointed to Michael Meadows and Jared Meadows." (Tr. at 128.) Michael Meadows and Jared Meadows met with the OSHA inspectors by the telehandler.[17] (Tr. at 292, 401.) CO Naim testified that Michael Meadows and Jared Meadows also told him that "they were in charge." (Tr. at 130, 197-198.) He testified that Michael Meadows told him that "I'm responsible for all the employees on the site." (Tr. at 198, 224, 251.)

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[14] Low-slope roof means a roof having a slope less than or equal to 4 in 12 (vertical to horizontal). *See* 29 C.F.R. § 1926.500(b).

[15] Michael Meadows testified that the telescopic boom lift had a "60-foot lift." (Tr. at 422; Ex. CX-49.)

[16] The Secretary referred to this piece of equipment as an "aerial lift scaffold." (Sec'y Br. at 17; Tr. at 184-185; Ex. CX-41.)

[17] CO Naim testified that he informed them that he was at the worksite to perform an inspection related to a complaint received by OSHA and that OSHA had a fall emphasis program. He also testified that he told them that he was there to address fall hazards and any other possible hazards that he observed. (Tr. at 129.)

When entering the worksite and during their meeting with Michael and Jared Meadows, CO Naim and Henson observed workers using an unguarded power table saw near the entrance to the worksite on the school building's east side. (Tr. at 132, 145, 283-285.) CO Naim then toured the worksite with Jared Meadows and foreman Gilson Oliveira.[18] (Tr. at 131-132.) During this time, CO Naim noted that the power table saw was plugged into an extension cord that did not have ground fault circuit interrupter ("GFCI") protection, and that a separate relocatable power tap, which was not intended for use at construction sites, was on the worksite and two items, one of which was an extension cord that ran up to the roof of the building, were plugged into it.[19] (Tr. at 170-173, 204-207.) Mr. Henson observed workers on the ground stepping through debris that had protruding screws.[20] (Tr. at 275-276, 281.)

***Threshold Issues***

*Respondent's Request for Reconsideration of the Court's Denial of its Motion for*

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[18] Although CO Naim referred to the Meadows foreman as Luis Oliveira, the record shows that he also was known as Gilson Oliveira. (Tr. at 391 (Michael Meadows referring to his foreman on the Lowell worksite); Exs. CX-13, R-G (Respondent's payroll records indicating that the foreman at the Lowell worksite was known as Gilson N. Oliveira).) CO Naim also testified that Michael Meadows may have accompanied him at times during his inspection. (Tr. 197.)

[19] CO Naim testified that GFCI protects electrical equipment users from electrical shocks and burns in the event of an equipment malfunction or cut in an electrical cord. (Tr. at 173.)

[20] Mr. Henson testified that another Meadows supervisor, Brian Dias, was at the worksite and that he toured the worksite with him. (Tr. at 289; 296.) Mr. Dias was a supervisor at the worksite and joint-owner of Meadows, but, according to Jared Meadows, was not at the worksite at the time of the inspection. (Tr. at 360, 381, 385.) CO Naim did not mention meeting Mr. Dias, only Messrs. Michael Meadows, Jared Meadows, and Gilson Oliveira. It is possible that Mr. Henson confused foreman Oliveira with Brian Dias. Mr. Henson testified:

Q. Were you present when Mr. Naim was interviewing Mr. Oliveira?
A. No.
Q. Did you walk the project site with Mr. Naim?
A. With Mr. Naim for a portion of it and I was with Mr. Dias from Meadows Construction for a portion of it on my own.

(Tr. at 296.) The record does not resolve this apparent discrepancy, but neither party raises any issue associated with it. Accordingly, the Court finds that the discrepancy is harmless.

*Summary Judgment*

In its post-hearing brief, Respondent asserts "that a post-trial reconsideration of Meadows' motion [for summary judgment] is warranted" because the Secretary disclosed for the first time at trial that Mr. Henson was not an OSHA compliance officer on July 10, 2012. (Resp't. Br. at 2-3.) In its reply brief, Respondent alleges that the Secretary "clearly and intentionally" used "chicanery" to "deceive this Court" as to Mr. Henson's status at the time of the OSHA inspection. Respondent argues that such chicanery should result in the dismissal of the amended complaint and all citations. (Resp't. Reply Br. at 9-10.)

A motion for reconsideration does "not necessarily fall within any specific Federal Rule" and, therefore, in such motions the movant "rel[ies] on 'the inherent power of the rendering district court to afford such relief from interlocutory judgments ... as justice requires."[21] *See Greene v. Union Mut. Life Ins. Co.,* 764 F.2d 19, 22 (1st Cir.1985) (citation omitted); *Bowater Inc.,* No. Civ. 03-227-B-C, 2005 WL 3021979, at *1 (D. Me. Nov. 10, 2005). A motion for reconsideration should not give a motion's losing party the opportunity to simply reargue losing points. Moreover, revisiting issues already addressed or advancing new arguments or supporting facts which were otherwise available when the original motion was under consideration by the Court are not valid purposes of a motion to reconsider and are likewise inappropriate. *Van Skiver v. United States,* 952 F.2d 1241, 1243 (10th Cir.1991) (citation omitted); *see also Frietsch v. Refco, Inc.,* 56 F.3d 825, 828 (7th Cir.1995) ("It is not the purpose

[21] While the federal rules do not recognize a "motion for reconsideration" in those exact words, Rule 59(e) governs motions for the alteration or amendment of judgments. *See Mass. Elec. Constr. Co.*, 16 BNA OSHC 1023, 1024 (No. 91-2111, 1992). Under Rule 59(e) the movant must demonstrate an intervening change in the law, the discovery of new evidence, or a clear error of law in order to prevail. The Court finds that Respondent has not demonstrated any intervening change in the law, the discovery of new evidence, or clear error of law.

of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him.”). The broad “interests of justice” standard, which helps guide the Court's analysis, is highly discretionary. *See Greene,* 764 F.2d at 22; *United States v. Roberts,* 978 F.2d 17, 22 (1st Cir.1992) (noting that the interests of justice test “covers considerable ground”). In conducting this analysis, this court may consider the following, nonexhaustive list of factors: (1) the nature of the case, (2) the degree of tardiness, (3) the reasons underlying the tardiness, (4) the character of the omission, (5) the existence *vel non* of cognizable prejudice to the nonmovant in consequence of the omission, (6) the effect of granting (or denying) the motion on the administration of justice, and (7) whether the belated filing would, in any event, be more than an empty exercise. *Winters v. FDIC,* 812 F.Supp. 1, 3 (D.Me.1993) (quoting *Roberts,* 978 F.2d at 21-22).

Here, the record shows that the date on CO Naim’s credential card had expired June 20, 2012 prior to the inspection of the Lowell worksite. (Tr. at 224-225; Ex. R-A.) Before the trial, Respondent filed a Motion for Summary Judgment based on Naim’s expired credential card. *See* Respondent Meadows Construction Co. LLC’s Motion for Summary Judgment Against Complainant under F.R.C.P. 56(2), Or Alternatively, Its Motion in Limine (June 21, 2013)(“Motion for Summary Judgment”). The Motion for Summary Judgment was denied. *See* Order Denying Respondent’s Motion for Summary Judgment, or Alternatively, its Motion In Limine (June 28, 2013). In its post-hearing briefs, Respondent requests that its Motion for Summary Judgment be reconsidered because: (1) OSHA had misled the Court regarding Mr. Henson’s “true status” as a safety assistant during the inspection, and (2) Mr. Henson’s “presence at the site did not raise a genuine issue of material fact.” (Resp’t Br. at 2-3, 30-32; Resp’t Reply Br. at 9-10.

According to Respondent, OSHA, in an "untimely disclosure" at the hearing, revealed Mr. Henson's "true status" as a safety assistant at the time of the Lowell inspection. (Resp't Br. at 2-3.) In doing so, Respondent claims that OSHA misled the Court in its response to Respondent's Motion for Summary Judgment by submitting a "brief and affidavit to this Court which misleadingly assert[ed] that Adam Henson's presence on the worksite create[d] a genuine issue of material fact with respect to the credentials issue." (Resp't Reply Br. at 9.)

First, the Court was not misled. OSHA never asserted that Mr. Henson was a credentialed Compliance Officer at the time of the Lowell inspection. Second, at the time of Respondent's summary judgment motion, Mr. Henson's presence at the worksite was a material fact in dispute, not because he was a safety assistant and not a credentialed Compliance Officer, but because, according to the affidavit submitted by Michael Meadows in support of Respondent's Motion for Summary Judgment, Meadows asserted, and OSHA disputed, that CO Naim "was the sole individual that interviewed people and investigated the Project site." *See* Michael Meadows Affidavit dated June 20, 2013; Complainant's Memorandum In Opposition To Respondent's Motion for Summary Judgment at 2 (June 27, 2013) ("OSHA employee Adam Henson was also at the project site assisting in the investigation and interviewing workers."). Third, Respondent has not provided any support, legal or otherwise, as to how it is appropriate under the Federal Rules of Civil Procedure or Commission rules for a party, in its post-hearing brief, to make a post-trial request for the Court to reconsider its ruling denying a motion for summary judgment. Finally, any such motion is untimely per the Court's Scheduling Order requiring all motions, including *in limine*, to have been submitted no later than 25 days before the commencement of the hearing. *See* Notice of Hearing and Scheduling Order (Jan. 23,

2013).

After weighing the factors suggested in *Roberts,* the Court is persuaded that the interests of justice do not justify the Court granting the requested reconsideration. Respondent's Motion for Reconsideration is without merit regardless of whichever legal standard applies to its disposition. The Court finds that there is no evidence that the Secretary used chicanery to deceive the Court as to Mr. Henson's status at the time of the OSHA inspection. The issue has been reviewed by the Court given the development of the record during the trial and Respondent's request in its post-hearing brief. For the reasons already set forth in the Order denying the Motion for Summary Judgment and herein, the Court affirms its denial of Respondent's Motion for Summary Judgment and denies Respondent's Motion for Reconsideration of the Court's denial of its Motion for Summary Judgment based on CO Naim's expired credentials.

*Multi-Employer Doctrine*

The Secretary claims that Meadows was the general contractor on the Lowell worksite and was therefore responsible for ensuring that the work done on the worksite was "conducted in a safe manner." (Sec'y Br. at 12.) The Secretary's claim falls under the multi-employer worksite doctrine, which is set forth in *Summit Contractors, Inc.*, 23 BNA OSHC 1196 (No. 05-0839, 2010). In *Summit*, the Commission held that "an employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act . . . to protect not only its own employees, but those of other employers 'engaged in the common undertaking.' " *Summit*, 23 BNA OSHC at 1205 (citations omitted). The Commission explained that a "controlling" employer is one in the position "where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Id*. A "creating" employer is one that

“creates a violative or hazardous condition [and] is [therefore] obligated to protect its own employees as well as employees of other contractors who are exposed to the hazard.” *Id.*

Of the fourteen affirmative defenses Respondent raised in its Answers to the Secretary’s Complaints, the following relate to the multi-employer doctrine that: (4) it was not legally responsible for those who allegedly violated the cited standard, (7) it neither caused the alleged hazards to exist nor did it directly control the conditions causing the hazard, and (13) the correct employer was not cited. In its prehearing statement, Respondent set forth the factual bases for these affirmative defenses: Mr. Ederson Pinto, thought by CO Naim to be a worker at the worksite, was not on any of the subcontractor payrolls; a subcontractor who was cited, LN Construction Co., was not directed or directly supervised by Meadows; and the power table saw and power tap at issue in the citation items were not Meadows’ property. (Resp’t Pre-Hr’g Statement at 6, 8.) In its post-hearing briefs, Respondent further claims: (1) Masonworks, LLC, the subcontractor who operated the power table saw at issue in Citation 1 Item 2, was not a “filed sub-bidder which Meadows could vet, select or reject depending on its safety record, experience and qualifications, per the normal procedures of the Massachusetts bid law,” and (2) the relocatable power tap at issue in Repeat Citation 2 Item 1 was most probably owned by either the window or the asbestos abatement contractors, neither of which subcontracted with Meadows.[22] (Resp’t Br. at 13-14, 23.)

It is undisputed that Meadows was the general contractor on the Lowell worksite and that subcontractors were also present during the OSHA inspection. With respect to these subcontractors and the worksite as a whole, the Court finds that the record shows that Meadows

[22] Michael Meadows testified that an asbestos abatement contractor was assisting the window contractor at the worksite. (Tr. at 406.)

had overall supervisory authority and control of the work functions being performed. General contractors at construction sites, who have the ability to do so, must prevent or abate hazardous conditions created by subcontractors, through the reasonable exercise of supervisory authority, regardless of whether the general contractor created the hazard or whether the general contractor's own employees were exposed to the hazard. *See Solis v. Summit Contractors, Inc.,* 558 F.3d 815 (8th Cir. 2009). First, the record shows that Meadows was in charge of safety.[23] Meadows required its own employees and subcontractors to follow its safety program specifically developed for the project, which was kept on site for everyone to use and follow. (Tr. at 435-437; Ex. R-O).[24] The safety program plainly states that all subcontractors must follow it. (Ex. R-O at "Responsibilities: Subcontractors and Suppliers"; "Subcontractors/Outside Service Providers.") The record also shows that Meadows communicated its safety rules, using an interpreter if necessary, to everyone on the worksite during daily coffee breaks. (Tr. at 435-437.) The safety program included topics such as fall protection and electrical safety. It also included a disciplinary program. (Ex. R-O at "Disciplinary Program.") Additionally, Bud Black, who represented the city of Lowell, testified that he reported any safety concerns directly to Respondent. (Tr. at 319-320, 330-331.) Safety Net, Respondent's safety consultant, developed Meadows' safety program and provided it to Meadows. (Tr. at 433-435.) Netco employee, Thomas Kondol, served as the city of Lowell's project manager ("PM"). Mr. Black

[23] In its interrogatory responses to the Secretary, Respondent identified Messrs. Michael Meadows, Jared Meadows, Brian Dias and Victor Andrade, all either owners or employees of Meadows, as persons in charge of safety at the worksite. (Ex. CX-1, at p. 3.)

[24] Meadows claims that the Massachusetts contracting bid requirements shield it from responsibility on its worksite, claiming that Meadows could not select some subcontractors based on their safety record. (Resp't Br. at 13-14.) The record shows, however, that Meadows knew about this requirement before it contracted with the city of Lowell. (Tr. at 80.) Meadows then required all subcontractors, including the ones it was allegedly required to hire, to conform to its safety program.

worked for PM Kondol. PM Kondol testified that as the worksite PM he was the "interface between the contractor, the designer, and the school district, which is – who the work was being performed for." He also testified that the subcontractors to Respondent at the worksite performed "work as directed by the general contractor [Respondent]." (Tr. at 77, 80.)

Second, the record shows that Respondent was in charge of the flow of work being done on the Lowell worksite. Michael Meadows and Jared Meadows testified that Jared Meadows coordinated all of the work being done by the subcontractors. (Tr. at 359; 393-395.) Michael Meadows testified that foreman Gilson Oliveira was in charge of deliveries, and would "lift[] stuff up to the guys on the roof," who were, according to Jared Meadows, employees of subcontractors Masonworks, LLC and LN Construction Co. (Tr. at 375, 392.) Michael Meadows also testified that Jared Meadows would coordinate the work of non-subcontractors; including the work of the window and asbestos contractors. (Tr. at 393.) CO Naim also asserted that Michael Meadows also told CO Naim that he [Michael Meadows] "controlled the work activities of the employees (Means and manner by which the work is accomplished) that are the subject of each of the citations issued. He [Michael Meadows] also indicated that he [Michael Meadows] gives additional projects to these workers, controls their hours and has the authority to remove or discipline these workers." *See* Secretary's Response to Interrogatory No. 10, at Ex. R-M, at 7.)

Finally, the record shows that the subcontracted workers viewed the Meadows supervisors as those that controlled the project. CO Naim testified that all the workers on the site that he spoke to indicated that Michael Meadows and Jared Meadows were "in charge." The only supervisors at the worksite at the time of the OSHA inspection were Meadows' supervisors. (Tr. at 128, 142-143.) This testimony was unrebutted. Based on the above facts, the Court finds that Respondent in general controlled the worksite in such a way as to be able to detect and abate any

violative conditions that developed on the worksite. Consistent with *Summit*, the Court finds Respondent to be a "controlling" employer that had a duty under the Act to protect not only its own employees, but those of LN Construction Co., Masonworks, LLC and the window and asbestos abatement contractors that were also working at the worksite. *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994) ("An employer is responsible for violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite."). With respect to the individual citation items where a Meadows subcontractor was involved with or exposed to the alleged hazard, the Court also specifically finds, as discussed below in the sections devoted to the specific citation items, that the record supports that Respondent had control over the working conditions surrounding the alleged violations, but failed to abate them.[25]

*Selective Prosecution*

In its answers, Respondent claimed that OSHA had engaged in selective enforcement against Meadows due to ongoing issues Respondent had with union representatives. *See* Fourteenth Affirmative Defense in Resp't Answers, Respondent's response to the Secretary's Interrogatory No. 22. (Ex. CX-1, at 10.) The Commission places the burden of showing selective prosecution on respondents. *Altor Inc.*, 23 BNA OSHC 1458, 1460 n.2 (No. 99-0958, 2011). Respondent alleges that union harassment has "effectively led to repeated OSHA inspections and selective enforcement."[26] Fourteenth Affirmative Defense in Resp't Answers.

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[25] These citation items include Citation 1, Items 2, 3, 5 and 6, and Citation 2, Items 1 and 2. The multi-employer doctrine does not apply to Citation 1, Items 1 and 4, in which a Meadows employee was undisputedly involved.

[26] Michael Meadows testified that unions have "been using thuggery tactics against me" since he was not a signatory contractor for unions. He also testified that Respondent has been a victim of vandalism at worksites where a telehandler and sixteen skylights were smashed. (Tr. at 390.)

Respondent alleges that OSHA selected it for inspection merely because the company was non-union. When a Respondent raises the spectre that it has been a victim of selective enforcement of the Act, it is alleging that it has been deprived of its right to due process under the law. Relief is available only if the decision to prosecute is shown to have been deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification. *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3 (1985).[27] Relief may also be available if the prosecutorial decision was vindictive and unreasonably initiated with the intent to punish the employer for its exercise of a constitutionally protected right.[28] *See Altor, Inc.*, No. 99-0958, 2001 WL 36358380, at **32-33 (O.S.H.R.C.A.L.J. December 17, 2001).

There is nothing in this record to support the conclusion that the Secretary's conduct with regard to OSHA's July 10, 2012 inspection or the issuance of the two citations at issue was based on an illegal premise or Respondent's non-union status, discriminatory, unreasonable or an attempt to prevent Respondent from exercising a protected right, or to punish Respondent for exercising any such rights.[29] The record does not establish that OSHA was aware, before

[27] *See Dekalb Forge Co.*, 13 BNA OSHC 1146, 1153(No. 83-299, 1987) (selective enforcement is judged "by ordinary equal protection standards, under which it must be shown that the alleged selective enforcement had a discriminatory effect and was motivated by a discriminatory purpose" (footnote omitted); *see also United States v. Torquato*, 602 F.2d 564, 569 n.8 (3d Cir. 1979) (defendant claiming selective prosecution " 'bears the heavy burden' " of proving that claim (citation omitted)).

[28] Vindictive prosecution requires Respondent to show: (1) an exercise of a protected right; (2) OSHA's stake in the exercise of that right; (3) the unreasonableness of OSHA's conduct; and (4) that the prosecution was initiated with the intent to punish the Respondent for the exercise of the protected right. *Nat'l Eng'g & Contracting Co*., 18 BNA OSHC 1075, 1077 (No. 94-2787, 1997), *aff'd, Nat'l Eng'g and Contracting Co. v. Herman*, 18 BNA OSHC 2114, 2119-20 (No. 97-4362, 1999)(6th Cir. 1999). Likewise, Respondent "must produce evidence tending to show that it would not have been cited absent that motive." (*Nat'l Eng'g & Contracting Co*., 18 BNA OSHC at 1078).

[29] In this case, Respondent has failed to establish that any government officials engaged in any misconduct. To the contrary, the actions of OSHA personnel have been in support of the public interest to ensure employee safety. *Fluor Daniel,* 19 BNA OSHC 1529, 1533 (No. 96-1729, 2001)(consolidated), *aff'd*, 295 F.3d 1232 (11th Cir. 2002).

deciding to conduct its inspection, of the absence of any union personnel at the worksite.[30] The record fails to establish that the choice of Respondent's worksite for inspection on July 10, 2012 was based on anything other than a routine decision to investigate for fall protection violations in response to OSHA's receipt of a complaint and in accordance with OSHA's fall emphasis program.[31] Respondent's has not met the standard required by the selective prosecution or vindictive prosecution affirmative defenses. It produced no credible evidence at the hearing that OSHA violated its rights, due process or otherwise, by conducting an inspection of Respondent's worksite on July 10, 2012, or that OSHA's July 10, 2012 inspection was unreasonable. Respondent has not demonstrated that OSHA acted with any discriminatory or retaliatory motive in citing Respondent for violations observed by CO Naim and Mr. Henson on July 10, 2012. The Court finds that no such motive existed. Nothing in the record identifies who submitted the anonymous complaint to OSHA. Similarly, nothing in the record establishes that the Secretary was not within his prosecutorial discretion when he issued the citation items in this case. *Altor Inc.*, 23 BNA OSHC at 1460 n.2. The Secretary has demonstrated the hazardous conditions that existed at the worksite on July 10, 2012 for which Respondent is responsible with regard to Citation 1, Items 2, 3 and 6, and Citation 2, Items 1 and 2. It was entirely proper for the Secretary to cite Respondent for these violations that CO Naim and Mr. Henson observed on July 10, 2012. Respondent has not demonstrated selective or vindictive prosecution. Accordingly, the affirmative defenses of selective or vindictive prosecution are rejected.

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[30] *See A.A. Beiro Constr. Co., Inc.*, 11 BNA OSHC 1662, 1665 (No. 81-1177, 1983) (Selective enforcement defense based upon a company's non-union status rejected where OSHA unaware of the absence of a union at the worksite.).

[31] There is also no evidence of any irregularities by OSHA personnel directed toward Respondent occurring either prior to or during the actual OSHA inspection conducted on July 10, 2012.

Finally, the Court makes note that the record calls into question Respondent's level of cooperation during the OSHA inspection. The record shows that neither OSHA inspector was able to meaningfully interview any non-supervisory worker on the worksite, except for perhaps Mr. DaSilva. (Tr. at 142-143, 289-290.) As an example, CO Naim testified that as he attempted to interview a worker, Jared Meadows got upset and intimidating, and stated that the worker "need[ed] to get back to work. I'm paying him $50/hour." As a result, CO Naim had difficulty interviewing that worker. (Tr. at 222.) Additionally, when all the workers "left the yard" during the OSHA inspection, Mr. Henson testified that no reason was given to him.[32] (Tr. at 289-290.)

***Secretary's Burden of Proof***

In order to establish a violation of a safety or health standard, the Secretary must prove by a preponderance of the evidence: "(1) that the cited standard applies; (2) that there was a failure to comply with the standard; (3) that employees had access to the violative condition; and (4) that the employer had actual or constructive knowledge of the violation." *P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Com'n*,, 675 F.3d 66, 72 (1st Cir. 2012) (citation omitted); *see also Astra Pharm. Prod*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982). A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). "A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979).

[32] Mr. Henson's attempt to gather the names and contact information of the workers at the worksite during the inspection were unsuccessful. He did not conduct any interviews of the workers during the OSHA inspection. (Tr. 290.)

## ***Discussion***

***Citation 1, Item 1***

This citation item alleges a violation of the general duty clause, or in the alternative, a violation of 29 C.F.R. § 1926.602(c)(1)(vi). Respondent initially argues that the alleged § 5(a)(1) violation should be dismissed because a violation of a specific standard is alleged. (Resp't Br. at 32.) The Court does not need to address Respondent's argument because the Secretary has not addressed the general duty clause theory in his post-hearing brief. The Secretary's allegation regarding the general duty clause violation is deemed abandoned. *L&L Painting Co.,* 23 BNA OSHC 1986, 1989 n. 5 (No. 05-0055, 2012) (item not addressed in post-hearing briefs deemed abandoned), *Midwest Masonry Inc.,* 19 BNA OSHC 1540, 1543 n. 5 (No. 00-0322-2001) (arguments not raised in post-hearing briefs generally deemed abandoned).

The Secretary alleges in the alternative a violation of § 1926.602(c)(1)(vi), which states in pertinent part: "All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined in American National Standards Institute B56.1-1969, Safety Standards for Powered Industrial Trucks." The Secretary alleges that Meadows violated this standard when Jared Meadows, the operator of the telehandler on the north side of the building, left the telehandler "unattended." (Sec'y Br. at 15-16.) Respondent claims that the Secretary failed to establish applicability, noncompliance and exposure.[33] (Resp't Br. at 9-12, 32-40; Resp't Reply Br. at 5, 7.)

[33] The Secretary's Violation Worksheet for Citation 1, Item 1 (General Duty Clause), states that "an employee were [sic] exposed to falls and equipment malfunction while the operator of the powered industrial truck was not at the controls when the employees were working out of the platform at an elevated position." The worksheet identifies Mr. Ederson Pinto as being exposed to the general duty clause violation for 30 minutes. (Ex. R-R.) CO Naim also identified Mr. Pinto as the worker who he observed operating the table saw without a guard on the ground, conduct which is the subject of Citation 1, Item 2, discussed below. Mr. Pinto testified that he was not at the worksite during the OSHA inspection. (Tr. at 137-139.) Whether or not Mr. Pinto or his imposter, or any other

*Merits*

With regard to applicability, Respondent argues that the cited standard applies only to "earthmoving equipment," pointing to § 602(a), and claims that the telehandler is actually a "rough terrain forklift." (Resp't Br. at 33; Resp't Reply Br. at 5.) Respondent's argument is misplaced because the cited standard does not fall under § 602(a), it falls instead under § 602(c), "Lifting and hauling equipment (other than equipment covered under subpart N [Helicopters, Hoists, Elevators, and Conveyors] of this part). (1) Industrial trucks shall meet the requirements of § 1926.600 and the following: …." 29 C.F.R. § 1926.602(c). OSHA has issued a standard interpretation letter explaining that § 602(c) applies to rough-terrain forklifts and powered industrial trucks.[34] OSHA Standard Interpretation Letter, "Applicable Standards to Lifting Personnel on a Platform Supported by a Rough Terrain Forklift: Re: §§ 1926.451(c)(2)(iv) and (v) and 1926.602(c)," (Nov. 27, 2001). (Ex. CX-25.) Both parties therefore agree that the telehandler was a rough-terrain forklift (powered industrial truck). *See* Complainant's Memorandum In Support Of Motion To Amend Citation And Complaint (June 11, 2013) (referring to the machine in question as a "powered industrial truck" and "industrial truck."). The Court finds that the cited standard applies.[35]

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worker was exposed to a violation of Citation 1, Item 1 (29 C.F.R. § 1926.602(c)(1)(vi)), is not determined since the Court found that the Secretary has failed to establish non-compliance with the alternatively cited standard.

[34] The OSHA Standard Interpretation letter states, in part:

> In short, requirements for the use of lifting and hauling equipment for material handling in construction, such as rough-terrain forklifts are set out in § 1926.602(c). … In construction, powered industrial trucks, which include rough terrain forklifts, are "similar pieces of equipment" to forklifts and front end loaders in this context. … (CX-25.)

[35] Also in the standard interpretation letter, OSHA states that the corresponding standards protecting workers in a platform elevated by a rough-terrain forklift are found under the scaffold standards, specifically §§ 451, 452 and 454. OSHA Standard Interpretation Letter, "Applicable Standards to Lifting Personnel on a Platform Supported by a Rough Terrain Forklift: Re: §§ 1926.451(c)(2)(iv) and (v) and 1926.602(c)," (Nov. 27, 2001). The workers in the

Respondent next argues that the Secretary failed to establish non-compliance with the cited standard. (Resp't Br. at 35-40; Resp't Reply Br. at 7.) The cited standard incorporates by reference ANSI Standard B56.1-1969, subsection E of section 603, which states that "[w]hen leaving a powered industrial truck *unattended, load engaging means shall be fully lowered*, controls shall be neutralized, power shut off, brakes set, key or connector plug removed." (Ex. CX-26 at 2) (emphasis added). Respondent argues that the machine's "outriggers [] were fully down, with wheels off the ground," claiming essentially that the brakes were set. (Resp't Br. at 36.) Even assuming so, and assuming that the controls were neutralized, power was shut off, and the key or connector plug was removed, the record still shows that the load engaging means, *i.e.*, the personnel platform, was undisputedly extended all the way to the roof of the building, and so it was not fully lowered. Therefore, the issue is whether the telehandler was left "unattended."[36]

The Secretary claims that Respondent left the telehandler unattended because Jared Meadows, the operator of the telehandler, was 25 feet or more away from the telehandler. (Sec'y Br. at 15-16.) This distance, according to the Secretary, violated Review Commission precedent, which has interpreted the word "unattended" in the context of the cited standard as being 25 feet or more away. *See A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 2001

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elevated platform of the telehandler are the subject of Citation 1, Items 5a & 5b, which allege violations of the aerial lift standards at § 1926.453.

[36] Respondent argues that CO Naim prepared the worksheet for the alleged violation in about August, 2012 because no one was at the controls of the telehandler when workers were on the platform, and that CO Naim was then unaware that the operator needed to only be within 25 feet of the telehandler. (Tr. at 462-463; Exs. CX-24, R-R, at 1.) Instructions posted on the telehandler platform stated: "forklift operator must remain at the controls and stay alert when personnel are on the platform." (Tr. 164-167; Exs. CX-23, CX-24.)

(No. 92-1022, 1994).[37] Consistent with the decision in *A.L. Baumgartner*, the Court relies upon the general industry standard at 29 C.F.R. § 1910.178(m)(ii) for the definition of "unattended."[38] In *A.L. Baumgartner*, the Review Commission stated that a CO's testimony of his observation and estimate of distance is enough to establish non-compliance, in the absence of rebutting evidence. *A.L. Baumgartner*, 16 BNA OSHC at 2001. In contrast to *A.L. Baumgartner*, the Court finds that the testimony of Michael Meadows and Jared Meadows "specifically rebutted" the observations and estimates by CO Naim and Mr. Henson that Jared Meadows was about 30 feet from the telehandler.[39]

According to CO Naim, Jared Meadows first approached him from the direction of the west side of the building and was more than 25 feet away from the telehandler. (Tr. at 128; 237; 447-448; 452.) CO Naim also testified that the telehandler was blocking his field of view, and so, because he could not see Jared Meadows definitively, he assumed that Jared Meadows was initially on the other [west] side of the building before approaching him.[40] (Tr. at 452.)

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[37] *See also* ASME/ANSI B56.6-1987 Interpretation: 6-7 that states "A rough terrain forklift truck is attended when the operator is less than 25 ft (7.6 m) from the truck, which remains in his view." (Ex. R-P.)

[38] 29 C.F.R. **§ 1910.178 Powered industrial trucks**.

….

(m) *Truck operations.*

....

(5)(ii) A powered industrial truck is unattended when the operator is 25 ft. or more away from the vehicle which remains in his view, or whenever the operator leaves the vehicle and it is not in his view.

[39] See *A.L. Baumgartner*, 16 BNA OSHC at 2001 (CO's estimate of distance from a truck "might easily" be specifically rebutted by the testimony of a nearby foreman.).

[40] CO Naim testified:

> Q. So you didn't see him on the other side of the building?
> A. No. I'm – I'm assuming where he was because he wasn't in view.

(Tr. at 452.)

According to Mr. Henson, Jared Meadows approached them from approximately 30 feet away,[41] but "was on the same [north] side of the building as the truck [telehandler]." (Tr. at 292.) The Court finds Mr. Henson's testimony that Jared Meadows was at the Building's north side to be significant and corroborates the testimony of Messrs. Jared and Michael Meadows. Mr. Henson testified that Jared Meadows told him that he was appropriately monitoring the telehandler and the men up on the roof.[42] (Tr. at 293.) According to Jared Meadows, he was 10-15 feet away from the telehandler, and he was not "on the other [west] side of the building," because he worked where the workers were, on "just the two sides" [north and east] of the building.[43] Jared Meadows testified that he could see both the telehandler and its platform from where he was positioned. Mr. Henson also testified that there was no work being done along the building's west side at the time the OSHA inspection began. Michael Meadows also testified that there was no work for Jared Meadows to do on the ground on the opposite [west] side of the school.[44] (Tr. at 279-280, 361-363, 408). And according to Michael Meadows, who was standing next to the telehandler, Jared Meadows was "touching the tire" of the telehandler when CO Naim first approached them. (Tr. at 400-401.) The evidence shows that the north side of

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[41] Mr. Henson testified:

Q. What would you guestimate it to be?
A. Thirty-ish feet.
(Tr. at 292).

[42] Jared Meadows testified that he needed to be outside the telehandler's cab because it was "tough to hear" the workers, while in the cab, who were 40 to 45 feet up and needed to be moved every ten minutes or so. He also testified that he needed to be able to see the workers give him "hand signals" in order to adjust their location. (Tr. at 361-363.)

[43] CO Naim testified that he was not sure whether there was any work on the ground on the building's west side that workers could be doing at the time he first encountered Jared Meadows. (Tr. at 237.)

[44] The Court credits this testimony by Jared Meadows, Michael Meadows and Mr. Henson and finds that at the time CO Naim and Mr. Henson first met Jared Meadows at the building's north side there were no workers working on the building's west side.

the building was about 60 feet in length. The Court infers that the width of the telehandler was between about 7 to 8 feet.[45] Photograph exhibit CX-5 shows that the telehandler was positioned more toward the western portion of the north side of the building. The Court finds the testimony of both Michael Meadows and Jared Meadows that Jared Meadows was within 15 feet of the telehandler and not coming from the opposite, west side of the school when CO Naim first approached him, to be credible based upon their demeanor during their testimony on this matter and their basis of knowledge; they knew best where they were standing when the OSHA inspectors first came upon them. Mr. Henson confirmed that Jared Meadows was positioned at the building's north side. CO Naim's testimony that Jared Meadows was at the building's east side was based upon a mere assumption on his part. The Court further finds that the telehandler and its platform remained in Jared Meadows' view when he was first approached by CO Naim and Mr. Henson.[46] (Tr. at 362.)

The record shows that CO Naim's field of view of the direction where Jared Meadows was coming from was blocked by the telehandler. The record also shows that CO Naim and Mr. Henson turned the building's northeast corner together, calling into question whether the

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[45] Reducing the width of the building's north side but the width of the telehandler leaves about 26 feet on either side of the telehandler to the building's edge. Jared Meadows was permitted to be within a distance of less than 25 feet of the telehandler. The Court finds that since the telehandler was positioned more toward the western portion of the building's north side Jared Meadows was less than 25 feet from the building's northwest corner and the telehandler, and the telehandler itself, at the time the OSHA personnel came upon him.

[46] Mr. Henson initially testified that he did not know whether Jared Meadows could see the telehandler and the lift from where Jared Meadows was standing. Mr. Henson later acknowledged that he met Jared Meadows at the telehandler, a place from which Mr. Henson could obviously see the telehandler and also observe the workers up on the lift. Mr. Henson also testified that Jared Meadows told him that he [Jared Meadows] was following standard procedure monitoring the workers while standing by the telehandler. (Tr. 292-293.) Mr. Jared Meadows testified that when CO Naim first approached him at the worksite he [Jared Meadows] was "next to the telehandler" and "monitoring the workers." (Tr. at 361.) Michael Meadows also testified that Jared Meadows was near the telehandler in order to lower the workers or raise equipment up, such as a pallet of synthetic slate for the roof or to remove the box. (Tr. at 408.)

telehandler also blocked Mr. Henson's view.[47] The Court finds that the obstructed view may have affected their estimates of how far they believed Jared Meadows was from the telehandler when they first came upon him during the inspection. In view of the above, the Court finds that the Secretary has failed to establish non-compliance with the standard. This citation item is vacated.

***Citation 1, Item 2***

This citation item alleges a violation of 29 C.F.R. § 1926.300(b)(1), which states in pertinent part: "When power operated tools are designed to accommodate guards, they shall be equipped with such guards when in use." The Secretary claims that Respondent violated this standard because workers used a power table saw without a guard.[48] (Tr. at 132-133; Sec'y Br. at 6-8, 16.) Respondent does not deny that its workers were using an unguarded power table saw, but argues that the given guard would not fit on the table saw for "bevel cuts" or "angle cuts" that were required for the job. (Resp't Br. at 41.)

*Multi-Employer Doctrine*

As noted above, the Court considers Meadows a controlling employer of this multi-employer worksite. As a controlling employer, Meadows had the responsibility of monitoring potential hazards with reasonable diligence on the worksite and correcting them. *Centex-Rooney Constr. Co.*, 16 BNA OSHC at 2129-30. The Court notes that photographs from the inspection show that the worker operating the table saw was wearing a "Meadows" t-shirt, suggesting that the unknown worker actually worked for Meadows. (Tr. at 141-142; CX-7.)

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[47] There is no evidence that Mr. Henson ever measured the distance from where he first met Mr. Jared Meadows to the telehandler.

[48] The power table saw was a DeWalt DW745 Heavy-Duty 10" (254 mm) Compact Worksite Table Saw. (Ex. CX-34.)

The Court also notes that Jared Meadows referred to the guard and the use of the table saw as if he had some say in the matter as follows:

> Q: Was there a guard nearby, do you know?
> A. Yes, we did have the guard.
> Q. And what was the purpose of having the guard nearby?
> A. It just -- well, we needed to take the guard off so we could make the bevel cuts because it, obviously, doesn't fit on –
> Q. Okay.
> A. -- when you're making the angled cuts.
> Q. And if there were straight cuts to be performed -- Were there straight cuts to be performed with this saw or not?
> A. Not that I know of. We probably used the skill saw if we needed to do some straight cuts.

(Tr. at 365-366.) CO Naim was also told by one of Respondent's supervisors that Respondent directed the work of the workers operating the table saw. (Ex. R-M, at 7.) The Court finds that these facts support a determination that Meadows was a controlling employer with regard to this citation item.

*Merits*

With regard to applicability, the record shows that the piece of equipment at issue, a power table saw, was a power operated tool. Exhibit CX-34 is a portion of the table saw's instruction manual, the pertinent part of which states that the saw comes with a "guarding system." (Tr. at 151-158; Ex. CX-34 at 2.) The table saw was designed to accommodate a guard. The cited standard is applicable.

With regard to non-compliance, it is undisputed that the power table saw was in use without a guard in place.[49] CO Naim testified that during his inspection "he saw an unguarded saw blade being used." (Tr. 144-145.) Mr. Henson also testified that he observed that the table

[49] Respondent's Safety Program for the project stated that "Power tools that are designed to be used with a guard will be used in this manner." (Tr. at 436; Ex. R-O at 1 of Hand and Power Tools section.)

saw was “being used to rip lumber for fascia boards.”[50] He further testified that he observed two workers using the table saw without using a guard. (Tr. at 283-285; Exs. CX-27, CX-29.) The Court finds that the type of cut that the workers were making during the OSHA inspection is not dispositive with regard to the citation. The standard explicitly states that if the saw was designed to accommodate a guard, that guard must have been in place when the saw was in use.

The Court also credits CO Naim’s testimony - over the conflicting testimony of Mr. Jared Meadows - that he observed the workers doing straight cuts with the table saw.[51] (Tr. at 445-446.) Throughout both of its post-hearing briefs, Respondent attacks CO Naim’s credibility as a witness in this case. (Resp’t Br. at 12-13, 15-16, 19, 24, 27, 38, 46, 50; Resp’t Reply Br. at 4, 7.) Respondent claims that CO Naim intentionally misrepresented and “shaded” facts, and provided false testimony, in his zeal to “make the citations stick.” (Resp’t Br. at 12; 38.) The Court finds these arguments unpersuasive and without merit. The Court observed the demeanor of CO Naim during his testimony and found him to be credible with regard to his testimony concerning Citation 1, Items 2, 3 and 6, and Citation 2, Items 1 and 2.[52] Respondent

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[50] Mr. Black testified that he had observed workers at the worksite use a table saw to form building “rafter tails.” The workers were making 40 degree, 45 degree and regular square cuts without using a guard, which the workers had nearby. Mr. Black also testified the he believed that this was allowed based upon his past experience with an OSHA inspector on another job. (Tr. 322-323.) Mr. Black further testified that he also saw workers use the table saw to rip pressure treated “two bys” [wood] into strips and he did not know whether that cutting required angled cuts. (Tr. 334.) Mr. Jared Meadows testified that “rafter tails” were three-foot pieces of wood tails, two and a half inches thick, that were attached underneath the fascia going out on the ridge. Jared Meadows further testified that the workers needed to make bevel cuts for those rafter tails. (Tr. at 364-365.) Michael Meadows testified that Masonworks, LLC employees were using the table saw because they were doing the carpentry on the facia, soffits, and rafter tails. (Tr. 409.)

[51] Jared Meadows testified that he was closer to the telehandler [at the building’s north side] when workers were using the table saw that was located mid-way on the building’s east side. (Tr. at 365.) The Court finds that CO Naim was in a better position than Jared Meadows to observe what type of cuts the workers were making using the table saw during the OSHA inspection. As indicated above, Mr. Jared Meadows speculated that workers “probably used” a skill saw to perform straight cuts. (Tr. at 366.)

[52] The fact that the Court is vacating the remaining citation items is not an adverse reflection upon CO Naim’s credibility; but is instead a Court finding of a lack of sufficient evidence to support affirming the vacated citation

argues that the worker who it says was operating the power table saw, Mr. Pinto, was not on its payrolls or any of its subcontractor's payrolls.[53] (Resp't Pre-Hr'g Statement at 6.) The name and address of the worker that CO Naim observed operating the table saw was misrepresented to CO Naim during the course of the OSHA inspection. CO Naim testified that he believed that the name of one of the workers who he observed operating the table saw was Ederson Pinto. However, Mr. Pinto testified that he was not present at the worksite during OSHA's inspection. Mr. Pinto further testified that he did work at the worksite sometimes for a company he did not know the name of. ((Tr. at 133-134, 137-139, 141-142; Ex. CX-7.) The Secretary also asserted that Respondent refused to identify employees to CO Naim. (Ex. R-M, at 10.) Whether Mr. Pinto was on Respondent's or its subcontractor's payrolls is not dispositive. Respondent was responsible under the Act for the workers CO Naim and Mr. Henson observed operating the unguarded table saw, whoever they were. The Court finds that Respondent was not in compliance with the cited standard.

With regard to exposure, Respondent claims that the Secretary failed to show how the operators of the table saw were exposed to any type of hazard, "likely because long boards can be handed off between two men so as to avoid either being in close proximity to the blade." (Resp't Br. at 42.) "[I]n order for the Secretary to establish employee exposure to a hazard [he] must show that it is reasonably predictable either by operational necessity or otherwise

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items.

[53] Jared Meadows testified that he believed that the men operating the table saw were employees of Respondent's subcontractor, D&S Commercial Masonry, Inc. He was unable to identify the names of these workers. (Tr. at 375, 378-379.) Payroll records for Masonworks, LLC show that Messrs. Arlen Souza, Bruno Camara, Ekel DaSilva, and Jose Vital were paid for 40 hours as carpenters or carpenter tenders for the week ending July 13, 2012 under the Moody School project. (Tr. at 402; Exs. CX-14, at 13, R-H, at 13.) Michael Meadows testified that D&S Commercial Masonry, Inc. was at the worksite repointing the building's brick chimney. (Tr. at 405-406.)

(including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). CO Naim testified that he "saw three employees exposed to an unguarded saw blade." The CO testified that the hazards associated with this table saw included laceration, cut, amputation, kickbacks and flying debris. (Tr. at 145-148; Exs. CX-31, CX-32.) Kickbacks, according to the CO, occur when the material to be cut "gets bound up" in the saw and the "blade [pushes] the material back towards the operator" causing "struck-by injury, impalement, eye injuries, and so forth." (Tr. at 148.) This testimony was unrebutted during the trial. The record does not establish how close the workers hands were to the unguarded saw blade, however, Respondent's claim does not address the hazard of flying debris or kickbacks. The Court therefore finds that the Secretary showed that the workers operating the unguarded table saw were exposed, at a minimum, to the hazards of flying debris and kickbacks.

With regard to knowledge, Respondent argues that the Secretary failed to "furnish any evidence that Meadows knew or could have known of the alleged straight cuts the men were making without the guard." (Resp't Br. at 42.) As noted above, the issue of the type of cut is not dispositive. Even so, both Michael Meadows and Jared Meadows testified that they observed the workers using the unguarded table saw. (Tr. at 364-366; 408-409.) Also, CO Naim testified that Messrs. Michael Meadows and Oliveira were both in the vicinity of the saw when it was being used in an unguarded condition. (Tr. at 149-150.) The record therefore establishes that Respondent had actual knowledge of the cited condition. *P. Gioioso*, 675 F.3d at 73 ("an employer can be charged with constructive knowledge of a safety violation that supervisory employees know or should reasonably know about.").

Respondent raises the impossibility defense claiming that it would have been impossible to use a guard on that table saw to make the bevel cuts necessary for the job.[54] (Resp't Br. at 44.) To prove infeasibility, however, Meadows has the burden to show, by a preponderance of the evidence, that " '(1) literal compliance with the terms of the cited standard was infeasible under the existing circumstances, *and* (2) an alternative protective measure was used or there was no feasible alternative measure.' " *Westvaco Corp.*, 16 BNA OSHC 1374, 1380 (No. 90-1341, 1993) (citation omitted) (emphasis added). Meadows has not met this burden. CO Naim testified that was not permissible for workers to make angle or other cuts on the power table saw without the saw guard in place. (Tr. at 151; Ex. CX-34.) The DeWalt DW745 manufacturer's instructions state:

> **Important Safety Instructions**
> · TO REDUCE THE RISK OF KICKBACK AND OTHER INJURIES, use all components of the guarding system (blade guard assembly, riving knife and anti-kickback) for every operation for which they can be used including all through cutting.

(Ex. CX-34 at 2.)

The manufacturer's instructions rebut the testimony by Messrs. Jared Meadows and Michael Meadows that it is impossible to use the guard on the table saw.[55] Even if it were infeasible to use a guard on the table saw to make bevel cuts, the record shows that no alternative protective measures were being used. The record also fails to show whether Respondent had attempted to use a feasible alternative measure of protection for making these bevel cuts, such as using a

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[54] Jared Meadows testified that "it's impossible" to use the guards on the table saw. (Tr. at 376.) Michael Meadows also testified that it was impossible to use the table saw to make 45 degree bevel cuts on two and one-half inch wood being used for fascias because the saw blade would hit the guard. (Tr. at 409.)

[55] The Court also rejects Michael Meadows' testimony that the instruction manual states that guards cannot be used on bevel cuts.

different saw that was designed to accommodate a guard while making bevel cuts. The Court therefore rejects Respondent's impossibility defense.

Respondent also raises the unpreventable employee misconduct ("UEM") defense with regard to the worker operating the saw. (Resp't Br. at 43.) To be successful in its UEM defense, Respondent has the burden to show that it: "(1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed it." *P. Gioioso & Sons, Inc. v. Occupational Safety & Health Review Comm'n,* 115 F.3d 100, 109 (1st Cir.1997). With regard to machine guarding, the record shows that Respondent has a work rule in place as shown in its safety manual. *See* Ex. R-O at "Hand and Power Tools." The rule states that "[p]ower tools that are designed to be used with a guard will be used in this manner." Ex. R-O at "Hand and Power Tools." The record also shows that Meadows communicated safety rules daily in its morning "coffee talks." (Tr. at 435-437.) Additionally, the record shows that Meadows took steps to detect noncompliance with safety rules. Meadows contracted a safety company, Safety Net, to develop the safety plan for this worksite and Safety Net had visited the worksite twice since the project began. (Tr. at 433.) Mr. Black, who was there four hours per day, also testified that Meadows was very responsive whenever he saw incidents of noncompliance. (Tr. at 330-331.)

However, the record does not show whether and how effectively Respondent enforced its machine guarding rule. Although its safety manual indicated that Meadows had a progressive disciplinary policy toward those who violated the work rules, Respondent produced no documentation showing that it implemented the progressive disciplinary policy in general or with

regard to machine guarding specifically. There was also no testimony as to whether and how Respondent implemented the progressive disciplinary policy. The Court therefore finds that Meadows failed to carry its burden of establishing the UEM defense with regard to this citation item.

The violation is affirmed.

*Characterization*

The Secretary alleges a serious violation of the cited standard. The Court agrees with CO Naim's testimony that the injuries associated with the violation of this standard include laceration, cut, amputation and impalement, and views these injuries as serious physical harm. (Tr. at 148.) The violation is properly characterized as serious.

***Citation 1, Item 3***

This citation item alleges a violation 29 C.F.R. § 1926.404(b)(1)(i), which states in pertinent part: "The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section or an assured equipment grounding conductor program ["AEGCP"] as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites." Section b(1)(ii) states in pertinent part: "All 120-volt, single-phase 15- and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection." The Secretary claims that CO Naim determined that the "unguarded saw was plugged into an extension cord, which was neither part of the building's permanent wiring nor protected by any GFCI[.]" (Sec'y Br. at 16-17.) In the citation, the Secretary claims that Respondent did not have an AEGCP. Respondent claims that

the Secretary did not establish non-compliance with the cited standard. (Resp't Br. at 45-46.) Respondent also raises the infeasibility defense. (Resp't Br. at 46.)

*Multi-Employer Doctrine*

As noted above, the Court considers Meadows a controlling employer of this multi-employer worksite. As a controlling employer, Meadows had the responsibility of monitoring potential hazards with reasonable diligence on the worksite and correcting them. *Centex-Rooney Constr. Co.*, 16 BNA OSHC at 2129-30. The unguarded table saw, used by Meadows' subcontractors as discussed above in Citation 1 Item 2, was in turn plugged into the extension cord at issue in this GFCI citation violation. (Tr. at 170-171.) The record shows that, just as the power table saw was visible to Respondent's supervisors and the OSHA inspectors, so was the non-GFCI extension cord that was used to power the table saw. Respondent had the power to detect this violative extension cord as it was being used to power the table saw, and also had the power to correct the violative condition. The Court finds that Meadows is responsible for the alleged violations in this citation item.

*Merits*

With regard to applicability, the record shows that workers on this construction site used a power table saw that was connected "by cords" to an interior, non-GFCI outlet in the school building. (Tr. at 170-172; Exs. CX-36, CX-37, R-M, at 7-8.) According to CO Naim, he "followed the cords to its originating outlet to see if there was any GFCI connected to the originating outlet, and there was not." (Tr. at 170.) The outlet at issue was therefore on the power saw's extension cord, which was in use and not part of the permanent wiring of Moody Elementary School. *Otis Elevator Co.*, 17 BNA OSHC 1166, 1168 (No. 90-2046, 1995) (holding that an extension cord plugged into a building's permanent wiring falls under the

requirements of ground-fault circuit protection in 29 C.F.R. § 1926.404(b)(1)(i)). Additionally, it is general knowledge that the two types of circuits in the United States are 120 volts and 240 volts. The instruction manual associated with the table saw states that it is intended for use on a circuit less than 150 volts. (Ex. CX-34 at 2.) The outlet illustrated on the same page shows a standard 120v/15-20amp outlet. (Ex. CX-34 at 2.) The record shows that the extension cord at issue was plugged into the same type of outlet as that illustrated in the power saw's instruction manual. (Exs. CX-36 through CX-38.) It is inferred that the extension cord provided a 120-volt/15 or 20 ampere circuit for the table saw. *New England Synthetic Sys., Inc.*, 18 BNA OSHC 1818, 1820 (No. 97-1843, 1999) (ALJ Yetman). Respondent does not argue against the applicability of the cited standard. The Secretary has shown that the standard applies.

With regard to non-compliance, CO Naim testified that by "tracing the cords" of the energized table saw, he determined that the power saw was not GFCI protected. (Tr. at 170-172.) The Court interprets this testimony to mean that if there were GFCI protection along any part of "the cords," including the cord outlets, CO Naim would have noted it. Respondent argues that (1) the only way to determine whether an outlet was GFCI protected is to check the panel box, and (2) neither CO Naim nor Mr. Henson checked the panel box during the inspection. (Resp't Br. at 45.) It is undisputed that neither CO Naim nor Mr. Henson checked the panel box during the inspection.[56] Under Commission precedent, however, extension cords themselves should be equipped with GFCI protection. *Otis Elevator,* 17 BNA OSHC at 1167.

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[56] CO Naim testified that Michael Meadows told him that he [Michael Meadows] did not know where the breaker panels were. Michael Meadows also testified that there was no GFCI [at the worksite]. (Tr. 449.) *See also* Respondent's response to Secretary's Interrogatory No. 13, which asserted that the school's electrical power did not have ground fault circuit breakers. (Ex. CX- 1, at 5.) *See also* Secretary's response to Respondent's Interrogatory No. 10, at 7-8, that stated that Jared Meadows told CO Naim that he [Jared] did not know if there was GFCI at the worksite. (Ex. R-M.)

Respondent does not claim that CO Naim missed any GFCI protection along the length of "the cords."[57] The Secretary has shown non-compliance.

With respect to exposure, the record shows that workers were using the table saw, which was energized by "cords" that were not GFCI protected. (Tr.at 170-173.) The Secretary has established exposure.

With respect to knowledge, the record shows that Messrs. Michael Meadows and Jared Meadows assumed that the originating interior power outlet was GFCI protected because the building was a schoolhouse. (Tr. at 373; 411-412.) The question, however, is not whether the schoolhouse's power supply was GFCI protected, but whether the outlets on "the cords" running the power equipment on the worksite were GFCI protected. The Court finds that Respondent's supervisors knew or should have known that the "cords" themselves were not GFCI protected. This became readily apparent to CO Naim during the course of his inspection. It was a condition that was readily discernible to Respondent's supervisors who were regularly present at the worksite. Ignorance of the requirements of the standard is no defense. *Manganas Painting Co., Inc.*, 21 BNA OSHC 1964, 1985 n.24 (No. 94-0588, 2007) ("It is well-settled that any misunderstanding about a respondent's legal obligations would not be relevant to whether it violated the standard.")

Respondent raises the infeasibility defense by arguing that it was contractually obligated to use the school's power supply and that it had no alternative power supply. (Resp't Br. at 44.) Despite its obligation to use the school's power supply, Respondent does not argue that it was restricted in the type of extension cords it could have used on the worksite. Respondent has

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[57] Respondent also does not dispute the Secretary's allegation in the citation that it does not have an AEGCP.

failed to show that it was impossible to use a different extension cord with GFCI protection on it. *Westvaco Corp.*, 16 BNA OSHC at 1380 (infeasibility defense fails when employer fails to show alternative protective measures were used or did not exist). The violation is affirmed.

*Characterization*

The Secretary alleges that serious violation of this standard. According to CO Naim, workers were exposed to electrical shock and burn by using power equipment that was not GFCI protected. (Tr. at 173.) The citation is properly characterized as serious.

***Citation 1, Item 4***

This citation item alleges a violation of 29 C.F.R. § 1926.451(f)(6), which states in pertinent part: "*Scaffolds* shall not be erected, used, dismantled, altered, or moved such that they or any conductive material handled on them might come closer to exposed and energized power lines than [3 feet for insulated lines up to 300 volts]."[58] 29 C.F.R. § 1926.451(f)(6) (emphasis added). The Secretary bases this citation item on conversations between CO Naim and foreman Oliveira and CO Naim and Mr. DaSilva during their tour of the worksite. CO Naim testified to the following: Mr. Oliveira told him that he had previously operated a piece of equipment to elevate himself up to arm's length distance of the live power cable in the alcove on the west side of the building, and draped rubberized material over it in an attempt to insulate it so that they could remove a catch platform above it without risk of being injured by electric shock. CO Naim testified that by doing so Mr. Oliveira brought the "scaffold" less than ten feet from the energized line. (Tr. at 174-181, 188-189; Exs. CX-40, CX-41.) The citation alleges that the elevated work occurred on about July 10, 2012. Respondent claims that the Secretary failed to

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[58] At trial, the Secretary stated that the power line at issue was less than 300 volts, and so the minimum safe distance was 3 feet. (Tr. at 66.)

show applicability and non-compliance of the cited standard. (Resp't Br. at 46-50.)

*Merits*

With regard to applicability, Respondent argues that the cited standard does not apply to the piece of equipment at issue because it is an "aerial lift" and not a scaffold.[59] (Resp't Br. at 16; Resp't Reply Br. at 5.) The Secretary, on the other hand, calls this piece of equipment an "aerial lift scaffold," and claims it "constitutes a powered wheel-mounted supported scaffold within the 'mobile scaffold' definition set forth in 29 C.F.R. § 1926.450." (Sec'y Br. at 17 fn25.) The Court agrees with Respondent.

Section 1926.450 defines "mobile scaffold" as a "powered or unpowered, portable, caster or wheel-mounted supported scaffold." 29 C.F.R. § 1926.450. A supported scaffold is defined as "one or more platforms supported by outrigger beams, brackets, poles, legs, uprights, posts, frames, or similar rigid support." 29 C.F.R. § 1926.450. In contrast, an "aerial lift" is defined as a type of "*vehicle-mounted* aerial device[] used to elevate personnel to job-sites above ground." 29 C.F.R. § 1926.453(a) (emphasis added). Aerial lifts include "extensible boom platforms" and "articulating boom platforms." 29 C.F.R. § 1926.453(a)(i) & (iii). Exhibits CX-3, CX-41 and CX-49 show the platform at the end of the telescopic boom lift. (Tr. at 184-185; Exs. CX-3, CX-41, CX-49, R-L at 3.) Together, the three photographs show that the platform is attached to the end of a mechanized arm of the telescopic boom lift. (Tr. at 185; Exs. CX-3, CX-41 marked "B", CX-49.)[60] Exhibit CX-40 also helps to clarify. Exhibit CX-40 is the warning instructions associated with this particular piece of equipment. (Tr. at

[59] The beginning of the cited standard explicitly states that it "does not apply to aerial lifts, the criteria for which are set out exclusively in § 1926.453." 29 C.F.R. § 1926.451.

[60] This is in contrast to a scissor-lift, which is covered by the mobile scaffold definition. *See* OSHA Standard Interpretation Letter, "§§ 1926.452(w) and 1926.453; scissor lifts and aerial lifts," June 10, 2002.

183; Ex. CX-40.) The instructions denote that the piece of equipment at issue is a "machine" and has a "boom," which is more consistent with the description stated above of an aerial lift than a wheel-mounted scaffold. (Ex. CX-40).

The testimony surrounding the telescopic boom lift is also illuminating. The CO referred to the unit as an "aerial lift" throughout his testimony, and also testified that he considers an "aerial lift" the same thing as a "scaffold." (Tr. at 176-191, 241.) The fact that the CO considered an "aerial lift" the same thing as a "scaffold" leads the Court to believe that he did not distinguish between the two in terms of regulatory requirements. According to the CO, Oliveira "raised" the elevation unit, and "operated" it to do work "adjacent to [the] energized electrical line." (Tr. at 181; 186.) This description of the use of the telescopic boom lift is more consistent with the definition of an aerial lift rather than with the definition of a scaffold as it shows that it was available to allow Mr. Oliveira to elevate himself to any work related task above ground. *See* 29 C.F.R. § 1926.453(a) (an "aerial lift" is "used to *elevate* personnel to job-sites above ground") (emphasis added).

Although the aerial lift standard falls under the scaffold subpart, the requirements for aerial lifts are explicitly set apart from scaffolds. 29 C.F.R. § 1926.451. In order for the Secretary to show that the cited standard applied, he must have established how the piece of equipment at issue was a scaffold and not an aerial lift.[61] The evidence in the record does not establish that; if anything, the evidence supports Respondent's claim that the telescopic boom lift is an aerial lift. As this burden falls on the Secretary, the Court finds that he has failed to prove applicability for this citation item.

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[61] Mr. Jared Meadows testified that Respondent did not erect any scaffolding on the building's west side. (Tr. at 369.)

With regard to non-compliance, Respondent argues that the evidence relied upon by the Secretary was "unreliable" and "second-hand."[62] (Resp't Br. at 17-18; 48-50; Resp't Reply Br. at 8.) The Court agrees and finds that the evidence that the Secretary relied upon to attempt to prove this citation item is flimsy, at best. Mr. Oliveira's account was admitted into the record as an admission by a party opponent under Federal Rules of Evidence 801(d)(2)(D).[63] Mr. Oliveira was not called as a witness at the trial. Mr. Henson testified that he had nothing to do with Citation 1, Item 4, had no information to share about it, and was not present when CO Naim spoke with Mr. Oliveira. (Tr. 285, 296.) Admissions admitted under Rule 801(d)(2)(D) are not inherently reliable. Several factors affecting the trustworthiness of any such admissions should also be considered; *e.g.* timing of admission, relationship of statement to declarant's work, and employer's access to evidence rebutting the matter asserted. *Regina Construction Co.*, 15 BNA OSHC at 1048. Here, there is doubt cast on Mr. Oliveira's alleged admissions. The CO did not observe Mr. Oliveira's alleged violative actions and relied solely on Oliveira's statement to him as support for the citation. The record shows that Oliveira may have had a language barrier to an unknown extent.[64] The CO also did not testify as to when Mr. Oliveira allegedly used the telescopic boom lift to elevate himself to come within an arm's length of the live power cable. CO Naim testified that he was not sure when that event happened, or if Mr.

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[62] Respondent's argument seems to take exception that OSHA violations cannot be charged unless a compliance officer actually observes the violation. *See contra Gateway Concrete Forming Servs., Inc.,* 11 BNA OSHC 2188, 2189 (No. 83-855, 1984) ("Numerous citations are issued by OSHA charging violations which are proven by evidence other than the eyewitness testimony of the compliance officer.").

[63] *See Regina Constr. Co.*, 15 BNA OSHC 1044, 1047 (No. 87-1309, 1991) (Compliance officer's testimony concerning statements made to him by non-supervisory employee during the inspection not hearsay and admissible under Rule 801(d)(2)).

[64] Mr. Jared Meadows testified that Mr. Oliveira did not speak English very well. (Tr. at 367.) Michael Meadows also testified that "there's some language barriers that he [Mr. Oliveira] doesn't understand." (Tr. at 418.) The Court gives little weight to CO Naim's testimony as to what Mr. Oliveira told him on July 10, 2012 as CO Naim did not take any notes of the interview. (Tr. 230.)

Oliveira told him that it happened on July 10, 2012.[65] CO Naim also testified that Mr. Oliveira did not tell him how long the rubberized material that he had draped over the wire remained on the wire, or if the rubberized material had been removed. CO Naim testified that Mr. Oliveira did not identify any other workers who were with him when he placed rubberized material over the wire, or to what extent the wire was covered. CO Naim stated that he had not seen, and no photographs showed, any covering on the wire. (Tr. at 176; 178, 223, 228-230, 240, 264-265, 367, 418, 436.) Also, Mr. Jared Meadows testified that Respondent, or its subcontractors, did not put any type of rubber insulation on the wire leading to the west side of the building. He also testified that he never observed Respondent's employees, or its lifts, working within feet of the live wire.[66] He further testified that Respondent was waiting for the electrical company, that it identified as Nstar, to put a boot on the wire, so Respondent was not working near it at the time of the OSHA inspection.[67] He stated that Nstar, without the involvement of Respondent's workers or subcontractors, installed a rubber boot on the wire a few days after the OSHA inspection.[68] (Tr. at 366-369.) The Court finds that the Secretary also failed to establish

[65] The Court finds CO Naim's testimony as to when Mr. Oliveira allegedly came within an arm's length of a live power cable to be inconclusive. CO Naim testified that all he knew was that it occurred "prior to the inspection. I may have assumed it was the day of the inspection. I can't remember if he [Mr. Oliveira] was specific...." (Tr. 264.)

[66] Michael Meadows also testified that Respondent did not place any type of protective covering over the wire while waiting for Nstar to do so. He also testified that Respondent did not operate any lifts near the wire. (Tr. at 414, 419.)

[67] On July 16, 2012, citing to a work order created on July 6, 2012, Respondent sent an email to Mr. Black that stated that National Grid was contacted on July 6, 2012 to put a boot on the feed at the school. (Tr. 413-418; Ex. R-U.) The Court does not view Jared Meadows and Michael Meadows' referral during their testimony to Nstar versus National Grid as significant.

[68] During his testimony, Jared Meadows acknowledged that Respondent's May, 2013 response to an interrogatory, made under oath by his father, Michael Meadows, stated that "Meadows repeatedly contacted Nstar to request the shutoff of the power line, and Nstar repeatedly failed and refused to do the same." (Tr. at 377-378; Ex. CX-1, at 7.) Michael Meadows testified that Respondent probably got in touch with Nstar three or four times to see if they could install a pipe boot over the electrical wire. He also testified that there was no covering on the wire before

non-compliance.

This citation item is vacated.

***Citation 1, Item 5(a) and 5(b)***

This citation has two sub-items, both of which allege violations of OSHA's aerial lift standards at 29 C.F.R. § 1926.453. Item 5(a) alleges a violation of 29 C.F.R. § 1926.453(b)(2)(iv), which states in pertinent part: "Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position." Item 5(b) alleges a violation of 29 C.F.R. § 1926.453(b)(2)(v), which states in pertinent part: "A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift."

*Multi-Employer Doctrine*

As noted above, the Court considers Meadows a controlling employer of this multi-employer worksite. As a controlling employer, Meadows had the responsibility of monitoring potential hazards with reasonable diligence on the worksite and correcting them. *Centex-Rooney Constr. Co.*, 16 BNA OSHC at 2129-30. The workers on the elevated platform in this citation item were elevated to the roof by Jared Meadows, the operator of the telehandler. Respondent's Safety Program for the worksite stated that the aerial lift operator is responsible for ensuring that "all personnel in the platform are wearing fall protection devices and other safety gear as required at all times (100% fall protection). Tie off only to manufacturer provided anchorage point and not handrails." (Ex. R-O, Aerial Lifts section, at 4.) The Court therefore

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Nstar (also referred to as National Grid) placed the protective boot over the wire after the OSHA inspection. (Tr. at 414, 417; Ex. R-U) Despite this interrogatory response, the Court credits Jared Meadows' testimony that he never observed Respondent's employees, or its lifts, working within feet of the live wire and the testimony of both Jared and Michael Meadows that Nstar, or National Grid, eventually put a rubber boot on the wire after the OSHA inspection.

finds that Meadows was also a "creating" employer in terms of responsibility for safety under the multi-employer doctrine at this worksite on July 10, 2012 wherever non-compliance with a standard is demonstrated. *Summit*, 23 BNA OSHC at 1205.

*Merits*

The Secretary bases the alleged violations of these standards on the observations of the OSHA inspectors of Meadows' workers in the telehandler's elevated platform.[69] (Sec'y Br. at 19.) According to Mr. Henson, he observed workers "climbing over the rails ... to access the roof and vice versa, off the roof into the basket." (Tr. at 286.) Mr. Henson testified that those same employees were accessing the roof and the platform "without being tied on to the basket or the roof." (Tr. at 286.) Similarly, CO Naim testified that he believed that the men on the platform were not using fall protection because he observed them exiting the platform and walking onto the roof without "pulling anything," *i.e.*, "there was no lines." (Tr. at 267.) CO Naim testified that he observed employees stepping on the telehandler's platform's midrails climbing out of the telehandler's platform, and standing on the telehandler's platform's toe boards. CO Naim also testified that he observed workers in the telehandler's platform wearing harnesses that were "not attached to anything."[70] (Tr. at 192-199; Ex. CX-52.)

[69] The telehandler was also the piece of equipment at issue in Citation 1, Item 1. The platform attached to the telehandler has been termed differently throughout the case. These terms include platform, basket, box, and lift. The Court uses the term "platform" for ease of reference in this discussion. *See* 29 C.F.R. § 1926.450(b).

[70] In the Secretary's response to Respondent's Interrogatory No. 10, CO Naim stated that he had "observed and *photographed* an employee, standing on the railing of an aerial lift, who was working on the roof" and "two employees in an aerial lift basket (that was a lift different from the lift in Item 5a) who did not have their lanyards attached or secured to prevent a fall." (emphasis added) CO Naim alleged more in the Secretary's response to Interrogatory 10 than he could, or did, deliver at trial through his testimony or photographs. CO Naim was unable to point to or identify any worker shown on photograph exhibit CX-52, or any other photograph that he took, that was not properly tied off or shown standing on the lift's railings. (Tr. 199; Exs. CX-52; R-M, at p. 8.)

Respondent claims that the Secretary failed to establish non-compliance with the cited standard, any exposure to a hazard, or knowledge. (Resp't Br. at 50-54.) Respondent is correct. The photographs in evidence do not support the Secretary's allegations in Citation 1, Item 5. When shown photograph exhibit CX-52, CO Naim testified that he could not say that the photograph showed that lanyards were not attached to the platform. He further testified that he was not sure whether there were any photographs showing workers on the platform that were not attached to the platform. He also acknowledged that photograph exhibit CX-52 did not show workers' feet; therefore the photograph does not show workers standing on the platform's midrails or toe boards. (Tr. at 257-258, 266.) Mr. Jared Meadows testified that he did not observe any workers standing on the platform's railings on July 10, 2012. He further testified that on that date all of the workers on the roof were wearing harnesses and lanyards that they were using to tie off. He also testified that he did not observe any workers not clipping onto the telehandler's platform. (Tr. at 371-375.) Michael Meadows also testified that he did not see any workers standing on the platform's railings on July 10, 2012. (Tr. at 405.) The Court credits the testimony of Messrs. Jared and Michael Meadows over that of CO Naim and Mr. Henson with regard to whether or not workers climbed over platform rails, or accessed the roof from the platform without being tied off. Mr. Jared Meadows was watching the workers in the platform while standing within 25 feet of the telehandler. CO Naim and Mr. Henson were further away and their ability to see the entire body of the workers within the confines of the platform was more limited by comparison.[71] The Secretary has failed to prove non-compliance with the standard. Complainant has also not shown that workers were actually exposed to the

[71] *Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1111, 1114 (No. 12-0379, 2012) (credibility finding must be made by taking the record as a whole).

hazard alleged in the Citation, Items 5(a) and 5(b), and Respondent had no knowledge of any such alleged violations because they did not exist. For these reasons, both of these citation sub-items are vacated.

***Citation 1, Item 6***

This citation item alleges a serious violation of 29 C.F.R. § 1926.25(a), which states in pertinent part: "During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures." The Secretary claims that the OSHA inspectors observed "debris, including wood containing protruding nails and screws," in plain view in a work area at the building's west side in the original vicinity of the telescopic boom lift.[72] (Sec'y Br. at 19; Tr. 200-202; CX-41, CX-54, CX-55.) Mr. Henson testified that the debris included material from a dismantled catch platform. (Tr. at 276-277; Ex. CX-54.) Respondent claims that it complied with the standard, and that no worker was exposed to any hazard. (Resp't Br. at 56, 58; Resp't Reply Br. at 9). Respondent also raises the infeasibility defense. (Resp't Br. at 56-57.)

*Multi-Employer Doctrine*

This citation item concerned debris that was generated on the worksite by roofers, and it was on the ground for any and all workers to navigate through. As Meadows was the controlling employer of the entire worksite, the Court finds that Meadows had the ability, with reasonable diligence, to detect this hazard and abate it. *Centex-Rooney Constr. Co.*, 16 BNA OSHC at 2129-30. The Court also finds that Meadows is responsible under the creating employer theory

[72] The OSHA Violation worksheet stated that the debris was in plain sight predominantly at the building's corner and near the platform of an aerial lift [telescopic boom lift at the building's west side]. (Ex. R-S at 2.)

of the multi-employer doctrine. *Summit*, 23 BNA OSHC at 1205. The debris was generated by the roofers, who were doing the work under Respondent's supervision that Meadows was specifically contracted to perform, replacing the roof on the Moody Elementary School. The Court finds that Meadows is responsible for the alleged violations for this citation item.

*Merits*

With regard to applicability, it is undisputed that Meadows was engaged in the course of construction, and that Henson observed workers walk over debris in a work area around the school building. (Tr. 200-202, 275-281; Exs. CX-41, CX-42, CX-53, CX-54 and CX-55.) To the extent that Respondent's argument that the debris did not contain nails reaches applicability, the Court disagrees. The Commission has broadly interpreted the term "debris" as "matter that is scattered about working or walking areas." *Gallo Mech. Contractors, Inc.*, 9 BNA OSHC 1178, 1180 (No. 76-7371, 1980); *see also Capform, Inc.*, 16 BNA OSHC 2040, 2044 (No. 91-1613, 1994) (affirming "debris" interpretation in *Gallo*). The record shows that plywood and other pieces of wood were scattered about the work area of the Lowell worksite. The Court finds that the cited standard applies.

With regard to noncompliance, the record shows that the debris was in a walkway as evidenced by the undisputed fact that workers walked over it. Respondent argues that it "reasonably" complied with the standard by keeping some of the debris in "attachment boxes" and removing the debris on the ground once a day.[73] (Resp't Br. at 56-57.) The standard explicitly states that debris "shall be kept cleared from work areas," not "reasonably clear." 29 C.F.R. § 1926.25(a). The Secretary has established non-compliance.

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[73] Mr. Black testified that he had instructed Respondent that the worksite was to be cleaned at the end of the day. (Tr. 319.) The Court finds that such an instruction did not permit Respondent to allow workers to be exposed to unsafe debris on the ground surrounding the school building throughout the work day.

With regard to exposure, Respondent claims that the debris did not contain nails, only screws, "such that no hazard was created for men in rugged work boots." (Resp't Reply Br. at 9). The Court denies this unsupported claim. Photographs at exhibits CX-54, CX-55, and CX-56 show pieces of wood with protruding nails. (Tr. at 278.) Additionally, the Commission has also held that the hazards associated with this standard include tripping and falling. *Gallo*, 9 BNA OSHC at 1180. Despite Respondent's argument that men in "rugged boots" were not exposed to any hazard because screws, as opposed to nails, were protruding out of the wood, the men were still exposed to the hazard of tripping and falling.[74] The record evidence establishes that workers actually walked over the debris.[75] Mr. Henson testified that he also observed a Meadows employee, who he identified as Brian Dias, walk through the debris at the building's west side.[76] (Tr. at 279-281; Ex. CX-56.) The Court therefore finds that the Secretary established exposure.

With regard to knowledge, the record shows that Respondent was aware of the debris throughout the workday and that workers supervised by Respondent cleared it once at the end of each work day. (Tr. at 319-320, 369, 419-420.) The Court finds that the Secretary established actual knowledge of the cited condition.

Respondent raises the infeasibility and greater hazard defenses to this citation item

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[74] Mr. Jared Meadows acknowledged during his testimony that Respondent "had ground workers at all times [at the worksite] ,…." (Tr. at 369.)

[75] CO Naim testified that workers were also exposed to the debris when exiting the telescopic boom lift at the building's west side. (Tr. 202; Exs. CX-54 through CX-56.) Mr. Henson testified that photograph exhibit CX-53 showed a worker stepping over a piece of plywood debris with screws in it [near the telehandler at the building's north side]. (Tr. 276; Ex. CX-53.) Jared Meadows testified that he was unable to identify the name of the worker shown in photograph exhibit CX-53. (Tr. at 379.)

[76] Mr. Henson testified that he was with the Meadows employee when the employee walked through the debris at the building's west side on July 10, 2012. (Tr. 279-281.) Whether that worker was Mr. Dias is not dispositive.

claiming that the nature of slate roof replacement caused a continuous "rain" of debris onto the ground below that would have been hazardous to workers had they continually cleared it from the work area. (Resp't Br. at 57-58.) To establish the infeasibility defense, Meadows must show that "(1) literal compliance with the terms of the cited standard was infeasible under the existing circumstances, *and* (2) an *alternative protective measure was used or there was no feasible alternative measure*." *Westvaco Corp.*, 16 BNA OSHC at 1380 (citation omitted) (emphasis added). To establish the greater hazard defense, the employer has the burden of showing "that the hazards of compliance with the standard are greater than noncompliance; that *alternative means of protecting employees were either used or not available*; and that an application for a variance under section 6(d) of the Act would be inappropriate." *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1391 (No. 97-0755, 2003) (emphasis added). Respondent claims that the measures it took to minimize the debris, and its daily clean-up routine, were "prudent and reasonable under all the circumstances." (Resp't Br. at 57.) The Court finds, however, that Respondent has failed to show that it took any alternative measures to protect its employees from tripping and falling over the debris, such as cordoning off the area. Indeed, the record shows that employees felt comfortable enough to walk over the debris in front of the OSHA inspectors, suggesting that supervisors had even failed to caution the workers about the debris. Respondent has therefore not met its burden of establishing either defense. The citation is affirmed.

*Characterization*

The Secretary alleges a serious violation of the cited standard. The hazards associated with this standard include tripping and falling. *Gallo*, 9 BNA OSHC at 1180. It is undisputed that screws protruded from the debris. The Court finds that tripping or falling onto a protruding

screw would likely cause serious physical harm. The violation is properly characterized as serious.

***Citation 2, Item 1***

This citation item alleges a repeat violation of 29 C.F.R. § 1926.403(b)(2), which states in pertinent part: "Listed, labeled, or certified equipment shall be installed and used in accordance with instructions included in the listing, labeling, or certification." The piece of equipment at issue here was a relocatable power tap that was not rated for use on a construction site. (Tr. at 346-349; Exs. CX-57-59, CX-60 at 2-3.) The Secretary claims that the CO saw the relocatable power tap "being used" on the construction site, which was contrary to its listing and was therefore a violation of the cited standard. (Sec'y Br. at 19-20.) Respondent claims that the Secretary failed to establish non-compliance, exposure, and knowledge. (Resp't Br. at 58-60.)

The power tap was "located outside on the construction site" near a microwave that had a beverage sitting on it. (Tr. at 204-206, 287; Exs. CX-57 at A, CX-58.) The microwave was located on the east side of the building. (Ex. CX-39.) The power tap had two electrical cords plugged into it, but the tap itself was not plugged in. (Tr. 204-206, 287, 294-295, 370, 427; Ex. CX-57.) One of the electrical cords plugged into the tap was an extension cord that ran to the roof. (Tr. 204-205, 287; Exs. CX-39, CX-58.) The other cord plugged into the tap was for either the microwave, or for a portable battery charger for an electric drill. (Tr. 205-206; Ex. CX-57.) CO Naim testified that he was told by one of Respondent's employees that he did not know who owned the power tap. The name on the back of the tap was "Hoberth Air Renovation," which Michael Meadows testified was not one of the subcontractors on the job. (Tr. 250, 428; Ex. CX-59.)

*Multi-Employer Doctrine*

As noted above, the Court considers Meadows a controlling employer of this multi-employer worksite. As a controlling employer, Meadows had the responsibility of monitoring potential hazards with reasonable diligence on the worksite and correcting them. *Centex-Rooney Constr. Co.*, 16 BNA OSHC at 2129-30. Despite Respondent's assertion that the power tap was located away from Respondent's work, and that it did not own it or know what company "Hoberth Air Renovations" was, the extension cord originating from it ran up the side of the building to the roof, where Meadows' subcontractors were working under Respondent's supervision. The Court finds that, due to its controlling authority over the Lowell worksite and the roofers in particular, Respondent was reasonably expected to "prevent or detect" the electronic source of the equipment used on the roof, and that it had the authority to use a proper source. Respondent is therefore liable under the multi-employer doctrine for this citation item.

*Merits*

With regard to applicability, the record shows that the power tap at issue is a "listed, labeled, or certified" piece of equipment with instructions. (Tr. at 346-349, Ex. CX-60 at 2-3.) OSHA Assistant Area Director ("AAD") Robert Carbone testified that the power tap at issue was certified by Underwriters Laboratory ("UL"), an independent testing laboratory.[77] (Tr. at 347-348.) He further testified that the instructions issued by UL stated that the power tap was not intended for use on construction sites.[78] (Tr. at 347-348; Ex. CX-60 at 3.) The Secretary

[77] AAD Carbone testified that he is an electrician who has held a master's contractor's license as an electrical contractor in Ohio. (Tr. 346.)

[78] The UL Product Guide Information for Electrical Equipment, The White Book 2012, states in part:

has established that the cited standard applies.

With regard to non-compliance, the Secretary alleges that the cited standard prohibited the power tap from being used at the Lowell worksite. (Sec'y Br. at 19-20.) The Court agrees that the power tap was a non-compliant piece of equipment under the terms of the cited standard. Respondent argues, however, that the power tap was not "in use," as stated in the standard, because it was not plugged in and because no tools or machinery were plugged into it at the time of OSHA's inspection. (Tr. at 370.) Although the male end of the power tap was not plugged into anything at the time of OSHA's inspection, the overall record undermines this claim that the power tap was not "in use." The instructions associated with this relocatable power tap, under the heading "Use and Installation," state that the power tap is "intended …to supply [energy and] to provide outlet receptacles[.]" (Tr. 287; Ex. CX-60 at 3.) The record shows that the power tap provided two outlet receptacles to items on the worksite. One of the items, the extension cord, ran up to the roof where the roofing work was being performed.[79] The power tap was therefore both available for use and actually in use at the worksite.[80]

The Secretary has therefore established non-compliance.

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**RELOCATABLE POWER TAPS (XBYS)**
**USE AND INSTALLATION**

This category covers relocatable power taps rated 250 V ac or less, 20A or less. They are intended for indoor use as relocatable multiple outlet extensions of a single branch circuit to supply laboratory equipment, home workshops, home movie lighting controls, musical instrumentation, and to provide outlet receptacles for computers, audio and video equipment, and other equipment. … Relocatable power taps are not intended for use at construction sites and similar locations.
(Ex. CX-60, at 3.)

[79] The Court notes that the instructions also prohibit extension cords from being plugged into the power tap. (Ex. CX-60 at 3.)

[80] The Court finds little merit in Respondent's argument that no tools or machinery was plugged into the power tap because the instructions prohibited anything to be plugged into this power tap while it was located on a construction site.

Respondent next argues that the Secretary has not established exposure. (Resp't Br. at 59.) As noted above, the Secretary establishes exposure to a hazard by showing that "it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal*, 18 BNA OSHC at 1074 *citing Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). "[A] rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure." *Id.* at 2003. The record shows that it is reasonably predictable that workers on the Lowell worksite used or would have had access to the violative power tap. Not only were two items already plugged into the non-compliant power tap, showing that workers had used the tap, but the tap was also near a location where workers travelled, as evidenced by the microwave with a beverage sitting on it. Additionally, the extension cord ran up to the roof, where it was undisputed that Meadows' subcontractors were working. Even though it was not plugged in at the time of the OSHA inspection, the Court finds the evidence noted above shows that the power tap was intended to be energized. It is therefore reasonably predictable that the workers on the site either had been using or had access to the violative power tap. The Secretary has established exposure.

Respondent finally argues that it did not have knowledge, nor could it have known, of the violative power tap because it did not belong to Respondent or any of its subcontractors, none of the workers claimed it as theirs, and it was located away from Respondent's work. (Tr. at 370; Resp't Br. at 59.) The evidence in the record does not establish that Respondent had actual knowledge of the existence of the power tap. Michael Meadows testified that the power tap did not belong to his company or any of his subcontractors. (Tr. at 428.) Jared Meadows testified that he never saw anyone use the power tap. (Tr. at 370.) Neither Michael Meadows nor

Jared Meadows confirmed or denied that they knew that the power tap was on the worksite before or during the inspection.

The evidence in the record, however, shows that Respondent had constructive knowledge of the existence of the power tap. "[A]n employer can be charged with constructive knowledge of a safety violation that supervisory employees know or should reasonably know about." *P. Gioioso,* 675 F.3d at 73; *see also Hamilton Fixture*, 16 BNA OSHC 1073, 1089 (No. 88-1720, 1993) (finding constructive knowledge when "a physical condition or practice is 'readily apparent to anyone who looked' ") (citations omitted). Michael Meadows testified that he knew that a power tap, like the one at issue here, was not supposed to be used on a construction site. (Tr. at 437-438.) Respondent's supervisors, Messrs. Michael Meadows and Jared Meadows, testified that they were at the worksite on the day of the inspection. The record shows that the power tap was in plain view of the OSHA inspectors during their inspection and that it was in an area travelled by workers on the site given its proximity to the microwave with the beverage sitting on it. (Tr. at 204; 287, 360; Ex. CX-39.) The record also shows that the extension cord originating from the power tap ran up the side of the building to the roof where it was undisputed that Respondent's workers were working. (Tr. 205, 287, 375; Exs. CX-39, CX-58.) The Court finds that if the OSHA inspectors could see the power tap and the extension cord running up to the roof, then Respondent's supervisors could have observed it too. The Secretary has shown that Respondent had constructive knowledge of the violative power tap. The violation is affirmed.

*Characterization*

The Secretary claims that this violation should be characterized as a repeat violation based on Respondent's previous violation of the same standard. (Sec'y Br. at 20; Ex. CX-61.)

"[A] violation is repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. Under this doctrine, the Secretary establishes a *prima facie* case of similarity by showing that both violations are of the same standard." *Capform*, 16 BNA OSHC at 2045 (citations omitted).

The record shows that Meadows received a citation in December 2011 for violating the same standard on a job at Woburn, Massachusetts. (Tr. at 215-217, 437-439; Ex. CX-61.) Meadows never contested the citation because it reached an informal settlement agreement with OSHA, conceding the violation, on January 30, 2012. (Ex. CX-61.) Nevertheless, because a citation was issued and Respondent did not contest it, the citation of the same standard became a final order of the Commission under § 10(a) of the Act, 29 U.S.C. § 659(a), before the violation occurred here. *Potlatch*, 7 BNA OSHC at 1062. Respondent has not attempted to show any dissimilarity between the cited citation at issue and the previous violation that was not contested and has become a final order. *Capform*, 16 BNA OSHC at 2044-2045 (once *prima facie* showing of similarity has been shown, burden shifts to employer to show dissimilarity). The Court therefore rejects Respondent's claim that the Secretary incorrectly attempted to draw an "adverse inference" from the previous citation regarding a power tap.[81] (Resp't Reply Br. at 6.) The citation is properly characterized as repeat.

***Citation 2, Item 2***

This citation item alleges a repeat violation of 29 C.F.R. § 1926.501(b)(10), which states in pertinent part: "each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from

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[81] Michael Meadows testified that Respondent previously had a repeat citation, where CO Naim was also the OSHA inspector, for an improper power tap on a job at Woburn, Massachusetts . (Tr. 437-438.)

falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system." The Secretary claims that a violation was established based on "the observations by both OSHA inspectors of workers on the low-sloped roof area of the building without secured lanyards to prevent their falling." (Sec'y Br. at 21.) Respondent claims that the Secretary failed to show non-compliance. (Resp't Br. at 60-63.) Respondent also raises the UEM defense with respect to this citation item. (Resp't Br. at 63-64.)

*Multi-Employer Doctrine*

As noted above, the Court considers Meadows a controlling employer of this multi-employer worksite. As a controlling employer, Meadows had the responsibility of monitoring potential hazards with reasonable diligence on the worksite and correcting them. *Centex-Rooney Constr. Co.*, 16 BNA OSHC at 2129-30. The roofers on this project were doing the work that Meadows was specifically contracted to perform – replacing the roof of the Moody Elementary School.[82] (Tr. at 403.) The Court finds that, due to its controlling authority over the Lowell worksite and the roofers in particular, Respondent was reasonably expected to "prevent or detect" the roofers' adherence to fall protection safety measures, and that it also had

[82] Jared Meadows testified that he believed that the workers on the roof were employees of Respondent subcontractors, Masonworks, LLC, D&S Commercial Masonry, Inc., and LN Construction Co. (Tr. at 375.) He was unable to identify the names of any of the: a) four workers shown on or near the roof in photograph exhibit CX-52, b) two workers shown on the roof in photograph exhibit CX-64, and c) two workers shown on the roof in photograph exhibit CX-65. (Tr. at 379-383.) Payroll records for LN Construction Co. show that Messrs. Wesley Rocha, Carlos Claros, Juan Alvarez, Dione Lima, Manuel Guevara, and Elliott Burgos were paid for 8 hours as roofers for July 10, 2012 under the Moody Elementary School project. (Tr. at 402-403; Exs. CX-15, at 10-11, R-I, at 10-11.) These payroll records also show that Messrs. Clayton Ladeira, Weuler Pavao, and Eliezer Melott were paid for 8 hours as carpenters for July 10, 2012 under the Moody Elementary School project. (Tr. at 402-403; Exs. CX-15, at 10, R-I, at 10.) Michael Meadows also testified that there were window trade workers at the worksite on July 10, 2012 working under a separate contract with the city of Lowell, Massachusetts. (Tr. 393-394.)

the authority to correct any deficiency. *Id.* Indeed, Meadows had a safety program that required its subcontractors to use fall protection, and which also included a disciplinary program designed to effectuate that requirement. Respondent is therefore liable under the multi-employer doctrine for this citation item.

*Merits*

With regard to applicability, CO Naim and Mr. Henson testified that when they approached the site, they observed workers on the roof who were not tied off.[83] (Tr. at 126, 213; 282, 288.) CO Naim testified that he "observed workers on a roof 60 feet high that were exposed to fall hazards that were not protected from falls." He further testified that there were "no guardrails" and "no netting" for these workers. He also testified that these workers on the roof were wearing harnesses that were not attached to anything. CO Naim stated that he told one of Respondent's supervisors that he had observed these fall hazards when he opened his investigation at the worksite. (Tr. 207-210; Exs. CX-64 at A, CX-65, CX-66.) Henson testified that he observed two individuals "on the top of the roof, which is the flat part, without being tied off with – by means of a lanyard or otherwise." (Tr.at 288.) The record shows that the workers on the roof were engaged in roofing activities on the low-sloped portion of the roof

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[83] Specifically, CO Naim testified:

Q. And what did you observe?

A. I observed employees not attached while they were exposed to falls.

Q. Describe what you saw. Give us a little more - - flush out some of the details of what you saw.

A. I saw employees exposed on a roof, and in aerial lifts, and working out of man-baskets that were not secured with a lanyard.

(Tr. at 123-124.)

Mr. Henson also testified:

Q. Can you tell me, when you first arrived at the site, what observations you made of any conditions that might have been cited in this citation? Did you observe any conditions that were cited?

A. Observed individuals along the top of the roof, the flat portion specifically, without fall protection.

(Tr. at 282.)

and were more than 60 feet above the ground. (Tr. at 124-126; Exs. CX-64, CX-65, CX-66.) The Secretary has shown that the cited standard applies.

With regard to non-compliance, the Court accepts CO Naim's and Mr. Henson's testimony that they could see that the workers on the roof, even though they were wearing harnesses, were not tied off. Respondent argues that (1) the Secretary cannot establish a violation without conclusive photographic evidence, (2) the photographs show that the workers were wearing lanyards, and (3) Henson was too far away to see whether the workers were tied off. (Resp't Br. at 60-61.) The Court is not persuaded. The Court accepts the Secretary's photographic exhibits CX-64, CX-65 and CX-66, coupled with the testimony of CO Naim and Mr. Henson, as conclusive evidence that the men on the flat part of the roof were not tied off. (Tr. 267-268.) Unlike the lack of photographic evidence to support a violation of Citation 1, Item 5(a) and (b), here the Secretary provided photographic evidence that shows workers on the roof that are not tied off. Additionally, personal eyewitness accounts have been held sufficient to establish violations before the Commission. *See, e.g., A.L. Baumgartner*; 16 BNA OSHC at 2001; *see also Suttles Truck Leasing, Inc.*, 20 BNA OSHC 1953, 1974 (No. 97-0545, 2004) (consolidated) (holding that industrial hygienist's uncontradicted personal observation was sufficient to establish a violation). Respondent has not provided sufficient evidence that CO Naim or Mr. Henson, based on distance, could not tell that the workers were not tied off on the roof. The Court finds CO Naim a credible witness in this regard. The Court also observed Mr. Henson's demeanor as he was testifying and found him to be credible, honest, impartial, well-meaning, confident, direct, and persuasive with regard to Citation 1, Items 1 through 3, and

6 and Citation 2, Items 1 and 2.[84] Respondent does not even question Mr. Henson's credibility. Finally, the issue is not whether the workers were wearing lanyards, but whether the lanyards were tied off while on the roof. Respondent's arguments regarding witnesses who saw the workers wearing lanyards are not dispositive.[85] The Secretary has established non-compliance.

With respect to exposure, the record shows that the workers were not tied off while working on the roof over 60 feet high. The Secretary has established exposure to the hazard of falling.

With respect to knowledge, the Secretary alleges that Respondent should have known that workers on the roof worked with unsecured lanyards. (Sec'y Br. at 12.) The Secretary claims that Meadows did not reasonably supervise the workers on the roof, and so did not "confirm whether effective fall protection was established." (Sec'y Br. at 12.) Respondent relies on Bud Black's testimony to show that Meadows properly supervised its workers. (Resp't Reply Br. at 2-4.) Under Commission precedent:

> the Secretary must prove that a cited employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition … Reasonable diligence requires the formulation and implementation of adequate work rules and training programs to ensure that work is safe, as well as adequate supervision of employees.

*Summit*, 23 BNA OSHC at 1207 (citations omitted). The Court finds that the record supports the Secretary's claim that Meadows inadequately supervised the workers on the roof.

Jared Meadows testified that he was the project supervisor on the worksite, but he did not

[84] Mr. Henson's testimony concerning Citation 1, Item 1, with regard to the distance Jared Meadows was away from the telehandler was an estimate. Mr. Henson offered no testimony with regard to Citation 1, Item 4. The fact that the Court is vacating Citation 1, Items 5(a) and 5(b), is not an adverse reflection upon Mr. Henson's credibility; but is instead a Court finding of a lack of sufficient evidence to support affirming these two sub-items.

[85] Similarly, Michael Meadows' testimony regarding using a lanyard to "traverse" the 60 degree pitch of the roof is also unpersuasive for this citation item because the allegation is that workers were already on the flat part of the roof, not traversing the steep 60 degree part of the roof. (Tr. 403-404; Resp't Br. at 62.)

state that he would go up to the roof. (Tr. at 360.) He further testified that no Meadows employees were on the roof, and that Meadows' foreman Oliveira stayed on the ground. (Tr. at 375.) It has not been established, therefore, that any Meadows supervisor ever effectively monitored the workers' use of lanyards up on the roof. Instead, Respondent relies on Bud Black's testimony to show that Meadows properly supervised the worksite. (Resp't Br. at 62.) As noted above, it was not established that Mr. Black was on the worksite during the OSHA inspection. Additionally, Mr. Black testified that he was not responsible for safety at the Lowell worksite. (Tr. at 328-329.) The Court notes that Mr. Black did not state whether he ever saw Jared Meadows or any other Meadows supervisor on the roof. The Court also notes that while Mr. Black testified that he observed the workers wearing lanyards on the roof, he did not testify that he observed those workers tied off. (Tr. at 327.) The Court therefore finds that Jared Meadows did not exercise reasonable diligence with regard to supervising the workers on the roof. His constructive knowledge can be imputed to Respondent based on his supervisory status. *P. Gioioso*, 675 F.3d at 73 ("an employer can be charged with constructive knowledge of a safety violation that supervisory employees know or should reasonably know about.") The Secretary has established knowledge.

Respondent raises the UEM defense with regard to its workers using fall protection on the roof. (Resp't Br. at 63-64.) With regard to fall protection, the record shows that Respondent has a work rule in place as shown in its safety manual. *See* Ex. R-O at "Safety Rules and Regulations." The rule states, in pertinent part, that "A means of fall protection will be utilized for anyone working over six feet in height." Ex. R-O at "Safety Rules and Regulations." The safety manual's fall protection section also states that its fall protection plan was "adopted to meet the requirements of 29 C.F.R. § 1926.500." Ex. R-O at "Fall Protection

Program." The record shows that Meadows communicated safety rules daily in its morning "coffee talks." (Tr. at 435-437.) The record also shows that Meadows contracted Safety Net to develop the safety plan for this worksite and also to monitor this worksite, presumably in an effort to discover incidents of noncompliance. (Tr. at 433.) Since Meadows had been on the worksite at Lowell, Safety Net had been there twice. (Tr. at 433.) Bud Black, who was there 4 hours per day, also testified that Meadows was very responsive whenever he saw incidents of noncompliance with safety rules. (Tr. at 330-331.)

The Court finds, however, that Respondent failed to take steps to discover incidents of noncompliance by inadequately supervising the roofers while they were on the roof, and that it failed to effectively enforce its rule. *P. Gioioso*, 115 F.3d at 109 (four prongs of UEM defense employer must show are: (1) work rule, (2) communication of work rule, (3) take steps to discover incidents of noncompliance, and (4) effective enforcement.) As noted above, despite the progressive disciplinary policy set forth in its Safety Manual, Respondent has not shown proof of how and whether it disciplined its workers in general or with regard to fall protection specifically. The Court therefore finds that Meadows failed to carry its burden of establishing the UEM defense with regard to this citation item. The violation is affirmed.

*Characterization*

The Secretary claims that this violation should be characterized as a repeat violation based on Respondent's previous violations of a substantially similar standard at 29 C.F.R. § 1926.501(b)(13), "Residential Construction," that occurred with a year and two months before the inspection in this case. (Sec'y Br. at 21; Exs. CX-61, CX-62, CX-68.) "[A] violation is repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Capform*, 16 BNA OSHC at

2045 (citation omitted). "The principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards." *Amerisig Se., Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996).

The informal settlement agreements proffered by the Secretary show that Meadows waived its right to contest violations of 29 C.F.R. § 1926.501(b)(13) in June, 2011 that occurred at Woburn, Massachusetts and again in January, 2012 that occurred at Beverly, Massachusetts.[86] (Tr. at 339-345, 439-440; Exs. CX-61, CX-68.) These two citations, therefore became final orders order of the Commission under § 10(a) of the Act, 29 U.S. C. § 659(a), before the violation occurred here. Likewise, the Secretary relied upon the violation summary of OSHA's database to show that Respondent was previously cited for another violation of 29 C.F.R. § 1926.501(b)(13) contained within OSHA Inspection Number 314605072 issued on July 28, 2010 with respect to a workplace in Malden, Massachusetts that was resolved through an informal settlement agreement before the violation occurred here. (Ex. CX-11 at 3-4.) *Potlatch*, 7 BNA OSHC at 1062. Respondent has not attempted to show any dissimilarity between the cited violation of 29 C.F.R. § 1926.501(b)(10) and the previous violations of 29 C.F.R. § 1926.501(b)(13). The Court finds that the hazards associated with both the cited standard at issue here, and in § 1926.501(b)(13), are substantially the same if not the same: falling from a high distance. *Amerisig Se., Inc.*. 17 BNA OSHC at 1661. The Court therefore rejects Respondent's claim that the Secretary incorrectly attempted to draw an "adverse inference" from

[86] CO Naim was also the OSHA inspector at Respondent's worksite at Beverly, Massachusetts. (Tr. 440.)

the previous citations regarding "an 8-foot roof on another project."[87] (Resp't Reply Br. at 6.) The citation is properly characterized as repeat.

***Penalties***

"Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give 'due consideration' to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations." *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994). The Secretary did not present any testimony at the trial as to how the proposed penalties were calculated. (Tr. at 351-353.) But the Commission is the "final arbiter" of penalties. *Id.* at 1622 (citation omitted). The Court has taken into account Respondent's size of 50-60 employees, and prior history of violations submitted into evidence, for each of the affirmed violations. (Tr. at 441.) Due to Respondent's lack of cooperation during the OSHA inspection as discussed above, no credit is given for good faith for the affirmed violations. (Tr. at 289.)

The Court has also considered the gravity of each violation. When determining gravity, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury. *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001). Gravity is typically the most important factor in determining penalty. *Capform*, Inc., 19 BNA OSHC at 1378.

For the affirmed Serious Citation 1, Item 2, the unguarded table saw, the Secretary proposed a penalty of $2,800. The Court has considered the seriousness of the potential injuries, including impalement, associated with this violation, combined with the fact that, at

[87] Michael Meadows also testified that Respondent was previously cited, where CO Naim was the OSHA inspector, for a fall protection violation at Woburn, Massachusetts where workers were working on a roof over six feet high without wearing a harness or lanyard. (Tr. at 438.)

least, two employees were exposed until the OSHA inspectors pointed out the condition, and that no precautions were taken to prevent injury while the violative condition was directly in front of the Respondent's supervisors and the OSHA inspectors. The proposed penalty of $2,800 is assessed.

For the affirmed Serious Citation 1, Item 3, no GFCI protection, the Secretary proposed a penalty of $2,000. The Court has considered the seriousness of the injury, including electronic shock and burn, combined with the fact that multiple workers were exposed to the hazard until the OSHA inspectors pointed out the condition, and that no precautions were taken to prevent injury. The proposed penalty of $2,000 is assessed.

For the affirmed Serious Citation 1, Item 6, debris in the work area, the Secretary proposed a penalty of $1,600. The Court has considered the seriousness of injury, including puncture from falling on protruding screws, combined with the fact that at least two employees were exposed during the OSHA inspection, and that no precautions were taken to prevent injury. The Court notes again that, despite Respondent's clean-up at the end of the work day, its workers were not warned of the hazard associated with the debris as evidenced by the workers walking on the debris in front of the OSHA inspector. The proposed penalty of $1,600 is assessed.

For the affirmed Repeat Citation 2, Item 1, the relocatable power tap, the Secretary proposed a penalty of $4,000. The Court has considered the fact that at least two employees were exposed during the OSHA inspection, and that no precautions were taken to prevent injury. The proposed penalty of $4,000 is assessed.

For the affirmed Repeat Citation 2, Item 2, unprotected side or edge fall protection on a low sloped roof, the Secretary proposed a penalty of $14,000. The Court has considered the seriousness of injury, including death from falling more than 60 feet, combined with the fact that,

at least, two workers were exposed up until the OSHA inspectors pointed out the condition. The court has also considered that Respondent took precautions to prevent injury by requiring fall protection and communicating its fall protection rule daily. The proposed penalty of $14,000 is assessed.

***Findings of Fact and Conclusions of Law***

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

***ORDER***

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

Item 1 of Citation 1 is VACATED.

Item 2 of Citation 1 is AFFIRMED as Serious and a penalty of $2,800 is assessed.

Item 3 of Citation 1 is AFFIRMED as Serious and a penalty of $2,000 is assessed.

Item 4 of Citation 1 is VACATED.

Item 5a of Citation 1 is VACATED.

Item 5b of Citation 1 is VACATED.

Item 6 of Citation 1 is AFFIRMED as Serious and a penalty of $1,600 is assessed.

Item 1 of Citation 2 is AFFIRMED as Repeat and a penalty of $4,000 is assessed.

Item 2 of Citation 2 is AFFIRMED as Repeat and a penalty of $14,000 is assessed.

/s/________________________________

The Honorable Dennis L. Phillips

United States OSHRC Judge

Date: May 6, 2014
Washington, D.C.