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

SECRETARY OF LABOR, Complainant, v. C & W FACILITY SERVICES, INC., Respondent.	OSHRC Docket No. 17-2056

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For the Respondent

Before: The Honorable Dennis L. Phillips
U.S. OSHRC Judge

DECISION AND ORDER

I. BACKGROUND

This case arises from a fatal drowning that occurred on May 15, 2017 at 333 Franklin Street, Tampa, FL 33602 (Worksite). (Tr. 365-66; Joint Prehearing Statement (Jt. Pre-Hr'g

Stmt.); Stipulation of Fact (SF) Nos. 1, 13). The victim, Johnnie Norton, was operating a pressure washer on a dock at the Tampa Convention Center (TCC). Mr. Norton was not wearing a personal flotation device (PFD) when he walked backward off the dock and drowned. (SF 11-12). OSHA opened Inspection No. 1237383 of C&W Facilities Services, Inc. (Respondent or C&W) as a result.[1] (Ex. 1).

On November 13, 2017, OSHA issued a one-item serious citation item to Respondent. OSHA cited Respondent for a violation of 29 C.F.R. § 1910.132(a) for the failure to provide and require the use of personal protective equipment (PPE) in the form of PFDs to an employee pressure washing a boat dock. (Ex. l). The total penalty issued to the company was $12,675. (Ex. 1). Respondent timely contested the Citation and Notification of Penalty. (SF 4).

The Court held an evidentiary hearing in the matter in Tampa, Florida on September 5-6, 2018 and February 20, 2019. (Tr. 1, 226, 576). Both parties filed post hearing briefs and post hearing reply briefs.

II. STIPULATIONS OF FACTS

In the Joint Prehearing Statement at 14-15, the Parties stipulated to the following facts:

1. On and before May 15, 2017, Respondent had a contract with the City of Tampa to provide certain services addressed in the contract at the Tampa Convention Center located at 333 Franklin Street, Tampa, FL 33602.

2. Johnnie Norton was a worker at the Tampa Convention Center Worksite on Awnclean's payroll.

[1] Any references herein to C&W Facility Services, Inc.'s or C&W Services' (C&W) predecessors, UGL Services University Cleaning Company Operations CO (UNICCO) or DTZ, Inc. (DTZ), are references to Respondent or C&W, and treated herein as one and the same.

3. Johnnie Norton had worked at the Tampa Convention Center for about one year prior to May 15, 2017.

4. Respondent's predecessor DTZ, Inc. and Awnclean USA, Inc. had entered into a contract for Awnclean to provide certain services at the Tampa Convention Center as specified in the contract.

5. DTZ, Inc. changed its name to C&W Facility Services, Inc., on November 20, 2015.

6. On May 15, 2017, Johnnie Norton was pressure washing the docks at the Tampa Convention Center as part of his normal job duties.

7. Mr. Norton was wearing rubber boots while pressure washing.

8. The City of Tampa owned the pressure washer used by Respondent and Awnclean personnel to clean the docks.

9. The dock was approximately 289' 7" long and 10' 2" wide.

10. The bay was approximately 19 feet deep at the end of the dock where Mr. Norton was working on May 15, 2017.

11. While pressure washing the dock, Mr. Norton walked backward off the end of the dock and fell into Tampa Bay.

12. Mr. Norton was not wearing a personal flotation device at the time he fell into the bay.

13. Mr. Norton drowned.

(Tr. 47).

III. STIPULATIONS OF LAW

In the Joint Prehearing Statement at 13-14, the Parties stipulated to the following Statement of Applicable Principles of Law on which there is agreement:

1. Respondent, at the time of the OSHA inspection, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970 ("the Act" or "OSH Act"), 29 U.S.C. 651, *et seq*.

2. The Occupational Safety and Health Review Commission has jurisdiction of this action pursuant to section 10(c) of the Act.

3. The principal place of business of Respondent is at 275 Grove Street, Suite 3-200, Auburndale, MA 02466, but Respondent operates an office in the state of Florida at 5200 Lagoon Drive, Suite 760, Miami, FL 33126.

4. Respondent timely contested the Citation and the proposed Penalty, pursuant to the provision of Section 10(c) of the Act.

(Tr. 47-48).

IV. JURISDICTION

The Court finds that, as of the date of the alleged violation, Respondent was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. (Stipulation of Law (SL) Nos. 1-2; Resp't Answer, ¶¶ 1-3). Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the OSH Act.[2]

V. CITATION

Complainant's Citation alleges a violation of one standard—29 C.F.R. § 1910.132(a). The

[2] Respondent was a covered employer under the OSH Act. 29 U.S.C. § 652(5) (defining "employer" as a "person engaged in a business affecting commerce who has employees").

Citation alleges the following:

Citation 1, Item 1 Type of Violation: **Serious**

29 C.F.R. § 1910.132(a): Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:

a. At the Tampa Convention Center, an employee engaged in pressure washing a boat dock was not provided and wearing a personal flotation device (PFD), on or about May 15, 2017.

(Ex. 1).

VI. FACTS

On October 12, 2012, the City of Tampa issued a Request for Proposals (RFP) for Operational Staffing Services at the TCC located at 333 South Franklin Street, Tampa, Florida 33602 calling for proposals to be received by November 16, 2017.[3] (Ex. 37, at 3, 6; SF 1). The RFP stated that the successful proposer shall be responsible for annually providing: 1) Cleaning/Setup Personnel: about 110,000 hours, 2) Working Supervisors: about 12,800,[4] 3) On-Site Manager: about 2,080 hours (salaried),[5] 4) Event Maintenance Personnel: about 12,000 hours, and Event Technical Personnel: about 4,160 hours. The RFP also stated that the successful proposer shall be responsible for providing on an as needed basis, among other types of equipment, "Pressure Washer." (Ex. 37, at 6). The RFP stated that it awarded rating points

[3] The RFP stated: "The TCC is directly on the waterfront in the heart of downtown Tampa. The facility, which is an award winning 600,000 feet of meeting space and 2,000 feet of waterfront access …. The facility hosts over 300 events annually." (Ex. 37, at 6).

[4] The RFP stated that the responsibilities of the Working Supervisor included ensuring "proper training programs for Successful Proposer's personnel and generate training schedules." (Ex. 37, § 8.2.5, at 9). It also stated that working supervisors were to "verify that all tasks requested by TCC rep have been completed in proper fashion and in a timely manner. Response time to critical tasks shall be closely monitored." (Ex. 37, § 8.2.14, at 9). The RFP also stated that the responsibilities of the Successful Proposer's Cleaning/Event Set-Up personnel included being "Knowledgeable concerning safety procedures, …." (Ex. 37, § 8.3, 5., at 10). The RFP further required maintenance personnel to be able "to use a pressure washer." (Ex. 37, § 8.4.8, at 10). Section 12.5 4., Cleaning Requirements, Riverwalk, required the successful proposer to perform work including "Pressure wash outside … docks, etc." (Ex. 37, at 13-14, § 12.5 4.).

[5] The RFP stated that the On-Site Manager shall be responsible for ensuring that proper training programs for the Successful Proposer's personnel are scheduled and completed to maintain "best practices" standards, including classes for the "Proper use of cleaning equipment". (Ex. 37, at 8).

for proposals that utilized Small Local Business Enterprise (SLBE or SBE) subcontractors with evaluation criteria that included "Diversity of SLBE subcontractors" and "Percentage of proposal/scope committed to SLBE subcontracting."[6] (Ex. 37, at 24, 52).

On April 1, 2013, the City of Tampa entered into a contract with UGL Services' UNICCO (also referred to as DTZ) for operational staffing services, including janitorial, grounds maintenance, and maintenance, at the TCC. This contract expired on March 31, 2014, subject to renewal for additional one-year periods by agreement of the parties. The contract was repeatedly renewed and continued through July 31, 2018. (Tr. 521-25, 607; Exs. 37, at 27, Y). DTZ identified three subcontractors, including Awnclean, U.S.A., Inc. (Awnclean), Chinchi Janitorial Services, Inc. (Chinchi or Chinchi's), and P&L Cleaning Services (P&L or J&L), for small business enterprise participation. (Tr. 523; Ex. Y, at 6). The contract called for 25% ($493,339.50) of its total value to be assigned to Awnclean and 13% of its total value to be assigned to Chinchi's ($256,536.54) and P&L ($256,536.54).[7] Chinchi and P&L provided janitorial services under the contract. Awnclean provided janitorial services and some maintenance of the exterior grounds under the contract. (Tr. 523-26; Ex. Y at 8).

Ken Jermulka (or Germulka) was a DTZ salesman who handled DTZ's account with the TCC. (Tr. 312). In 2013, Mr. Jermulka was working with Paul Frederick Diehl, then Awnclean's Office Manager, helping Awnclean become a subcontractor for DTZ because DTZ needed minority participation in DTZ's contract with the TCC.[8] (Tr. 140, 312-15). Mr. Diehl

[6] The evaluation criteria included the award of "5 Bonus Points" for SLBE participation. (Ex. 37, at 25).
[7] Ms. Diaz testified that DTZ "proposed that we would have 51 percent minority spent for SBE component into the contract. … Therefore, if you have a contract that is valued at $1 million, you already know of $510,000 of that contract value, it's going to go to that SBE component because you proposed 51 percent SBE." (Tr. 604-05). She said once the City of Tampa awarded the contract to DTZ, DTZ had to comply with the 51 percent SLBE participation DTZ had proposed. (Tr. 616-17).
[8] Mr. Diehl testified that: "We were told that – that we were participating and involved with them because we were going to be the minority business participation, which is what they needed for their contract and so we were one of the two or three or four vendors who provided that." (Tr. 328).

testified that "the contract put out by the City was that there had to be a certain amount of minority owned business participation in the contract. And so they had to subcontract out some of their work to minority companies, and we were one of those." (Tr. 329-30).

Amy Diehl is Awnclean's owner and President. She is married to Mr. Diehl. (Tr. 133, 140). Awnclean is a commercial cleaning business that specializes in the clean-up of construction sites. (Tr. 133, 136, 252-53; Ex. D, at 5). It performs roof, building, pressure, awning, and window cleaning. It also does some construction cleanup and interior rafter cleaning in gymnasiums. (Tr. 133, 308-09). Awnclean employs approximately 26 employees. (Tr. 133). It has been in business since 1989, when it was founded by Mr. Diehl. (Tr. 257, 309).

Mr. Jermulka reached out to Ms. Diehl and asked her if Awnclean was interested in joining DTZ to bid for a contract with the City of Tampa to provide operational staffing services (also referred to as janitorial services) at the TCC. (Tr. 134, 285-86, 539-40). He did so because Awnclean is a woman-owned business. (Tr. 134-35, 276, 300, 312; Ex. M). Ms. Diehl testified that, "It was made clear to us on this contract that we were doing – providing staffing. That this was a staffing position." (Tr. 253). She explained that Awnclean "wouldn't have got the contract" if it did not agree to the terms of the contract that said otherwise. (Tr. 253-54). She said "the truth, is that" the workers on Awnclean's payroll who were paid weekly and worked at the TCC "were all run and managed by C&W." (Tr. 253-54).

Mr. Diehl testified that the TCC awarded a contract to DTZ for operational staffing in May 2013. (Tr. 310). He said, during that same year, Awnclean entered into an agreement with DTZ.[9] He said DTZ transferred workers already working at the TCC to Awnclean's payroll. He further said DTZ hired new workers to work at the TCC who were also placed on Awnclean's

[9] This agreement is also referred to herein as the subcontract agreement or subcontract.

payroll. (Tr. 313-14). Mr. Diehl stated that later on DTZ sent workers to be hired to work at the TCC to Awnclean to fill out applications. (Tr. 313-14, 320).

By email dated May 20, 2013, DTZ's Interim Site Manager Tommie Harris[10] asked Ms. Diehl to advise her when Ms. Diehl's attorney approved the subcontractor agreement between DTZ and Awnclean. Ms. Harris also attached "the steps that we will use to get your company started as a subcontractor to DTZ @ the Tampa Convention Center." (Tr. 142-43; Exs. 13, at 1, L, at 1). These "Step by Step instructions for a smooth transition" included an unspecified date for DTZ to meet with its current DTZ employees to end their DTZ assignment and identified a list of eleven DTZ employees and one supervisor (for a total of twelve employees), and their "Work Hours", who would be assigned by DTZ to Awnclean to work at the TCC.[11] The date the "Subcontractor starts employee assignment" was left blank. The email also stated that a weekly payroll, including the signature and time clocked by each worker, would be sent to Awnclean by DTZ weekly by 4:00 p.m., on Mondays. Both Amy and Paul Diehl testified that until Awnclean received a payroll time sheet from DTZ Awnclean did not know who had worked, what hours they had worked, and what rate to pay them for work performed at the TCC.[12] Ms. Diehl testified that the May 20, 2013 email were DTZ's instructions on how to put these twelve DTZ employees on Awnclean's payroll. (Tr. 143, 147-48, 153, 161, 315-16, 322-23; Ex. 13, at 2). Both Paul and Amy Diehl also testified that it was DTZ's policy for Awnclean to pay the

[10] Mr. Diehl testified that Ms. Harris handled the administrative side of the contract between DTZ and Awnclean for DTZ. (312-13). Ms. Diaz testified that Ms. Harris was the first account manager on the contract who preceded Ms. Ericka Alberti. (Tr. 553-54).

[11] Rigoberto Monteaqudo was atop the list. Ms. Diehl testified that, although he was on Awnclean's payroll, she had never met him in person. (Tr. 141; Ex. 13, at 2). She also testified that she had not met or did not know Jermain Slaughter, Ducatel Watson, or Anita Letourneau, even though the latter two were also on Awnclean's payroll. (Tr. 141-42).

[12] Ms. Diehl testified that Ms. Harris or her replacement, Ms. Alberti, sent the time sheets directly to Awnclean's office manager. (Tr. 161).

workers working at the TCC on a weekly basis. (Tr. 160-61, 327). Paul Diehl testified that "this is the only contract we had that was like that." (Tr. 328).

She said that Awnclean was "working within their [DTZ] payment system" for only these workers on Awnclean's payroll. Paul and Amy Diehl both testified that Awnclean paid all its employees, other than those workers on its payroll working at TCC, on a bi-weekly basis. (Tr. 160-61, 327). Both Paul and Amy Diehl testified that DTZ supervisors set the number of hours each worker was going to work at the TCC. (Tr. 161, 356). Paul Diehl said that Respondent dictated the amount of hours supervisors on Awnclean's payroll paid weekly worked at the TCC. (Tr. 356). Both Amy and Paul Diehl testified that if a worker working at TCC was sick that worker would notify DTZ, but not anyone at Awnclean. (Tr. 161-62, 321-22, 330). Paul and Amy Diehl also stated that DTZ supervisors, specifically Michael Sheehan,[13] provided safety and health training for the workers on Awnclean's weekly payroll who worked at the TCC. (Tr. 173, 303-05, 338; Ex. 19).

Ms. Diehl testified that she was not aware of any Job Hazard Analysis (JHA)[14] that Awnclean prepared prior to May 15, 2017 for work at the TCC. (Tr. 239). She said that DTZ made it "really clear" that it did not want Awnclean to write up a JHA for work done at the TCC by workers on Awnclean's weekly payroll. (Tr. 199-200). Awnclean's employees also said that a DTZ supervisor performed the job safety analysis (JSA) for pressure washing at the TCC. She said Awnclean did not perform a JSA because Awnclean assumed DTZ did one. She said after Mr. Norton's drowning, Mr. Sheehan told her that workers on Awnclean's weekly payroll

[13] Mr. Diehl testified that Mr. Sheehan handled the management side of the contract between DTZ and Awnclean for DTZ. (Tr. 312-13). Ms. Diaz testified that Mr. Sheehan was an "Assistant Manager." (Tr. 600; Ex. 35, at 34-35).
[14] The trial transcript also refers to the JHA as a "JSA"; these terms and abbreviations are used interchangeably.

working at the TCC had sat in on safety meetings; but may not have signed off on paperwork.[15] (Tr. 174-75, 199).

By email dated May 31, 2013, Ms. Harris indicated that her first meeting with Awnclean would occur on June 4, 2013 where employee information would be transferred from DTZ to Awnclean and DTZ would provide the work schedule for Awnclean's "new employees." Ms. Harris also stated that these employees would start working for Awnclean starting the week of June 17, 2013. Ms. Diehl testified that Ms. Harris was transferring or switching the employees from DTZ to Awnclean's payroll. (Tr. 148, 153-54, 287-88, 607-08; Ex. 14, at 1).

Mr. Diehl testified that he was the only Awnclean representative to show up for the June 4, 2013 "kick off" meeting. He said he thought it would be "like a job's fair." (Tr. 313-14). Mr. Diehl said he went to the meeting "under the assumption that we would be managing our employees." Instead, he said Mr. Sheehan told him that "you don't need to be here" and that DTZ would manage the employees on Awnclean's weekly payroll working at the TCC. (Tr. 314-19). Mr. Diehl testified that he "was surprised by it. I did leave. I didn't stay for the meeting." (Tr. 317-19). He said DTZ did not provide a work schedule to anyone there. (Tr. 317).

By email dated June 12, 2013, Ms. Harris sent Paul Diehl[16] a listing of twelve DTZ employees that omitted one employee whose name appeared on the May 20, 2013 listing and added Jermain Alonzo Slaughter. Ms. Harris stated, "We [DTZ] just made J. Slaughter a new supervisor."[17] The listing included the Job Type and Hourly rate for each employee. (Tr. 149,

[15] Ms. Diehl testified that "during the course of the contract. She had talked to Mike [Sheehan] and I knew they were doing safety sessions, because they were very proud of it." (Tr. 176).
[16] Mr. Diehl was also an Awnclean officer at that time. (Tr. 308-09).
[17] Mr. Diehl testified that Awnclean had no role in making Mr. Slaughter a supervisor or giving him, or any other weekly paid workers, a pay raise. (Tr. 324, 326-27; Ex. 14, at 5). Ms. Diehl testified that she did not know what day-to-day activities of Mr. Slaughter's new role as supervisor involved. (Tr. 156, 167).

155-56, 316; Ex, 14, at 3). Ms. Diehl testified that these were the employees who would be working on the TCC project. She said that DTZ assigned them to Awnclean's payroll to be paid weekly. (Tr. 155, 287, 316-17). Ms. Diehl testified that Respondent set the hourly rate of pay for workers on Awnclean's weekly payroll. (Tr. 159). Mr. Diehl testified that DTZ set up autopay for these workers. He said Awnclean put the autopay information into its system and got it over to Awnclean's accountant, who did Awnclean's weekly payroll. He said Awnclean had no role in soliciting, interviewing, or hiring these workers, or any workers later on. (Tr. 316-17, 326-27). He said he did not meet any of these twelve workers who were placed on Awnclean's payroll. (Tr. 319; Ex. 14, at 3).

By email dated June 20, 2013, Paul Diehl informed Ms. Harris, and others, that Awnclean would begin processing weekly payroll the next week. He also indicated that he would soon need to pick up "employee files" from DTZ. (Ex. 13, at 3).

By email dated June 21, 2013, Ms. Harris told Paul and Amy Diehl that she [Ms. Harris] had collected applications from potential employees. Ms. Diehl testified that DTZ "ran the employment adds" seeking the applications. (Tr. 143-44, 155; Ex. 13, at 3).

In 2013, Awnclean and DTZ entered into a subcontract for Awnclean to provide certain services at the TCC as specified in the subcontract.[18] (Tr. 205; SF 4). Ms. Diehl testified that Awnclean had annual revenues of about $2,400,000. (Tr. 184). She said that Awnclean made an annual profit of about $18,000 under the subcontract, although some years were "slimmer than others." (Tr. 205-06). Both Amy and Paul Diehl testified that when Awnclean entered into the subcontract with Respondent, Awnclean did not have enough employees on its regular payroll to complete the work required by the subcontract. (Tr. 138, 313).

[18] The Court is unaware of the exact date in 2013 this subcontract was entered into by Awnclean and DTZ.

By email, Subject: payroll W/E 6/30/13 total hours 354.50, dated July 1, 2013, Ms. Harris told Amy and Paul Diehl that "[t]his is our first week of payroll." Ms. Harris further stated: "We only had 10 employees this week. We did not send the termination papers in for Marie Justinvil. We will get that done this week and she will be on next weeks payroll for your company." Ms. Diehl testified that Ms. Justinvil came onto Awnclean's weekly payroll at DTZ's request. (Tr. 152, 158; Ex. 14 at 10).

By email dated October 17, 2013, DTZ's Operations Manager, Michael Sheehan, told Awnclean's Scheduler, Brooke Martz, and Paul Diehl that DTZ was "sending a new employee, she [Jill Glass] will be on you[r] (sic) staff starting Monday, 10/21/13. Her rate of pay is $8.00 an hour." (Tr. 156; Ex. 14, at 7). Ms. Diehl testified that even though Awnclean did not solicit or interview Ms. Glass, Awnclean put her on the weekly payroll. (Tr. 157). She further testified that DTZ sent Awnclean "an email saying we're adding five people to your payroll." (Tr. 284).

Ms. Diehl testified that she had a statewide certification as a Woman Owned Business for quite a few years before 2014. (Tr. 273-74; Ex. L, at 7). She said that since she was going after local work, she submitted an application to Hillsborough County. On February 17, 2014, Hillsborough County, Florida, Minority and Disadvantaged Business Manager, Sheila Hudson, acting on behalf of the Economic Development Department, approved Awnclean's application for certification as a bona fide Disadvantaged Minority/Disadvantaged Woman Business Enterprise for two years effective February 14, 2014.[19] (Tr. 276; Ex. M).

In April 2014, Awnclean's principal place of business was at 501 N. Newport Avenue, Tampa, FL 33606. On April 1, 2014, Awnclean entered into a follow-on one year "Services

[19] Ms. Diehl testified that Awnclean was a Woman Business Owner of the Year in 2014. (Tr. 273-74; Ex. L, at 7).

Agreement" subcontract with DTZ because it was an opportunity for Awnclean to work with Respondent, a larger company, and learn how to provide janitorial services.[20] (Tr. 135, 253, 526; Ex. A). Ms. Diehl stated she thought Respondent was "going to help us on how to do that [provide janitorial services]" since Awnclean's experience was with construction cleaning which differed from janitorial cleaning. She said, "Yeah, we were kind of learning as we went along." (Tr. 136).

Paragraph 6, Change in Scope of the April 1, 2014 subcontract, stated, in part: "DTZ has the right to increase or decrease the scope of Services upon thirty (30) days advanced written notice to Subcontractor."[21]

Paragraph 11, Contractor Relationship, stated:

> In furnishing Services, hereinunder, Subcontractor shall be acting as an independent contractor in relation to DTZ. … Neither Subcontractor nor any personnel employed by or affiliated with Subcontractor for the benefit of DTZ shall be considered as having employee status at DTZ.[22]

(Tr. 286; Ex. 30, at 4).

Paragraph 13, Subcontractor Employees, stated:

> DTZ agrees not to directly or indirectly hire or cause to hire, employ or engage the services of Subcontractor's employees during the term of this Agreement. Subject to controlling law, DTZ shall have the right, upon written notice to Subcontractor stating any cause, to require Subcontractor to remove any employee of Subcontractor's from assignment to any locations services under this Agreement.

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[20] Ms. Diehl testified that Respondent was one of the largest janitorial contractors "in the world and we were following their lead." She said regardless of what the contract said, DTZ "dictated what was going to be done … we did it the way they [DTZ] wanted to do it." (Tr. 236, 245).

[21] Ms. Diehl testified that the special, additional or extra projects she was referring to being done by Awnclean's biweekly employees through DTZ at the TCC fell under this section of the subcontract. (Tr. 269-75, 285, 289-90, 299-300, 331-33; Exs. 30, at 3, ¶ 6, L). She said Awnclean's bi-weekly employees who performed these large one-to-four-day projects were always supervised by Awnclean's crew chiefs, and not C&W management. She further stated that none of these projects involved pressure washing the docks, or were near water. (Tr. 290-92).

[22] Ms. Diehl testified that in practice, DTZ and Awnclean did not follow paragraph 11 of the contract. She said, "the people on our [Awnclean's weekly] payroll were essentially DTZ employees. They did everything that their people told them to do. They [DTZ] set the schedules." (Tr. 118-27, 286; Ex. 20). Ms. Diehl testified "that what was put on that contract [in this regard] was not what was put in practice per their [DTZ's] request and their [DTZ's] directions." (Tr. 235).

Such right of removal shall not be construed as instruction to dismiss the employee(s).

(Exs. 30, at 5, 35, at 14).

Paragraph 17, Indemnification, stated, in part:

(a) Subcontractor shall defend, indemnify, and hold harmless DTZ, Prime Customer, and their respective employees, agents, directors, officers, shareholders, successors, and assigns from any and all claims and liability for … death to persons providing that such arise out of (1) the presence of Subcontractor's personnel and equipment at the Location serviced under this Agreement, (2) the acts or omissions of Subcontractor or its agents, employees, under this Agreement, or (3) any failure by Subcontractor to conform to the terms of this Agreement and/or Federal, state, and local laws, regulations and ordinances. … In no event shall DTZ be liable for any special, indirect or consequential loss or damage under this Agreement.

(Ex. 30, at 6).

The Scope of Services and Locations section at Exhibit A of the subcontract stated, in part:

> CLEANING SET-UP PERSONNEL
> The responsibilities of the subcontractor's Cleaning/Event Set-Up personnel include, but are not limited to the following:
> …
> 3. Ability to operate all aspects of cleaning equipment. …
> 5. Knowledgeable concerning safety procedures, ….
>
> (Ex. 30, at 9).
>
> MAINTENANCE PERSONNEL REQUIREMENTS.
> Responsibilities of the subcontractor's Maintenance Personnel include, but are not limited to the following:
> …
> 2. Must be skilled in one or more of the following:
> …
> f. Ability to use a pressure washer.
>
> (Ex. 30, at 9).
>
> SUBCONTRACTOR'S PERSONNEL UNIFORM REQUIREMENTS
> 1. DTZ shall provide, …, complete uniforms and require all employees to wear distinctive uniform clothing and assure every employee is in uniform on the date an employee first enters on duty….

3. DTZ shall furnish and require each employee at the work site to wear name tag identification with the names of both the employee and the TCC logo. …

(Ex. 30, at 10). …

CLEANING REQUIREMENTS
The performance of work to be completed by the subcontractor includes, but is not limited to, the list of duties provided below: …

ENTRANCES/BISTRO/PARK/FRONT DRIVE/RIVERWALK:
…
4. Pressure wash outside … docks, etc.

(Tr. 134, 197-99; Ex. 30, at 12).

OTHER DUTIES:

1. Subcontractor shall perform all related tasks as requested [sic] the Operations Manager or designee necessary to fulfill building requirements with the ability of their employee(s) to safely and successfully accomplish the work.[23]

(Tr. 201-02; Ex. 30, at 14).

EXHIBIT B, CHARGES, stated:

DTZ shall pay Subcontractor in current funds for the performance of the Subcontract, (actual costs for payroll with the associated taxes, insurance and benefits). Listed below are the regular time billable rates that you will invoice DTZ for the following positions;

Cleaning/Event Setup personnel $ 10.75 per hour for hours worked only
Supervisor personnel $13.25 per hours for hours worked only.[24]

(Tr. 160, 207-08; Ex. 30, at 15).

[23] Ms. Diehl testified that, when signing the subcontract, she was told "that DTZ was going to be managing these teams and that they [DTZ] did not want us there because there would be too much hassle trying to have all these different companies running around. And I – you're correct that it does say this in the contract. What we were told was, we [DTZ] will take care of it." (Tr. 201-02).

[24] Ms. Diehl testified that workers at TCC were not actually paid these hourly wages; these were billable hourly rates paid to Awnclean by DTZ. (Tr. 166-67). For example, she said Supervisor Slaughter was actually paid $9.50 as of June 12, 2013. By email dated June 12, 2013, Ms. Harris told Paul Diehl to review Mr. Slaughter's performance on August 1, 2013 "and give [him a] raise to 10.00 if doing acceptable job." (Ex. 14, at 3).

On April 1, 2015, the subcontract was extended for 12 months through March 31, 2016. (Tr. 136-37; Ex. 30, at 17). The subcontract was further extended through 2018 until there was a "formal separation" that occurred in December 2017 after Awnclean gave Respondent a 30-day notice. (Tr. 137-38, 297, 527). Ms. Diehl testified that Awnclean terminated the subcontract because it was not making money on it and it "didn't seem like a good fit anymore." (Tr. 137-38, 206). She said that when the subcontract ended the employees working at the TCC "were transferred back on staff to C&W" or to another company's payroll." (Tr. 140, 297-98).

Ms. Diehl testified that she did not know that docks were being pressure washed at the TCC. (Tr. 198-99, 205). She said Awnclean never identified the need for an employee working near water to wear a PFD "because we were not aware when we started this contract that we were going to be working on any docks. And yes, I see it there and I'm just telling you what happened." (Tr. 205). She further said Awnclean did not provide anybody doing work at the TCC with a PFD or life jacket "[b]ecause we did not know they were doing it, for one thing. We were not directing their bus – their work. That was totally done by DTZ supervisors." (Tr. 256). Ms. Diehl testified that she did not know that some of the workers on Awnclean's weekly payroll were pressure washing the docks. (Tr. 170).

She said that she went to the TCC about three or four times a year, primarily to quote additional work through the subcontract to be performed by Awnclean employees not put on Awnclean's weekly payroll by DTZ, such as large pressure cleaning projects performed away from water. She said that Awnclean did not do a written formal JHA for these jobs because they too were DTZ's "employees in a lot of ways." She acknowledged that she was responsible for the safety and identification of hazards for these employees on Awnclean's bi-weekly payroll. (Tr. 198-204, 237).

Ms. Diehl said that while at the Worksite she was not welcome to check to see what workers on Awnclean's weekly payroll were doing. Ms. Diehl testified that she never attended any scheduling or planning meetings between C&W and employees on Awnclean's weekly payroll regarding getting work done at the TCC. (Tr. 301). She said DTZ "did not want us managing the day-to-day employees." (Tr. 207). Mr. Diehl similarly testified Awnclean never had Awnclean managers managing the day to day activities of workers on Awnclean's weekly payroll working at the TCC. (Tr. 321, 359). He said supervisors on Awnclean's weekly payroll working at the TCC did not report to Awnclean. (Tr. 321).

On about November 20, 2015, DTZ changed its name from DTZ to C&W Facility Services Inc. (Tr. 524-25; Ex. V; SF 5).

Mr. Diehl testified that sometime in about 2016 Respondent got behind in their minority owned business participation rate in their contract with the TCC. As a result, he said, Mr. Sheehan told him:

> [W]e're going to put more – we've got to raise this quota and so we're going to give more employees to you, mostly because we just did a good job. We made his life easier. And so we were given quite a few at that point. In round numbers I think our numbers went from, you know, the gross payroll of $3,800 to it was 5,800 to 6,000. So it substantially increased for that reason, so.
> (Tr. 328-29).

Ms. Diehl testified that C&W sent Mr. Norton over to Awnclean to fill out Awnclean's paperwork and start working at the TCC. (Tr. 288). On about June 3, 2016, Mr. Norton submitted an Awnclean Employment Application, where he indicated he had worked as a laborer at Staff Zone, at Tampa, Florida from March 2015 through about June 1, 2016. He also indicated that he had some experience performing the service of "Flat Work Pressure Cleaning", including sidewalks, pavers, and hot water pressure washer. He also submitted a Form W-4 (Employee's Withholding Allowance Certificate) and a Form I-9, both forms dated June 3, 2016.

(Tr. 211-16; Ex. I). The parties have stipulated that Mr. Norton worked at the TCC for about one year before his death on May 15, 2017. (Tr. 379-80; SF 3). Ms. Diehl believes C&W referred Mr. Norton to Awnclean. (Tr. 212-13). Mr. Diehl testified that "Mike [Sheehan] or someone at DTZ or in this case C&W Services hired him and put him on, instructed us to put him on the [Awnclean weekly] payroll." (Tr. 338-39, 379-80). Ms. Diehl said Awnclean did not assign Mr. Norton to pressure cleaning duties. She testified that either Mr. Sheehan or Ms. Alberti assigned Mr. Norton to perform pressure cleaning. (Tr. 215-16).

By email, Subject: Sam Wilson new employee, dated September 20, 2016, Awnclean's Office Manager, Keith Richardson, told Paul Diehl that "C W Services/DTZ is hiring another person." (Tr. 151; Ex. 14, at 8-9). Ms. Diehl testified that even though Awnclean did not solicit or interview Mr. Wilson, Awnclean put him on the weekly payroll to work at the TCC. (Tr. 157-58).

Ms. Diehl testified that Respondent disciplined workers on Awnclean's weekly payroll by Respondent's managers "writing up" those employees. (Tr. 170, 336). Ms. Diehl said Awnclean never did these write-ups. (Tr. 289). One worker, Ms. Glass, was written up twice by DTZ supervisors. (Tr. 170). On March 10, 2014, Respondent's Michael Sheehan issued a "Progressive Discipline Notice" to Ms. Glass, a worker on Awnclean's weekly payroll. (Tr. 171-72; Ex. 15, at 8). She said on March 13, 2014, Respondent's Area Manager South Region, Lillian Casiano, and Mr. Sheehan completed an "Incident/Investigation Report" regarding Ms. Glass. (Tr. 171; Ex. 15, at 4-12). By email dated April 30, 2014, Subject: Jill Glass, to Awnclean's scheduler, Sara McGue, with copies to Mr. Sheehan and Paul and Amy Diehl, Ms. Casiano, confirmed her meeting of April 29, 2014 with Amy and Paul Diehl and Mr. Sheehan where another situation with Ms. Glass that occurred during the weekend was discussed. She

further stated Ms. Glass "was given an opportunity when that [previous] situation was enough for immediate termination." (Tr. 170-73, 278-80; Ex. 15). Thereafter, Respondent asked Awnclean "to talk to her and let her go. So she did come over to her office and we fired her."[25] (Tr. 170-71, 280).

By email, Subject: "DTZ janitorial acct.", dated September 20, 2016, Paul Diehl informed Amy Diehl that he was:

> thinking about tell[ing] (sic) DTZ that we are going to drop the account come January, 1 [2017]. Why mostly as a negotiating tool. I had asked roughly .20 cents more starting in August due to the increase in Workers Comp premiums by an injury at their facility.[26] It does not really make sense to drop the account because the account does cover the cost of the [Workers Comp] premium increase, but most if not all profit is gone. Two thoughts, if there is another claim we could readily be upside down. Our three year commitment with them ended in March[2016]. …
> (Tr. 151, 277-78; Ex. 14, at 8).

Ms. Diehl testified that Mr. Sheehan had told Awnclean that it was "his favorite sub[contractor] because we always did the payroll correctly. They never had problems with us." (Tr. 289). Mr. Diehl testified that Respondent never notified Awnclean that it was not complying with any of the terms of the subcontract. He said "Just the opposite. We were always told we were doing a great job." (Tr. 338).

Mr. Diehl testified that Awnclean's total gross pay for 2016 was $1,369,421.29. (Tr. 346; Exs. 36, at 1, H, at 1). He further stated that the hourly supervisor and hourly workers on Awnclean's payroll working at the TCC for 2016 was about $170,000, or more than 10 percent of all Awnclean's gross pay for 2016. (Tr. 344-46; Exs. 36, at 1, 8, H, at 1). Awnclean's Payroll

[25] Ms. Diehl testified that DTZ made the decision to terminate Ms. Glass' employment. She said, "we were told to fire her and so we fired her." (Tr. 280-81, 336-37). She acknowledged that this was the practice, even though the subcontract said DTZ cannot make the decision to fire anybody. (Tr. 281).

[26] Ms. Diehl testified that the injury involved a slip and fall at the TCC by one of the workers there on Awnclean's weekly payroll. She also said that in 2016 she was aware that an injury by such a worker could impact TCC's Workers' Compensation premiums. (Tr. 278; Ex. 14, at 8).

Summary for 2016 shows those weekly paid workers on Awnclean's payroll who worked at the TCC included: 1) Rose A. Bonheur, 2) Esther Chery, 3) Nam T. Dam, 4) Jashon D. Davis, 5) Watson Ducatel, 6) Ralph A. Few, 7) James L. Flanning, 8) Cornelious Fiournoy-Walker, 9) Jimmy L. Gilchrist, 10) Kennethia L. Hall, 11) Erica Q. Howard, 12) Virginia N. Lee, 13) Terrance G. Malloy III, 14) Rigoberto Monteaqudo, 15) Johnnie L. Norton, 16) Earnest E. Reid, 17) Jermain A. Slaughter and 18) Latasha G. Williams. (Exs. 36, H). Only two workers, Messrs. Monteaqudo and Slaughter, remained on the Awnclean payroll as of December 31, 2016 from those twelve workers identified in Ms. Harris's June 12, 2013 email to Mr. Diehl. (Exs. 14, at 3, 36).

On February 8, 2017, Messrs. Sheehan and Taurus Gadsden taught a course entitled "2017 Hazard Communications (GHS)" at the TCC. The Class Attendance Sign-In sheets show that several C&W employees on Awnclean's weekly payroll, including Deanna Ballard, Rigoberto Monteaqudo, Anita Letourneau and Watson Ducatel, attended the course. (Tr. 304-05; Ex. 19).

On May 15, 2017 at 10:57 a.m., E.D.T., Mr. Norton fell into the water at Tampa Bay and drowned while pressure washing the dock at the TCC. (Tr. 366-71, 374; Ex. 12; SF 6, 11-13). OSHA's Safety and Health Compliance Officer (CO) Winfred E. Marrero explained how Mr. Norton died.

> Q And what did you learn during your investigation about how Mr. Norton drowned?
>
> A That he was doing some pressure washing with the use of a rotating scrubber, and that accidentally he fell on the – I think this is the Hillsborough River – into the Hillsborough River. And that there was nobody nearby and as much as he tried to surface or save his life, you know, he was not able to do so.[27]

[27] OSHA's Fatality/Catastrophe Report's "Preliminary Description (Hazard Description and Location" stated: "Johnny Norton, 53 was pressure washing the docks at the Tampa Bay Convention Center when his pressure washer fell on top of him and he fell off the dock being pinned by the pressure washer under the water." (Ex. U, at 3). The

(Tr. 371; Ex. 12).

Ms. Diehl testified that she first learned of Mr. Norton's drowning a couple of hours after it happened. She said she went to the TCC and Mr. Sheehan showed her where he drowned. They did not go out onto the dock, which she agreed was a solid concrete structure that did not move or shake when stepping on it. She said that she had previously been on the dock for non-business occasions. Unless coming onto the dock from a boat, she did not wear any PFD. (Tr. 216-18). Ms. Diehl testified that Awnclean made a call to the police, its insurance company, and a report to OSHA regarding the fatality.[28] She also believed C&W made a report to OSHA. (Tr. 232).

On May 16, 2017, Ms. Diehl testified that she also met with CO Marrero at the TCC.[29] CO Marrero testified that Ms. Diehl told him that C&W "was in charge of the process or the activity inside the Convention Center which Johnnie Norton was involved." (Tr. 369). Ms. Diehl testified that she told the CO that Awnclean's role was to administer the weekly payroll on the project as a subcontractor. She confirmed that Mr. Norton was on Awnclean's weekly payroll. She said she was unaware of any distinction between subcontractor and independent

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Court finds this to be inaccurate as the video shows that only the rotary scrubber fell into the water and it was retrieved from the water and returned atop the dock two minutes after Mr. Norton fell into the water. (Ex. 12)

[28] Ms. Diehl signed OSHA's Form 301 "Injury and Illness Incident Report" for 2017 that indicated Mr. Norton was an Awnclean employee who drowned at 11:00 a.m., May 15, 2017 while "pressure cleaning the dock at the Convention Center." It further stated Mr. Norton "stepped backward and fell in the water and never came up." (Tr. 264-65; Ex. G, at 14; SF 6, 11, 13). OSHA's Form 300 "Log of Work-Related Injuries and Illnesses" for 2015 reported injuries to three Awnclean employees, including Ralph Few, that occurred at the TCC. Ms. Diehl stated she never met the three injured workers. She said Respondent notified Awnclean of the injuries. (Tr. 263-64, 298-99; Ex. G, at 4). The OSHA Form 300A "Summary of Work-Related Injuries and Illnesses" for 2016 stated that the average number of employees for 2016 was "22" with total hours worked at 32,000 and for 2017 stated that the average number of employees for 2017 was "25" with total hours worked at 43,750. (Ex. G, at 10, 13). The OSHA Form 300A and Payroll Summary for 2016 shows that the Awnclean weekly paid workers at the TCC completed 24,384.03 hours (or 76%) of the 32,000 total hours performed by all workers on Awnclean's payroll in 2016. (Exs. G-H, 36). The Court finds that at least one-half of the average number of 22 employees at Awnclean for 2016 worked at the TCC and were on Awnclean's weekly payroll. (Exs. G-H, 36).

[29] CO Marrero has a Bachelor of Science degree in Chemistry. He has been an OSHA CO with a specialty in industrial hygiene for 28 years. He is a senior industrial hygienist. He has been trained in and able to handle both health and safety-related issues. (Tr. 362-63, 396). CO Marrero said that the Tampa Police Department notified OSHA of Mr. Norton's fatality. (Tr. 367).

contractor. (Tr. 233-34, 362-67; SF 2). Ms. Diehl said she told CO Marrero that Awnclean's employees were "absolutely not" washing the docks.[30] (Tr. 235). She said she later found out that someone on Awnclean's weekly payroll was washing the docks. (Tr. 235).

Upon arrival at the dock on May 16, 2017, CO Marrero spoke briefly with the TCC's dock master, who told him that he gives permission for people to go onto the dock. (Tr. 411-13).

During the course of his on-site investigation on May 16, 2017, CO Marrero took photographs of the dock area where Ms. Diehl described that the incident occurred. (Tr. 370-71, 432-33; Exs. 2-6, 9). He said Mr. Norton fell off the far right of the dock shown in the photograph at Exhibit 9. (Tr. 433**,** 451**;** Ex. 9). He said that the photograph at Exhibit 9 was a close-up view where Mr. Norton fell from at the end of the dock. (Tr. 451, Ex. 9). On a different day, he took measurements of the length and width of the dock. (Tr. 371-72, 426). The CO said there were no guardrails or barricades around the dock between the dock and the water.[31] He said the dock was surrounded by three sides of water. He said that the water was 19 feet deep at the location where Mr. Norton drowned. (Tr. 372-73; Exs. 2-6; SF 9-11).

CO Marrero testified that the only PPE Mr. Norton was wearing when he drowned was rubber boots.[32] (Tr. 373; SF 7). Mr. Norton was not wearing a PFD at the time he fell into Tampa Bay. (SF 11-12). CO Marrero testified that when personnel working at the TCC needed PPE or equipment, they would contact a C&W supervisor, such as Mr. Sheehan, to obtain the equipment from a warehouse that the City of Tampa maintained. (Tr. 383-84).

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[30] Ms. Diehl testified that Mr. Sheehan had told her after Mr. Norton's drowning that regularly pressure washing the docks had recently been added to the service list.

[31] At her Rule 30(b)(6) deposition, Ms. Diaz admitted that there were no guardrails or barriers on the dock that separated the dock from the water. (Ex. 35, at 28).

[32] CO Marrero testified that Mr. Norton was still wearing rubber boots when his body was recovered from the bottom of the Hillsborough River. (Tr. 375). The parties have stipulated that Mr. Norton fell into Tampa Bay. (SF 11).

At the trial, CO Marrero narrated a TCC video that recorded Mr. Norton's drowning.[33] Mr. Norton can be seen pushing the rotary scrubber forward and pulling it backwards cleaning the dock. CO Marrero stated and the video shows that Mr. Norton was using the rotary scrubber all the way at the very edge of the dock. The video shows Mr. Norton walking backwards with the rotary scrubber at his front and falling off the very end of the dock into the water at about 10:57 AM. He can be seen splashing around in the water for about 30 seconds during which time he was unable to reach the dock or remain on the surface of the water. The CO said, and the video shows, the rotary scrubber[34] went into the water as well. At 10:59 AM, the video shows three unidentified men appearing at the end of the dock. One man is seen diving into the water at 10:59 AM. The two men atop the dock are seen pulling the cord of the rotary scrubber. At 10:59 AM, these three men are shown pulling and pushing the rotary scrubber back atop the dock. The man in the water stretches to reach the level of the dock and returns to the top of the dock. At 11:00 AM, the man dives into the water a second time. Two minutes later, a second unidentified man dives into the water. The divers are shown getting help to get back atop the dock. Other dives into the water by unidentified men are shown. At 11:21 AM, a boat appears near where Mr. Norton fell into the water. At 11:27 AM, a diver, with the help of others atop the dock, is seen placing Mr. Norton back atop the dock where he is removed on a gurney from the scene of the incident. (Tr. 373-75; Ex. 12; SF 11).

CO Marrero testified that during his investigation he requested that Respondent provide to him all documentation pertaining to Respondent's Hazard Communication (HazCom)

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[33] The video at Exhibit 12 shows Mr. Norton using the rotary scrubber at the end of the dock where he fell into the water from 10:55 AM through 11:32 AM, May 15, 2017. (Ex. 12). With the consent of the parties, the video itself has been sealed by Order of the Court in the public record of this case pursuant to Fed. R. Civ. P. 5.2(d), (e) and 29 C.F.R. § 2200.67(c).

[34] CO Marrero testified that the photograph at Exhibit 11 shows the pressure washer and rotary scrubber. He said that the rotary scrubber [at photograph's right] was an attachment to the pressure washer [at photograph's left]. (Tr. 450; Ex. 11).

program, Respondent's policy, supervision of Awnclean employees, and training records. He said Respondent's response to his document request was that "it was not related to the accident, therefore they did not provide me with that documentation."[35] (Tr. 391-92, 443-44). He said that the only thing Respondent provided to him was the JSA at Exhibit 21, dated 12/8/2014, "Description of Job/Task: Pressure Washer." (Tr. 391-92; Ex. 21). CO Marrero testified that the JSA "fail[ed] to address an obvious hazard, which was drowning while doing the pressure washing on the dock area." (Tr. 392-93; Exs. O, at 2, U, at 5, 8). He said that the hazard was obvious "because the person is working around water. If there's going to be some slips, trips and fall, the person basically can fall in water. There was nothing to prevent an individual to fall into the water, regardless if the person knew how to swim or not."[36] (Tr. 392-93).

Ms. Diehl said after Mr. Norton's drowning Mr. Sheehan told her workers on Awnclean's weekly payroll were not going to be performing work on the docks anymore. (Tr. 244, 248-49).

On May 24, 2017, CO Marrero discussed the incident with Milagros Diaz[37] and Robert Mucinski, Respondent's Southeast Regional Safety and Health person. (Tr. 375-76, 485). He was seeking to obtain further information from them as to who supervised Mr. Norton and told him to pressure wash the dock. (Tr. 375-76). They told him that Marvin Walker was Mr. Norton's immediate supervisor. They also identified Erika Alberti as the "top person to speak to in reference to the job that he was performing. And also Mike Sheehan was kind of like a top person involved with the services that they were being provided to the Convention Center."[38]

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[35] Consequently, during cross examination, CO Marrero acknowledged that he did not identify any records showing that C&W told Mr. Norton how to perform pressure washing on the dock. (Tr. 419).

[36] At her Rule 30(b)(6) deposition, Ms. Diaz testified that she dd not know if working close to the water presented a potential drowning hazard. (Ex. 35, at 30).

[37] Ms. Diaz is C&W's Director of Operations in Florida. (Tr. 519-21, 591).

[38] CO Marrero testified that "top person" was referring to managers. (Tr. 376).

(Tr. 376). CO Marrero requested C&W provide him with documentation concerning safety and health programs and training records relating to Mr. Norton. (Tr. 377).

CO Marrero testified that he interviewed several C&W employees and workers on Awnclean's weekly payroll randomly selected by Ms. Alberti.[39] (Tr. 393-94). The interviews occurred in a meeting room on the fourth floor of the TCC. (Tr. 393-94). On May 24, 2017, CO Marrero interviewed Marvin Dwayne Walker, Respondent's Supervisor of Grounds, who said he had worked for C&W for one year, six months.[40] Written notes of the interview show that Mr. Walker told CO Marrero that when he [Mr. Walker] pressure washed the north dock he [Mr. Walker] "was not given and they didn't have a PFD to wear. Now after the accident, they are available (5) But prior to the accident there were none. Now they require that you wear it when doing pressure washing in the docks or checking the trash in the docks." His interview notes further state he told the CO he had:

> never seen a job hazard analysis and training for the docks pressure washing process. They just hire someone and put them to do pressure washing without any training "(sic) because they say they know how' and they just put them to perform the work. It's always rush, rush, rush. Johnny didn't had (sic) a radio. He had done some pressure washing that morning but he went back because he was told to clean a rust stain on the floor of the dock area.

Mr. Walker's interview notes state that "They never did asked (sic) me if I knew how to swim."[41] (Tr. 390-91, 395; Exs. 22, U, at 9).

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[39] CO Marrero testified that although he had asked to interview a supervisor on Awnclean's weekly payroll he was not given that opportunity. (Tr. 415).

[40] CO Marrero testified that Mr. Walker supervised Mr. Norton on May 15, 2017 and that the task assigned to Mr. Norton that day to scrub and pressure wash the docks "probably came in from Mr. Mike Sheehan." The CO said that C&W was preparing the dock area for the Special Operations Forces Industry Conference event that was going to occur on May 16, 2017. (Tr. 450-51; Exs. O, at 2, U, at 5).

[41] Ms. Diaz testified that Mr. Walker did not appear at his deposition that had been noticed by the Secretary of Labor for July 25, 2018. She said that he stopped working for C&W in "late July, beginning of August", 2018. (Tr. 601-02).

On May 24, 2017, Ms. Diehl sent an email to Mr. Sheehan and Ms. Alberti seeking, at OSHA's request, a copy of their most recent signed subcontract, information relating to DTZ's Safety Training Program, and JHAs. Later that evening, Respondent's Ms. Diaz responded by stating:

> As a subcontractor to C&W Services and as Mr. Norton's employer, Awnclean should be maintaining the documents requested by OSHA. C&W Services, as the prime contractor, will provide any information requested by OSHA directly to OSHA. C&W Services is not responsible for maintaining compliance records for subcontractors or their employees. I also do not think that you should be communicating with C&W Services' client, Tampa Convention Center, regarding OSHA's request for information.

(Tr. 175-76, 281-82; Ex. 16, at 3).

Ms. Diehl said, "that was the first time we'd ever had any kind of conversation like that, ever." (Tr. 282). She never received the three items she requested from C&W Services. (Tr. 176). She also said that Respondent never asked Awnclean to provide it with any safety documentation or safety training documents for the workers on Awnclean's weekly payroll. (Tr. 289).

On June 5, 2017, CO Marrero also interviewed Ms. Alberti in the presence of an attorney representing C&W. Ms. Alberti had worked at the TCC for three years as Respondent's Account Manager. In that position she received instructions from the City of Tampa as to what needed to be done at the TCC; such as setting up for activities, doing maintenance work and housekeeping. She also routinely walked around to insure employees were doing their work. CO Marrero described her as "top top management" and testified his impression was that she was at the TCC "every single day." (Tr. 377-80, 600; Exs. 24, 35, at 31). The CO testified that Ms. Alberti told him that "C&W was in charge of providing the supervision to all the employees working at the Convention Center." She said that supervisors worked under two operational managers. If one of the operational managers is not available, the supervisors can go directly to her. She said supervisors make sure jobs are completed and direct orders to subcontractor

employees. She said Chinchi employees provide supervision to their employees. She said "Awnclean use to provide with supervision but not … right now, probably couple of months ago. There was no supervisor from Awnclean when the accident took place." He said she told him that Mr. Norton had been working for about a year under her direction and was being supervised by C&W employee, Marvin Walker. She further said that Mr. Walker "had to follow the supervision of Mike Sheehan." (Tr. 378-82; Exs. 24, Y, at 6).

Ms. Alberti told the CO that Charlie Estonier, and two other men, did the pressure washing before Mr. Norton. She said that Mr. Estonier did not know how to swim and always use to wear a PFD if he was doing work close to water. (Tr. 382-83, 386; Ex. 24). She did not know how he got his PFD because he was working at the TCC before she arrived. She said the City of Tampa warehouse will provide PPE upon request. She said that Mr. Norton did not tell her that he could not swim. (Tr. 383-84; Ex. 24). Ms. Alberti said she saw Mr. Norton perform his work the day of the accident. She saw him pressure washing the dock area many times. She said he performed pressure washing "most of the time." CO Marrero testified that Ms. Alberti told him that she saw Mr. Norton on May 15, 2017 pressure washing or scrubbing the dock without wearing a PFD. (Tr. 450; Exs. 24, U, at 8).

Ms. Alberti told CO Marrero that there was a JHA for pressure washing that did not specify the use of a RFD when pressure washing the dock area. She said that "Nobody that works on the docks wears a PFD. Including City employees, basically all employees working at the Tampa Convention Center." She told the CO that she "will not wear a PFD because she knows how to swim." She said, "nobody has ever asked to wear a PFD while working in the dock area", including Mr. Norton. CO Marrero also testified that Ms. Alberti created the

schedules assigning tasks to different employees of different companies working at the TCC. (Tr. 387, 439; Ex. 24).

On June 16, 2017, CO Marrero interviewed James Flanning, who worked in Housekeeping at the TCC on Awnclean's weekly payroll for about two years. (Tr. 401; Ex. 28). He said about a year before he cleaned and picked up trash in the dock area. He said he knew how to swim; but no one asked him at work if he did. He said he saw only one worker, Charlie [Court finds that Charlie's last name is Estonier], wear a PFD while working close to the water. He also said he had received training from C&W and the City of Tampa; but not from Awnclean. (Tr. 401-03; Ex. 28).

On June 16, 2017, CO Marrero interviewed Virginian Lee, who worked in Housekeeping at the TCC on Awnclean's weekly payroll for about two and one-half years. (Tr. 404; Ex. 29). She said that she "never worked close to water that will require me to wear a personal floatation device. Have never worked close to the edge of the river or dock area." She also said she had received training from C&W, an unidentified Awnclean representative, and the unidentified "distributor." She said some supervisors at the TCC were from C&W, and others were Awnclean supervisors.[42] (Tr. 404-05; Ex. 29).

On June 16, 2017, CO Marrero interviewed Mr. Sheehan who told him that he had been working at C&W since April 2013, and before that with DTZ, for a total of nine years at the TCC. (Tr. 385; Ex. 23). Mr. Sheehan was the Operations Manager in control of the supervision and employee work at the TCC. (Tr. 386; Ex. 23). CO Marrero testified that Mr. Sheehan told him that he was aware of a worker that had a fear of water using something similar to a PFD while pressure washing the docks. The written, signed statement of Mr. Sheehan's interview

[42] Ms. Lee identified her job classification as "housekeeping" and she did not identify herself as a supervisor during her interview. (Ex. 29).

states that he told the CO that Mr. Norton had told him a couple of months after Mr. Norton began working at the TCC that he knew how to swim. He stated, "[Norton] told me that he knew how to swim. This conversation happened when he was told to do pressure washing. He was asked because the person that used to clean the area had a fear of water and used to put a jacket [on]." Mr. Sheehan's statement also states that he had "never seen anybody wearing a personal floatation device working in the dock area."[43] His statement says if Mr. Norton had asked for a PFD, he [Mr. Sheehan] would have been able to get him one from the City of Tampa. (Tr. 385-88, 439; Ex. 23).

On about June 16, 2017, CO Marrero also interviewed Mario Arana who had worked "the grounds as maintenance" for C&W for two-and-a-half years. (Tr. 399; Exs. 25-26). He told the CO that he last pressure washed the dock when Mr. Norton was sick. He said he went to the warehouse and got a life jacket (PFD) and put the PFD on to wash the dock. Mr. Arana said no one told him to get the PFD. Even though he knows how to swim, he said he wanted to make sure that he was protected. He said that he did not "remember having seen anyone else using the life jacket during the pressure washing process in the dock area." (Tr. 399-400; Exs. 25-26).

On June 16, 2017, CO Marrero also interviewed Ms. Ballard who had worked for DTZ and C&W for about 7 years. (Tr. 76, 401; Ex. 27). At the trial, Ms. Ballard testified that she worked in housekeeping and maintenance at the TCC. At that time, she was employed by Owens Realty, the company that take over from Respondent in about July 2018 after Respondent lost the contract. (Tr. 75-76). She said she had performed pressure washing at TCC, but never on the docks near the water. (Tr. 76). Ms. Ballard testified that in 2017 Messrs. Marvin Walker, Norton, Ralph [Few], Mario [last name not given; believed by the Court to be Arana], and others

[43] CO Marrero testified that Mr. Sheehan had also told him that he knew one worker, with a fear of water, had worn something similar to a PFD while pressure washing the docks. (Tr. 386, 442; Ex. 23).

pressure washed the docks at TCC.[44] (Tr. 77-78; Exs. 25-26, 35, at 59). Derrick [last name not given], and Supervisor Torres [no last name given], who did both inside and outside work, also performed pressure washing at TCC when she worked for Respondent. (Tr. 78-79).

Ms. Ballard said Michael Sheehan was the top supervisor at TCC and Mr. Walker, who was responsible for outside work, was a supervisor subordinate to Mr. Sheehan. (Tr. 79). She said workers paid by Chinchi and Awnclean also worked at the TCC performing the same types of activities as those performed by Respondent's employees.[45] (Tr. 79).

Ms. Ballard testified that supervisors working for Respondent provided all the workers at the Worksite, including those from C&W, Chinchi, Awnclean, and J&L Services, with safety equipment. (Tr. 81, 110-11). She said she was working at the Worksite on May 15, 2017 when Mr. Norton drowned. She said Mr. Norton was not wearing a PFD when he was pressure washing the docks. (Tr. 81-82; SF 12). She testified that starting on May 16, 2017 all C&W workers had to wear a PFD when pressure washing the docks or pulling the "garbage" off the dock.[46] (Tr. 82).

Ms. Ballard attended, along with many other C&W employees, HazCom training taught by Mr. Sheehan at Taurus Gadson at the TCC on February 8, 2017. (Tr. 84, 116; Ex. 19, at 1). She later said everyone had to attend safety meetings, including Chinchi employees. (Tr. 116). CO Marrero testified that he concluded during his investigation that employees from Awnclean attended training presented by Respondent. (Tr. 386-87).

[44] At her Rule 30(b)(6) deposition, Ms. Diaz stated C&W employees Messrs. Walker, Mario [Arana], and Jason Wilson pressure washed the docks in 2017. (Exs. 35, at 24-25, X, at 3).
[45] Ms. Ballard testified that these workers were "fill-ins" who worked with Respondent's employees under the same supervisors Respondent's employees worked for. (Tr. 80-81).
[46] Ms. Ballard stated: "They just said nobody can go on the dock without a floatation device." (Tr. 83-84).

On June 16, 2017, the CO Marrero interviewed Ms. Ballard at the TCC. She read, initialed and signed the written account of her interview. (Tr. 395, 400-01; Ex. 27). At the trial, Ms. Ballard acknowledged that she told CO Marrero on June 16, 2017 that Respondent "has never asked me if I knew how to swim." She further said that Respondent did not require her to wear a PFD when she worked near the water collecting trash from around the dock area. She also acknowledged that she told the CO that she recalled that a C&W employee named "Charlie" wore a life jacket when he was collecting trash along the river or pressure washing. He stored the life jacket in his locker. She said Charlie "wore it [a life jacket] a lot", and Respondent's management knew that.[47] (Tr. 89-92, 102, 110-11; Ex. 27).

During cross examination, Ms. Ballard testified that she was a C&W hourly employee who operated a sweeper machine, backpack blower, pressure washer and other extractor machines as part of her job at the TCC. She also cleaned restrooms, swept mostly outside, and pulled "garbage around the south pavilion where the docks are and pulling garbage down the river walk." (Tr. 103-04). She said that she did not wear a PFD when she swept or cleaned the trash by the water in 2011. (Tr. 105). She testified that C&W provided her with the PPE that she needed. She said that some PPE was stored in a warehouse controlled by the TCC. (Tr. 108). Ms. Ballard said she never requested a PFD, and was never told by Respondent that she could not have a PFD. She did not feel that she needed a PFD because she knew how to swim. (Tr. 109-110; Ex. 27). She said that Respondent never said she needed to wear a PFD during training she attended. (Tr. 110). She explained that the statement in her interview with CO Marrero that Charlie "stood out wearing the jacket" meant that Charlie "left it on for such a long period, like half the day." She further explained that Charlie "kind of stood out, running outside

[47] Later, Ms. Ballard said Charlie left Respondent in about 2015. (Tr. 112). The Court finds that she was referring to Charlie Estonier.

with a hot life jacket on." (Tr. 112-13; Ex. 27). She said she never saw anyone, other than Charlie, wear a PFD while working at the TCC. (Tr. 113). She also said she never saw a sign or notice from the City [of Tampa] saying if you're going out on the dock you have to wear a PFD. (Tr. 113; Ex. 27, at 2). Ms. Ballard also said C&W managed other contractors at the Tampa Convention Center, including Chinchi and J&L Services. (Tr. 110-11). Ms. Ballard said she saw Mr. Norton actually pressure washing on May 15, 2017. She did not observe him going into the water. She said nobody was on the dock with Mr. Norton. (Tr. 115; Ex. I, at 8).

During redirect examination, Ms. Ballard stated C&W directed all the employees at the TCC, including those on Awnclean's and Chinchi's payrolls, and told them where to work and what tasks to perform. (Tr. 118). She said, "[w]e would go in and they [C&W] would tell you in the morning at the table which break you have, what you're supposed to be doing." She further said C&W had a written weekly schedule that told her and others at the Worksite, including workers from C&W, Awnclean, Chinchi, and P&L, what tasks were going to be performed each day. (Tr. 120-21, 125-26; Exs. 20, Y, at 6). She said C&W Supervisor Erika Alberti prepared the work schedule for the period May 15 through May 21, 2017.[48] (Tr. 126-27; Ex. 20).

[48] The weekly schedule showed Mr. Norton assigned to the Exterior: "Water pressure and river walk" for Monday, May 15, 2017. (Ex. 20, at 1). Of the 39 workers identified on the schedule for the week of May 15 through May 21, 2017, seven workers (or 18%): Johnnie Norton, Ralph Few, James Flanning, Jimmy Gilchrist, Marie Justinvil, Virginia Lee, and Dam Nan, were identified as "Awnclean". The Court finds that the Awnclean Payroll Summary for 2017 shows that, with the very limited exception of Ms. Lee, none of the other six workers served as a supervisor in 2017. Ms. Lee was paid the same hourly wage rate of $8.25 as her six other colleagues for 1,654.7 hours, and the supervisor wage rate of $10 for only 7.75 hours in 2017. The Court further finds that Ms. Lee was not working as a supervisor during the week starting May 15, 2017. Her tasks that week included cleaning the grounds, restrooms, and halls. 18 other workers on the May 15, 2017 weekly schedule were identified as "C&W", 5 workers as "Chinchi", 3 workers as P&L, and 6 workers were not identified with any company. (Tr. 125, 444-45, 514, 525, 559-60; Exs. 20, 35). Ms. Diaz testified at her Rule 30(b)(6) deposition that Awnclean not have any supervisor at the TCC on May 15, 2017. (Ex. 35, at 3).

At trial, CO Marrero testified that he determined that it was appropriate for him to cite Respondent with the general industry standard for PPE at 29 C.F.R. § 1910.132(a) because it is a performance standard and addressed PPE whenever an employee is exposed to a hazard that could cause severe injury or death. (Tr. 406, 438; Ex. 1). He said he concluded that C&W, and not Awnclean, was providing the supervision of workers on Awnclean's weekly payroll at the TCC, including Mr. Norton. He further stated that C&W had control over the environment, which was an unguarded dock 300 feet in length and only 10 feet in width,[49] and was capable of correcting the condition.[50] (Tr. 406-07). CO Marrero testified that C&W obtained PPE from the City of Tampa and gave the PPE to workers on Awnclean's weekly payroll at the TCC. (Tr. 81, 404, 447; Ex. 35, at 115). He said Messrs. Arana and Estonier were able to detect that there was a hazard and find a way to protect themselves through the use of PFD. (Tr. 408). He said Awnclean was "just providing employee service to" C&W. (Tr. 406-07).

The CO said the citation was classified as Serious since the case involved a fatality. He said that the proposed penalty of $12,675 was derived from the OIS "system" where the severity was high because a fatality occurred, and the probability was greater because the activity was being done almost on a daily basis. He said no reductions were allowed to the original proposed penalty of $12,675 due to the fatality.[51] (Tr. 409-10; Ex. U, at 7-8).

[49] CO Marrero testified that a dock width of only 10 feet provided an insufficient 5 feet of distance from the center point. (Tr. 407; Exs. 2-6, 9). He later testified that the dock was a solid, level cement structure. (Tr. 419-20).
[50] The parties have stipulated that the dock was approximately 289' 7" long and 10'2" wide. (SF 9).
[51] OSHA's C&W Services Inspection Narrative for Inspection No. 1237383, dated 9/20/2017, stated that C&W Services had "no prior OSHA history". (Ex. U, at 4). OSHA's C&W Services Violation Worksheet for Inspection No. 1237383 indicated that "information obtained from the NOK [next of kin] indicated his [Mr. Norton's] lack [of] knowledge on how to swim." (Ex. U, at 8-9). It also indicated C&W Services as the "Exposing, Controlling" employer for C&W Services employee, Marvin Walker, and Awnclean's Virginia Lee. (Ex. U, at 7-8). The Court need not decide whether or not Mr. Norton could swim. He should have been issued and required to wear a PFD to accomplish his assigned task to scrub the dock regardless.

During cross examination, CO Marrero that he said during his July 19, 2018 deposition that Awnclean's owner had confirmed that Mr. Norton was an Awnclean employee and that he had been pressure washing the docks for about one year. (Tr. 410-11, 414; SF 3). He acknowledged at trial that he understood that the City of Tampa and the TCC were "owners of the dock" who controlled and operated the dock. (Tr. 411). He also acknowledged that he said at his deposition that the City of Tampa was providing PPE for individuals working at the TCC, including workers on Awnclean's weekly payroll.[52] (Tr. 414-15). He also acknowledged that at his deposition he said that C&W did not provide any safety rules to workers on Awnclean's payroll.[53] (Tr. 418-19). He also said that he did not find any information related to any industry standard for somebody to wear a PFD while working on the dock. (Tr. 422-23). He further acknowledged that at the start of his investigation he spoke with Mr. Mucinski about any requirement to wear a PFD on the dock. CO Marrero testified that Mr. Mucinski told him that a lot of people working adjacent to water were not wearing PFDs.[54] The CO told him that whenever a company is doing work close to water there is a more direct requirement under the "construction industry standard" to use a PFD. CO Marrero stated that he continued his investigation "to determine if indeed there was a need to have a personal floatation device while conducting this type of task." (Tr. 423-24, 448-49). CO Marrero testified that he did not

[52] At trial, CO Marrero clarified his deposition by saying he was "not a hundred percent" sure of that because his conclusion was based on his interviews with employees. (Tr. 414-15, 445-47).

[53] During re-direct examination, CO Marrero explained that at the time of his deposition he was unaware of C&W's HazCom Program, a document C&W had not provided to him during his investigation even though he had asked for it. (Tr. 391-92, 443).

[54] At trial, he clarified this early belief of what Mr. Mucinski told him by saying "it was not something that I made a conclusion in my mind that that was a real statement or a statement to take as solid from C&W." The Awnclean USA, Inc., Inspection No. 1234048, Inspection Narrative, dated 9/20/2017, prepared by CO Marrero states that "[i]t was C&W Services (sic) belief that there was no regulation and/or requirement for the use of PFD while working on a boat dock area; therefore, employees that conducted the task even prior to Mr. Norton were not offered and/or provided PFD's as part of their ppe." (Tr. 424, 452; Exs. N-O, at 2, U, at 5, HHH, at 58). OSHA's Awnclean Inspection Report for Inspection No. 1234048 identifies C&W Services Inspection No. 1237383 as a Joint-Employer related Inspection type. (Ex. N).

identify any incidents before May 15, 2017 where Mr. Norton, or any other employee, including C&W or Awnclean employees, had fallen into the water. (Tr. 424-25).

Ms. Diehl testified that OSHA did not issue a citation to Awnclean for events related to Mr. Norton's drowning. She said it was her understanding that OSHA's investigation determined that Mr. Norton was an employee on Awnclean's weekly payroll working under the direction of Respondent's management. (Tr. 237). By letter dated November 13, 2017, OSHA's Tampa Area Office Area Director (AD), Leslie L. Grove III, sent to Awnclean copies of the citations OSHA issued to Respondent for violations of the OSH Act. AD Grove asked Ms. Diehl to review the citations "and ensure that appropriate steps are taken to protect your employees at that job site." He also stated:

> While the extent of responsibility under the law for staffing agencies and host employers is dependent on the specific facts of each case, staffing agencies and host employers are jointly responsible for maintaining a safe work environment for temporary workers. Temporary staffing agencies and host employers share control over the worker, and OSHA may hold both the host employer and the staffing agency responsible for violative condition(s) in the appropriate case. (Tr.238; Ex. R, at 2).

At the trial, Ms. Diehl testified that Respondent provided Awnclean with the employees needed to fulfill the contract at TCC. (Tr. 138). Awnclean did not advertise or solicit employees to work on the contract at the TCC. (Tr. 138). Respondent ran employment advertisements for the contract at the Tampa Convention Center. (Tr. 155). Mr. Diehl attempted to attend a job fair to recruit workers for the subcontract on or about June 4, 2013. Upon arriving at the job fair, Mr. Sheehan told Mr. Diehl that he did not need to be [at the job fair] because Mr. Sheehan would be "managing everyone." (Tr. 140, 313-15). Awnclean never interviewed applicants or candidates to work on the subcontract with Respondent at the TCC. (Tr. 138). Awnclean received completed employment applications for jobs at Awnclean from

Respondent. (Tr. 143; Ex. 13, at 3). Ms. Diehl testified that Awnclean did not independently hire or fire any of the weekly payroll workers working at the Tampa Convention Center. (Tr. 138-39, 289). Respondent conducted criminal background checks for employees hired to work under the subcontract and placed them on Awnclean's weekly payroll. Respondent also handled the drug screening of these workers.[55] (Tr. 287, 315, 320; Ex. 30, at 11).

Ms. Diehl testified that Awnclean provided supervision and project managers to, and conducted monthly safety meetings and JHAs with, the Awnclean employees who worked on special projects at the TCC. (Tr. 290-91). Ms. Diehl said that the Awnclean employees who worked on "special projects" at the TCC did not interact with, or work on, the same projects as the Awnclean workers at the TCC being paid weekly. (Tr. 292). She said Awnclean staffed those special projects with different workers than the Awnclean workers working under the subcontract at the TCC. The Awnclean special project employees were paid on a biweekly basis. (Tr. 300).

Except when performing large special projects, such as multi-story building window cleaning regularly done by Awnclean employees paid bi-weekly and not assigned to Respondent, Amy and Paul Diehl said Awnclean did not have any management employees supervising supervisors who were working on Awnclean's payroll at the TCC. (Tr. 166-68, 331). Ms. Diehl testified that Respondent did not want Awnclean to have any of its actual employees on site daily at the TCC to manage the subcontract on Awnclean's end. (Tr. 167-68). Ms. Diehl said C&W management decided that there would not be any workers paid at the supervisory level working at the TCC on Awnclean's payroll in 2017. (Tr. 168-69). If an

[55] Mr. Diehl testified that Awnclean's subcontract with Respondent called for criminal background checks and drug screening to be handled by Awnclean. (Tr. 287, 315, 320; Ex. 30, at 11).

Awnclean worker did not report to work, C&W would "pull from their [C&W] resources" to cover the work. (Tr. 35, at 44).

Ms. Diehl testified C&W set vacation and sick time policies for the workers working at TCC on Awnclean's weekly payroll. (Tr. 162-63, 282; Ex. 17). Mr. Diehl testified that Respondent "didn't have any vacation pay for them. … They didn't have PTO hours for them, they didn't have 401(k)'s for them. They didn't have anything. You got basically a paycheck, which did create a conflict for us, because it created two tiers of employees."[56] (Tr. 330).

Ms. Diehl said Awnclean withheld taxes from, gave W-2 forms to, and went through the I-9 [Employment Eligibility Verification] process for workers, including supervisors, on Awnclean's weekly payroll who worked at the TCC. (Tr. 195-97, 209). Mr. Diehl testified that Awnclean handled the deductions for Mr. Norton while he was on Awnclean's weekly payroll, including Federal tax, Medicare and social security withholdings. (Tr. 350; Exs. 36, at 32, H).

Ms. Diehl testified that Awnclean only gave copies of Awnclean's Employee Handbook to Awnclean's employees who were on its biweekly payroll. (Tr. 249-50, 295, 320-21; Ex. D). She said Awnclean's Employee Handbook was kept at Awnclean's office and was not disseminated to workers on its weekly payroll who were working at the TCC since it was not part of the TCC project. Both Paul and Amy Diehl said the workers on Awnclean's weekly payroll working at the TCC followed C&W policies. (Tr. 170, 249-50, 295, 321; Ex. D). Ms. Diehl also stated that Awnclean's "Crew Handbook" only applied to Awnclean's employees who were paid bi-weekly. She said there was nothing in the Personal Protection section of the

[56] During cross examination, Mr. Diehl admitted that Awnclean's Payroll Summary for 2017 showed that James L. Flanning. a worker on Awnclean's weekly payroll who worked at the TCC, was paid a vacation hourly rate of $10.00 for 34.5 hours. (Tr. 348-49; Exs. 36, at 27; Supplement to H, at 27**).** He said that Mr. Flanning would have to clear any vacation with Respondent. (Tr. 359).

Crew Handbook that defined the use of PFDs or life jackets. She explained that Awnclean had "not actually done work on any docks or anything that would have required anything like that." (Tr. 257-58, 295-96; Ex. E, at 3, ¶ C).

Both Amy and Paul Diehl testified that Awnclean did not provide tools to the Awnclean workers on its weekly payroll working at the TCC. (Tr. 177, 334). Amy and Paul Diehl and Ms. Diaz all said Respondent provided uniforms to the workers on Awnclean's weekly payroll. (Tr. 177-78, 330, 549; Ex. 30, at 10). Mr. Diehl stated that the uniforms were printed with the words "The Convention Center." (Tr. 330-31). Ms. Diehl said Respondent provided cleaning supplies to the workers on Awnclean's weekly payroll who worked at the TCC. (Tr. 177-78).

Mr. Diehl testified that Awnclean's total gross pay for 2017 was $1,479,285.59. (Tr. 346; Exs. 36, at 1, H, at 3). He further stated that the hourly supervisor and hourly workers on Awnclean's weekly payroll working at the TCC were paid about $128,000 during 2017, or a little less than 10 percent of all Awnclean's gross pay for 2017. (Tr. 347-48; Exs. 36, at 1, H, at 1).

Respondent called Marc Lee Hale Wendall (also referred to in exhibits as Wendell) as a witness during its case-in-chief.[57] He started working for UNICCO in 2003 as the manager of the Plant Services Group through 2005, and later as the director overseeing the business as a whole. In 2015, he was promoted to Vice President of Health, Safety, Security and Environment (HSSE) reporting to the chief executive.[58] He is one of about 15 who serve as the executive leadership team for C&W's 15,000 employees. He is Respondent's head of safety.

[57] Mr. Wendall is a chemical engineer who graduated from the University of Illinois with the highest distinction. He also has a Master's degree in organizational systems and communication. For four and one-half years, he later taught and pursued a Ph.D. at Cornell University reaching a level of "all but dissertation." (Tr. 468-69). Thereafter, he worked for Environmental Resources Management as an auditor and compliance expert for about 8-10 years. He then spent another 8-10 years working at Foster Wheeler's Environmental Remediation section before coming to UNICCO. (Tr. 468-70).

[58] Mr. Wendall is also a certified safety professional, who has received PPE training on OSHA standards. (Tr. 473).

He testified that C&W is in the "general industry, it's 1910, and the PPE portion is … in that realm, 1910, 132 and --." He said it's called either "facilities management or facilities services." (Tr. 470-74, 477; Ex. 18, at 1, 18, 20-22).

Mr. Wendall testified that it was his understanding that the TCC provided in its warehouse PPE for employees working at the TCC. (Tr. 477-79). He said that he knew "that Awnclean was responsible for doing certain pieces of the work" at the TCC, but later admitted on cross examination that he "didn't know the specifics of what each contractor was doing" before May 15, 2017. (Tr. 480, 491-92). He said Respondent often invites its subcontractors to voluntarily participate in Respondent's training. Doing so, he said, "doesn't negate their [subcontractors'] requirement to do their training." He said Respondent does not track the training of subcontractor personnel. (Tr. 481-82).

Mr. Wendall testified that C&W developed multiple JSAs for the TCC, including a JSA for pressure washing. He said Jaime Gonzalez, a Florida based safety professional reporting to Mr. Mucinski, prepared the JSA for the Pressure Washer task at the TCC that was prepared in 2014 and revised on January 10, 2017. He said that he did not know whether Mr. Gonzalez considered the 300-foot dock when he created the JSA. (Tr. 484-85, 502-03; Exs. 21, 31, at 8, 35, at 57-58). He said that Messrs. Jason Wilson, Marvin Walker and Mario [no last name identified; believed by the Court to be Arana] signed off on the JSA for pressure washing. (Tr. 483-87; Ex. X). He said Respondent does not give its JSAs to subcontractor personnel. He also said Respondent does not train subcontractor personnel on its JSAs. (Tr. 486).

Mr. Wendall testified that Respondent looks at the hierarchy of controls when preparing a JSA, including the use of PPE, which he described as the "last and least significant important or the least effective" control. (Tr. 486-86). He said that Respondent's Pressure Washer JSA for

the TCC does not identify a PFD.[59] (Tr. 487-89). Mr. Wendall said that JSAs are site specific and any need for PPE is situational. (Tr. 494-95; Ex. 35, at 54-55). He said a pressure washer is powerful and the one used by Mr. Norton had 4,200 pounds per square inch of pressure. He said that rubber boots provided protection from cuts, for traction, and help keep bodies dry when water is sprayed.[60] (Tr. 496-97; Ex. 35, at 59-61, 68). He said rubber boots do not prevent tripping. He agreed that every inch of the dock had to be cleaned, initially saying "Absolutely", then adding "I'm presuming, yeah", and knew that Ms. Alberti directed Mr. Norton to go back a second time to clean the dock to remove some rust stains.[61] He agreed that "people can have a slip, trip or fall anywhere, including the dock." (Tr. 498-99, 601). He said it was possible, but "very improbable", that a person on an unguarded 300 feet long dock could trip, slip, or fall and end up in the water, with an injury.[62] He said when preparing a JSA you look at the various possibilities "within the realm of significant possibility and that present a significant risk", where an employee can get injured when performing a particular task. (Tr. 502; Ex. 35, at 71-72).

Mr. Wendall also testified that HSSE's HazCom Program, last reviewed on June 1, 2016, was in effect at all C&W work sites. He said the HazCom Program required C&W to provide subcontractor employees working under C&W's direction "precautions to be taken to protect subcontractor employees".[63] He said C&W invited subcontractor personnel, including

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[59] Mr. Wendall testified that he "didn't see a risk that warrants a PFD".

[60] Respondent's response to Interrogatory No. 13, Request for Admission No. 10, states "that the City of Tampa provided the rubber boots, safety glasses and ear plugs used by Awnclean USA, Inc. employees." (Ex. 32, at 16).

[61] Ms. Diaz testified at her Rule 30(b)(6) deposition that Ms. Alberti told Mr. Norton to go back and clean some rust stains. (Ex. 35, at 23). At his Rule 30(b)(6) deposition, Mr. Wendall said that he considered Ms. Alberti's statement to Mr. Norton to be "a direction." (Ex. 35, at 78). Nonetheless, Respondent asserts that "Mr. Norton was not supervised by C&W Services." (Resp't Post Hr'g. Br., at 18, ¶ 63). The Court rejects this assertion and finds that on May 15, 2017, C&W, and not Awnclean, was directly supervising Mr. Norton's work at the TCC. (Tr. 166-69, 331, 378-82; Exs. 24, 35, Y at 6).

[62] Mr. Wendall said that Mr. Norton "didn't fall off the dock, he walked off the dock." (Tr. 502). At his Rule 30(b)(6) deposition, Mr. Wendell said that walking "backwards off of a dock is very improbable. Extremely improbable." (Ex. 35, at 72).

[63] At his Rule 30(b)(6) deposition, Mr. Wendall said he did not know whether C&W complied with this provision. (Ex. 35, at 75-77).

Awnclean, to attend C&W's HazCom training. But, he said, these subcontractor employees were "not temp agency employees, they're independent contractors." He said it was not C&W's "job to train them." He acknowledged that C&W did not verify whether Awnclean or Chinchi had provided HazCom, PPE, and/or safety and health training to their employees on their weekly payroll. He said C&W had not alleged Awnclean had breached its contract with C&W. (Tr. 505-16; Ex. 18, at 17).

Mr. Wendall said that C&W was not aware of any alleged requirement for an employee to wear a PFD on a dock prior to May 15, 2017. (Tr. 487-91). After reviewing photographs, including exhibit 2, Mr. Wendall testified that the dock was solid concrete, with a uniform, flat surface, that was low to non-turbulent water and not slippery. He said that the 10-foot width of the dock was not a significant concern to him. (Tr. 488-90; Ex. 2). Both Ms. Diaz and Mr. Wendall said they knew that people on Awnclean's and Chinchi's weekly payroll were performing the same job classifications as C&W employees; i.e. custodial, janitorial, groundkeepers, and maintenance. (Tr. 493, 540; Ex. 35, at 2). He said prior to May 15, 2017, C&W had not identified any circumstance where an employee of any contractor had fallen off the dock at the TCC. (Tr. 516-17).

At his pre-trial Rule 30(b)(6) deposition, Mr. Wendall agreed that anyone tasked with using a pressure washer to clean the dock would have to get the entire dock including the very edge of the dock that abuts the water. He agreed that workers can sometimes be distracted in their jobs and do things that are unsafe. He also stated he was not sure what Mr. Norton did on May 15, 2017 that was improper. Specifically, he said:

> Q And you are saying that – what are you saying was improper about what Mr. Norton did on that day?
> A My perspective?
> Q From C&W's perspective. You are answering for C&W.

> A I'm not sure. I'm not sure. I'm not sure what he did wrong. Certainly walking backwards off a dock is something that you shouldn't do.
>
> (Tr. 499-501; Ex. 35, at 63-67).

Mr. Wendall said:

> Q Falling into water; let's say water that's 19 feet deep, is that a drowning hazard"
>
> A The Witness: Falling into a swimming pool that's a foot deep or 5 feet deep could be a hazard. It's a hazard. There's hazards, you know, everywhere. That's a hazard, but it wasn't identified in this case. We don't see the hazard here.
>
> (Ex. 35, at 69).

When asked during his Rule 30(b)(6) deposition if the JSA anticipated that a person performing the task of pressure washing on the dock could trip or slip or fall, Mr. Wendall stated, "It's possible, yeah, because that is a general hazard that you see." He further said that "it's possible" that a person can slip or fall in the water when on an unguarded edge that's abutting water. (Ex. 35, at 72-73). He also said that he did not know if any subcontractor employees sat in on any HazCom training provided by C&W. (Ex. 35, at 74).

Milagros Diaz testified that since July 2011 she has worked as C&W's Director of Operations responsible for, and oversees, all 18-19 accounts in Florida. Before that, she served as C&W's general manager at the Miami International Airport. (Tr. 519-21, 591). She said C&W hired Awnclean as a subcontractor under its contract with the City of Tampa based on its expertise, experience, and strength with regards to pressure washing, among other things. (Tr. 527-29). Ms. Diaz said that Awnclean employees pressure washed the docks "multiple days during the week" including after May 15, 2017 through the end of the subcontract in December 2017. (Tr. 530). She said C&W did not consider Awnclean's employees to be employed by C&W. She said Awnclean was an independent contractor. She said that a provision for the small business enterprise in the contract between the City of Tampa and C&W required

Awnclean to perform a "useful function" which required Awnclean to manage, supervise, pay, process, and "cover all of their operational needs of the facility." She said, "useful function" "means that the companies have to be engaged in the operation, have to have a useful function in managing their contracts." (Tr. 530-32). She said, "employee discipline, employee communications, schedulings, supervision, direction of the work, checking of the quality of the work are requirements in order for the subcontractors to comply and maintain their SLBE certification with the City or the County." (Tr. 592-93).

Ms. Diaz said Awnclean's employees were not on C&W's payroll and C&W did not pay them for vacation. She said workers on Awnclean's weekly payroll had to notify C&W if they were going to be absent from working at the TCC.[64] (Tr. 590-91; Ex. 35, at 18-19). She said C&W never employed Mr. Norton. Ms. Diaz said C&W did not maintain a personnel or training file for Mr. Norton. (Tr. 532-33). She said work schedules were prepared after production meetings between C&W and the TCC's project manager. Thereafter, she said "an allocation of hours had to be made according to the subcontractors and the percentage of allocation that needed to go to each of them." She said other assignments could either be emailed to Awnclean or assigned to Awnclean supervisors. At her Rule 30(b)(6) deposition, Ms. Diaz said that C&W dispatched work to Awnclean. She said C&W assigned tasks, such as cleaning a space, to particular individuals, including workers on Awnclean's weekly payroll. She said C&W did "not necessarily" go through "the Awnclean executive team. We could go directly to a supervisor at the site, to Awnclean, or to the employee that's been performing the task." Ms.

[64] Ms. Diaz said absence notifications "ideally needs to come from the subcontractors. That's as per contract and as per policy." (Tr. 590-91). But, she later agreed what's written in the contract on paper is not necessarily how things progress in reality. (Tr. 594). At her Rule 30(b)(6) deposition, she said C&W "could pull from their resources" if an Awnclean worker called out sick or did not report to work when Awnclean did not have any supervisors at the TCC. (Ex. 35, at 18-19).

Diaz agreed that C&W Managers, Ms. Alberti and Mr. Sheehan, told Awnclean employees directly what tasks they needed to perform. (Ex. 35, at 3-9). She stated that C&W checked work performed by Awnclean workers for quality purposes when Awnclean did not have any supervisors at the TCC. She admitted that C&W had the ability to "ask" Awnclean workers to redo work that it decided was deficient when done the first time. (Ex. 35, at 10-11, 21-22). She also said Ms. Alberti and Mr. Sheehan could stop any Awnclean worker from working in an unsafe manner. (Ex. 35, at 12-13). She said C&W did not tell Awnclean how to do the work. She said Awnclean had supervisors at the TCC "on a regular basis, depending on the number of allocated hours given to us by the City of Tampa and the events that were going to be taking place." She said Awnclean had responsibility for supervision of its employees on site "because it's part of the useful function of the subcontractor. Each of the subcontractors had responsibility for the supervision, the management, and the operation of their portion of the contract."

Ms. Diaz testified that the City of Tampa requested the dock be pressure washed on May 15, 2017 because of a scheduled large military event where the dock would be used. She said C&W did not tell or show Mr. Norton how to clean the dock. She said Mr. Norton never told C&W that he had a concern about working on the dock or that he could not swim.[65] She said that C&W's work schedule for the week starting May 15, 2017 showing "Awnclean" to the right of Mr. Norton's name indicates that Mr. Norton was an employee of Awnclean. (Tr. 533-37; Ex. 20, at 3).

During cross examination, Ms. Diaz testified that she did not "remember if it was required or optional" under the 2013 contract between the City of Tampa and DTZ to use subcontractors as part of the small business/minority business component. She acknowledged

[65] Ms. Diaz testified at her Rule 30(b)(6) deposition that C&W did not know whether Mr. Norton could swim. (Ex. 35, at 23).

that the City of Tampa would look more favorably upon a company bidding for the contract if it were utilizing minority owned, small businesses. She agreed that C&W transferred C&W employees to Awnclean at the beginning of the contract in order to fulfill the minority small business requirement with the City of Tampa. (Tr. 555).

Ms. Diaz said the agreement between C&W and Awnclean called for C&W to provide uniforms to employees on Awnclean's weekly payroll who worked at the TCC. (Tr. 549-50; Ex. 37, at 9, § 10). She said C&W required workers on Awnclean's payroll who worked at the TCC to be paid by Awnclean on a weekly basis. (Tr. 549-50). Ms. Diaz agreed that Ms. Alberti created the weekly schedules that provided the scheduling of all people on Awnclean's weekly payroll for work to be performed at the TCC. C&W designated the "break times" for the workers shown on the weekly schedules.[66] She said the draft schedules did not assign specific work to a specific subcontractor's employee. She agreed that the weekly schedules identified "C&W Services" in several places, including the top caption. (Tr. 551, 558-59, 585-86, 606; Exs. 20, 35, at 16-17, 32). She said, "as a prime contractor we had to create drafts and make allocations because the point of contact between the Tampa Convention Center and the contract and the operations was C&W Services." (Tr. 586). Ms. Diaz testified that C&W communicated the number of draft hours that were allocated by the City of Tampa for operations at the TCC for a particular week to "each of the subcontractors [including Awnclean] in order to be able to schedule the staff to come in and for the staff to know when to show up to work assignments and projects that were to be conducted." (Tr. 581-82). She said that she was not involved in the day-to-day activities at the TCC. (Tr. 552). Ms. Diaz testified that C&W did not set the hourly rate of pay for workers on Awnclean's weekly payroll who worked at the TCC. (Tr. 553-54). She

[66] Ms. Diaz testified that "assignments were given, not directions." (Tr. 558-59; Ex. 20). She said Awnclean could schedule any worker on Awnclean's weekly payroll to perform the work that needed to be completed. (Tr. 603-06).

said Awnclean would submit an invoice to C&W after Awnclean received payroll information from C&W that included the names and hours worked by workers on Awnclean's weekly payroll who had worked at the TCC. Ms. Diaz initially denied having any knowledge that C&W continued to hire employees to be put on Awnclean's payroll after the initial transfer of C&W employees to Awnclean's payroll. Based upon C&W emails shown to her at trial, she agreed that C&W continued to hire employees and send them to Awnclean to be placed on Awnclean's payroll as late as September 2016. (Tr. 556-58, 583-84; Ex. 14).

Ms. Diaz testified that as prime contractor, C&W's Ms. Alberti and Mr. Sheehan had the responsibility to do joint checks with the City of Tampa on the quality of work performed by individuals on Awnclean's weekly payroll at the TCC. Ms. Diaz said that Ms. Alberti and Mr. Sheehan "did not have authority to direct staff that belongs or are employees of another company. In this case the subcontractors. They had to communicate to each of the vendors, whether it was the company owner, the supervisor on site or the point of contacts for each of the subcontractors."[67] (Tr. 587). She agreed that Awnclean did not always have supervisors on site at the TCC on a day-to-day basis. She agreed that Awnclean did not have any supervisors at the TCC for a period of several months prior to May 15, 2017.[68] (Tr. 587-88, 594-95; Ex. 35, at 3). She said as an independent contractor, Awnclean had to "supervise and manage their staff, comply with the contract and the supervisors don't necessarily work with the employees every hour of a shift or every single day." She said the main reason Awnclean did not have supervisors on site was because the City of Tampa started reducing the number of hours and

[67] Ms. Diaz later contradicted herself by testifying that if C&W, after checking on the quality of work performed, identified work that needed to be redone "you could either communicate it to a subcontractor or the employee." (Tr. 589, 595). She also said at her Rule 30(b)(6) deposition that Mr. Sheehan could tell Awnclean workers what tasks they needed to perform on any given day. (Ex. 35, at 35).

[68] The Payroll Summary for 2017 shows that the amount of hours supervisors were paid was only about 3.7% (558.75 hours) for the total hours of 15,515.85 worked by both supervisory and hourly Awnclean workers (14,957.10 hours). (Ex. H, at 3).

projects being scheduled in exterior grounds, window cleaning, and pressure washing. (Tr. 610-11). She said that C&W did not direct, assign or tell subcontractor employees how to perform their tasks. She said that Ms. Alberti or Mr. Sheehan could stop the work of a worker on Awnclean's weekly payroll's if they saw something occurring at the TCC that was unsafe. She also testified that C&W had the contractual right to ask that a worker on Awnclean's weekly payroll be dismissed from working at the TCC. (Tr. 590).

At the trial, Ms. Diaz testified that Marvin Walker was not a C&W supervisor.[69] She said he was a "lead worker."[70] She was unaware that Mr. Walker told OSHA during his interview that he was "Supervisor of Grounds." She said Mr. Walker did not tell Mr. Norton to pressure wash the dock on May 15, 2017.[71] (Tr. 596-97). She also said C&W did not know that Charlie Estonier wore a life jacket while pressure washing the docks.[72] (Tr. 598).

At her Rule 30(b)(6) deposition, Ms. Diaz testified that she did not know what C&W believed that it did to protect against the Citation's alleged violation. (Ex. 35, at 38). She also did not identify any specific measures C&W took to prevent any drowning hazards at the TCC.

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[69] Respondent's response to Request for Admission No. 4 states, "Respondent admits that Marvin Walker was a supervisor for C&W Services at the Tampa Convention Center and was employed by C&W on May 15, 2017." (Ex. 31, at 4-5). Respondent also identified Mr. Walker as "Supervisor of Grounds" in its Answer to Interrogatory No. 12 verified by Ms. Diaz on June 20, 2018. (Tr. 599; Ex. 32, at 12, 20). Ms. Alberti also told the CO on June 5, 2017 that Mr. Norton worked under her supervision for about a year. She further said Mr. Norton was supervised by Mr. Walker, who reported to Mr. Sheehan. (Tr. 378-82; Exs. 24, Y, at 6). Nonetheless, Respondent asserts in its post hearing brief that "Mr. Marvin Walker was not a supervisor for C&W Services." (Resp't Post Hr'g. Br., at 16, ¶ 54). The Court finds Ms. Diaz's trial testimony that Mr. Walker was not a supervisor to not be credible. (Tr. 596-97). The Court further rejects Respondent's position and finds that Mr. Walker was a C&W supervisor who supervised Mr. Norton on and before May 15, 2017. (Tr. 378-82, 599, Exs. 24, 31-32, Y, at 6).

[70] At her July 25, 2018 Rule 30(b)(6) deposition, Ms. Diaz described Mr. Walker on May 15, 2017 as a "working lead so he was one more individual working in the area." (Tr. 615-16; Ex. 34, at 13). She also said his role with C&W was as a "Working supervisor." (Ex. 35, at 33).

[71] Ms. Diaz agreed that at her July 25, 2018 Rule 30(b)(6) deposition she answered, "They worked as a team, yes." when asked if "So Marvin Walker would tell Johnny Norton to go pressure wash the dock on May 15, 2017." (Tr. 597-98; Ex. 35, at 20-21). Ms. Diaz also stated Mr. Walker could have conveyed the task to clean the dock to Mr. Norton on May 15, 2017. (Ex. 35, at 26). She said she did not know whether Ms. Alberti or Mr. Sheehan told Mr. Norton to pressure wash the dock on May 15, 2017. (Ex. 35, at 26, 35).

[72] Ms. Diaz testified that she never reviewed statements made to OSHA by Ms. Alberti, Mr. Sheehan or Mr. Walker. (Tr. 598-99; Ex. 35, at 44, 46-48).

(Ex. 35, at 39). She further stated that there is no state or federal regulation that requires employees pressure washing docks to wear a PFD. She also said that pressure washing a dock does not require an employee to work on the dock's edge. Specifically, she said: "It's not to work on the edge. You work off the center side to side, or front to back, always keeping your eyes looking at the machine in front of you. So, you know, it's not a function that you do in any other manner." (Exs. 32, at 9, 35, at 40-42). Ms. Diaz also said the City of Tampa's training and recommendations from the pressure washer manufacturer do not recognize the need for a worker to wear a PFD when working on a dock.[73] (Ex. 35, at 43).

VII. ARGUMENT

A. Respondent was in an Employer-Employee Relationship with Workers on Awnclean's Weekly Payroll, including Mr. Norton, who worked at the TCC for at least Several Months on and before May 15, 2017.

This case raises the issue of whether C&W, the prime contractor, was in an employer-employee relationship with workers who were on Awnclean's weekly payroll who worked at the TCC on and before May 15, 2017, including the worker exposed to the violative condition, Johnnie Norton. In cases in which the cited employer asserts that it was not the statutory employer of Mr. Norton as of May 15, 2017, resolution of the issue turns on the application of the common law test for agency, based on the Supreme Court's decision in *Nationwide Mut. Ins. Co. v. Darden* (*Darden*), 503 U.S. 318 (1992) (holding, in an ERISA context, that the common law test for master/servant relationships applies). The Commission has harmonized its test with *Darden*. *See e.g., All Star Realty Co., Inc.,* 24 BNA OSHC 1356, 1358 (No. 12-1597, 2014); *Don Davis, d/b/a Davis Ditching and Davis Ditching Inc.*, 19 BNA OSHC 1477,

[73] Ms. Diaz also said at her Rule 30(b)(6) deposition that she was not saying that there are other companies within the facilities management industry that do not recognize the need for PFDs when working on a dock. (Ex. 35, at 43).

1480 (No. 96-1378, 2001); *Timothy Victory,* 18 BNA OSHC 1023, 1026 (No. 93-3359, 1997); *Vergona Crane Co*., 15 BNA OSHC 1782, 1784 (No. 88-1745, 1992).

In determining whether a hired party is an employee under the general common law of agency, the Court considers the hiring party's right to control the manner and means by which the product is accomplished. Other factors relevant to this inquiry are: (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party. *Darden*, 503 U.S. at 323-24**;** *Richard Hargrove d/b/a R.H. Constr.,* 25 BNA OSHC 1702 (O.S.H.R.C.A.L.J. Sept. 8, 2015). The single most important question is whether the putative employer controls the means and manner of the employee's work. *See Darden,* at 323; *Timothy Victory*, 18 BNA OSHC at 1026-27; *Barbosa Grp., Inc*., *d/b/a Executive Security***,** 21 BNA OSHC 1865, 1867 **(**No. 02-0865, 2007)(stating "[r]egardless of whether the INS had any sort of employment relationship with the security personnel supplied by Barbosa, the degree of control Barbosa retained over its contract security personnel compels the conclusion that Barbosa remained their employer in these circumstances and was properly cited as such under the OSH Act.")(emphasis added). (*Id.*).

The record shows that Complainant has established that Respondent controlled the means and manner of the workers who were on Awnclean's weekly payroll who worked at the TCC for at least several months on and before May 15, 2017, including Mr. Norton. *See Timothy*

Victory, 18 BNA OSHC at 1026-27. Respondent exercised daily control over the weekly Awnclean workers at the TCC by assigning work directly to the weekly Awnclean workers, including Mr. Norton. The City of Tampa sent daily work orders directly to Respondent. (Tr. 377-80, Exs. 20, 24, 35, at 24, 31). After receiving a work order, Respondent dispatched the work order to its own staff and to the workers on Awnclean's weekly payroll who worked at the TCC. (Exs. 20, 35, at 3-9, 21-24).

Both Amy and Paul Diehl credibly testified that Awnclean did not conduct daily supervision or management of the workers on Awnclean's weekly payroll who worked at the TCC.[74] Respondent exercised virtually complete control over these workers, especially during the several months preceding May 15, 2017. (Tr. 167- 68, 331). During that time frame, Awnclean did not have any supervisor at the Worksite. (Tr. 166-69, 331, 378-82, 587-88, 594-95; Ex. 24, 35, at 20, Y, at 6). It is undisputed that on the day Mr. Norton drowned, Awnclean did not have a supervisor at the Worksite. Ms. Alberti testified that "[t]here was no supervisor for Awnclean when the accident took place." Mr. Norton worked for about a year under Ms. Alberti's direction. On May 15, 2017, he was being supervised by Ms. Alberti and C&W employee, Marvin Walker, who followed the directions of C&W's Mike Sheehan. (Tr. 378-82; Exs. 24, 35, at 20, Y at 6).

In addition to assigning work, Respondent also exercised control over the workers on Awnclean's weekly payroll by inspecting their work at the TCC and ordering them to redo work if their initial work was deficient. (Ex. 35, at 29-30). Here, Mr. Norton drowned after

[74] Ms. Diehl testified that its subcontract with Respondent called for Awnclean to provide "staffing" to Respondent and the workers on Awnclean's weekly payroll who worked at the TCC "were all run and managed by C&W." (Tr. 253-54). She said, "They were essentially DTZ employees." (Tr. 286). Respondent's Alberti admitted "C&W was in charge of providing the supervision to all the employees working at the Convention Center." (Tr. 378-82, 406-07; Exs. 24, Y, at 6). Ms. Diaz agreed that Awnclean did not have any supervisors at the TCC for a period of several months prior to and on May 15, 2017. (Tr. 587-88, 594-95; Ex. 35, at 3).

C&W Supervisor Alberti directed him to again pressure wash the dock in order to remove some rust stains.[75] (Tr. 390-91, 395, 498-99, 601; Exs. 22, 35, at 54, 65, 78, U, at 9).

1. The Secretary has established an employer-employee relationship under the *Darden* factors.

The record demonstrates Respondent's control over the workers on Awnclean's weekly payroll at the TCC on and before May 15, 2017 and substantiates a finding of an employer relationship under the *Darden* factors.[76] Here, Respondent was motivated to enter into a subcontract with Awnclean that included some provisions that were generally not enforced; e.g. paragraphs 11 and 13, in order to: a) better posture itself to secure the contract with the City of Tampa through the engagement of a SLBE and b) directly control the day-to-day activities of the workers on Awnclean's weekly payroll at the TCC. In doing the latter, C&W created and maintained an actual employer-employee relationship between itself and the workers on Awnclean's weekly payroll who worked at the TCC. (Tr. 118-27, 207, 253-54, 314-21, 328-29, 359, 387, 439; Exs. 20, 24, 30, at 4-5, Y, at 6).

First, with regard to the skill required for pressure washing and scrubbing the dock, the work itself is essentially manual labor and does not require specialized skill. This favors the existence of an employer-employee relationship.

Second, the *Darden* factor regarding the provisions of instrumentalities and tools favors an employer-employee relationship. Respondent obtained and gave workers at the TCC on Awnclean's weekly payroll all the tools and equipment needed to perform assigned tasks. C&W employee Deanna Ballard testified that C&W provided equipment, including safety equipment,

[75] Mr. Wendell testified that he knew that Ms. Alberti directed Mr. Norton to go back a second time to clean the dock to remove some rust stains. (Tr. 498-99, 601; Ex. 35, at 78).
[76] The Secretary's position is that Mr. Norton and other workers similarly situated to him on Awnclean's weekly payroll, were "*both* Awnclean *and* C&W employees." (emphasis in original) (Sec'y Reply to Resp't Post Hr'g. Br., at 2).

to these workers. (Tr. 81, 110-11). Respondent's argument that it did not own the equipment does not overcome the fact that it provided the equipment to these workers.[77] Respondent determined what equipment was needed and obtained equipment from the City of Tampa. Respondent then gave the equipment directly to the workers on Awnclean's weekly payroll. (Ex. 35, at 115). C&W obtained the pressure washer and rotary scrubber Mr. Norton was using atop the dock when he drowned. (Tr. 211). Respondent's attempt to argue that it did not own the pressure washer obfuscates the fact that Respondent, not Awnclean, obtained and provided the pressure washer and rotary scrubber to Mr. Norton. Respondent could also have provided workers pressure washing the dock with a PFD and required its use — but chose not to. Mr. Sheehan told the CO that he could have obtained a PFD from the City of Tampa's warehouse for Mr. Norton to use when pressure washing the dock. (Ex. 23). Of the eight workers who reportedly pressure washed the dock before May 15, 2017, only Messrs. Estonier and Arana wore PFDs. (Tr. 77-82, 113, 598; Exs. 25-26, 35, at 59).

In addition to tools, Respondent also provided the workers on Awnclean's weekly payroll with uniforms. (Tr. 177-78, 330, 549). Respondent provided all Chinchi, J&L Services and Awnclean workers on its weekly payroll with identical uniforms that said, "The Convention Center." (Tr. 330). These workers were indistinguishable from every other worker working under C&W's contract with the City of Tampa, including C&W's own employees.

[77] Ms. Diehl testified that she did not know whether the pressure washer was owned by the TCC or Respondent. (Tr. 211). The parties have stipulated that the City of Tampa owned the pressure washer used by Respondent and Awnclean personnel to clean the docks. (Tr. 414; SF 8; Ex. 35, at 45). The CO testified that the City of Tampa and the TCC owned both the pressure washer and the rotary scrubber used by Mr. Norton on the dock on May 15, 2017. (Tr. 414).

Third, the *Darden* factor regarding work location also favors an employer-employee relationship. Respondent managed the personnel of multiple subcontractors at the TCC, including those of Awnclean, Chinchi, and J&L Services. (Tr. 110-1l). Workers on Awnclean's weekly payroll worked side by-side with C&W, Chinchi's, and J&L Services workers; performing the same tasks. (Tr. 79; Ex. 35, at 17).

Fourth, the duration of the relationship between the parties favors an employer-employee relationship. The workers on Awnclean's weekly payroll were not simply hired for one job or one project; some worked continuously at the TCC for a period of years.[78] Mr. Norton worked there for about one year. (SF 3).

Fifth, the *Darden* factor regarding whether the hiring party has the right to assign additional projects to the hired party is indicative of an employee-employer relationship. Respondent could and did assign tasks to the workers at the TCC on Awnclean's weekly payroll at will. (Tr. 118-27, 207, 253-54, 314-21, 328-29, 359, 387, 439; Exs. 20, 24, 35, at 3-9, 10-13, 21-22, Y, at 6).

Sixth, the *Darden* factor regarding discretion over when and how long to work favors an employer-employee relationship. C&W assigned work and set the weekly schedules for the workers on Awnclean's weekly payroll working at the TCC. (Tr. 118-27, 207, 253-54, 314-21, 328-29, 359, 387, 439; Exs. 20, 24, Y, at 6). Respondent exercised near total control over the schedules for all the workers at the TCC on Awnclean's weekly payroll. Ms. Ballard testified that C&W had a written weekly schedule that told her and others at the Worksite, including workers from C&W, Awnclean, Chinchi, and P&L, what tasks were going to be performed

[78] Workers on Awnclean's weekly payroll began working at the TCC in 2013 and continued working there through December 2017. (Tr. 137-38, 297, 314,527; Exs. 13, at 3, 30).

each day.[79] (Tr. 120-21, 125-26; Exs. 20, 35, at 36-37, 87, Y at 6).[80] Respondent then gave Awnclean the weekly schedules so Awnclean could process the weekly payroll. (Tr. 154, 322; Ex. 14, at 1). Awnclean had no idea how many hours the workers were working until after Respondent provided the records. (Tr. 322). Awnclean did not have discretion over when workers on its weekly payroll could start and finish jobs at the TCC.

Seventh, the *Darden* factor regarding the method of payment also favors an employer-employee relationship. Awnclean managed the payroll of the workers paid on a weekly basis while working at the TCC under the subcontract between C&W and Awnclean. However, Respondent wielded total control over Awnclean's payroll practices for these paid weekly workers. Respondent required Awnclean to bifurcate its pay practices; demanding that Awnclean pay workers working under the subcontract at the TCC on a weekly basis. (Tr. 160, 327, 549). Awnclean paid all its remaining workers on a bi-weekly basis; its usual practice. (Tr. 160-61, 168, 327-28, 181). Respondent also told Awnclean which workers to place on its weekly payroll. (Tr. 143, 155, 316; Exs. 13, at 2, 14, at 3). For example, Respondent sent Awnclean an email with a list of workers to add to its weekly payroll. Some of the workers that Respondent told Awnclean to place on its weekly payroll were previously on Respondent's payroll. Awnclean never interviewed, solicited, or made any hiring decisions for any of the twelve workers identified in Ms. Harris' email to Mr. Diehl in June 2013. (Tr. 316-17; Ex. 14). Awnclean was merely a conduit for Respondent's own payroll practices. This practice continued even after Awnclean ended its contractual relationship with Respondent in December 2017, when Respondent just transferred the workers on Awnclean's weekly payroll to another

[79] The Court finds the testimony of Ms. Diaz that C&W's weekly schedules did not assign specific work to Awnclean workers to not be credible. (Tr. 551, 558-59, 585-86, 606; Exs. 20, 35, at 16-17, 32).
[80] Ms. Ballard said C&W Supervisor Erika Alberti prepared the work schedule for the period May 15 through May 21, 2017. (Tr. 126-27; Ex. 20).

subcontractor's payroll. (Tr. 297-98). Respondent also set the hourly rate of pay for workers on Awnclean's weekly payroll. (Tr. 159). Respondent decided which workers on Awnclean's weekly payroll to promote and how much their pay raises should be. (Tr. 156; Ex. 14, at 3).

Eighth, the *Darden* factor regarding whether the hired party's role in hiring and paying assistants favors an employer-employee relationship. Respondent exercised hiring and firing power over the workers who worked at the TCC who were on Awnclean's weekly payroll. Awnclean never solicited or interviewed applicants or candidates to work at the TCC on Awnclean's weekly payroll. (Tr. 138, 143-44, 155, 316-17, 326-27; Ex. 13, at 3). In 2013, Mr. Diehl attempted to participate in an employee recruiting event and Respondent's Michael Sheehan told him that he did not need to be there. (Tr. 313-15). Respondent recruited and interviewed applicants to work at the TCC under Awnclean's subcontract with C&W. Respondent sent Awnclean completed employment applications for these jobs. (Tr. 143; Ex. 13, at 3). Ms. Diehl testified that C&W sent Mr. Norton over to Awnclean to fill out Awnclean's paperwork and start working at the TCC. (Tr. 288). Respondent also conducted the criminal background checks for these workers. (Tr. 287, 320).

Respondent also controlled disciplinary and firing decisions. Respondent disciplined workers on Awnclean's weekly payroll by "writing up" those employees. (Tr. 170). In at least one instance, Respondent completed an "incident report" and a "Progressive Discipline Notice" for Jill Glass, a worker at the TCC on Awnclean's weekly payroll. (Tr. 171; Ex. 15, at 4-12). Respondent ultimately directed Awnclean to fire Ms. Glass. (Tr. 170-71). While Respondent may argue that Awnclean fired Ms. Glass, the Court agrees with the Secretary that it was Respondent who "wielded the ax."[81] (Sec'y Post Hr'g. Br., at 25).

[81] Ms. Diehl acknowledged that she could "[t]heorectically" terminate a supervisor who worked at TCC who was on Awnclean's payroll. (Tr. 209).

Ninth, the *Darden* factor regarding whether the work is part of the regular business of the hiring party favors an employer-employee relationship. C&W was the prime contractor on a contract to provide janitorial services to the TCC. Respondent's own employees worked on the contract as managers, custodial and maintenance workers, and groundskeepers. (Ex. 35, at 16-17). Respondent did not hire Awnclean so that Awnclean's actual employees would provide janitorial services at the TCC. Respondent's own workers were already doing that. Awnclean was merely a conduit for Respondent to obtain the contract in the first place. The Court agrees with the Secretary that Respondent courted Awnclean in order to help obtain the award of the contract with the City of Tampa for the work at the TCC because Awnclean is a woman-owned small business.[82] (Tr. 134-35, 276, 300, 312-13, 329-30, 555; Exs. 37, at 24, 52, M; Sec'y Post Hr'g. Br., at 23). During contract performance, Respondent needed to ensure that it was spending more on Awnclean to meet the SLBE component in its contract with the City of Tampa. (Tr. 328-29, 616-17).

Tenth, the *Darden* factor regarding whether the hiring party is in business favors an employer-employee relationship. It is undisputed that Respondent is in business. Respondent was one of the largest janitorial contractors "in the world." As noted above, Respondent provided janitorial services to the TCC and its own employees worked on the contract as managers, custodial and maintenance workers, and groundskeepers. (Tr. 236; Ex. 35, at 16-17).

Eleventh, the *Darden* factor regarding the provision of employee benefits favors an employer-employee relationship. Respondent set vacation and sick time policies for the workers at the TCC on Awnclean's weekly payroll. (Tr. 163; Ex. 17). Awnclean employees paid on a biweekly basis received vacation time, whereas Awnclean workers working at the TCC who

[82] Awnclean did not have sufficient actual employees on its regular payroll at that time to complete the work required under its subcontract with C&W. (Tr. 138, 313-14, 320).

were paid on a weekly basis did not, with very limited exception.[83] When a worker at the TCC on Awnclean's weekly payroll was sick and needed to request time off, the worker called Respondent, and not Awnclean. (Tr. 161-62, 321-22, 330; Ex. 35, at 43).

Here, the tax treatment of the hired party favors a non-Employer-employee relationship. Awnclean withheld taxes from, gave W-2 forms to, submitted W-4 forms for, and went through the I-9 [Employment Eligibility Verification] process for workers, including supervisors, on Awnclean's weekly payroll who worked at the TCC. (Tr. 195-97, 209). Awnclean also handled the deductions for Mr. Norton while he was on Awnclean's payroll, including Federal tax, Medicare and social security withholdings. (Tr. 350; Exs. 36, at 32, H, at 9, Supplement to Ex. H, at 32; Resp't Post Hr'g. Reply Br., at 10-11).

With limited exception, the Court's analysis of the *Darden* factors demonstrates that Respondent was in an employer-employee relationship with the workers at the TCC who were on Awnclean's weekly payroll on, and for at least several months before, May 15, 2017, including Mr. Norton. (Sec'y Post Hr'g. Br., at 19-26).

B. Respondent Controlled the Workers on Awnclean's Weekly Payroll at the TCC, including Mr. Norton, on, and for at least Several Months before, May 15, 2017.

Pursuant to OSHA Directive CPL 2-0.124 (Multi-Employer Citation Policy (MEP)), OSHA may cite an employer if it creates a hazard, exposes employees to a hazard, has the ability to correct a hazardous condition, or is a controlling employer. A controlling employer has "general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them." *Summit Contractors Inc.,* 22 BNA OSHC 1777, 1780-81 (No. 03-1622, 2009) (agreeing with and quoting the MEP's definition of a controlling employer). Although control can be established by explicit contractual authority,

[83] *See* n. 56, above.

it is not required where an employer exercises control in practice. Where a right to control safety is not clearly defined or where the contract says that the employer does not have such a right, an employer may still be deemed "controlling" based on a totality of circumstances, including analysis of other contractual rights that may grant an employer broad responsibility over almost all aspects of the job that necessarily involve safety, i.e. resolving disputes between subcontractors, setting schedules, making purchase decisions, and determining project sequencing. Even in the complete absence of explicit contractual provisions, the exercise of control in practice is equally enough to deem an employer "controlling." (CPL 2-0.124, ¶ E-5(b)). Here, the provision in the subcontract stating Awnclean was an "independent contractor" was more form than substance. (Tr. 286; Ex. 30, at 4, ¶ 11). In practice, the subcontract provisions at paragraphs 11 and 13 were ignored with regard to workers on Awnclean's weekly payroll. (Tr. 118-27, 161-63, 168-70, 201-02, 235-36, 245, 281-82, 286, 316-17, 336, 356, 378-82, 594; Exs. 17, 20, 30, at 4-5, Y, at 6). Ms. Diaz agreed that what's written in the contract on paper is not necessarily how things progress in realty. (Tr. 594).

Under Commission precedent, an employer who either creates or controls the cited hazard has a duty under section 5(a)(2) of the Act to protect not only its own employees, but those of other employers "engaged in the common undertaking." *McDevitt St. Bovis, Inc*., 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) (citing *Anning-Johnson*, 4 BNA OSHC 1193, 1199, (No. 3694, 1976); *Grossman Steel & Aluminum Corp*., 4 BNA OSHC 1185, 1188 (No. 1275, 1976). Specifically, the Commission has concluded that an employer may be held responsible for the 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." *Centex-Rooney Constr. Co*., 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994).

Here, Respondent was the prime contractor of a facilities services contract. The MEP applies. *See Harvey Workover, Inc.,* 7 BNA OSHC 1687 (No. 76-1408, 1979) (holding "We no longer find the distinction between construction sites and other worksites valid. The safety of all employees can best be achieved if each employer at multiemployer worksites has the duties to: (1) abate hazardous conditions under its control and (2) prevent its employees from creating hazards.

In addition to its own employees, Respondent managed three subcontractors at the Worksite, including Awnclean, Chinchi and P&L. (Tr. 110-11). These workers generally performed similar tasks, wore identical uniforms, and were supervised by Respondent. (Ex. 35, at 17). Workers on Awnclean's weekly payroll and C&W employees alike were "engaged in the common undertaking" of cleaning and maintaining the Worksite. Respondent had a duty to protect the workers on Awnclean's weekly payroll working at the TCC, including Mr. Norton. *See McDevitt St. Bovis, Inc*., 19 BNA OSHC at 1109.

Respondent argues that Awnclean's subcontract with Respondent does not establish C&W's control within the meaning of OSHA's MEP. It further argues that the subcontract specifically disclaims an employment relationship (or any "engagement") with workers on Awnclean's weekly payroll working at the TCC. (Tr. 190; Ex. 30; Resp't Post Hr'g. Br., at 28-29). An employer cannot shift to another its responsibilities under the Act. *See Pride Oil Well Serv*., 15 BNA OSHC 1809, 1815-17 (No. 87-692, 1992). In *Summit Contractors, Inc.* 23 BNA OSHC 1196, 1207 (No. 05-0839, 2010), citing to *Cent. of Ga. R.R. Co. v. OSHRC*, 576 F.2d 620, 624-25 (5th Cir. 1978), the Commission stated that "Commission precedent establishes that 'an employer may not contract out of its duties under' the OSH Act." *Summitt Contractors Inc*., 23 BNA OSHC at 1207.

The exercise of control in practice is enough to deem an employer "controlling." (CPL 2-0.124, ¶ E-5(b)). Respondent could "reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite" because on the day Mr. Norton drowned and the months leading up to May 15, 2017, Awnclean did not have a supervisor at the Worksite. (Tr. 166-69, 331, 378-82, 587-88, 594-95; Ex. 24, 35, at 20, Y, at 6). *See also Centex-Rooney Constr. Co*., 16 BNA OSHC at 2130; *Double "A" Indus., Inc*., 19 BNA OSHC 1833**,** 1836 **(**No. 01-0534, 2002) (finding controlling employer status where the prime contractor's project manager was overseeing the work, could stop work, make corrections to the work, and the subcontractor 's foreman was not at the worksite).

Respondent exercised control and supervision over its own workers and the workers on Awnclean's weekly payroll at the TCC. It made safety decisions, set schedules, and exercised hiring and firing power for workers at the TCC on Awnclean's weekly payroll. C&W supervisors had the authority to stop Awnclean personnel from working if they observed the employee doing something unsafe. (Ex. 35, at 31-32). Respondent could, and did, require a subcontractor to remove its employee from the Worksite. (Ex. 35, at 33). Respondent could also obtain safety equipment for all its subcontracted workers. C&W Supervisor Michael Sheehan stated that "[i]f Johnnie [Norton] would have asked for a PFD I would have been able to get him one."[84] (Ex. 23).

Respondent set the work schedules for all the personnel who worked under Respondent's contract with the City of Tampa at the Worksite. C &W Supervisor Alberti created and implemented a weekly schedule that directly affected workers on Awnclean's weekly payroll. The weekly schedule designated assignments, set the allocation of the hours

[84]After Mr. Norton drowned, C&W provided PFDs to all the workers who worked under its contract with the City of Tampa at the TCC, including workers on Awnclean's weekly payroll. (Tr. 389; Ex. 22).

and assigned specific workers to specific tasks.[85] (Tr. 118-27, 207, 253-54, 314-21, 328-29, 359, 387, 439; Exs. 19-20, 24, Y, at 6). Ms. Alberti's schedule included assignments for both C&W and workers on Awnclean's weekly payroll who worked at the TCC. (Tr. 387, 439; Exs. 20, 24, 35**,** at 36-37, 87). Respondent, not Awnclean, told Mr. Norton to pressure wash the dock. (Tr. 498, 601; Ex. 35, at 23, 78).

C&W exercised hiring and firing power over Awnclean workers. Awnclean never interviewed applicants or candidates to work at the TCC under its subcontract with Respondent. (Tr. 138). Respondent explicitly told Awnclean who to place on its weekly payroll. Awnclean's President never met many of these workers, including Mr. Norton.

In addition to having hiring authority over the Awnclean workers, Respondent also disciplined and fired workers on Awnclean's weekly payroll who worked at the TCC. Respondent completed an "incident report" and a "Progressive Discipline Notice" for Ms. Glass, a worker on Awnclean's weekly payroll. Respondent ultimately directed Awnclean to fire Ms. Glass. (Tr. 170-71, 280-81, 336-37; Ex. 15, at 4-12).

All these facts establish Respondent's "general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them."[86] *Summit Contractors Inc.*, 22 BNA OSHC at 1780-81. The Court finds that OSHA properly cited Respondent as the controlling employer pursuant to OSHA's MEP. (Sec'y Post Hr'g. Br., at 26-31).

1. Respondent Failed to Exercise Reasonable Care to Prevent and Detect Violations at its Worksite.

[85] To the extent that Ms. Diaz testified to the contrary, she was either mis-informed or not credible. (Tr. 551, 558-59, 585-86, 606; Exs. 20, 35, at 16-17, 32).

[86] The facts of this case as enumerated herein refute Respondent's discredited argument that it "did not supervise Awnclean's employees, did not provide them with the tools to complete their work, did not control the quality of the Awnclean's employees' work, [and] did not have the authority to remove or terminate any Awnclean employee,.…" (Resp't Post Hr'g. Br., at 34, Resp't Post Hr'g. Reply Br., at 4).

A controlling employer must "exercise reasonable care to prevent and detect violations on the site." CPL 2-0.124, ¶ E-2. In *Grossman Steel & Aluminum Corp*., 4 BNA at 1188, the Commission articulated the position that:

> The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. It is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected. Thus, we will hold the general contractors responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.

(*Id*. at 1188).

The Commission has not required a general contractor to conduct continuous inspections of the subcontractor's work. A general contractor does have responsibility to seek to have worksite hazards corrected, if it was aware of the hazards or could reasonably be expected to have detected them. Many facts may bear on the issue of reasonableness. These may include the manner, frequency or extensiveness of an employer's efforts to monitor the worksite; the difficulty an employer might have had in discovering the alleged hazards; or the length of time the hazards existed. (CPL 2-0. 124, ¶¶ E-3-4). Where work is not routine or where unusual hazards are present, it is not "reasonable to completely rely on [an employee's] experience and provide no supervision or oversight…." *Wayne J. Griffin Elec., Inc*., 26 BNA OSHC 1786, 1805 (No. 15-0858, 2017) (ALJ).

Here, Respondent was well suited to ensure that workers on Awnclean's weekly payroll whom it tasked to pressure wash and rotary scrub the dock at the TCC wore PFDs because it exercised supervisory control over them and was aware that workers had pressure washed the dock without wearing PFDs. The Court agrees with the Secretary that Respondent could have

prevented or abated the hazardous drowning condition involving the use of a pressure washer and rotary scrubber on a dock adjacent to deep water without wearing a PFD.

First, Respondent monitored the Worksite. This is not the situation where the contractor was unaware of what was happening at the Worksite or where Respondent relied on the experience of a supervisor when assessing the frequency of inspections.[87] Here, Respondent was well aware of what was happening at the Worksite because it exercised near complete control over the workers on Awnclean's weekly payroll at the TCC, including Mr. Norton. Respondent did not rely on Awnclean supervisors to inspect the Worksite and detect hazards because on the day of, and months leading up to, the accident Awnclean did not have any supervisory personnel at the Worksite. Respondent knew that Mr. Norton was going to pressure wash the dock and work close to surrounding water because Respondent's supervisors ordered Mr. Norton to do so. Further, C&W supervisors Walker and Alberti knew Mr. Norton was not wearing a PFD while he was pressure washing and rotary scrubbing the dock on May 15, 2017. (Tr. 390-91, 395, 450; Exs. 22, 24, U, at 8-9). Respondent was monitoring the Worksite with its supervisory personnel who knew exactly what Mr. Norton was doing, and was, therefore, aware of the hazard.

Next, pressure washing a dock using a rotary scrubber to clean every inch of the dock up to and including the very edges of a ten foot wide, 289 feet long unguarded, raised above the water, dock while wearing rubber boots and not wearing a PFD while surrounded on three sides by open, 19 feet deep water in Tampa Bay, Florida, is an open and obvious drowning hazard. Respondent had no difficulty in assessing how obviously hazardous this was. Respondent knew

[87] *Cf. E.P. Guidi, Inc. and Haines & Kibblehouse, Inc.,* No. 04-1055, 2005 WL 3338020 ((O.S.H.R.C.A.L.J., Sept. 16, 2005) (consolidated) (noting prime contractor not liable for subcontractor's violation because it neither controlled safety measures at the work site nor had authority to direct the means or methods of the subcontractor's work, and the Secretary failed to show prime contractor should have known of the violative conditions.).

that pressure washing the dock without a PFD presented a hazard after at least two of Respondent's own employees used a PFD to do so. Respondent recognized the hazard because C&W Supervisor Sheehan specifically asked Mr. Norton if he could swim. This conversation happened when Mr. Norton was told to pressure wash the dock. Mr. Sheehan's inquiry was made because one of the employees that used to clean the dock "area had a fear of water and used to put a jacket [on]." If Respondent was unaware of the drowning hazard, Mr. Sheehan would not have asked Mr. Norton if he could swim. It was foreseeable to Respondent and its Worksite supervisors that an employee looking forward and down at a rotating scrubber dragging a cord could fall into the bay while cleaning the edges of the TCC's boat dock on May 15, 2017. (Tr. 371-73, 392-93, 426, 498-501, 601; Exs. 1, 23, 35, at 63-73; SF 2-6, 9-11).

Finally, this is not the case were Respondent was caught unaware because the hazard existed for a short period. This hazard played out repeatedly, as Respondent routinely ordered many workers, including Messrs. Walker, Estonier, Norton, Arana, Wilson, and Few to pressure wash the dock on and before May 15, 2017. Respondent could have reasonably been expected to prevent or abate the hazard. (Sec'y Post Hr'g. Br., at 31-35).

C. Judicial Notice is Not Suitable for the Factual Assertion Sought by the Secretary.

In Complainant's Reply to Respondent's Post Hearing Brief "[t]he Secretary asks the Court to take judicial notice of the dangers of swimming or falling into open water pursuant to Rule 201 of the Federal Rules of Evidence." (Sec'y Reply to Resp't Post Hr'g. Br., at 9-10). The Secretary asserted that "[o]pen water presents additional dangers due to limited visibility, depth, distance, and drop-offs, currents and tides, water temperature, and weather and seasonal differences [fn omitted]." *(Id.)*. The Secretary asserts that "the dangers of swimming or falling into open water are generally known." He argues that these facts can be

accurately and readily determined from a handout produced by Safe Kids Worldwide, *available at* https://www.safekids.org/blog/five-hidden-hazards-open-water, and another document produced by the Red Cross and available on the Bureau of Resource Management's webpage at https://www.usbr.gov/watersafety/docs/RedCrossWaterSafety.pdf.

Federal Rule of Evidence 201(c) states the court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Subsection e of the same Rule continues, noting, "[o]n timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed." On January 13, 2020, the Court ordered the parties to state their respective positions concerning Complainant's request that the Court take Judicial Notice of the dangers of swimming or falling into open water pursuant to Rule 201, F.R.E. *See* 29 C.F.R. § 2200.67(l). On January 17, 2020, both parties filed their respective positions.[88]

Federal Rule of Evidence 201 allows judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b)(1)(2). Judicial notice is an adjudicative device that alleviates the parties' evidentiary duties at trial, serving as "a substitute for the conventional method of taking evidence to establish facts." *Grand Opera Co. v. Twentieth Century–Fox Film Corp.,* 235 F.2d 303, 307 (7th Cir. 1956). It replaces the evidentiary procedure that would otherwise be necessary to establish "adjudicative fact[s]" that are generally known or "capable of accurate and ready determination" by resort to reliable sources. *York v.*

[88] Neither party took advantage of the Court's offer to allow the parties the opportunity to present oral argument on the Secretary's request that judicial notice be taken.

Am. Tel. & Tel. Co., 95 F.3d 948, 958 (10th Cir. 1996). Caution must be used in determining that a fact is beyond controversy under Rule 201(b). *See*, Fed. R. Evid. 201(b) Advisory Committee Notes; *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger USA, Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) (noting that "[c]are must be taken that the requisite notoriety exists [and] [e]very reasonable doubt upon the subject should be resolved promptly in the negative"). Here, the Secretary's request for judicial notice falls short of qualifying under Rule 201(b).

The Secretary cites to several federal and state court premises liability cases in support of his argument that the Court should take judicial notice of the fact that open water may be deemed an obvious danger as a matter of law.[89] (Sec'y Position Stmt., at 2-3). None of these cases are in the context of the OSH Act and "judicial notice" was not taken by any of these courts in these cited cases.

The Secretary also cites to *Knife River, Contestant v. Sec'y of Labor, Mine Safety and Health Admin. (MSHA)*, No. WEST 2009-1147-RM, 2011, 2011 WL 3794326 (F.M.S.H.R.C.A.L.J., June 16, 2011) (consolidated) , a Federal Mine Safety and Health Review Commission (FMSHRC) case where the Secretary asserts that a FMSHRC judge observed that a dock that lacked handrails and toe boards exposed "miners to the risk of fatal drowning in the event of a slip or fall into water reported to be … approximately 20 feet deep" and presented a clear and present danger. (*Id*. at 1460). Again, no "judicial notice" was taken in that case.

Respondent argues that taking judicial notice of "the dangers of swimming or falling into open water" is inconsistent with Federal Rule of Evidence 201 and should be denied. C&W asserts that Secretary's general request is subject to reasonable dispute, and the assertion is not

[89] The Secretary cites to one OSHA-related case concerning 11th Circuit law on what the Secretary is required to show to make out a prima facie case for a violation of an OSHA standard. (Sec'y Position Stmt., at 2-3).

capable of ready determination with accurate sources whose accuracy cannot reasonably be questioned. Citing to *Shahar v. Bowers*, 120 F.3d 211, 214 (11th Cir. 1997), Respondent asserts that judicial notice would apply to an indisputable fact such as the number of days in a week, or that the sun rises in the east, e.g. "the kinds of things about which courts ordinarily take judicial notice are (1) scientific facts: for instance, when does the sun rise or set; (2) matters of geography: for instance, what are the boundaries of a state; or (3) matters of political history: for instance, who was president in 1958." (*Id. at* 214). Respondent states that a high degree of *indisputability* is an essential prerequisite for judicial notice. *See* Fed. R. Evid. 201(b) Advisory Committee's Notes to subdivision (b) ("With respect to judicial notice of adjudicative facts, the tradition has been one caution in requiring that the matter be beyond reasonable controversy").

Here, the Secretary's request to take judicial notice of swimming or falling into open water" is general and not indisputable. The Secretary's assertion does not define "open water" or conditions of the open water.[90] It does not identify particular "dangers."[91] As noted by Respondent, courts have declined to take judicial notice of general assertions that do not meet the test of indisputability. *See Shahar v. Bowers*, 120 F.3d at 214 (declining to take judicial notice of newspaper accounts or press releases of a public official's conduct); *Howard v. Hyundai Motor Mfg. Ala.*, 754 F. App'x 798, 807 (11th Cir. 2018) (declining to take judicial notice of the general "fact that, in most employment situations, an applicant is required to submit the name of his or her last employer to the new employer") (unpublished) *cert. denied*, 140 S.Ct. 126 (2019); *Kerruish v. Essex Holdings, Inc.*, 777 F. App'x 285, 293 (11th Cir. 2019) (declining to take

[90] Here, the parties have stipulated that the waters of Tampa Bay were approximately nineteen (19) feet deep at the end of the dock, where Mr. Norton was working before he fell and drowned.

[91] Complainant asserts that "[o]pen water presents additional dangers due to limited visibility, depth, distance, and drop-offs, currents and tides, water temperature, and weather and seasonal differences. [fn. omitted]". (Sec'y Reply Br., at 10).

judicial notice of an affidavit never made part of the district court record) (unpublished) ; *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (stating that judicial notice is appropriate if the fact is "one that only an unreasonable person would insist on disputing" and declining to take judicial notice that a defendant "refused to come to work"); *Davis v. Valsamis, Inc.*, 752 F.App'x 688, 697 (11th Cir. 2018) (unpublished) , *cert. denied,* 139 S. Ct. 1283 (2019) (declining to take judicial notice that defendant received knowledge of the plaintiffs' injuries through the news). (Resp't Opp. To Sec'y Request for Judicial Notice, at 4-5).

Judicial notice is also improper if a legitimate question exists as to the underlying source(s) of the information upon which the proponent relies. Accurate records or other sources of a judicially noticed fact must be known to the court to enable it to consider whether the fact is amenable to judicial notice. Here, the Secretary did not provide the Court with sources whose accuracy cannot reasonably be questioned. As support for his request for judicial notice, the Secretary refers to two general online handouts or pamphlets that it never identified during the trial, and that he never introduced as trial exhibits. No one testified at trial regarding either of these two documents and their authors are unknown. The Safe Kids Worldwide handout describes potential risks of open water for children and teens. The Red Cross document provides general guidelines on what to look out for near a natural water environment. Both publications describe potential variables of open water; not facts about a particular body of water. Neither publication is specific to the body of water around the dock at issue in this case. Neither document indicates the source of its information. *See Carley v. Wheeled Coach*, 991 F.2d 1117, 1126 (3rd Cir. 1993) (refusing to take notice of government test on vehicle rollovers because results are not "readily provable through a source whose accuracy cannot be reasonably questioned"); *Cofield v. Ala. Pub. Serv. Comm'n,* 936 F.2d 512, 517 (11th Cir. 1991) (holding

that a statement of fact that appears in a daily newspaper does not of itself establish that the stated fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned") (citing Fed. R. Evid. 201(b)(2)). Here, the accuracy of the sources referenced by the Secretary in his request for judicial notice can reasonably be questioned.

D. The Secretary Has Met His Burden of Proving That Respondent Violated 29 C.F.R. § 1910.132(a).

In order to establish that an employer violated an OSHA standard, the Secretary must show: (1) the standard applies to this employer at this workplace; (2) the employer failed to comply with the standard; (3) employees were exposed to the hazard; and (4) the employer knew or could have known of the conditions with the exercise of reasonable diligence. *See Astra Pharm. Prods., Inc*., 9 BNA OSHC 2126 (1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982); *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992).

1. The Standard Applies to this Worksite

The Secretary cited Respondent for violating 29 C.F.R. § 1910.132(a). That standard provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

General industry standards under 29 C.F.R. § 1910 apply at this Worksite. Respondent was engaged in providing janitorial services at the Worksite, and it is undisputed that their employees were custodians, groundskeepers, and maintenance workers. (Ex. 35, at 16-17).

PFDs are considered PPE within the meaning of 29 C.F.R. § 1910.132(a). *United Geophysical Corp*., 9 BNA OSHC 2117, 2121-22 (No. 78-6265, 1981) (holding section 1910.132(a) "may properly be read to encompass flotation devices to protect against the hazard of drowning."). (*Id*. at 2122). In *United Geophysical Corp.,* the Commission concluded "that the hazard of drowning in the gravel pit is part of the surroundings in which United's employees worked." (*Id.*). Respondent was in an employment relationship with workers on Awnclean's weekly payroll, including Mr. Norton, for a period of several months on and before May 15, 2017. The evidence establishes that the cited standard applies to Respondent at this Worksite.[92]

2. Respondent Failed to Comply with the Standard.

On May 15, 2017, Mr. Norton was pressure washing and rotary scrubbing the docks at the TCC as part of his normal job duties. (SF 6). The dock was unguarded on three sides and was approximately 289'7" long and 10' 2" wide. (SF 9). The bay at the end of the dock where Mr. Norton was working was approximately 19 feet deep. (SF 10). Mr. Norton was not wearing a PFD when he drowned. (SF 12-13). Respondent failed to ensure that Mr. Norton was issued and wore a PFD while he was pressure washing the dock. Respondent violated the standard.

3. Johnnie Norton was Exposed to the Hazard

Mr. Norton was not wearing a PFD on May 15, 2017 when he drowned. (SF 12-13). *See Id.* at 2123 ("By inquiring whether any employee could swim across the pit at a time when no protective equipment was available at the site, [the head linesman] demonstrated that he was willing to expose an employee to the hazard of drowning in order to accomplish the assigned work."). (*Id.*). Mr. Norton was exposed to the hazard. (SF 12).

[92] The Court notes that it is unaware of any indication that the drafters of the standard intended to exclude PFDs from the scope of the standard. *See United Geophysical Corp*., 9 BNA OSHC at 2122.

4. Respondent Had Actual Knowledge of the Hazard

"To meet [his] burden of establishing employer knowledge, the Secretary must show that the cited employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Pride Oil Well Serv.,* 15 BNA OSHC at 1814. An employer is required to make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during the course of their scheduled work. *Automatic Sprinkler Corp. of Am.*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980). The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer. *Tampa Shipyards,* 15 BNA OSHC 1533, 1537 (No. 86-368, 1992) (consolidated) (citing *A.P. O'Horo Co*., 14 BNA OSHC 2004, 2007 (No. 85-369, 1991); *N&N Contractors, Inc*., 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000); *Cent. soya de P. R., Inc*., 653 F.2d 38, 39 (1st Cir. 1981).

Because the site of the alleged violation was in Florida, this case can be appealed to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit has held that to prove a violation of a generally-worded PPE standard such as section 1910.132(a), unless he has proven actual knowledge, the Secretary must show that the protective equipment sought by the Secretary is what the employer's industry would deem appropriate under the circumstances.[93] *Farrens Tree Surgeons Inc*., 15 BNA OSHC 1793 (No. 76-4083, 1992) citing *Fl. Mach. & Foundry, Inc*., 693 F.2d 119, 120 (11th Cir. 1982).

Here, Respondent had actual knowledge on May 15, 2017 that Mr. Norton was pressure washing a dock at the Worksite using a rotary scrubber to clean every inch of the dock up to and

[93] The parties agree that the Secretary did not put forth evidence of industry custom at trial. The Secretary asserts that he need not address "industry custom" because here Respondent had actual knowledge of the hazard. (Sec'y Reply to Resp't Post Hr'g. Br., at 8, Resp't Post Hr'g. Br., at 18).

including the very edges of a ten foot wide, 289 feet long unguarded, raised above the water, dock while wearing rubber boots and not wearing a PFD while surrounded on three sides by open, 19 feet deep water in Tampa Bay, Florida. ((Tr. 371-73, 392-93, 426, 498-501, 601; Exs. 23, 35, at 63-73; SF 2-6, 9-11; Sec'y Reply to Resp't Post Hr'g. Br., at 7-8). Respondent's management tasked Mr. Norton to scrub and pressure wash the dock. (Tr. 450-51; Exs. O, at 2, U, at 5). At least two separate C&W supervisors, Mr. Walker and Ms. Alberti, were fully aware that Mr. Norton was pressure washing the dock without a PFD that morning. After Mr. Norton pressure washed the dock the first time, Ms. Alberti told him to go back and clean some rust stains off the dock. (Tr. 378-82, 450-51, 498-99, 601; Exs. 24, 35, at 23, 35, 54, 65, 78, O, at 2, U, at 5, 8, Y, at 6).

Actual knowledge may be imputed to the employer where a supervisor continues to work in the area of the violative condition through the time of the accident. *Am. Wrecking Corp*., 19 BNA OSHC 1703, 1710 (No. 96-1330, 2001) (consolidated), *affd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003). The violative condition, Mr. Norton not provided and wearing a PFD while he was pressure washing a boat dock at the TCC on May 15, 2017, did not change between the time Ms. Alberti observed him working and when Ms. Alberti sent Mr. Norton back to the dock to clean the rust stains. Mr. Wendall acknowledged that falling into water that was nineteen feet deep was a drowning hazard. (Ex. 35, at 69). He further acknowledged that there was a "general hazard" where a worker pressure washing a dock with an unguarded edge could trip, slip or fall into water the abutted the dock's edge. These acknowledgements were made on behalf of Respondent at Mr. Wendall's Rule 30(b)(6) deposition. (Ex. 35, at 72-73).

The Secretary need not show that an employer understood or acknowledged that the physical conditions were actually hazardous. He must show only that the employer was aware of the physical conditions that constitute a violation. *Jake 's Fireworks Inc*., 893 F.3d 1248, 1260 (10th Cir. 2018). C&W Supervisors Alberti and Walker were fully aware of the physical conditions that constituted a violation, i.e. that Johnnie Norton was pressure washing a boat dock at the TCC without wearing a PFD on May 15, 2017. (Ex. 1). Respondent also misstates the Secretary's burden where it argues that the "Secretary failed to establish in the record that Respondent had actual knowledge that a personal flotation device was necessary for the work performed at the Tampa Convention Center." (Resp't Post Hrg. Br., at 42). The Secretary need not show that a PFD was "necessary for the work performed." *S&H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n,* 659 F.2d 1273, 1284 (5th Cir. 1981), provides that the Secretary must show "clear actual knowledge that personal protective equipment was necessary under the circumstances." (*Id*.).

In the thirty seconds after Mr. Norton fell into the Tampa Bay, video evidence shows Mr. Norton splashing and struggling in the water (Ex. 12). He was unable to remain above water, get or stay afloat, reach the dock or its deck, or swim to the sea wall. (Exs. 5, 9, 12). Under these circumstances, where Mr. Norton suddenly fell into Tampa Bay, a PFD would have prevented Mr. Norton from quickly sinking down into the Tampa Bay and drowning. (Sec'y Reply to Resp't Post Hr'g. Br., at 14-15).

These facts demonstrate that Respondent had "clear actual knowledge that PPE was necessary under the circumstances." The circumstances (that the dock was unguarded and surrounded on three sides by the Tampa Bay, and that there were no ladders extending off the dock) are facts that existed before Mr. Norton drowned. When Mr. Sheehan asked Mr.

Norton if he could swim, he was aware of these "circumstances."

The Court finds that the Secretary has carried his burden in this regard.

Respondent's attempts to argue that it did not have knowledge of the hazard because it did not "see a hazard" are rejected. Mr. Wendell testified that he did not "see a risk there ... a risk that warrants a PFD …." (Tr. 502). Respondent's JHA did not identify a drowning hazard associated with pressure washing and Mr. Wendell did not know if the JHA was site specific to the dock. (Tr. 503; Ex. 21). The JHA provides little support to Respondent's argument. Whether or not Respondent understood or acknowledged that the physical conditions were actually hazardous is not dispositive. *Jake 's Fireworks Inc*., 893 F.3d at 1260. (Sec'y Post Hr'g. Br., at 40).

Respondent's position that it just did not see a "risk there" is unpersuasive because its own employees recognized the hazard. Operating a pressure washer and rotary scrubber on an unguarded dock close to water is an open and obvious hazard as discussed above. As Mr. Wendall stated at his Rule 30(b)(6) deposition, anyone tasked with using a pressure washer to clean the dock would have to get the entire dock, including the very edge of the dock that abuts the water. (Tr. 499-501; Ex. 35, at 63-67). C&W's employees, not on Awnclean's weekly payroll, recognized that working near water while pressure washing presented a drowning hazard. Mr. Estonier routinely wore a life jacket/PFD when he pressure washed the dock. (Tr. 382, 386; Ex. 24, at 7). Ms. Ballard testified that she observed C&W management watching Mr. Estonier pressure washing the dock while wearing a life jacket. (Tr. 92, 110; Ex. 27, at 2). In another instance, Mario Arana wore a life jacket when he pressure washed the dock once when Mr. Norton was sick. (Ex. 26). Mr. Arana knew how to swim but wore the life jacket anyway because he "wanted to be sure that [he] was protected." (Ex. 26). C&W supervisor Sheehan also

recognized the hazard because he specifically asked Mr. Norton if he could swim. This conversation happened when Mr. Norton was told to do pressure washing on the dock. He was asked because the person that used to clean the area had a fear of water and used to put a jacket on. (Tr. 386, 442; Ex. 23). The fact at least two C&W employees recognized the hazard belies Respondent's argument that it "didn't see a hazard there." (Sec'y Post Hr'g. Br., at 37-42).

Respondent points to *Cotter & Co. v. Occupational Safety & Health Review Comm'n*, 598 F.2d 911 (5th Cir. 1979) in support of its position that the citation should be vacated. (Resp't Post Hr'g. Br., at 40). In *Cotter*, the Fifth Circuit Court of Appeals reversed the Commission's decision which had found actual knowledge, by finding no evidence of "confirmed knowledge"[94] on the employer's part regarding a hazard warranting PPE. *Cotter*, 598 F.2d at 915. In support of its holding, the *Cotter* Circuit court found that an employer's voluntary provision of steel-toed shoes to employees did not establish actual knowledge of the hazard. (*Id.* at 914). The Circuit court reasoned that the safety-shoe program was "established merely to accommodate the preferences of the employees." (*Id.*). The Circuit court further explained its rationale stating that it recognized "the folly of discouraging an employer, by expanding the scope of his liability beyond what it would otherwise be, from exhorting employees to take every possible safety precaution in the development of a superior industrial safety program." (*Id.).*

That is not the case here. Cotter's holding is distinguishable from the case at hand. Respondent did not exhort employees "to take every possible safety precaution." Respondent did not provide Mr. Norton with a host of safety precautions, including a PFD, Mr. Norton

[94] The Court finds that Respondent had specific confirmed knowledge that PFDs were warranted because C&W Supervisor Sheehan specifically asked Mr. Norton if he could swim. Mr. Sheehan's query as to whether Mr. Norton could swim is evidence of actual knowledge that pressure washing the boat dock at the TCC without a PFD being issued and worn presented a drowning hazard. (Sec'y Rely to Resp't Post Hr'g. Br., at 11-12).

could have taken. Instead, Respondent did not give Mr. Norton any PPE even after Mr. Sheehan made a specific inquiry of Mr. Norton regarding a hazard (drowning) warranting a PFD. (*Id.* at 915). Mr. Norton did not express a "preference" for a PFD and Respondent did not "take every possible safety precaution in the development of a superior industrial safety program." (*Id.).* Instead, Mr. Sheehan recognized a specific hazard (drowning) and then did nothing. Respondent did not require the use of a PFD once it recognized the drowning hazard. (Sec'y Reply to Resp't Post Hr'g. Br., at 8-9).

The aforementioned facts establish that C&W supervisors had actual knowledge that Mr. Norton was pressure washing an unguarded boat dock at the TCC on May 15, 2017 without being provided with, or wearing, a PFD.

VIII. THE VIOLATION WAS PROPERLY CLASSIFIED AS SERIOUS AND THE PROPOSED PENALTY IS REASONABLE

Under section 17(a) of the Act, a "serious" violation exists if there is a "substantial probability that death or serious physical harm could result" from the condition and the employer knew, or with reasonable diligence could have known, of the presence of the violation. *See E. Tex. Motor Freight, Inc*., 671 F.2d 845, 849 (5th Cir. 1982); *Cal. Stevedor & Ballast Co*., 517 F.2d 986, 988 (9th Cir. 1975); *Ga. Elec. Co.,* 595 F.2d 309, 318 (5th Cir. 1979).

Respondent's knowledge of the conditions has been established. In determining whether the violation here was serious, the only consideration is whether there would be a substantial probability of death or bodily harm in the event of an accident. The Secretary need not prove substantial probability that an accident will occur, only the probability of death or bodily harm if an accident occurs.

The evidence in this case establishes that there is a high probability of death or serious bodily harm if an accident occurs given that Mr. Norton actually drowned. This evidence is

sufficient to support a serious citation. Accordingly, the violation was properly classified as "Serious."

The evidence also reflects that the penalty of $12,675 was properly calculated and should be affirmed. Section 17(j) of the Act, 29 U.S.C. 666(j), requires the Secretary to consider four factors in proposing penalties: the gravity of the violation and the employer's good faith, history, and size. The Act does not prescribe how or what weight to apply to the factors. *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1001 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977) (OSHA penalties are meant to "inflict pocket-book deterrence"). Usually, the gravity of the violation is the factor of greater significance. *Caterpillar, Inc*., 15 BNA OSHC 2153, 2178 (No. 97-922, 1993). Penalty assessment requires application of administrative discretion. *D.S. Grading Co., Inc*., 899 F.2d 1145, 1148 (11th Cir. 1990).

CO Marrero testified that there was a "greater" probability of an accident in light of the fact that C&W employees, including workers on Awnclean's weekly payroll, were routinely pressure washing the dock without wearing a PFD device, and, in this case a fatality occurred. (Tr. 409). Accordingly, the gravity of the violation is properly classified as "high/greater." (Tr. 413). The Secretary's analysis resulted in the assessment of a $12,675 penalty. (Tr. 408; Sec'y Post Hr'g. Br., at 44-46).

The Court finds that the Secretary properly considered Respondent's size, history of violations, and good faith and determined that no adjustments to the gravity-based penalty were warranted. (Tr. 409). After considering these same factors, the Court agrees with the Secretary's proposed penalty and assesses the penalty of $12,675.

IX. RESPONDENT'S DEFENSES FAIL

In its Answer, Respondent pleaded numerous defenses: inapplicability of the standard, that it was not an employer of Mr. Norton, it was not a controlling employer at the Worksite, that Mr. Norton's drowning was an isolated incident, that it took adequate alternative measures, that it lacked knowledge that PFDs were required in these circumstances, that the violation was not serious, that it followed normal and customary procedures in its industry, that its safety precautions were adequate, and estoppel.[95] Each and every one of these defenses fails. (Sec'y Post Hrg. Br., at 46-51).

The Secretary has proven his prima facie case. He has shown that the standard applies, Respondent was in an employee-employer relationship with Mr. Norton on and before May 15, 2017 for at least several months, or, at the very least, was a controlling employer, and that Respondent had actual knowledge that its employees were pressure washing the boat dock at the TCC without being issued or wearing PFDs.

Respondent's argument that Mr. Norton's drowning is an isolated incident is unsupported. The affirmative defense of "isolated incident" is sustained when an employer proves that the assertedly isolated incident results from an employee's departure from a uniformly enforced work rule. *B-G Maint. Mgmt., Inc*., 4 BNA OSHC 1282 (No. 4713, 1976); *Robert T. Winzinger, Inc*., 4 BNA OSHC 1475 (No. 6790, 1976). Respondent's has not identified any work rule that Mr. Norton allegedly violated. As such, Respondent has not carried its burden and this affirmative defense fails.

Respondent's adequate alternative measures defense also falls short. In

[95] Respondent has abandoned its estoppel defense. (Ex. 32, at 10, answer to Interrogatory No. 9).

Novak & Co., Inc., 11 BNA OSHC 1763, 1765-66 (No. 80-7335, 1984), the Commission held that where a "a hazard remains unabated, the employer who does not create or control the hazard will be relieved of any responsibility for violating the standard if it can establish that it used reasonable alternative means to protect its employees or had no actual or constructive knowledge that the condition was hazardous." (*Id*.). Here, Respondent controlled whether employees were exposed to the drowning hazard and had actual knowledge of it. Respondent sent Mr. Norton to pressure wash and rotary scrub an unguarded boat dock close to water without issuing him a PFD and requiring its use. C&W Supervisor Alberti sent Mr. Norton back to the dock to remove a rust stain. Respondent ordered Mr. Norton to do the work and controlled the Worksite. It had actual knowledge as imputed to it through its supervisors Ms. Alberti and Mr. Walker. There is no persuasive evidence that Respondent took any meaningful alternative measures to protect Mr. Norton from drowning while pressure washing the boat dock at the TCC on May 15, 2017. During her Rule 30(b)(6) deposition, C&W's designated representative, Ms. Diaz, could not articulate any facts about this defense.

> Q: What does C&W believe that it did to protect against . . . the violation alleged in the citation?
>
> A: I don't know.

(Ex. 35, at 103).

Respondent's defense that it lacked knowledge that PFDs were required in these circumstances is unpersuasive and also fails. As noted above, Respondent argues that it lacked knowledge that PFDs were required. For the reasons outlined above, Respondent had actual knowledge of the hazard.

Respondent's argument that the violation was not serious is also without merit. As set forth above, in determining whether a violation is serious, the only consideration is whether

there would be a substantial probability of death or bodily harm in the event of an accident. The Secretary need not prove substantial probability that an accident will occur, only the probability of death or bodily harm if an accident occurs. Here, an accident occurred, and Mr. Norton drowned. The violation was properly classified as "Serious".

Respondent's claim that its practices were consistent with normal and customary procedures in the facilities management industry is unpersuasive. Respondent has not sufficiently shown what the industry norms are. During Ms. Diaz's Rule 30(b)(6) deposition, she admitted that Respondent only looked to what the TCC did. She said:

> Q: Are you saying that there are other companies within that industry that don't recognize the need for PFDs when working on a dock?
>
> A: No, I am not saying that.
>
> Q: Okay. You are saying that as far as the City of Tampa's training and the recommendations from the pressure washer manufacturer, that's what your answer is based on?
>
> A: Correct.

(Ex. 35, at 109).

The TCC is in the "facilities management industry." But what it told, or did not tell, Respondent to do does not by itself establish normal and customary procedures within the facilities management industry.

The Secretary has carried his burden showing that Respondent had actual knowledge that Mr. Norton performed pressure washing work on the boat dock at the TCC without being issued, or wearing, a PFD on May 15, 2017. What the employer's industry would deem appropriate under the circumstances of this case is therefore immaterial. Moreover, neither Mr. Wendell nor Ms. Diaz were qualified as an expert witness pursuant to Fed. R. Civ. P. 702. They were only

competent to speak about their own actual knowledge and were not qualified to opine about what the employer's industry would deem appropriate under these circumstances.

It is Respondent's duty to identify hazardous conditions. Respondent conducted a JHA for pressure washing at the TCC.[96] (Ex. 21). Its JHA identifies three components for training on: how to operate the pressure washer, required PPE, and the manufacturer's/operator's manual. (Ex. 21, at 2). Respondent's reliance on the pressure washer manual to establish "normal and customary procedures in the facilities management industry" is deficient. It is not the pressure washer manufacturer's duty to identify all hazardous conditions.

Respondent argues that its safety precautions were adequate. Respondent has admitted that it did nothing to protect workers from a drowning hazard at the dock at the TCC. During C&W's Rule 30(b)(6) deposition, Ms. Diaz admitted that Respondent did not take any measures to prevent drowning hazards at all. She said:

> Q: What specific measures did C&W take to prevent drowning hazards at the TCC site?
>
> A: Not for drowning hazards. We don't have anything documenting drowning hazards. I mean, our jobs and tasks really don't represent a drowning hazard.

(Ex. 35**,** at 104).

It is disingenuous for Respondent to allege that its safety precautions were adequate while simultaneously admitting that it did nothing to prevent drowning hazards at the boat dock at the TCC.

[96] Respondent made it "really clear" that it did not want Awnclean to write up a JHA for work done at the TCC by workers on Awnclean's weekly payroll. (Tr. 199-200).

X. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

XI. ORDER

Based on these findings of fact and conclusions of law, it is **ORDERED** that Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1910.132(a) is **AFFIRMED** and a penalty of $12,675 is **ASSESSED.**

SO ORDERED.

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

Date: February 14, 2020
Washington, D.C.