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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

TESSIER'S, INC., and its successors,

Respondent.

OSHRC Docket No. 18-0859

Appearances:

Jennifer Casey, Esq., Department of Labor, Office of Solicitor, Denver, Colorado
For Complainant

Aaron Dean, Esq. & Kelly C. Engebretson, Esq., Moss & Barnett, Minneapolis, Minnesota
For Respondent

Before: Judge Patrick B. Augustine – U. S. Administrative Law Judge

DECISION AND ORDER

During the construction of an orthopedic and sports medicine facility in Rapid City, South Dakota, one of Respondent's employees fell through a hole in the roof as he was modifying its cover to accommodate the installation of a roof curb.¹ The employee fell twenty-two (22) feet to the second floor and suffered serious injuries as a result. Subsequent investigation revealed the employee removed the load-bearing edges of the hole cover while leaning on it, causing the hole cover to fall into the hole. Complainant cited Respondent for allowing its employees to modify a hole cover while it was being used as fall protection without taking additional measures to protect against the fall hazard below which it claims was a violation of the Occupational Safety and Health Act of 1970 ("Act"), 29 U.S.C. §§ 651-678. Respondent contends it did not know, nor could it have known, the general contractor failed to

¹. As explained for fully below, a roof curb houses an air handling unit (AHU) that moves air through a building's HVAC system. (Tr. 82).

attach the hole cover to the building's structure. Ultimately, as discussed below, the Court finds Respondent violated 29 C.F.R. § 1926.501(b)(4)(i).

I. PROCEDURAL HISTORY

Upon receiving a report of the above-described injury at the Rapid City worksite, the Sioux Falls OSHA Area Office contacted the Area Office in Billings, Montana—which was geographically closer to Rapid City, South Dakota—and requested assistance conducting the inspection. The Billings Area Director dispatched Compliance Safety and Health Officer (CSHO) Anthony Castillo to conduct a partial inspection of the worksite that was limited to the employee's fall through the hole in the roof. (Tr. 76–77). After conducting an opening conference with the general contractor of the worksite, Layton-Gustafson, and Respondent, CSHO Castillo inspected the area where the fall occurred and conducted interviews of various employees. Based on his investigation, CSHO Castillo recommended, and Complainant issued, a Citation and Notification of Penalty (“Citation”) to Respondent, which alleged a serious violation of 29 C.F.R. § 1926.502(i)(3) and proposed a penalty of \$7,068. Respondent timely contested the Citation, bringing this matter before the Occupational Safety and Health Review Commission (“Commission”).

On June 22, 2018, the Chief Administrative Law Judge designated this case for Simplified Proceedings under Commission Rule 203(a). Less than a week later, Complainant submitted an unopposed motion to discontinue Simplified Proceedings, which was granted by the Court. On July 18, 2018, Complainant filed its Complaint, in which he amended the Citation to allege a violation of 29 C.F.R. § 1926.501(b)(4)(i). On August 2, 2018, Respondent filed its Answer, which generally denied all allegations in the Complaint and asserted various general and affirmative defenses. The trial was initially set for two days, on April 4–5, 2019, in Sioux Falls, South Dakota. On the beginning of the second day, it became clear to the Court the parties would not finish their respective presentations of evidence in the time requested, so the trial had to be held over and reconvened for a third day on April 29, 2019. Both parties timely filed post-trial briefs.

II. STIPULATIONS & JURISDICTION

The parties stipulated to, and the Court adopts, the following jurisdictional facts:

1. Jurisdiction of this action is conferred on the Occupational Safety and Health Review Commission by section 10(c) of the Act.
2. The Administrative Law Judge has subject matter and personal jurisdiction over the dispute in this case.
3. At all relevant times, Respondent was engaged in [a] business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and was an employer within the meaning of section 3(5) of the Act.
4. The Secretary timely issued the citation at issue herein pursuant to section 9(c) of the Act.
5. Respondent timely contested the citation and proposed penalty at issue herein, pursuant to the provisions of section 10(c) of the Act.
6. At all times relevant to this litigation, the Secretary employed Anthony Castillo as a Compliance Safety and Health Officer for the Occupational Safety and Health Administration (OSHA), assigned to OSHA's Billings, Montana, Area Office. He served in that position and was an authorized representative of the Secretary at all pertinent times.

See Joint Stipulation Statement. The parties also agreed to the following "undisputed facts":

1. At all times relevant to this litigation, Respondent was under contract to install a new heating, ventilation, and air conditioning system at the Advanced Orthopedic and Sports Medicine Institute (AOSMI), located at 1635 Caregiver Circle, Rapid City, South Dakota 57701 ("the worksite").
2. On or about March 8, 2018, Respondent was tasked with installing roof curbs at the AOSMI project. The curbs were designed to accommodate Air Handling Units ("AHU") at a future date.
3. The floor hole covers were manufactured and installed by Layton-Gustafson, the general contractor at the worksite.
4. On March 8, 2018, a Tessier's employee suffered serious injuries after a floor hole cover collapsed and the employee fell approximately 22 feet to the concrete floor below.
5. On March 9, 2018, Inspector Castillo initiated an accident investigation at the worksite (OSHA Inspection No. 1300671).

Id.

III. FACTUAL BACKGROUND

A. The AOSMI Project

The AOSMI project was a joint venture between Layton Construction and Gustafson Construction Corporation, two general contractors that, for the purposes of the project, served as a single contractor. The joint venture did not have any employees, *per se*; instead, employees from each general contractor continued to work for, and be paid by, their respective employer. (Tr. 299–300). For the purposes of setting policy and hiring subcontractors, however, the joint venture (hereinafter “LG”) was a singular entity. (Tr. 299–300). As it relates to this case, LG hired MMC Contractors to provide the labor, materials, equipment, and drawings for the installation of wet and dry mechanical systems, *i.e.*, plumbing and piping and HVAC and ductwork, respectively. (Tr. 327). While MMC was principally responsible for the wet side of mechanical (plumbing), it hired Respondent to install “dry side” mechanical, such as air handling units, roof curbs, and ductwork for the HVAC system. (Tr. 81, 327).

B. The Day of the Fall

On the day of the incident, Respondent had two crews at the worksite, totaling 14 employees. (Tr. 81, 848). At the beginning of the day, Respondent’s crews, as well as every other contractor at the worksite, participated in a safety stand down in response to a couple of near misses and injuries that occurred on the worksite up to that point in the project.² (Tr. 455). According to Jared Brandt, Layton’s project safety manager, the various trades gathered for a group discussion, wherein they were told to “get their house in order” by reviewing their respective scopes of work, identifying ways to cut down on injuries, and performing housekeeping. (Tr. 455–459). The stand down ended roughly mid-morning, at which time all of the subcontractors went back to where they were scheduled to work for the day. (Tr. 458–59).

². One incident involved one of Respondent’s foremen, Carl Fleming, operating a forklift in an unsafe manner. (Tr. 456, 537). Another incident involved a piece of sheeting that had blown off the roof because it was not adequately secured against wind. (Tr. 455–456).

According to Carl Fleming, Respondent's foreman, and as documented in their pre-task plan, Respondent's crews were working in aerial lifts installing ductwork in Area C and Area A on the first floor and installing hangers and laying out wall openings in Area C of the second floor.³ (Tr. 703; Ex. J-4 at 70). At some point that morning, LG told Respondent's crews they needed to shift gears and start installing the curbs on Area C of the roof. (Tr. 592). According to Jason Fenner, one of Respondent's employees, concrete pads for the AHUs had been poured the day before, and the curbs needed to be installed before the roofers started installing roof membrane the following day. (Tr. 592). Even though the scope of Respondent's work changed at that point, Fleming, who was the head foreman for Respondent, did not fill out another pre-task plan for the change in work. According to [redacted], one of Respondent's employees, a new or modified pre-task plan was required when a new task was started. (Tr. 684).

Area C of the roof had five holes where three separate AHUs would be installed.⁴ Each of the holes was equipped with a cover, which was emblazoned with the word "hole". (Tr. 341; Ex. C-3 at 10, 11, R-12). The curbs were designed to fit around the holes where the AHUs would be installed. (Tr. 338; Ex. R-10 at TESS000602). The materials for the roof curbs, which were mostly galvanized tin, were lifted to the roof and built in the location where they would ultimately be placed. (Tr. 82-84, 461-62). Once Respondent's employees had built the curbs, they moved them into place around the holes where the AHUs would be installed. (Tr. 84-85). As they were moving the curbs into place, Respondent's employees noticed the hole covers had an excess of overhang, which prevented the curbs from sitting flush against the holes' edges. (Tr. 564, 567, 612). In response, Jason Fenner and [redacted], who were in charge of installing the curbs, decided to trim the edges of the hole covers to accommodate the curbs. (Tr. 565). Fenner relayed his plan to Fleming, who acknowledged the plan to cut the edges.

³. Due to the size of the building, the project was broken down into Areas A, B, and C. (Tr. 83).

⁴. One of the AHUs was unique and utilized the same hole for intake and output, whereas the other two AHUs had separate holes for those functions. (Tr. 339-40).

(Tr. 565). Respondent's plan to cut the covers while they were in place was premised on Fenner and [redacted]'s belief the framework of the covers was bolted to the structural steel of the roof. This plan was not communicated to LG or MMC, even though representatives of both, including the carpenter who had fabricated the covers, were present at the worksite. (Tr. 454, 487, 1145). Had Respondent communicated with LG, or had its employees done a more thorough inspection of the covers, it would have discovered the covers on the roof were not physically attached to the structure of the building.

Respondent's employees had to modify two hole covers to accommodate the curbs. On the first cover, for AHU No. 6, Fenner and [redacted] cut a small strip of wood from the short end of the cover, roughly 1–2 inches x 3 feet.⁵ (Tr. 562–63, 566; Ex. C-3 at 3). Nothing happened during the modification of cover Number 6. This is likely because the cover still retained load-bearing capacity on both long ends of the cover, thus allowing it to remain suspended in place. (Tr. 102). On cover Number 4, however, Fenner and [redacted] removed strips of wood from both the long and short ends of the cover, which produced a hinging effect.⁶ After removing a portion of wood on the short side, [redacted] and Fenner were removing a strip of wood along the long side while [redacted] was leaning on the middle of the cover. (Tr. 646). Once enough of the strip on the long side had been removed, the cover collapsed, and [redacted] fell through the hole. (Tr. 577). Fenner was able to catch himself and was assisted to safety by other members of the crew, who were standing on the outside of the curb waiting to push it into place. (Tr. 575–76).

C. The Hole Covers

According to the evidence, there appears to have been different types of hole covers used at the AOSMI worksite, and the type of cover being used varied based on where the hole was located and the conditions at that location. While there is agreement regarding the fact that some covers on the second

⁵. Others, including CSHO Castillo and Paul Adams, testified that the opening was 2–3 inches wide; however, no one took an actual measurement of the cut to verify this. (Tr. 412)

⁶. The specific dimensions, which are in dispute, are described more in subsection C, *infra*.

floor of AOSMI were attached to the building, the evidence regarding when and how those covers were attached to the building is in dispute. As for the covers on the roof, the evidence shows they were never attached to the building, notwithstanding Respondent's belief that they were. (Tr. 113–14, 490, 1147). Although they were not attached to the structure, the covers on the roof were modified before the concrete pads were poured for the AHUs. (Tr. 1003, 1140).

Paul Garcia, a carpenter for Gustafson, was initially responsible for installing the hole covers throughout the AOSMI project. (Tr. 1155). Initially, the holes on the roof were framed by “L” shaped bent steel plates, which were supported by underlying I-beams. (Tr. 1140; Ex. J-2). Prior to the installation of the concrete pads, Garcia testified he fabricated covers that relied on a 2x4 frame, which rested outside of the bent steel plates. (Tr. 1140). He set the 2x4 box outside the bent plate and screwed a sheet of plyform⁷ into the box. (Tr. 1140). Later in the process, Garcia was informed he needed to modify the hole covers so they would not interfere with the concrete deck that needed to be poured for the AHUs. (Tr. 1142). In response, with the approval of LG Project Safety Manager Jared Bradt and Superintendent Marty Lieberman, he changed the structure of the hole covers so the 2x4 frame sat snugly inside the bent plate—as opposed to outside—and reattached the plyform to the top of the frame. (Tr. 1142, 1169). He referred to these covers as “friction” covers. (Tr. 1152). In both instances, the plyform/plywood served as the load-bearing surface; however, in the latter iteration, the amount of plywood overhanging the bent plate was less, roughly one-half-of-an-inch to an inch. (Tr. 88, 1153–54). Garcia was still convinced, though he did not test it, the covers would hold approximately 600–700 pounds. (Tr. 1160).

Also at issue during trial was the makeup of the surface of the cover for AHU No. 4, where [redacted] fell. According to Fenner and [redacted], the cover was comprised of four pieces of plywood,

⁷. According to Garcia, plyform is used to create concrete forms and is designed to withstand the pressure of concrete, and is, thus, stronger than plywood. (Tr. 1140–41). The references in the transcript bounce back and forth between plywood and plyform, suggesting that both were probably used.

including: two small strips that were no more than an inch or two wide, and collectively spanned the nearly eight-foot length of the cover; the substantial piece of plywood still attached to the frame after it fell through; and the three-foot by one-foot section found on the roof. (Tr. 584–89, 614, 682; Ex. R-27). Both Fenner and [redacted] testified they had used a Sawzall to cut a 1–2-inch wide section on the short end (3-foot wide) of the cover and had begun unscrewing a separate, 1–2-inch wide strip along the eight-foot length of the cover when it collapsed. (Tr. 633, 667). They could not explain why a 12-inch by 3-foot section was missing from the cover and, ultimately, found on the roof where they were cutting. (Tr. 590; Ex. C-3 at 15, 16). That said, [redacted]’s testimony at trial differed markedly from his deposition testimony, wherein he testified they removed a one-foot by three-foot section, as opposed to a three-foot by 1–2-inch section. (Tr. 646–48; Ex. C-3 at 15). At no time did they believe there was a hazard, however, because they believed the underlying 2x4 frame was attached to the bent steel structure. (Tr. 581, 638–39).

Conversely, according to Garcia, the covers of AHU Nos. 4 and 6 were comprised of a single piece of plywood, or perhaps two pieces given the space it had to cover. (Tr. 1158). He testified, however, he would not have used an 8-foot long strip that was only 1–2-inches wide as a load-bearing member of the cover. (Tr. 1161). CSHO Castillo, who believed the hole cover for AHU No. 4 was composed of two pieces of plywood, appeared to agree, at least in part, with Garcia. (Tr. 266–270; Ex. C-3 at 16). Paul Adams, from Layton Construction, testified it was three pieces of plywood—the two pieces discussed by CSHO Castillo, as well as the 1–2-inch-wide strip that ran the eight-foot length of the hole cover. (Tr. 436–37; Ex. R-26). Jared Bradt, of Gustafson Construction, testified the cover was a single piece and the separate pieces were removed with a saw and/or pry bar. (Tr. 520).

The foregoing disparities make it difficult for the Court to piece together exactly how the cover for AHU No. 4 was constructed and how many pieces it was made from. The cut mark on the short end

of the 2x4 frame⁸ lends credence to the testimony that [redacted] and Fenner used a Sawzall to remove a roughly 1–2-inch section from the end. It is unclear why Fenner and [redacted] would also remove an additional 12 inches from that end of the cover, but the fact that a section of plywood with those dimensions was found on the roof after [redacted]’s fall provides a strong indication they did. Though the screw holes on the underlying 2x4 cross-brace appear as if the screws had been ripped out, there is still no explanation as to why that one-foot by three-foot section of plywood remained on the roof when everything else fell through. The lack of similar saw scoring along the lengthwise 2x4 underlaying the cover (across the top of the word “Hole” on Exhibit C-3, p. 15), coupled with the splintering around the screws in the 2x4 frame, seems consistent with Fenner and [redacted]’s testimony they were merely removing screws from a narrow section of plywood when it collapsed instead of using a saw to cut a piece of that length.⁹ Regardless of how it was constructed, though, Respondent did not provide the Court with any definitive evidence to suggest the cover, as constructed, was insufficient to support a load consistent with the requirements of 29 C.F.R. § 1926.502(i). As for whether LG failed to comply with the standards governing hole covers by physically securing it to the structure, the Court shall address that issue in Section V.1.b.i, *infra*.

As for the hole covers on the second floor, the Court is again confronted with conflicting testimony about the way they were built and secured to the building. According to Respondent’s employees, they claim they saw covers on the second floor physically attached to the concrete floor with tapcon screws, as illustrated in Exhibit R-12, prior to [redacted]’s fall. According to Garcia, however, he was solely responsible for installing the hole covers prior to the accident and at no time did he use tapcon screws to fasten the covers to the concrete. (Tr. 1154–55). Instead, he testified any covers on the second floor that were fastened to the structure were simultaneously surrounded by guardrails. (Tr.

⁸. For ease of reference, the Court is referring to the score mark as seen on Exhibit C-3, p. 15, on the upper right-hand portion of the cover when viewed with the word “Hole” in its proper, upright orientation.

⁹. Similar scoring can be seen along the 2x4 that was on the short end of the hole cover. (Ex. C-3 at 16).

1147). The presence of guardrails around the second floor hole covers was also noted by Fenner. (Tr. 594). Garcia testified it was only after [redacted]'s fall that other LG employees were brought in to modify all the floor hole covers. (Tr. 1155). In either case, there was a notable difference in appearance between the structurally fastened hole covers on the second floor and the covers installed on the roof.

D. Post-Fall Inspections

1. Employer Investigations

After [redacted]'s fall, LG closed down the worksite and the employees who witnessed the incident were asked to complete a written statement of the events leading to the fall. (Tr. 407, 521–22; Ex. C-11). The general consensus from the statements taken from Respondent's employees was they felt rushed to complete the job, they were mistaken in their belief that the covers were structurally attached, and they should have been wearing fall protection. (Ex. C-11). Two employees, including [redacted], reported the covers were insufficient and the wood cover should not have given way in the manner that it did. (Ex. C-11 at 6, 14). To illustrate what happened, the employees generated a diagram, which showed where [redacted] was at the time of the collapse and how the plywood cover was constructed. (Ex. J-9 at 1). LG's project manager, Jared Bradt, made a computer-generated version of the diagram, which he edited in an attempt to provide additional illustration; however, he admitted he made modifications that suggested the removal of a one-foot by three-foot section, which was not reported in the employee interviews. (Tr. 511; Ex. J-9).

Subsequent analysis by LG and Tessier's led to starkly different conclusions. Tessier's found the failure was due to the covers not being attached to the structure, which it believes is required and representative of industry standard. LG, on the other hand, asserts the failure was due to Tessier's employees cutting the load-bearing portions of the floor hole cover without conferring with LG about the nature of those covers prior to making alterations. Irrespective of the cause,¹⁰ though, Complainant

¹⁰. See *American Wrecking Corp.*, 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated) (“Determining whether the standard was violated is not dependent on the cause of the accident.”), *aff'd in part, rev'd in part*, 351 F.3d 1254 (D.C.

ultimately determined Tessier's exposed its employees to a fall hazard by permitting its employees to modify the cover while it was in place without utilizing an additional form of fall protection.

2. OSHA Inspection

As noted above, CSHO Castillo conducted an inspection in response to a reported injury at AOSMI. CSHO Castillo recorded his observations on video, conducted interviews, and gathered relevant documents, but he did not record measurements of the gaps remaining in the covers or of the individual cover pieces involved in the accident. (Tr. 220, 228–29). At the conclusion of his inspection, he recommended a Citation, which alleged a violation of 29 C.F.R. § 1926.502(i)(3). After the inspection, Area Director Sheila Stanley held an informal settlement conference with Respondent's Safety Director, Ron Faber, during which Faber attempted to show why Respondent had no liability under § 1926.502(i)(3). In response, Complainant amended the citation to allege a violation of § 1926.501(b)(4)(i), which is discussed in further detail below.

IV. BURDEN OF PROOF AND LAW APPLICABLE TO 5(a)(2) VIOLATION

To establish a *prima facie* violation of a specific standard promulgated under section 5(a)(2) of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

Complainant must establish his *prima facie* case by preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995).

“Preponderance of the evidence” has been defined as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from

Cir. 2003).

all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014).

V. ANALYSIS, FINDINGS OF FACT AND LEGAL APPLICATION

1. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

29 CFR 1926.501(b)(4)(i): Each employee on walking/working surfaces was not protected from falling through holes (including skylights) more than 6 feet above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

- a) Tessier's, Inc. at 1635 Caregiver Circle, Rapid City, SD 57701: On or about March 8, 2018, and at times prior, employees were exposed to a fall of approximately 22 feet to the concrete floor below, while making modifications to floor hole covers in order to set curbs for new HVAC units to be installed. The employer failed to provide an alternative fall protection system or ensure the existing fall protection remained adequate for employees that were cutting and removing portions of the existing floor hole covers.

See Citation and Notification of Penalty at 6.

The cited standard provides:

Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

29 C.F.R. § 1926.501(b)(4)(i).

a. The Cited Standard Applies

"In order to establish a violation, the Secretary must show that the standards applied to the cited conditions." *Arcon, Inc.*, 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004). Under Commission precedent, "the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014). See also *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1267 (No. 06-1416,

2008)(finding “the cited ... provision was applicable to the conditions in KS Energy's traffic control zone”), *aff'd*, 701 F.3d 367 (7th Cir. 2012); *Active Oil Serv., Inc.*, 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005)(finding “that the confined space standard applies to the cited conditions” because “the vault was a confined space”).

The parties spent substantial time arguing over whether any particular cut in the cover made by Respondent’s employees was such that the hole left behind fit the definition of a hole under § 1926.500(b). This explains why Complainant focused so intently on whether Respondent removed a one-foot by three-foot section from the hole for AHU No. 4, and why Respondent pointed out that CSHO Castillo failed to take any measurements during his inspection. Notwithstanding those arguments, the question of applicability is fairly straightforward.¹¹ The fact there was a hole in the roof that required the installation of a cover is sufficient for the purposes of the standard regardless of whether any particular cut exposed a hole of sufficient size to fit the definition of a “hole” under § 1926.500(b). Alternatively, the Court nonetheless finds the removal of the one-foot by three-foot section of plywood from the end of the cover, which was found on the roof, indicates Respondent actually created a hole fitting the definition provided in Subpart M.

As an initial matter, the standards found under Subpart M “set[] forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926”, but do not apply “when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed.” 29 C.F.R. § 1926.500(a)(1). The AOSMI project is a construction workplace covered under Part 1926. Thus, as a general matter, the subpart M standards apply. The cited standard, as reproduced above, requires

¹¹. On a side note, the Court would like to point out it did not conclusively resolve the issue of applicability on Respondent’s oral motion for judgment on the pleadings, which Complainant asserts in lieu of specifically arguing the standard applies. Rather, the Court found the evidence did not clearly preponderate against Complainant and rejected the motion on that basis. That said, given the manner in which the Court framed its ruling, Complainant’s method of argumentation is understandable. In either case, the Court will address the question of applicability based on whether a hole existed, which Complainant addresses in the section discussing whether the standard was violated.

employers to protect its employees from holes more than six feet above lower levels and specifies how such protection shall be accomplished. Thus, the question of applicability is whether the condition precedent—a hole more than six feet above the next level—existed. Based on the plain language of the standard at issue, the Court finds it did. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (holding that before concluding a rule is genuinely ambiguous, court must exhaust all the ‘traditional tools’ of construction, including the text, structure, history, and purpose of a regulation).

According to § 1926.500(b), a “hole” is defined as “a gap or void 2 inches or more in its least dimension, in a floor, roof, or other walking/working surface.” 29 C.F.R. § 1926.500(b). In this case, there were five holes in the roof in Area C of the AOSMI roof, each of which had been fitted with a friction-style hole cover. The holes did not cease to exist simply because LG had installed hole covers; instead, LG took one of the enumerated steps (covers) under § 1926.501(b)(4)(i) to protect against the fall hazard presented by the holes. Indeed, under Subpart M, covers are required to be “color coded or [] shall be marked with the word ‘HOLE’ or ‘COVER’ to provide warning of the hazard.” *Id.* § 1926.502(i)(4) (emphasis added). In other words, the regulations note the hazard (e.g., a hole) still exists even though a protective element has been installed or implemented. Much like a roof edge equipped with a guardrail, the fall hazard does not disappear once the guardrail is installed; rather, it is merely protected against consistent with the dictates of the applicable regulation. Accordingly, the Court finds the standard applies.

Alternatively, the Court finds the standard applies based on the one-foot by three-foot section removed from the end of the cover for AHU No. 4. Although this piece is not specifically mentioned in the statements provided by Respondent’s employees in their post-accident interviews, such can be attributed to the fact the employees were focused on the narrow strips being removed at the time of the collapse. Just because the piece was not mentioned in their statements, does not mean [redacted] and Fenner did not remove it. In fact, [redacted] testified at trial that, during his deposition, he admitted he had removed a roughly one-foot by three-foot section of plywood from the end of the hole cover prior

to removing the 1 to 2-inch strip on the lengthwise portion of the cover, which ultimately led to the cover's collapse. (Tr. 647–48). Given that [redacted]'s deposition was taken closer in time to the accident, and considering the disputed piece of plywood was found on the roof, as opposed to the second floor, the Court finds it more likely the piece was removed during the modification of the floor cover. A hole of that size is more than sufficient to qualify as a “hole” under Subpart M, which only requires an opening of two inches or more in its least dimension. *See* 29 C.F.R. § 1926.500(b). Finally, though the underlying 2x4 cross brace, which runs across the width of the cover, shows signs the screws had been ripped out, the ends of the lengthwise 2x4s to which the one-foot by three-foot section was attached do not show a similar “volcano” effect, which indicates some of those screws were removed intentionally. (Ex. C-2 at 1, 4, 6, 7). Thus, the standard applies on this basis as well.

b. Respondent Violated the Terms of the Standard

Having satisfactorily proved the condition precedent—the existence of a hole on a walking/working surface more than six feet above lower levels—Complainant must also show Respondent failed to protect its employees from falling through that hole with one of the enumerated fall protection systems. While this incident occurred on a multi-employer construction site, this case does not involve many of the issues indicative of a typical multi-employer liability case, such as whether Respondent is responsible for the employees of another employer. Rather, the question in this case is whether Respondent violated the standard by permitting its employees to modify the fall protection system installed by the general contractor without utilizing other means of fall protection or otherwise ensuring the existing fall protection method would be effective both during and after the modification.

i. Respondent Failed to Protect its Employees

Once [redacted] and Fenner began to cut into the hole covers of AHU Nos. 6 and 4, albeit under the belief the cover was fastened to the structure itself, they undermined the integrity of the fall protection system and, thus, exposed themselves and others to the fall hazard posed by the hole beneath. They modified the hole covers, which were the only form of fall protection they used around the holes, without

knowing how the covers were built. Such knowledge could have been gained through conducting more than a “visual” inspection or by communicating with LG, who built the covers, about its plan to make such modifications. This presented a hazard in at least two ways, each of which resulted in Respondent failing to provide adequate protection as required by § 1926.501(b)(4)(i).

Respondent believed, without additional inquiry or inspection,¹² the covers were structurally fastened to the bent steel plate on the inside border of the hole. According to Respondent, it was standard practice—and required by regulation—for hole covers to be fastened to the building structure. There are at least two problems with this assumption. First, the standards do not require hole covers to be bolted, screwed, or otherwise fastened to the building structure. According to § 1926.502(i)(3), which Respondent was initially cited under, “All covers shall be secured when installed so as to prevent *accidental displacement* by the wind, equipment, or employees.” 29 C.F.R. § 1926.502(i)(3) (emphasis). In other words, the intent was to prevent a loose piece of plywood or material from being kicked or blown off the roof, but the question of what constitutes such a cover being “secured” is not immediately apparent. The intent behind this provision was clarified in the preamble to the final rule, and OSHA’s response to various proposals. OSHA remarked, “OSHA has revised the proposed paragraph to state more clearly OSHA’s intent that covers be secured when installed so that employees cannot easily remove them, and so that wind and equipment will not accidentally cause covers to be displaced.” Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672, 40,716 (August 9, 1994). In its discussion regarding the use of color-coding or marking covers with the terms “HOLE” or “COVER”, OSHA addressed the issue of whether covers should be *fastened* to the structure:

- Bristol Steel and the NEA noted the hazards associated with unintentional lifting/moving of covers and noted how such hazards could be reduced by marking or fastening the covers. Recognizing it would not always be feasible to fasten covers to permanent building materials without causing unacceptable damage, Bristol and NEA proposed the standard as an alternative: either mark the cover to indicate its function or securely fasten

¹². Although partially discussed here, Respondent’s assumptions about the state of the hole cover are also germane to the question of whether Respondent should have known of the hazardous condition, which will be more fully addressed in Section V.1.d, *infra*.

it to prevent unintentional removal.

- The United Union of Roofers, Waterproofers, and Allied Workers commented that covers should be securely fastened and that marking covers should not be allowed in lieu of fastening. Similar comments were submitted by other organizations.

Id. In response, OSHA “agree[d] that painting or labeling covers is necessary for the enhanced safety afforded affected employees”, but did not accept the recommendation that covers should be securely *fastened* in place. *Id.* In other words, securing against accidental displacement is not the same as securing or fastening the cover *to* the structure itself. In that respect, OSHA’s interpretation has been consistent: In response to a question about whether a product referred to as a “Hole in One Cover” met the standard’s requirements, OSHA noted the product came with “adjustable securing wedges that must be adjusted to fit the hole”. *See* OSHA Standard Interpretations, *Duty of a Subcontractor to cover floor holes in a Multi-Employer work site*, available at <https://www.osha.gov/laws-regs/standardinterpretations/2004-11-17-0> (November 17, 2004). The discussion of adjustable wedges to fit inside of a hole reiterates OSHA’s original intent to ensure the cover is secured against accidental displacement without explicitly requiring the cover being fastened to the building’s structure. Given the snug-fitting internal frame of the cover, and the combined weight of a three-foot by eight-foot area of 3/4-inch plywood and underlying 2x4 frame, as testified to by the carpenter that installed the covers, the Court finds they were secured against accidental displacement per § 1926.502(i)(3). (Tr. 1143)

As it turned out, none of the covers on the roof of AOSMI were fastened to the bent steel plate of the building’s structure. Instead, the load-bearing capacity was borne by the edges of the plywood that overhung the lip of the bent plate steel by anywhere from 1/2- to 1-inch. (Tr. 611). When Fenner and [redacted] cut the short ends of the cover on AHU No. 6, they removed the load-bearing portions on the end, but the cover still retained substantial load-bearing capacity because both of the lengthwise edges remained intact. Although in no way definitive, Fenner and [redacted] testified this lent support to what they already believed to be the case—the underlying frames were fastened to the structure. Unfortunately, when they cut sections from the short end and the lengthwise portion of the cover for

AHU No. 4, they created a hinge that was otherwise unsupported from underneath. This modification rendered the cover on AHU No. 4 useless as a method of fall protection and exposed Fenner and [redacted] to a nearly three-foot by eight-foot hole that dropped 22 feet to the second floor below.

Equally problematic is Respondent's failure to ensure the employees engaged in modifying the hole cover were equipped with alternative means of fall protection. Respondent argues the removal of 1- to 2-inch strips of plywood from the edges of a cover that was purportedly fastened in place would not constitute a "modification" and, therefore, did not require back-up fall protection. The Court disagrees. First, Respondent removed enough material from both cover No. 4 and No. 6 that daylight shined through the cover to the floor below. Regardless whether any of these individual gaps constituted a sufficiently large hole for the purposes of the standard and irrespective of what Respondent's employees believed about the manner in which the cover was secured, the cover was, in reality, modified in appearance and performance. Second, nearly every one of Respondent's employees who filled out a statement after the accident opined they should have been equipped with alternative fall protection while modifying the covers, which served as the only form of fall protection against the floor hole. (Ex. C-11). Even Garcia, who was responsible for constructing the hole testified hole cover modifications should not be performed while the cover is in place without some other form of fall protection. (Tr. 1165-66).

In addition to the removal of plywood strips from the covers, the Court also finds the use of a saw on the covers while they are in place problematic in and of itself. As illustrated in many of the pictures referenced above, the Sawzall used by Fenner and [redacted] is not a precision instrument. In addition to cutting through the plywood surface of the cover, Fenner and [redacted] also cut into the underlying 2x4 framework that lay underneath the surface. In that respect, the Court finds the act of cutting into an in-place hole cover, whether secured by friction or by fasteners, exposed Fenner and [redacted] to the hazard posed by the floor hole due to the possibility that they could have inadvertently cut through the supporting framework of the hole cover. *See Fabricated Metal Prods., Inc.* 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (to establish exposure, Secretary must show "that it is reasonably

predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger”); *see also Pete Miller, Inc.*, 19 BNA OSHC 1257 (No. 99-947, 2000) (finding nature of work employee performed on a roof near fall hazard, even though he never got closer than 8 feet to edge, made it reasonably predictable employee would enter zone of danger). Given that [redacted] and Fenner were physically leaning on the cover while making these modifications, the Court finds their exposure to the hazard posed by the hole required additional fall protection methods.

ii. Respondent is Both a Creating and Exposing Employer

In *Summit Contractors*, the Commission described the different types of employer liability on a multi-employer worksite as laid out in OSHA’s multi-employer citation policy. *See Summit Contractors, Inc.*, 23 BNA OSHC 1196 (No. 05-0839, 2010). In this case, we are concerned with two: creating and exposing employers. *Id.* (citing OSHA Compliance Operations Manual defining a ‘creating’ employer as one responsible for “creating a hazard endangering employees”); *see also Southern Pan Services Co.*, 25 BNA OSHC 1081 (No. 08-0866, 2014) (“We agree with the Secretary’s contention that this question is answered by long-standing Commission precedent holding that an employer whose own employees are exposed to a hazard . . . has a statutory duty to comply with a particular standard even where it did not create or control the hazard.” (citing *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198–99 (No. 3694, 1976))). There is, however, one slight different in this case as opposed to other multi-employer cases: this case does not address a general contractor that exposed a subcontractor’s employees to a hazard, nor does it address whether Respondent exposed employees other than his own. *See id.*, 2010 WL 3341872 at *5. Instead, the focus of this case is whether Respondent created a hazard when its employees cut into the hole covers on the roof of the AOSMI building and, subsequently, exposed its employees to a hazard by failing to provide them with an alternative form of fall protection. In both cases, the answer is “yes”.

a. Creating Employer.

Complainant argues Respondent is a creating employer due to the fact it created a hazard when its employee cut into and modified the hole covers on the roof of Section C, therefore undermining the

integrity of the hole covers. Respondent contends it is not a creating employer, because it did not create the hazard. Instead, Respondent argues, the covers installed by LG were already deficient at the time they attempted to modify them to fit the curbs for AHU Nos. 4 and 6 because the covers were not fastened to the structure. However, as illustrated above, the regulations do not require the covers to be fastened to the structure.

Respondent argues the covers were deficient due to their inability to hold the required amount of weight. According to Garcia, he believed the covers could support 600–700 pounds. (Tr. 1160). Respondent did not put forth competent evidence to suggest this assessment was incorrect, instead only providing speculation about the cover’s durability and weight capacity. As discussed at length in the preceding sections on whether Respondent violated the terms of the standard, the Court finds Respondent created a hazard. [redacted] and Fenner made cuts that ultimately removed the load-bearing portions of the hole covers without first verifying the covers were fastened to the structure of the building, as they believed. By removing the load-bearing edges of the hole covers, [redacted] and Fenner created a fall hazard.

b. Exposing Employer

While Respondent has called into question whether the roof covers fabricated by LG met the requirements of § 1926.502(i) in the context of whether it was a creating employer, Respondent failed to proffer sufficient evidence to establish that fact.¹³ Irrespective of whether the covers were, in fact, faulty, Respondent was still obliged to perform a proper inspection of the hazard to which its employees were exposed. It failed to do so, and thus Respondent is also properly characterized as an exposing employer.

Even if the covers themselves were insufficient, Respondent still had an obligation to determine

¹³. While it is Complainant’s burden to establish a violation of the cited standard, Respondent is obligated to prove all facts relevant to its defense. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993) *aff’d*, 28 F.3d 1213 (6th Cir. 1994). Because Respondent claims it did not create the hazard, it is incumbent upon Respondent to show LG created it by installing faulty hole covers.

their adequacy prior to placing its employees in the zone of danger created by the purportedly insufficient covers. *See Anning-Johnson*, 4 BNA OSHC at 1198–99 (exposure of a subcontractor’s “employees to a condition that the employer knows or should have known to be hazardous, in light of the authority or ‘control’ it retains over *its own* employees, gives rise to a duty under section 5(a)(2) of the Act . . .”). If the cover on AHU No. 4 was, indeed, as patchwork as Respondent suggests, this should have been obvious before cuts were made, and inquiries or further inspection should have been undertaken to determine its adequacy. *See, e.g., Hamilton Fixture*, 16 BNA OSHC 1073, 1993 WL 127949 at *16 (No. 88-1720, 1993) (“Where the alleged ‘violations [were] based on physical conditions and on practices . . . which were readily apparent to anyone who looked,’ they ‘indisputably should have been known to management.’”) (citing *Simplex Time Recorder Co. v. Brock*, 766 F.2d 575, 588 (D.C. Cir. 1985)). Respondent’s self-serving, hearsay testimony about what other industry representatives told Faber about friction covers does not constitute competent evidence sufficient to undermine Respondent’s obligation to inquire about the manner in which the covers were installed or, at the very least, to perform an independent inspection of the covers. (Tr. 858–860). Respondent’s failure to so inquire prior to modifying the covers exposed its employees to a fall hazard.

Regardless of how the Court frames Respondent’s obligation, the Court finds Respondent is both a creating employer and exposing employer. Based on the foregoing, the Court finds Respondent violated the terms of the standard as both a creating and exposing employer.

c. Respondent’s Employees Were Exposed to the Hazard

To prove exposure, Complainant must establish under longstanding Commission precedent “that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Fabricated Metal Prods., Inc.* 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). The zone of danger is the “area surrounding the violative condition that presents the danger to employees.” *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (citing *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107,

1995)). The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction, Co.*, 17 BNA OSHC at 1234; *Gilles & Cotting, Inc.*, 3 BNA OSHC at 2003.

As discussed at length above, Respondent exposed its employees to the hazard presented by the floor hole by allowing them to make modifications to the hole cover while it was serving as a protective element without requiring those employees to wear an additional form of fall protection. By cutting away the load-bearing portions of the cover as it was in place, Respondent's employees were exposed to a fall hazard of approximately 22 feet.

As argued by Complainant, such an action is no different than making modifications to an existing guardrail or scaffold, both of which require the use of fall protection when modifying, installing, or deconstructing the same. *See, e.g.*, 29 C.F.R. § 1926.451(g) (requiring various forms of fall protection when erecting or dismantling scaffolds). Respondent contends the cuts it made on the cover were not akin to modifications to other types of fall protection systems because cuts to a "properly installed" and fastened cover do not create a hole or compromise its integrity. Respondent's argument does not hold water for a number of reasons, many of which have been recounted above: (1) § 1926.503(i) does not require hole covers to be fastened; (2) the hole covers at issue in this case were not fastened, which would have been discovered with a reasonably diligent inspection; and (3) even if the covers were fastened, [redacted] and Fenner's use of a saw on an in-place form of fall protection presented the possibility that the underlying framework could be cut and compromised, as illustrated by the cut marks on various pieces of the underlying 2x4 frame.

There is no question both [redacted] and Fenner were exposed to the fall hazard—they were working directly on the hole cover at AHU No. 4 at the time it collapsed. As for other employees' exposure to the hazard, the Court finds Complainant overestimated the number of employees exposed. As illustrated by Respondent, a full crew, representing about half of Respondent's 14 employees on site,

left around lunchtime. (Tr. 99, 241). Thus, there were approximately 7 employees on the roof while [redacted] and Fenner were making modifications. (Tr. 240). Although the other employees were standing outside the curb while Fenner and [redacted] were cutting the hole cover, the curb did not constitute adequate fall protection because, at 39-inches tall, it is just short of the required height for guardrails. *See* 29 C.F.R. § 1926.502(b)(1). That said, the Court finds that only three additional employees—those that pulled Fenner back from falling into the hole after [redacted]—were actually exposed to the hazard. (Tr. 576). Accordingly, the Court finds five of Respondent’s employees were exposed to the hazard.

d. Respondent Had Constructive Knowledge of the Hazard

To prove this element of the Secretary’s *prima facie* case, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). In other words, Complainant must show whether Respondent had actual knowledge of the violation, or whether it should be charged with constructive knowledge. The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of an employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of a hazardous condition, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980).

Actual knowledge is established when a supervisor directly engages in or sees a subordinate’s misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.*, 5 BNA OSHC 1202, at *3 (No. 11015, 1977) (holding because the supervisor directly saw the violative conduct without stating any objection, “his knowledge and approval of the work methods employed will be imputed to the respondent”).

Constructive knowledge, on the other hand, is established where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have. *See, e.g., Hamilton Fixture*, 16 BNA OSHC at 1073 *17–19, *aff'd*, 28 F.3rd 1213 (6th Cir. 1994). (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). To establish constructive knowledge, the Secretary must prove “that the ‘employer ... could have known with the exercise of reasonable diligence of the conditions constituting the violation.’” *Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007). Whether an employer has exercised reasonable diligence is a question of fact that “will vary with the facts of each case.” *Martin v. OSHRC*, 947 F.2d 1483, 1484 (11th Cir. 1991); *see also Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129 (No. 92–0851, 1994) (finding that a preponderance of the evidence established the cited employer was reasonably diligent); *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001) (noting that Secretary has burden of identifying what reasonable diligence required).

Respondent asserts it was not aware of the conditions constituting a violation, nor should it have been aware. Specifically, Respondent contends, as recounted multiple times above, that it was unaware the hole covers on the roof of the AOSMI building were not fastened to the structure itself. Complainant contends Respondent had both actual and constructive knowledge of the violative condition; namely, (1) that Fleming, [redacted], and Fenner were aware they were modifying one form of fall the protection (the cover) without being equipped with another form of fall protection, and (2) that [redacted], Fenner, and Fleming could have discovered the covers were not fastened to the building with the exercise of reasonable diligence. The Court finds Respondent had constructive knowledge of the violation.

Respondent's employees were modifying a hole cover while it was serving as a form of fall protection without simultaneously protecting themselves with another form of fall protection. [redacted], Fenner, and Fleming were aware of this fact, as Fenner and [redacted] were doing the cutting and Fleming gave his approval to their plan of action. While this provides some support for the

proposition that Respondent had actual knowledge of the conditions giving rise to a violation, there is at least a question as to whether smaller cuts on the surface of a cover that was fastened to the structural steel would have exposed Respondent to a hazardous condition. As such, the Court finds the stronger case for knowledge lies in what Respondent could have known about the hole covers had they exercised reasonable diligence.

“[A]n employer has a general obligation to inspect its workplace for hazards.” *Hamilton Fixture*, 16 BNA OSHC 1073, 1993 WL 127949 at *16 (No. 88-1720, 1993) (citing *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980)). The scope of that obligation “requires a *careful and critical examination* and is not satisfied by a mere opportunity to view equipment.” *Austin Comm. v. OSHRC*, 610 F.2d 200, 202 (5th Cir. 1979) (emphasis added). Some factors to assess whether an employer has exercised reasonable diligence include an employer’s “obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). Additionally, an employer “cannot claim lack of knowledge resulting from its own failure to make use of the sources of information readily available to it.” *Wiley Organics, Inc. d/b/a Organic Tech*, 17 BNA OSHC 1586, 1597 (No. 91-3275, 1996), *aff’d* 124 F.3d 201 (6th Cir. 1997); *see also N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000) (“Reasonable diligence implies effort, attention, and action; not mere reliance upon another to make violations known.”).

As it turns out, Respondent had all the information it could have possibly needed right at its fingertips, or at least very close by. First, [redacted], Fenner, and Fleming all testified they did not seek out LG to find out how the covers had been installed, nor did they seek permission to make modifications to the covers. (Tr. 529–30, 565, 629–30, 715–16). This is so even though representatives from LG had previously been on the roof and were at the AOSMI site at the time Respondent was preparing to install the curbs. In fact, Garcia, the carpenter that fabricated the covers, was at the worksite that day, and could have told Fenner, [redacted], or Fleming how the covers were installed. *See, e.g., Wiley Organics, Inc.*,

17 BNA OSHC at 1597, *supra*. Second, at best, [redacted] and Fenner performed a surface-level, visual inspection prior to cutting into the cover. According to Fenner, they performed an inspection of the cover from above; however, his testimony suggests this inspection did not occur until they removed portions of the plywood, which revealed the underlying 2x4 frame. (Tr. 581). Even then, however, it was only the presence of the frame that led Fenner to believe it was fastened to the structure; there was nothing about the frame itself or his inspection of it to support his belief. (Tr. 581). According to [redacted], they inspected the first cover they altered—AHU No. 6—but did not go down to the second floor to verify what they believed to be the case. (Tr. 630). Perhaps more problematic was the testimony of Fleming, the supervising foreman to whom Fenner communicated the plan to alter the covers. Fleming was stationed on the second floor just below the covers and had a scissor lift at his disposal. (Tr. 685–86, 717–18). He testified he did not perform an inspection of the covers, nor did he believe he was obligated to perform an inspection of the covers before alterations were made *even though the covers were installed by someone else*. (Tr. 704). He admitted this even though he also recognized his own obligation to inspect the area where his employees were working prior to work beginning in that area. (Tr. 706). Instead, he stated he just “expected” the covers were installed correctly. (Tr. 706). Third, even though Garcia testified the covers would not easily be moved, the frame was not fastened to anything—Respondent’s employees likely could have lifted up on the cover itself to ensure it was, in fact, fastened to the steel plate.

Respondent proffered a few reasons why its belief the covers were fastened to the structure were reasonable, none of which persuaded the Court to find Respondent exercised reasonable diligence in inspecting them prior to making modifications. Respondent’s safety manager, Faber, provided hearsay testimony that no one he spoke to, either internally or in the industry, had heard of a friction cover. First, this was not entirely true, as Fenner testified he had heard of friction covers, albeit used in a different context with smaller holes. (Tr. 601–602). Second, as discussed at length above, the § 1926.502(i) does not require covers to be fastened to the structure. Indeed, as discussed by Bristol Steel in the preamble

to the Final Rule, there are circumstances where the use of such fasteners is unacceptable due to the potential damage to structural components. Thus, there may be circumstances where the use of fasteners would be inappropriate. This last point is important, as reasonable diligence depends on the circumstances surrounding the hazard and the work being performed, which leads to a separate, yet related, point.

This is not a situation where Respondent was simply relying on the adequacy of a hole cover to meet the minimum criteria for supporting the weight of men and materials as they worked in its vicinity. Under such circumstances, perhaps only a visual verification of the hole cover, i.e., ensuring it was in place, would be sufficient. In this case, however, Respondent was physically modifying the cover while it served as fall protection based on little more than an assumption about the manner in which it was secured against accidental displacement. Reasonable diligence under the circumstances required more than merely looking at the cover before deciding to cut into it. *See, e.g., Prestressed Systems, Inc.*, 9 BNA OSHC 1864 (No. 16147, 1981) (finding employer's failure to discover latent defect, whether because it failed to inspect or performed an inadequate inspection, illustrated a lack of reasonable diligence). Indeed, even if the Court were to accept Respondent's arguments that other covers on the second floor had been fastened to the structure of the building prior to [redacted]'s fall, the Court would note two important details about the covers on the second floor illustrated in Exhibit No. R-12. First, the 2x4 framework for those covers is positioned on the surface of the floor, not underneath. (R-12 at 24–26). Second, from simple observation, one can see the plywood and 2x4s are bolted into the floor with tapcon screws (or the like). The covers on the second floor were different in appearance and orientation and provide no basis to indicate the covers on the roof were similarly fastened, once again highlighting the importance of context to the exercise of reasonable diligence.

Constructive knowledge, just like actual knowledge, can be imputed to the employer through the knowledge of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of a hazardous condition, it is reasonable to charge the

employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980). Both [redacted] and Fleming were foremen for the AOSMI project. (Tr. 625, 695). As such, the Court finds it appropriate to impute their knowledge of the hazard to Respondent.

Accordingly, the Court finds Complainant proved Respondent had constructive knowledge of the condition because Respondent failed to exercise reasonable diligence in its inspection of the hole covers prior to making modifications to them.

e. The Citation is Properly Classified as Serious.

The Court finds the violation was serious within the meaning of section 17(k) of the Act. If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA 1044, 1047 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA 2072, 2077 (No. 88-523, 1993). Unfortunately, the facts of this case illustrate quite clearly how serious the violation of the standard was—[redacted] suffered a serious head injury and multiple fractures as a result of his 22-foot fall from the roof to the second floor. (Tr. 645). That said, irrespective of [redacted]’s injuries, the Court finds the hazard presented by the hole in the roof exposed Respondent’s employees to the possibility of serious injuries, as well as death, as a result of a 22-foot fall. Therefore, Citation 1, Item 1 will be AFFIRMED as a serious violation of the Act.

V. Respondent Failed to Brief any Affirmative Defense

Respondent asserted multiple affirmative defenses in its Answer to the Complaint; however, it did not pursue any of those defenses in its post-trial brief. As noted in the Court’s Briefing Order, “Issues not briefed will be deemed abandoned.” *See Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991). Accordingly, the Court finds Respondent has abandoned its proffered affirmative defenses.

VI. Penalty

Under the Act, Complainant has the authority to propose a penalty according to Section 17 of the Act. *See* 29 U.S.C. §§ 659(a), 666. The amount proposed, however, merely becomes advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441–42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001). Ultimately, it is the province of the Commission to “assess all civil penalties provided in [Section 17]”, which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995).

“Regarding penalty, the Act requires that “due consideration” be given to the employer’s size, the gravity of the violation, the good faith of the employer, and any prior history of violations.” *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (*citing* 29 U.S.C. § 666(j)). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citation omitted*). Rather, the Commission assigns the weight that is reasonable under the circumstances. *Eric K. Ho*, 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003) (Consol.), *aff’d sub nom.*, *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005). It is the Secretary’s burden to introduce evidence bearing on the factors and explain how he arrived at the penalty he proposed. *Valdak Corp.*, 17 BNA OSHC at 1138. “The gravity of the violation is the ‘principal factor in a penalty determination. Assessing gravity involves considering: (1) the number of employees exposed to the hazard; (2) the duration of exposure; (3) whether any precautions have been taken against injury; (4) the degree of probability that an accident would occur; and (5) the likelihood of injury. *See, e.g., Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff’d*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished).

Complainant proposed a gravity-based penalty of \$7,068 for Citation 1, Item 1. For the most part, the Court agrees with Complainant’s various assessments as they relate to the penalty assessed. Complainant determined the hazard was of moderate gravity—even though the severity of injuries resulting from exposure to the hazard was significant, the likelihood of those injuries occurring was moderate due to the fact that Respondent spent a short period of time actually working on the hole covers.

(Tr. 184–185). The Court agrees. Complainant also awarded a 15% reduction to its assessed penalty based on Respondent’s otherwise thorough and well-designed safety and health program, albeit one that was not carefully executed under the circumstances. Although Complainant does not award a discount for history if an employer does not have any inspections in the previous five years, the Court finds an additional discount is warranted under the circumstances. According to Faber, Respondent dropped its incident rate substantially over the course of his tenure with the company and has implemented innovative methods by which to ensure appropriate training has been provided to its employees and reduce safety incidents. (Tr. 830–31, 849–50). As such, the Court finds an additional reduction of 20% is appropriate and assesses a penalty of \$5,655.

ORDER

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

1. Citation 1, Item 1 is AFFIRMED as serious, and a penalty of \$5,655 is ASSESSED.

SO ORDERED.

/s Patrick B. Augustine

Patrick B. Augustine
Judge, OSHRC

Date: March 30, 2020
Denver, Colorado

CERTIFICATE OF SERVICE

CASE NAME: TEAM SOLUTIONS INDUSTRIAL SERVICES
OSHRC DOCKET NO.: 17-1199

Service of the foregoing Order has this date been made by mailing a copy thereof via Electronic Mail, to the following:

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