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

SECRETARY OF LABOR, Complainant, v. KEENAN, HOPKINS, SUDER AND STOWELL CONTRACTORS, INC., dba KHS&S CONTRACTORS, Respondent.	OSHRC Docket No. 18-1091

FINAL ORDER

The parties have submitted a Joint Notification of Full Settlement pursuant to Commission Rule 100, 29 C.F.R. § 2200.100, informing the Commission that they have resolved all the contested citation items in this case. Having noted the absence of any objection to the agreement served on the authorized representative of the affected employees pursuant to Commission Rule 7(f), 29 C.F.R. § 2200.7(f), and since the parties have agreed to terminate the proceeding before the Commission, the case is hereby DISMISSED.

SO ORDERED.

BY DIRECTION OF THE COMMISSION

/s/
John X. Cerveny
Executive Secretary

Dated: September 21, 2020

Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. KEENAN, HOPKINS, SUDER, AND STOWELL CONTRACTORS, INC., dba KHS&S CONTRACTORS, Respondent.	OSHRC Docket No. 18-1091

Appearances:

Bryan Kaufman, Esq., Department of Labor, Office of the Solicitor, Denver, Colorado
For Complainant

Kristin R.B. White, Esq., and Benjamin J. Ross, Esq., Fisher & Phillips, LLP, Denver, Colorado
For Respondent

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

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (the "Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the "Act"). Respondent, Keenan, Hopkins, Suder and Stowell Contractors, Inc. ("KHS&S"), is a carpentry and drywall contractor. (Tr. 220, 307, 406). KHS&S was performing work on a construction site for an outlet mall called the Denver Premium Outlets ("DPO"), located at 13801 Grant Street, Thornton, Colorado, 80023. (Tr. 399).

On the afternoon of March 3, 2018, two employees of KHS&S, [Redacted] and Eusebio Ruiz, were directed to remove existing pieces of plywood from the deck and replace them with larger pieces. (Tr. 112-114). At about 2:00 p.m. on March 3, 2018, [Redacted] and Mr. Ruiz removed the screws from the smaller piece of plywood, which was covering a hole in the decking, to replace it with larger pieces of plywood, (Tr. 48, 112-113, 123-24, 630; Ex. R-13). In the process of removing the smaller piece of plywood, [Redacted] fell through the exposed hole in the decking to the concrete floor below. After this accident the Occupational Safety and Health Administration ("OSHA") Denver, Colorado Area Office received a report of the accident.

In response, on March 16, 2018, OSHA sent Compliance Safety and Health Office ("CSHO") Brian Oberbeck to conduct an inspection. (Tr. 397-99). As a result of the inspection, OSHA issued a two-item *Citation and Notification of Penalty* (the "Citation") to Respondent alleging three serious violations of the Act and proposing a total penalty of $14,136. The Citation was issued on June 6, 2018. Respondent timely contested the Citation, bringing the matter before the Commission.

Citation 1, Item 1 alleged a serious violation of 29 C.F.R. § 1926.20(b)(2) for Respondent's failure to maintain a safety program which provided for frequent and regular inspections of jobsites, materials, and equipment to be made by a competent person. (Citation at 6). Citation 1, Item 2a alleged two instances of a serious violation of 29 C.F.R. § 1926.454(a) for failing to ensure that employees working on scaffolds and aerial lifts were trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. (Citation at 7-8). Citation 1, Item 2b alleged a serious violation of 29 C.F.R. § 1926.503(a)(1) for failing to provide a training

program enabling recognition of, and appropriate protective procedures for, fall hazards for each employee who might be exposed to fall hazards. (Citation at 9).

A three-day trial was held from May 14 through May 16, 2019, in Denver, Colorado. Five witnesses testified: (1) KHS&S leadman Joel Peraza Soto; (2) KHS&S Director of Safety and Risk Control Michael Cabrea; (3) KHS&S safety engineer Christian Mancera Garcia; (4) CSHO Brian Oberbeck; and (5) KHS&S general foreman Morgan Payne. Both parties filed post-trial briefs. After briefing, Respondent filed a "Motion to Strike Portion of Complainant's Post-Trial Brief" ("Motion to Strike") which Complainant opposes.

Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. As discussed further below, the Court finds Respondent violated Citation 1, Item 1 and Citation 1, Item 2a. The Court also finds, however, Complainant failed to establish a violation of Citation 1, Item 2b, because he failed to establish the exposed employee was not provided adequate training. Accordingly, the Citation is AFFIRMED in part and VACATED in part. The Court assesses a penalty of $7,068 for Citation 1, Item 1 and a penalty of $4,712 for Citation 1, Item 2a, for a total penalty of $11,780.

II. Stipulations

The parties entered into stipulations ("Joint Stipulation Statement") prior to the beginning of trial. The Joint Stipulation Statement was introduced into the record as Joint Exhibit No. 1 (hereinafter "Ex. J-1"). (Tr. 13). In lieu of reproducing the stipulations in their entirety, the Court will make references to the Joint Stipulation Statement as necessary.

III. Jurisdiction

The Court has jurisdiction over the parties and subject matter in this case under sections 3(3), 3(5) and 10(c) of the Act. The Court obtained jurisdiction over this matter under section 10(c) of the Act upon Respondent's timely filing of a notice of contest. 29 U.S.C. § 659(c). (*See* Ex. J-1, ¶3). The Court also finds Respondent is an employer engaged in interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). *See Slingluff* v. OSHRC, 425 F.3d 861, 866–67 (10th Cir. 2005). (Ex. J-1, ¶ 3); (Tr. 8).

IV. Factual Background

In March of 2018, Respondent was a subcontractor working under general contractor Whiting-Turner to provide framing and drywall services at the DPO construction worksite. (Ex. J-1, ¶ 4). On March 2, 2018, Respondent's employees had largely finished their work on framing towers for Building 1 of the DPO and were preparing to start work on framing a tower for Building 2.[1] (Tr. 103-04, 574-75, 630). Before Respondent began work on Building 2, Whiting-Turner held a "roof hatch coordination" meeting on March 2, 2018, at 1:00 p.m. (Tr. 408-09, 634-36; Ex. C-4). This meeting was attended by, among others, representatives from Whiting-Turner; a representative from another subcontractor, Complete Contracting ("Complete"); and Respondent's foreman, Morgan Payne. (Tr. 408-09, 634-36; Ex. C-4). Among the issues discussed were the plans for Complete to cut "openings" in three buildings, Buildings 1, 2, and 3.[2] (Tr. 636-38; Ex.

[1] It is unclear how many buildings were planned for the DPO site, although the evidence suggests as many as eight. (Tr. 686; Ex. C-4). The buildings most relevant for the issues raised in the Citation are Buildings 1, 2, and 3. (Tr. 103-04, 574-75, 637-38; Ex. C-4).

[2] The purpose of the "openings" Complete intended to cut appears to have not been uniform. The opening ultimately cut on Building 2 was repeatedly described as a "roof access hatch," which was flush with the deck of the tower. (Tr. 38, 79, 406, 651; Ex. C-1 at 11). There was also evidence introduced showing openings for HVAC RTUs (roof top units), which, with their openings

C-4). By the end of this meeting, Mr. Payne knew Complete planned on cutting openings on the three buildings by the end of Monday, March 3, 2018 although he did not know the exact schedule. (Tr. 637-38). Mr. Payne believed Complete's representative would inform him when the work was finished. (Tr. 637). Between the coordination meeting and the accident, Mr. Payne never informed anyone else from KHS&S about the openings to be cut. (Tr. 415, 640-41). Mr. Payne did not contact anyone from Complete to see if any openings had been cut, nor did anyone from Complete inform Mr. Payne if any openings had been cut. (Tr. 696-97, 719-20).

On Saturday, March 3, 2018, the day after Mr. Payne attended the coordination meeting, Respondent's employees began preparing the deck of the tower of Building 2 for framing work. (Tr. 105-06, 639-41). Mr. Payne visited Building 2 that day, but he did not inspect the deck of the tower on which Respondent's crew would be working to see if any openings had been cut. (Tr. 413-15, 503, 686). Despite having never informed anyone of the plans of Complete to cut openings in the decks of Buildings 1, 2, and 3, Mr. Payne relied on the leadman for the crew, Joel Soto Peraza, to inspect and prepare the deck for framing work, which was to begin the following Monday. (Tr. 69, 86-87, 413-15, 625-26, 640-41).

On the morning of March 3, 2018, Mr. Peraza visited the tower deck of Building 2 and filled out a "pre-task plan" ("PTP"). (Tr. 44-45, 99-100). Filling out the PTP involved inspecting the worksite to identify potential safety hazards. (Tr. 44-45, 99-100). Although holes were not directly listed in the PTPs, it was something Mr. Peraza and his crew were trained to look for and, if one were to be found, the work area would be closed to workers until the hole could be covered and marked. (Tr. 45, 100).

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approximately 18 inches above the deck, bear little resemblance to the opening on the deck of Building 2. (Tr. 515-16; *Compare* Ex. C-1 at 2, *with* Ex C-1 at 8).

Already extant on the deck during Mr. Peraza's PTP inspection of Building 2 were three pieces of plywood, two larger and one smaller, and a piece of metal decking the approximate size of the smaller piece of plywood. (Tr. 110-12, 149-50, 547-51; Ex. C-1 at 8, 9 & 11; Ex. R-13). The smaller piece of plywood had been screwed into place on the deck. (Tr. 115-17, 147). Mr. Peraza observed the pieces of plywood during his PTP inspection; however, he could not recall if he observed the piece of metal decking. (Tr. 50, 60-62, 110-14, 118). Mr. Peraza did not know who had laid the plywood on the deck, but he believed it could have been another subcontractor or a member of his own crew. (Tr. 81-82). Unbeknownst to Mr. Peraza, at some point between the coordination meeting with Mr. Payne the day before and the next day, Complete had cut an opening in the deck and covered it but had not marked it as a "hole," as required by OSHA regulations. (Tr. 104-05, 114-15, 200, 320-21, 413, 513-15). The smaller piece of plywood was covering this hole, which opened to the concrete floor 15 feet below the deck. (Tr. 481, 649-650; Ex. C-1 at 14-15). Although the area below the deck was accessible to him, Mr. Peraza did not go below the deck to look up and see if the piece of plywood was covering a hole during his PTP inspection. (Tr. 83-84, 138-41, 426-27, 649-650; Ex. C-1 at 14-15, Ex. C-2 at 01:48-02:29).

On the afternoon of March 3, 2018, Mr. Peraza directed two members of his crew, [Redacted] and Eusebio Ruiz, to install plywood on the deck of the tower of Building 2 so the crew could bring up scaffolding to begin framing work the following Monday. (Tr. 69, 73, 86-87). Mr. Paraza directed them to remove the existing pieces of plywood from the deck and replace them with larger pieces, because he believed the "little pieces" constituted a tripping hazard. (Tr. 112-114). At about 2:00 p.m. on March 3, 2018, [Redacted] and Mr. Ruiz removed the screws from the smaller piece of plywood, which was covering the hole in the decking, to replace it with larger pieces of plywood. (Tr. 48, 112-113, 123-24, 630; Ex. R-13). In the process of removing the

smaller piece of plywood, [Redacted] fell through the exposed hole in the decking to the concrete floor below.[3] (Tr. 481; Ex. C-2 at 13:50-14:08). Mr. Peraza saw [Redacted] removing the screws from the smaller piece of wood and "grabbing" the wood to remove it, but he did not see [Redacted] fall because he was not facing that direction at the time. (Tr. 123-24). [Redacted] suffered brain injuries and was hospitalized as a result of his fall. (Tr. 481-84, 708).

The CSHO was assigned to investigate the accident and visited the worksite on March 16, 2018,[4] and again on March 27, 2018.[5] (Tr. 397-99). The CSHO met with multiple individuals to discuss the accident, including Mr. Payne and Mr. Peraza, as well as representatives from Whiting-Turner, Complete, and the employees' union. (Tr. 399-405; Ex. C-2). Through his investigation, the CSHO learned the name of the other members of Mr. Peraza's crew on the date of the accident: Sergio Hernandez, Daniel Chavarin, Miguel Mendoza, and Javier Cuaves. (Tr. 411-12). The CSHO also discussed training with various KHS&S employees and reviewed documents regarding training. (Tr. 488-90). Ultimately, the CSHO concluded: (1) Respondent had failed to adequately inspect the worksite; (2) Messrs. Ruiz, Hernandez, and Chavarin were working on scaffolds and operating aerial lifts without training; and (3) Mr. Ruiz was doing leading edge work without training in fall protection. (Tr. 507-11; Ex. C-27). Based on the CSHOs conclusions, Complainant issued the Citation.

Respondent's employees who testified at trial were as follows:

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[3] It seems, in picking up the piece of plywood to remove it, [Redacted]' vision was obscured by the plywood, thereby blocking his view of the exposed hole beneath it. (Ex. C-2 at 13:50-14:08).

[4] The record indicates there was a substantial delay in responding to Respondent's report of the accident due to a "transcription error" on the report filed with the OSHAs hotline and thereafter forwarded to the Denver Area Office. (Tr. at 399, 512).

[5] Apparently, two of the workers the CSHO wanted to interview were not available on March 16, 2018 requiring his return to the worksite. (Tr. at 450-51).

Joel Peraza Soto was a "leadman" for Respondent and the supervisor of the crew on the deck of the tower of Building 2 at the DPO site on the day of the accident. (Tr. 38-39). As a leadman, Mr. Peraza would typically lead a crew of six to ten men, depending on the work being done. (Tr. 39-40). His duties as a leadman included reading blueprints to do the "layout plans" for walls to be constructed, giving instructions to his crew of framers, and inspecting the security and safety of the worksite and equipment. (Tr. 37-40). He has worked in the construction industry for over 20 years, progressing from a "learner of framing," to a framer, to a leadman, and then a foreman. (Tr. 93). He has his OSHA 10 and OSHA 30 certifications. (Tr. 96, 128-29). At the time of the accident, Mr. Peraza had worked for KHS&S approximately four months. (Tr. 35-36). Based on his work experience, he was designated as the "competent person" by Respondent to inspect KHS&S worksites for safety issues. (Tr. 57, 102-03, 391-92, 687). Mr. Peraza had received training from Mr. Mancera in fall protection, scaffolds, and aerial lifts. (Tr. 46-47). He had also attended daily meetings where these topics were discussed. (Tr. 106-07).

Michael Cabrea was the Director of Safety and Risk Control for Respondent on the day of the accident. (Tr. 162-63). He had worked for Respondent for approximately two years and held similar positions with various firms before his position with KHS&S. (Tr. 217-19). He received training in various safety matters and has his OSHA 10 and OSHA 30 certifications. (Tr. 217-19). Among other duties, Mr. Cabrea's department was responsible for examining risks associated with construction work and to reduce or mitigate those risks, including developing and instituting safety training programs for employees. (Tr. 163, 220). As to training, employees at the DPO site went through Respondent's new-hire orientation training as well as an orientation training program with the general contractor, Whiting-Turner. (Tr. 169-70, 220-21). All of Respondent's employees are hired through a union, who also trains the employees. (Tr. 227-28). In addition to those trainings,

members of specific crews meet for "pre-huddle" meetings to discuss site-specific safety hazards prior to the start of work each day. (Tr. 220-221, 229-30). Employees also meet for weekly toolbox topic meetings to discuss safety issues. (Tr. 221; Ex. R-9).

Christian Mancera Garcia was a safety engineer for Respondent on the day of the accident. (Tr. 269). He received a bachelor's degree in safety and health management and had worked in the construction industry for five years, four of those years with Respondent. (Tr. 269-70). Prior to working for Respondent, he worked for a general contractor for a year where he was in charge of inspecting and monitoring a single worksite with regard to safety issues. (Tr. 275-76). His duties with Respondent include inspecting, auditing, and mitigating safety issues at Respondent's worksites, as well as training employees. (Tr. 279-80). New employees at the DPO worksite received initial processing and review of Respondent's "Employee Safety Standards" ("ESS") with an administrative staff member named Rosa Thompson at another worksite in Gaylord, Colorado, and then the new employees would train with Mr. Mancera the next day at the DPO worksite. (Tr. at 301). Ms. Thompson's "training" was just a review of the employee safety standards, which Mr. Mancera covered in more depth at the DPO worksite. (Tr. 303-04, 345-47, 370-74). Every new employee received training from Mr. Mancera. (Tr. 370). Due to the high turnover rate at the DPO worksite Mr. Mancera estimated he trained around 600 employees. (Tr. 304-05).

Mr. Mancera conducted his training at the DPO site, both in a trailer and in the field, and he provides this training in both English and Spanish. (Tr. 341, 357). He also conducted the same training at the Gaylord site, and many of those employees later transferred to the DPO site. (Tr. 357-58). He trains the employees on the inspection, use, and maintenance of scaffolds; on fall protection; inspecting the work area for holes; and aerial lifts, including scissor and boom lifts.

(Tr. 341-57). All employees at the DPO worksite received Respondent's training, even if they had also received training from Whiting-Turner or from their union. (Tr. 382-84).

Mr. Mancera conducted walkthrough inspections of Respondent's worksites along with the Respondent's worksite's foreman or superintendent. (Tr. 292). He was not at the DPO worksite on the date of the accident. (Tr. 316-19).

Morgan Payne was Respondent's general foreman for the DPO project on the date of the accident. (Tr. 571, 585). He had worked for Respondent for six years as of that date, starting as a carpenter, then moving on to be a leadman, a foreman, and then a general foreman. (Tr. 571-72). He had only been a general foreman a couple of months, starting in early 2018. (Tr. 571). As a general foreman, his main duties involved scheduling and coordination among Respondent's work crews, the general contractor, and other subcontractors. (Tr. 585-86). His coordination with other contractors involved ensuring Respondent's employees could access the worksite to do their work. (Tr. 586). Mr. Payne would also walk the worksites to look for safety issues. (Ex. C-5).

IV. **Discussion**

A. **Respondent's Motion to Strike**

1. Procedural Issues at Trial

As an initial matter, pending before the Court is Respondent's "Motion to Strike Portion of Complainant's Post-Trial Brief" ("Motion to Strike"), filed August 20, 2019, and Complainant's response. The Motion to Strike relates to various references in Complainant's post-trial brief to Exhibit C-35, which is the unredacted witness statement of Mr. Eusebio Ruiz provided to the CSHO during the course of the inspection. Mr. Ruiz's identity was protected under the government informant privilege. The context for the entry of Mr. Ruiz's unredacted witness statement into evidence follows.

During Complainant's attorney's direct examination, the CSHO was asked about certain statements made to him during a March 27, 2018 interview of Mr. Ruiz.[6] (Tr. 462). Respondent's attorney objected to this testimony because Complainant had asserted the government informant privilege as to Mr. Ruiz throughout the course of discovery and had only disclosed Mr. Ruiz's unredacted witness statement to Respondent at the beginning of the second day of the trial. (*Id.*). Respondent's attorney also objected on the grounds of hearsay. (*Id*.).

Complainant's attorney admitted Complainant had claimed government informant privilege as to Mr. Ruiz. (*Id*.). However, Complainant's counsel further stated when the decision was made to elicit testimony from the CSHO concerning the statements of Mr. Ruiz, he disclosed the unredacted witness statement of Mr. Ruiz for Respondent's attorney to review. (Tr. 462-63). This disclosure occurred the day before the CSHO testified. (Tr. 463).

As to the hearsay objection, Complainant's attorney argued Mr. Ruiz's unredacted witness statement, as well as the CSHOs testimony as to what Mr. Ruiz said to him during the course of the inspection, were admissible as an employee admission under *Regina Construction Co.*, 15 BNA OSHC 1044 (No. 87-1309, 1991). (Tr. 463-64). In response, Respondent's attorney argued under *Massman-Johnson (Luling)*, 8 BNA OSHC 1369 (No. 76-1484, 1980), the witness statement was not admissible because in the typical situation "the … employee himself actually is testifying not when the inspector is seeking to say what the … employee said to him." (Tr. 464).

[6] Mr. Ruiz was also implicated in the issuance of Items 2a and 2b of the Citation, as the CSHO believed he had not been trained in scaffolding, aerial lifts, or fall protection. (Tr. 509-11).

2. Court's Rulings at Trial

The Court ruled on Respondent's objection on the record. (Tr. 465-471). Noting the procedure invoked by Complainant to enter into the record Mr. Ruiz's statements made to the CSHO during the course of inspection using *Regina Construction,* the Court cited *Massman-Johnson* for the procedure normally used by the complainant to enter statements of a government informant into the record. The Court noted, under *Massman-Johnson (Luling)*, the normal procedure in cases where the government informant privilege has been invoked is "the government calls the government informant's witness" for direct examination and then "provides the unredacted witness statement …" to Respondent. (Tr. 466). Respondent is then given a recess to review the unredacted statement and decide whether or not it wants to change their litigation strategy. (Tr. 466-67).

The Court noted the "key point" for the Court's ruling was the issue of prejudice to Respondent using the procedure being utilized by Complainant. (Tr. 467). The Court found, irrespective of when Complainant disclosed Mr. Ruiz's status as a government informant and provided his unredacted witness statement to Respondent, the issue to be resolved was whether the prejudice could be cured. (*Id*.). The parties informed the Court Mr. Ruiz no longer worked for Respondent and could not be located to testify at trial.[7] (Tr. 468-69).

The Court found the prejudice to Respondent could only be cured one of two ways: (1) a continuance to attempt to locate Mr. Ruiz and have him appear for trial; or (2) not permitting any testimony from the CSHO as to what Mr. Ruiz told him. (Tr. 470). As to a possible continuance,

[7] Complainant did not provide the Court what specific efforts had been taken to locate Mr. Ruiz except to state that he was unavailable. (Tr. 462).

the Court found Mr. Ruiz could not likely be found within a reasonable time, and it was not reasonable to believe a subpoena could secure his attendance at trial. (Tr. 471). The Court therefore found the prejudice could not be cured under the first avenue since the government informant would not be in the witness box and subject to cross examination. Therefore, the Court held the unredacted witness statement of Mr. Ruiz and what Mr. Ruiz told the CSHO during the course of the inspection was going to be "off limits." Therefore, the CSHO's was prohibited from disclosing those during his testimony. (*Id*.).

3. Procedures After Court's Ruling

Following a brief recess, Complainant's attorney asked to brief the issue of the admissibility of Mr. Ruiz's statements to the CSHO, which the Court directed could be done in post-trial briefs. (Tr. 472). Complainant's attorney also asked to make a verbal offer of the excluded testimony, which the Court declined to entertain. (*Id*.). The questioning of the CSHO then continued throughout the remainder of the day. (Tr. 473-555).

At the end of the trial on May 15, 2019, the Court emailed counsel for both parties and asked Complainant's attorney to bring the unredacted witness statement of Mr. Ruiz's to trial the next day. (Tr. 563). At the start of trial on May 16, 2019, the Court then clarified its procedural rulings made the day before. (Tr. 565). The Court then re-visited its ruling on Complainant's attorney's request to make an offer of proof. (*Id.*). The Court found the "best offer of proof is the unredacted statement [of Mr. Ruiz]" because if he "was available and was called as a witness by either side, he would likely testify within the parameters of his unredacted statement." (Tr. 566). The Court then marked Mr. Ruiz's unredacted witness statement as Exhibit C-35 and modified its previous ruling to accept Mr. Ruiz's unredacted witness statement as an offer of proof "in lieu of [Complainant's attorney's] attempted offer of proof" from the day prior. (Tr. 567).

4. Arguments Made in Motion to Strike and Response

In its Motion to Strike, Respondent argues Exhibit C-35 was only accepted as an offer of proof and the Court, as the finder of fact, should not consider this evidence in rendering its decision. (Resp't Mot. to Strike at pp. 1-2). Respondent further argues Complainant, despite his attorney asking only to brief the admissibility issue in his post-trial brief, has impermissibly cited the exhibit as substantive evidence in support of his case. (Resp't Mot. to Strike at p. 2). Respondent therefore asks the Court to strike the portions of the Secretary's post-trial brief which cite to or otherwise reference Exhibit C-35. (Resp't Mot. to Strike at pp. 3-4).

In response to the Motion to Strike, Complainant asserts the Court properly admitted Exhibit C-35 at trial. (Compl. Opp. to Resp't Mot. to Strike at p. 2). Complainant further asserts the Court can consider the contents of the exhibit in ruling on its admissibility, as it directed the parties to brief. (Compl. Opp. to Resp't Mot. to Strike at p. 2). Finally, Complainant asks the Court to simply disregard the citations to this exhibit rather than strike the portions of his brief. (Compl. Opp. to Resp't Mot. to Strike at pp. 2-3).

As an initial matter, the Court finds Complainant has misapprehended the relevant portion of the ruling accepting Exhibit C-35 into evidence. Prior to accepting Exhibit C-35, the Court made clear its prior ruling on prejudice to Respondent "still stands." (Tr. 565). The Court, referencing Complainant's attorney's prior request to make a verbal offer of proof accepted Mr. Ruiz's unredacted witness statement "in lieu of [that] offer of proof," finding it represented the "best offer of proof." (Tr. 566-67). Thus, Complainant is simply incorrect in arguing Exhibit C-35 was "already admitted" at trial for *all* purposes. (Compl. Opp. to Resp't Mot. to Strike at p. 2) (Emphasis added).

Having so clarified the record, the Court finds no reason to modify its previous ruling concerning prejudice to Respondent were Exhibit C-35 be admitted for all purposes. Complainant claimed government informant privilege as to Mr. Ruiz throughout the course of discovery and during the first day of trial. (Tr. 462). In *Massman-Johnson (Luling)*, the Commission was confronted with "balancing the public interest in protecting the free flow of information against the Respondent's need to prepare their defense" where Complainant attempts to enter witness statements at trial which were previously withheld as protected by the government informant privilege.[8] *Massman-Johnson (Luling)*, 8 BNA OSHC at 1374. The Commission recognized a respondent at trial is "entitled to an opportunity for full and effective cross-examination of each witness. This includes an opportunity to test the veracity and accuracy of a witness's testimony against prior statements by that witness on the same subject." *Id.* at 1376. To balance these interests, the Commission weighed several possible procedures, and ultimately adopted a version of the "Jencks Act" approach, as articulated by the Eighth Circuit in *Brennan v. Engineered Prods., Inc.*, 506 F.2d 299 (8th Cir. 1974). *Id.* The Commission stated its adopted procedure, in relevant part:

> [W]hen a witness [for which government informant privilege has been asserted] has completed testifying for the Secretary on direct examination, the Secretary shall, upon motion by a respondent, turn over to it all the witness's prior statements that are in the government's possession and that relate to the subject matter of the witness's testimony …

[8] The Commission also confronted the application of the privilege in the context of pre-trial discovery. In that context, once the privilege has been asserted, the burden is on a respondent to demonstrate "'special circumstances which justify withdrawing the qualified privilege from the Secretary.'" *Massman-Johnson*, 8 BNA OSHC at 1374, *quoting Stephenson Enterprises, Inc.*, 2 BNA OSHC 1080 (No. 5873, 1974). The Commission also made clear, however, that if the statements are used "[d]uring the hearing itself, different considerations come into play." *Id.* at 1376.

> The Respondent shall then be entitled to a recess for such reasonable time as is necessary to evaluate a statement and prepare to use it in the hearing …

Id.

In this case, accepting Mr. Ruiz's written unredacted statement as substantive evidence under *Regina Constriction* would circumvent the procedural protections established in *Massman-Johnson.* Without Mr. Ruiz present, Respondent was prejudiced because it could not "test the veracity and accuracy of [Mr. Ruiz's] testimony against [his] prior statements" made to the CSHO by way of cross-examination. (*Id.)*

Contrary to Complainant's argument, the disclosure of Mr. Ruiz's unredacted witness statement to Respondent the day before the CSHO's testimony did not cure the prejudice to Respondent. (Compl. Post-Trial Br. at p. 31 n.16). At a minimum, due process protects Respondent's ability to test the veracity of the statements *in some fashion without unfair surprise*. (Emphasis added). *Cf. U.S. v. Baum*, 482 F.3d 1325 (2d Cir. 1973) (due process was denied when undisclosed witness testified at trial and defendant had insufficient notice). Complainant's invocation of the government informant throughout this proceeding and then seeking to waive that privilege on the second day of the trial in order to introduce the contents of the unredacted statement and what Mr. Ruiz told the CSHO during the inspection through *Regina Construction* constitutes unfair surprise and denied Respondent the right to test the veracity of Mr. Ruiz's statement by way of cross examination.[9]

[9] The Court acknowledges the unredacted statement of Mr. Ruiz – had he not been cloaked as a government informant – would generally be admissible under *Regina Construction* so long as the threshold requirements for introduction of Mr. Ruiz's statements as evidence have been established. However, when Complainant decided to protect Mr. Ruiz as a government informant, the rules of engagement changed.

Complainant mainly argues Respondent has failed to show prejudice because a redacted copy of Mr. Ruiz's witness statement had been provided during discovery. (Compl. Post-Trial Br. at p. 31, n.16). Complainant also argues Respondent had not shown a particularized need for the unredacted witness statement and further argues it should have raised any issues concerning privilege on the unredacted witness statement during discovery. *Id.* However, Complainant misunderstands the nature of the prejudice suffered by Respondent, which formed the basis for the Court's ruling.[10] While it is true Respondent bears the burden to demonstrate a particularized need for privileged statements *prior* to trial, the Commission made clear in *Massman-Johnson* the paradigm shifts when those statements, which have prior to trial been shielded from a respondent's discovery, are attempted to be entered at trial. As the Commission stated, "different considerations come into play", and Respondent is entitled to the procedure prescribed therein. *Massman-Johnson (Luling)*, 8 BNA OSHC at 1376. Here the argument should center around the actions taken by Complainant at trial in relation to getting the unredacted witness statement of Mr. Ruiz into evidence – not the actions that could have been taken by Respondent in the discovery phase of this case. At this stage in the proceeding, the Court is not dealing with any pretrial motion for discovery. With no ability to test the veracity of the unredacted witness statement of Mr. Ruiz at trial, Respondent was prejudiced in its defense.

Complainant argues Mr. Ruiz's unredacted witness statement is admissible as non-hearsay under *Regina Construction*, 15 BNA OSHC at 1044. (Compl. Post-Trial Br. at p. 31 n.15). Regardless of the unredacted witness statement's admissibility under *Regina*, the Court finds

[10] Respondent has likewise focused some of its attention on the Commission's decision as it relates to pre-trial discovery of witness statements, as opposed to the procedural protections afforded to respondents once the statements are introduced at trial. (Resp't Post-Trial Br., pp. 20-21).

where, as here, Complainant has asserted the government informant privilege throughout the course of litigation and the witness was not called at trial for cross-examination, *Regina Construction* cannot then be used by Complainant to circumvent the procedural safeguards established by *Massman-Johnson (Luling)* as to government informant witness statements and testimony. To adopt Complainant's approach would essentially gut the procedural protections of *Massman-Johnson (Luling)*.

Under Complainant's approach, he could shelter a witness from Respondent by using the government informant privilege and during trial decide not call the government informant as a witness and waive the privilege at that stage – effectively depriving Respondent a meaningful opportunity to cross-examine the witness based upon his prior statement and sworn testimony. Then after engaging in the above litigation strategy, Complainant invokes *Regina Construction* to argue the CSHO can testify as to what Mr. Ruiz told him during the inspection even though his identity and portions of his statement had been shielded from discovery by Complainant invoking the government informant privilege. To permit Complainant to engage in these procedural gymnastics would render meaningless the protections afforded under *Massman-Johnson (Luling)*. At both stages – discovery and the trial - Respondent is prejudiced due to the lack of an opportunity to confront and cross exam the witness. As the Commission noted in *Regina Construction,* one reason for admitting party admissions—and one indicator of their reliability—is "the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted." *Regina Constr.*, 15 BNA OSHC at 1047. Where, as here, Respondent was not given an opportunity to compile such evidence, *Regina Construction* does not dictate a different result. While Complaint could have used *Regina Construction* to permit the CSHO to testify as to what Mr. Ruiz told him during the inspection, *Regina Construction* cannot be used to

override the protections afforded Respondent under *Massman-Johnson (Luling)* when the witness involved is a government protected informant. Complainant made the decision to cloak this witness as a government informant. Complainant cannot be permitted to hide a witness under the government informant privilege until the second day of trial, not present the witness for cross-examination, and then use the CSHO's testimony to introduce the witness's statements. Such procedure is disingenuous and would permit Complainant to hide the government informant witness and his testimony to the prejudice of any employer. The Court rejects Complainant's argument that *Regina Construction* allows him to do what he attempted to do at trial. The Court denies Complainant's argument Exhibit C-35 is admissible as substantive evidence under *Regina Construction* under these set of circumstances.

5. What is the Appropriate Remedy

Having found the statements were properly excluded as substantive evidence, the remaining issue is the proper remedy. Respondent asks the Court to strike all references in Complainant's post-trial brief to Exhibit C-35 or the contents of that exhibit. Complainant asks the Court to simply disregard these portions of its brief. The Court does not find striking entire portions of Complainant's brief to be the proper course.

Respondent has not invoked any particular rule as the basis for its motion. However, the Federal Rules of Civil Procedure ("FRCP") govern proceedings before the Commission in absence of a more particular rule. S*ee* 29 C.F.R. § 2200.2(b). Motions to strike "pleadings" are governed by FRCP 12(f). *See* Fed. R. Civ. P. 12(f). Additionally, Commission Rule 101(a) empowers the Court to "strike any pleading or document not filed in accordance with these rules." 29 C.F.R. § 2200.101(a). Respondent has not alleged Complainant's brief was not filed in accordance with

any particular rule, as contemplated by Commission Rule 101(a). Thus, the Court's analysis is guided by Fed. R. Civ. P. 12(f).

Although the decision to strike a "pleading" under Fed. R. Civ. P. 12(f) rests within the discretion of the trial court, the remedy is "generally disfavored." *Kaiser Aluminum, Etc. v. Avondale Shipyards*, 677 F.2d 1045, 1057 (5th Cir. 1982); *see also Redwood v. Dobson*, 476 F.3d 462, 471 (7th Cir. 2007) ("Motions to strike sentences or sections out of briefs waste everyone's time."). Indeed, in exercising its discretion, a court should only strike those pleadings which are "redundant, immaterial, impertinent, or scandalous" and prejudicial to the opposing party. *Ruby v. Davis Foods, Inc.*, 269 F.3d 818, 820 (7th Cir. 2001). Moreover, as a general matter, briefs are not considered "pleadings," which are the proper subject of a motion to strike under FRCP 12(f). *See Kongtcheu v. Seacaucus Healthcare Ctr.*, 2014 WL 2435999, at *3 (D.N.J 2014); *Herb Reed Enters., Inc. v. Fla. Entm't Mgmt.*, 2014 WL 1305144, at *6 (D.Nev. 2014); *Hrubec v. National R.R. Passenger Corp.*, 829 F. Supp. 1502, 1506 (N.D.Ill. 1993).

In this case, the Court declines to strike the proposed portions of Complainant's brief. This decision is guided not only by the principle counseling against motions to strike generally, and motions to strike briefs or portions of briefs particularly,[11] but also by the nature of the evidence which is the subject of Respondent's contention. As detailed above, the Exhibit C-35 was accepted as an offer of proof. (Tr. 566-67). It was therefore provisionally accepted for the Court's ruling on its admissibility and, thereafter, on appellate review. *See United States v. Adams*, 271 F.3d 1236, 1241 (10th Cir. 2001); *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1406 (10th Cir. 1991). Thus, although the Court will not consider the contents of Exhibit C-35 in rendering

[11] *See Redwood*, 476 F.3d at 471 ("Motions to strike sentences or sections out of briefs waste everyone's time."); *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725 (7th Cir. 2006).

its decision, nor will it consider any reference to it in Complainant's argument, Exhibit C-35 remains part of the record in the event either the Commission or a Circuit Court of Appeals disagrees with the Court's decision on the matter. *See Adams*, 271 F.3d at 1241; *Polys*, 941 F.2d at 1406; *see also* Fed. R. Evid. 103(a)(2).

The Court finds Respondent's request is overboard as to what portions of Complainant's brief should be disregarded. Particularly, Respondent's request regarding the final five lines of the first paragraph on page 23 includes citations to testimony which was not objected to at trial. (Tr. 70-71, 351, 473, 662). The Court will, however, disregard footnote 8. Likewise, the first sentence of the third paragraph of page 29 contains testimony given at trial without objection. (Tr. 456, 461). Although this testimony refers to the occurrence of the interview with Mr. Ruiz, it does not touch upon its substance. (*Id.*). The Court will consider the testimony for that purpose alone. Finally, Respondent also objects to the "entirety of page 31 including footnotes 14 and 15." (Resp't Mot. to Strike at p. 4). The Court notes page 31 contains footnotes 15 and 16, but footnote 14 references Mr. Ruiz's statements to the CSHO. The Court will disregard it accordingly. As to the remainder of page 31, the Court will disregard the bullet point at the top of the page. The Court will consider the first sentence of the first paragraph in the main text, as it is representation of the record and does not go to the substance of Mr. Ruiz's statements. The Court will disregard the second sentence of this paragraph in its entirety. The Court will consider the legal arguments made in footnotes 15 and 16 and has considered the citation to Exhibit C-35 only in the context of the admissibility arguments made by the parties, as addressed above.

Based on its review of the record, the Court denies Respondent's Motion to Strike references from the record. The Court affirms its findings on the record, as well as those made herein, that Mr. Ruiz's unredacted witness statement was properly excluded as substantive

evidence. Thus, it will not consider Exhibit C-35 or any references in Complainant's post-trial brief to that exhibit.

B. **Applicable Law**

All of the items in the Citation relate to standards promulgated pursuant to section 5(a)(2) of the Act. To establish a violation of a safety or health standard promulgated pursuant to section 5(a)(2) of the Act, Complainant must prove: (1) the cited standard applies; (2) the terms of the standard were violated; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

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 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).

C. **Citation 1, Item 2a – The Alleged Scaffold and Aerial Lift Training Violations**

Complainant alleged two instances of a serious violation of 29 C.F.R. § 1926.454(a) as follows:

> 29 CFR 1926.454(a): Employees who perform work while on a scaffold were not trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards:
>
> a) Keenan, Hopkins, Suder and Stowell Contractors Inc, dba KHS&S Contractors, at 13801 Grant Street, Thornton, CO: On and preceding 3/6/18, the employer did not ensure that employees who performed work while on a scaffold were trained by a person qualified in

the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards: Employees were directed to perform framing and sheathing work on towers upon flat steel decking roofs of buildings. Employees performed some of the tasks while standing upon Bill-Jax Sectional/Utility scaffolds. The employer did not ensure that all employees working upon the scaffolds received scaffold training. This condition exposed employees to approximate six[-]foot fall hazards.

b) Keenan, Hopkins, Suder and Stowell Contractors Inc, dba KHS&S Contractors, at 13801 Grant Street, Thornton, CO: On and preceding 3/27/18, the employer did not ensure that employees who performed work while on a scaffold were trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. Employees were directed to install sheathing on the exterior sides of buildings. The employees performed these tasks using an aerial lift. The employer did not ensure that all employees working from the aerial lifts received scaffold training. This condition exposed employees to approximate twenty-foot fall hazards.

Citation at 7.

The cited standard provides as follows:

(a) The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. The training shall include the following areas, as applicable:

(1) The nature of any electrical hazards, fall hazards and falling object hazards in the work area;

(2) The correct procedures for dealing with electrical hazards and for erecting, maintaining, and disassembling the fall protection systems and falling object protection systems being used;

(3) The proper use of the scaffold, and the proper handling of materials on the scaffold;

(4) The maximum intended load and the load-carrying capacities of the scaffolds used; and

(5) Any other pertinent requirements of this subpart.

29 C.F.R. § 1926.454(a).

1. The Standard Applies to Both Alleged Instances of Item 2a

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) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *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"); *Arcon, Inc.,* 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004) ("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions.")

The parties do not dispute the standard applies as to instance (a) alleged in Citation 1, Item 2a pertaining to the "Bill-Jax Sectional/Utility Scaffolds." However, as to instance (b), related to aerial lifts, Respondent disputes the application of the standard, arguing an aerial lift is not a "scaffold" and any training required for aerial lifts is covered by 29 C.F.R. § 1926.453. (Resp't Br. at 16-17). Citing a Commission ALJ's decision, *R.G. Bigelow Elec. Co., Inc.*, 2001 WL 987459 at *5 n.12 (No. 00-1213, 2001) (ALJ), Complainant argues the cited standard applies to "all scaffolds, including aerial lifts." (Sec'y Br. p. 23). The Court agrees with Complainant that employees working on aerial lifts are subject to the training requirements of 29 C.F.R. § 1926.454(a).

"When determining the meaning of [a] standard, the Commission must first look to its text and structure." *The Davey Tree Expert Co.*, 2016 WL 845440, at *1 (No. 11-2556, 2016), citing

Superior Masonry Builders, Inc., 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003). If the meaning of the standard's language is "sufficiently clear," the inquiry ends. *Unarco Comm. Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993). Based on the following, the Court finds the language of the standard clear and not ambiguous.

Section 1926.450(b) defines a "scaffold" as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or material or both." 29 C.F.R. § 1926.450(b). A "platform" is further defined as a "work surface elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated planks, fabricated decks, and fabricated platforms." 29 C.F.R. § 1926.450(b).

The Court finds the definition of "scaffold" includes aerial lifts, which are "elevated platforms," i.e., "work surface[s] elevated above lower levels." 29. C.F.R. § 1926.450(b). Because aerial lifts are "scaffolds," the training requirements of 29 C.F.R. § 1926.454 are applicable. Aside from a plain application of the definitions of "scaffold" and "platform," the structure of Subpart L directs the training requirements of 29 C.F.R. § 1926.454(a) apply to aerial lifts. Section 1926.450(a) states Subpart L, which includes aerial lifts under 29 C.F.R. § 1926.453, "applies to all scaffolds used in workplaces covered by this part" and specifically exempts only "crane or derrick suspended personnel platforms." 29 C.F.R. § 1926.450(a). Moreover, the training required by 29 C.F.R. § 1926.454 includes "[a]ny other pertinent requirements of this subpart," which in turn would include the specific requirements of 29 C.F.R. § 1926.453.

Respondent argues 29 C.F.R. § 1926.450(a) goes on to say "[t]he criteria for aerial lifts are set out exclusively in § 1926.453." 29 C.F.R. § 1926.450(a). However, 29 C.F.R. § 1926.453, although containing some safety requirements, is devoid of training requirements. Thus, if this final sentence of 29 C.F.R. § 1926.450(a) is read as Respondent suggests, Subpart L imposes no

training requirements for aerial lifts, as opposed to all other types of scaffolds. The Courts find such a reading implausible. *See Avcon, Inc.*, 2011 WL 2280634, at *11 (Nos. 98-0755 & 98-1168, 2011) (interpreting statutory provisions to avoid "absurd results"). Rather, the better reading of this sentence is the "criteria" referred to are the technical and operational requirements that are actually set forth in 29 C.F.R. § 1926.453, which are specific to aerial lifts, leaving the technical "criteria" for other types of scaffolds to be governed by 29 C.F.R. §§ 1926.451 and 452. *See R.G. Bigelow Elec. Co., Inc.*, 2001 WL 987459, at *5 (reaching the same conclusion).

The regulation's preamble and agency interpretive guidance also supports the Court's findings. *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 157 (1991). "The preamble is the best and most authoritative statement of the Secretary's legislative intent." *Phelps Dodge Corp.,* 11 BNA OSHC 1441, 1444 (No. 80-3203, 1983), *aff'd,* 725 F.2d 1237, 1240 (9th Cir.1984). Here, the Preamble to Subpart L confirms the Court's conclusion the training requirements of 29 C.F.R. § 1926.454 apply to aerial lifts. Specifically, it states "this equipment," *i.e.* "elevating and rotating work platforms" which collectively are referred to as "aerial lifts," is "a scaffold and that it should be addressed by subpart L." Safety Standards for Scaffolds Used in the Construction Industry, 61 Fed. Reg. 46,026, 46,095 (Aug. 30, 1996) (to be codified at 29 C.F.R. pt. 1926); *see also R.G. Bigelow Co., Inc.*, 2001 WL 987459, at *5 n.12.

Additionally, interpretive guidance from OSHA has read Subpart L to apply to both boom and scissor lifts, which are the types of lifts at issue here. (Tr. at 355-56, 498-501). *See Union Tank Car Co.*, 18 BNA OSHC 1067 (No. 96-0563, 1997). A 2000 Interpretation Letter concluded because "scissor lifts do meet the definition of a scaffold (§1926.451), employers must comply with the other applicable provisions of Subpart L when using scissors lifts." OSHA Interpretation Letter, Re: "Subpart 'L' [of Part 1926] and Appendices, Scissors Lifts" (Feb. 23, 2000). This

Interpretation Letter further concluded a specific type of boom lift was an "aerial lift" and "the training requirements [of § 1926.454] apply to all equipment covered by Subpart L, which includes aerial lifts covered by §1926.453." *Id.*

Complainant has established the cited standard applies to both instances alleged in the Citation 1, Item 2a..

2. The Standard Was Violated

The Citation alleged Respondent violated this standard (1) by not conducting training with a qualified person, and (2) by not ensuring all employees at the DPO worksite were trained. The Court finds Complainant has proven the provided training was not conducted by a person meeting the definition of a "qualified" person in scaffolds.

Section 1926.450(b) defines "qualified" as "one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his/her ability to solve or resolve problems related to the subject matter, the work, or the project." Respondent's main training program was its "Employee Safety Standards" or "ESS," which were reviewed once during new-hire processing and again during formal safety training. (Tr. 303-04, 345-47, 370-74). New-hire processing took place with Rosa Thompson, while formal training took place with safety engineer Christian Mancera. (*Id*.). Complainant correctly notes, Ms. Thompson was Respondent's "project admin" at the time of the accident (Tr. 212) and was not a qualified person to provide the required training. (Sec'y Br. at 27, n.10). The evidence showed Ms. Thompson would review the ESS with new employees while processing their work documentation. (Tr. 301). No evidence concerning Ms. Thompson's qualifications was adduced at trial, and the Court finds none to find she met the definition of a "qualified" person.

Thus, Respondent's compliance with the standard turns on the qualifications of Mr. Mancera.[12] The Court finds the relevant definition requires, at a minimum, evidence of Mr. Mancera's familiarity with OSHA's scaffolding regulations, found at either 29 C.F.R. § 1926.454 or, for the purpose of aerial lifts, 29 C.F.R. § 1926.453. *Cf. Midwest Steel, Inc.*, 26 (BNA) OSHC 2177 at *19 (No. 15-1471, 2017) (finding a qualified person for purposes of a scaffold design violation under 29 C.F.R. § 1926.451(a)(6) must demonstrate these qualifications). This evidence must be specific to the "Bill-Jax Sectional/Utility scaffolds" referenced in instance (a) of the Citation 1, Item 2a and the boom and scissor "aerial lifts" referred to in instance (b) of the Citation 1, Item 2a. *Cf. id.* at *19 (finding the same for the specific type of scaffold at issue). Under the relevant definition, this requires evidence of either (1) "possession of a recognized degree, certificate, or professional standing" or (2) "extensive knowledge, training, and experience" of the requirements of 29 C.F.R. §§ 1926.453 & 1926.454. 29 C.F.R. § 1926.450(b); *see also Midwest Steel, Inc.*, 26 BNA OSHC at *19. Although Mr. Mancera had a "bachelor's of science in safety and health management," (Tr. at 269-70), no evidence was adduced to suggest this was a "recognized degree" for the purpose of the subject scaffolds or aerial lifts. This leaves the question of whether Mr. Mancera demonstrated "extensive knowledge, training, and experience" of the applicable scaffolding and aerial lift regulations to deem him a qualified person in those subjects.

Respondent's argument regarding Mr. Mancera's qualifications are limited to the above-mentioned degree and his "apparent knowledge and passion." (Resp't Br. at 18). The relevant definition, however, requires a showing of "*extensive* knowledge, training, *and* experience." 29 C.F.R. § 1926.450(b) (emphases added); *see also Midwest Steel, Inc.*, 26 BNA OSHC at *19 n.25.

[12] Although there was evidence of other trainings conducted by Whiting-Turner and the employees' union, there was no evidence adduced on the qualifications of the individuals conducting those trainings.

Mr. Mancera demonstrated some apparent knowledge of scaffolds and aerial lifts generally. (Tr. 341-45, 354-57). However, as to specific OSHA regulations, he testified during training he referred to "just subpart M," which relates to fall protection, not scaffolding. (Tr. 378-79). *See* Resp't Br. at 18. Moreover, Mr. Mancera's background was limited to five years of experience, and no specific evidence was adduced concerning his experience in scaffolds or aerial lifts. Finally, as to training, Mr. Mancera briefly mentioned an "aerial lift … train the trainer" course, but no further evidence was given as to the nature of this course.[13]

Based on the above, there is insufficient evidence to find Mr. Mancera was a "qualified" person for purposes of scaffold and aerial lifts training.[14] Accordingly, Complainant has demonstrated Respondent violated the cited standard.

3. Employees Were Exposed to the Hazard

Respondent has not contested, and the evidence supports, its employees were exposed to the hazard while working on scaffolds and aerial lifts at the DPO worksite.

4. Respondent Had Actual Knowledge of the Violation

"The knowledge element of the *prima facie* case can be shown in one of two ways." *Eller-Ito Stevedoring*, 567 F. App'x at 803 (*citing ComTran,* 722 F.3d at 1307). Complainant may show that a supervisor had either actual or constructive knowledge of the violation. *Id.* (*citing ComTran,* 722 F.3d at 1307–08). It is not necessary to show the employer knew or understood the condition was hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079-1080 (citations omitted); *Peterson*

[13] In any event, merely taking a course in the subject matter would not be sufficient to deem someone "qualified" in the subject matter. *See Midwest Steel, Inc.*, 26 BNA OSHC OSHC at *20 ("[T]elling the Court the course someone took without detailing the content of the course does not provide much in the way of demonstration of that person's abilities.").

[14] The Court notes the testimony of Mr. Cabrea as to Mr. Mancera's background and qualifications. (Tr. 238-40). Mr. Cabrea's testimony concerning Mr. Mancera's qualifications was conclusory, and the Court gives it little weight.

Bros. Steel Erection Co., 16 BNA OSHC 1196, 1199 (No. 90-2304, 1999), *aff'd* 26 F.3d 573 (5th Cir. 1994).

Respondent has not disputed its knowledge of Mr. Mancera's qualifications or its designation of him to conduct the requisite training. Respondent is presumed to have knowledge of Mr. Mancera's qualifications for training purposes. *See Compass Envtl., Inc. v. OSHRC*, 663 F.3d 1164, 1168 (10th Cir. 2011) ("[E]mployer knowledge of the violative condition … will almost invariably be present where the alleged violative condition is inadequate training of employees."). In addition, Mr. Cabrea, Mr. Mancera's direct supervisor, testified as to his knowledge of Mr. Mancera's background and that knowledge provided Mr. Cabrea with all the information he needed to know to determine that Mr. Mancera was not a "qualified person." (Tr. 238-40). The Court finds Respondent had actual knowledge that Mr. Mancera was not a "qualified person" to train under the cited standard.

Knowledge may be imputed to the employer through its supervisory employee." *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) quoting *Access Equip. Sys.*, 21 BNA OSHC 1400, 1401 (No. 03-1351, 2006). It is well settled an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Access Equipment Systems. Inc*., 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) (employee who was "in charge of" or "the lead person for" one or two employees who erected scaffolds "can be considered a supervisor). The Commission has long held it is the substance of the delegation of authority not the formal title of the employee having the authority. *Dover Elevator Co*., 16 BNA OSHC 1281 (No. 91-862, 1993). Mr. Cabrea, as Director of Safety and Risk Control, is a high-ranking supervisor of Respondent. (Tr. 162-63, 279-80). The Court finds the actual knowledge of Mr. Cabera as to Mr. Mancera's

lack of qualifications to be a "qualified person" for the purpose of conducting the type of training required may be imputed[15] to Respondent.

5. The Violation was Serious

Complainant has classified the violation of 29 C.F.R. § 1926.454(a) as serious. A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Complainant need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010).

The requirements for scaffold training address multiple associated hazards, including electrical and fall hazards, the maximum intended load for the scaffolds, as well as the proper construction, maintenance, and use of the scaffolds. 29 C.F.R. § 1926.454(a) & (b). The Court finds lack of proper training in these subjects from someone who is qualified exposes employees to multiple workplace hazards and serious injury from the potential misuse of scaffolds and aerial lifts. The violation was properly classified as serious. Citation 1, Item 2a will be AFFIRMED as a serious citation.

D. **Citation 1, Item 2b – The Alleged Fall Protection Training Violation**

Complainant alleged a serious violation of 29 C.F.R. § 1926.503(a)(1) as follows:

> 29 CFR 1926.503(a)(l): The employer did not provide a training program enabling recognition of and appropriate protective procedures for fall hazards for each employee who might be exposed to fall hazards:

[15] Case law underscores an employer's knowledge will almost invariably be present when inadequacy of training is at issue. *Compass Envtl., Inc. v. OSHRC*, 663 F.3d at 1164. Since training is the sole responsibility of the employer and the employer would know whether or not training was adequately provided and therefore foreseeable as to the consequences of not providing training, the Tenth Circuit decision in *Mountain States Tel. & Tel. Co.,v. OSHRC,* 623 F.2d 155 (10th Cir. 1980) does not need to be discussed for imputation of knowledge to the employer to occur in this case.

> a) Keenan, Hopkins, Suder and Stowell Contractors Inc, dba KHS&S Contractors, at 13801 Grant Street, Thornton, CO: On and preceding 3/6/18, the employer did not provide a training program enabling recognition of and appropriate protective procedures for fall hazards for each employee who might be exposed to fall hazards. Employees were directed to perform framing and sheathing work on towers upon flat steel decking roofs of buildings. The employer did not ensure that all employees working upon the roofs of the buildings received fall protection training. This condition exposed employees to approximate 15'9" fall hazards.

Citation at 9.

The cited standard, 29 C.F.R. § 1926.503(a)(1), provides as follows: "The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards."

1. **The Standard Applies**

Respondent has not contested the cited standard applies, and the record supports a finding that Respondent's employees were exposed to fall hazards while framing towers at the DPO worksite and therefore required fall protection training. The cited standard applies.

2. **The Standard Was Not Violated**

Under Commission precedent, the reasonably prudent employer test is, and has consistently been, used to determine whether an employer has failed to comply with the standard – that is, to assess the adequacy of the content of the instructions at issue.

To establish non-compliance with a training standard, Complainant must show the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the circumstances. *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2126 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001), citing *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1019-20 (No. 87-1067, 1991); *El Paso Crane & Rigging Co., Inc.*, 16 BNA OSHC 1419, 1424

(No. 90-1106, 1993). If the employer rebuts the allegation of the training violation "by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided." *Id.*, quoting *Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1086 (No. 91-2494, 1997).

Unlike the scaffolding training standard cited in Citation 1, Item 2a, 29 C.F.R. § 1926.503(a)(1), by its own terms, does not require a "qualified" person to provide fall protection training. Thus, any training provided to Respondent's employees, either by Mr. Mancera or otherwise, is properly the focus of the Court's analysis for this training Item. Here, Respondent's main training consisted of the ESS. (Tr. 246-48, 345-47, 358-60, 370-74; Ex. C-15). As clarified by Mr. Mancera, the ESS was the list of topics discussed during Respondent's formal training, which would typically last three-and-a-half hours. (Tr. 355). Every new employee hired by Respondent went through the ESS orientation training, regardless if they had been trained elsewhere. (Tr. 168-70, 205-07, 210, 225-27, 249-51, 291, 300-04, 369-70, 382-84, 592-94). Part of the ESS was fall protection training. (Ex. C-15). The topics included: (1) when fall protection was required, including for leading edges, holes, and scaffolds and aerial lifts; (2) controlled access zones; (3) the components of personal fall protection systems; and (4) guardrail systems. (Ex. C-15). In addition, Mr. Mancera detailed more content of this training at trial. (Tr. 347-50). Respondent also introduced its Fall Protection Program, which was in effect at the time of the accident. (Tr. 184-86; Ex. C-6). In addition to Respondent's own training, every employee at the DPO worksite had to go through an orientation program provided by the general contractor, Whiting-Turner. (Tr. 97-99, 168-69, 233-34, 362-69, 592-94, 668, 700; Exs. C-10, 13, 14; R-2, 3, 5, 6, 7). Whiting-Turner's program also included training in fall protection. (Exs. C-13 at 2; C-14 at 2).

In response to Respondent's evidence, rather than point to any perceived deficiency in the training provided to Respondent's employees, Complainant argues there is insufficient evidence to conclude three of Respondent's employees – Messrs. Chavarin, [Redacted], and Ruiz – received the training *at all*.[16] (Sec'y Br. at 25-26). Providing no training at all would violate the express terms of the standard requiring "each employee" to receive the specified training. 29 C.F.R. § 1926.503(a)(1); *see also Gen. Motors Corp.*, 22 BNA OSHC 1019, 1030 (Nos. 91-2834 & 91-2950, 2007) (consolidated) ("[W]ith regard to training, it would be unreasonable to require that an employee be exposed to a hazard before requiring that he be trained to recognize and avoid that hazard."). With an initial clarification, the Court, however, disagrees with Complainant's contention. At trial, the CSHO made clear the Citation Item regarding fall protection training was only charged with respect to Mr. Ruiz. (Tr. 510-511). The CSHO's violation worksheet, which the Court gives determinative weight, supports this. (Ex. C-27 at 8-9). The Court thus analyzes this Item only with respect to Mr. Ruiz.

The Court finds there is sufficient evidence Mr. Ruiz received the required fall protection training. Of particular note to the Court is the "New Hire Checklist," signed and dated by Mr. Ruiz on February 21, 2018. (Ex. C-11). As several witnesses testified, after the New Hire Checklist was completed for a given employee, that employee was invariably trained by Mr. Mancera using the ESS. (Tr. 168-70, 205-07, 210, 225-27, 249-51, 291, 300-04, 369-70, 382-84, 592-94). Complainant has not pointed to any persuasive evidence to suggest this protocol was not followed in the case of Mr. Ruiz. Rather, Complainant emphasizes the lack of a signed ESS from

[16] Complainant *does* point to perceived deficiencies in Mr. Payne's attitude toward training, arguing he "was unaware and did not value certain training." (Sec'y Br. at 28-29). It was undisputed, however, Respondent relied on Mr. Mancera to provide its employees training, not Mr. Payne.

Mr. Ruiz, like the one introduced for Mr. Hernandez. (Exs. C-15 and R-4). While such a document would perhaps be more conclusive on the point of Mr. Ruiz's ESS training, the Court is nonetheless persuaded by the New Hire Checklist for Mr. Ruiz and finds it lends credible support for the conclusion that Mr. Ruiz in fact received the ESS training from Mr. Mancera. *See Morris v. Travelers Indem. Co. of Am.*, 518 F.3d 755, 761-762 (10th Cir. 2008) (finding evidence of an insurance company's routine practice together with other evidence can establish the company acted in accordance with its practice on a specific occasion); Fed. R. Evid. 406.

In any event, the evidence also establishes Mr. Ruiz attended Whiting-Turner's safety orientation on February 23, 2018. (Ex. C-10 at 1). This orientation also included fall protection training. (Exs. C-13 at 2; C-14 at 2). Complainant has raised no issues as to the adequacy of this training, and nothing requires an employer to actually train its employees itself, only to provide a program for the required training. *See* 29 C.F.R. § 1926.503(b)(1) (contemplating training provided by "another employer" can satisfy the requirements of 29 C.F.R. § 1926.503(a)); *see also BSE Indus. Contractors*, 2001 WL 604904, at *4 (No. 00-2331, 2001) (ALJ).

Complainant further argues 29 C.F.R. § 1926.503(b) required Respondent to keep a written certification of each employee's fall protection training, but Respondent "did not produce any such certifications."[17] (Compl. Br. at 27-28). The Citation did not charge Respondent with a violation

[17] 29 C.F.R. § 1926.503(b) states:

> (b) Certification of training.
>
> (1) The employer shall verify compliance with [29 C.F.R. § 1926.503(a)] by preparing a written certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer. If the employer relies on training conducted by another employer or completed prior to the effective date of this section, the certification record shall indicate the date the employer determined the prior training was adequate rather than the date of actual training.
>
> (2) The latest training certification shall be maintained.

of 29 C.F.R. § 1926.503(b) which requires certification. While Respondent's failure to produce the required certification may be evidence the training did not occur, the Court does not find, without more, it demonstrates a violation of 29 C.F.R. § 1926.503(a). *See William Trahant, Jr., Constr., Inc.*, at 2017 WL 3399778, *13 (No. 15-0489, 2017) (ALJ) (finding lack of a certification together with other evidence demonstrated lack of fall protection training). *Cf. Jake's Fireworks, Inc.*, 26 BNA OSHC 1738, 1750 n.10 (No. 15-0260, 2017) (ALJ) (finding that, although lack of a written certification was "strong evidence" that no hazard assessment occurred, it was not sufficient to prove a violation of 29 C.F.R. § 1910.132(d)(1) requiring a hazard assessment to be performed).

The Court finds Respondent provided the required fall protection training to Mr. Ruiz and thus did not violate the standard. Accordingly, the Court VACATES Item 2b of the Citation.

E. **Citation 1, Item 1 – The Alleged Inspection by Competent Person Violation**

Complainant alleged a serious violation of 29 C.F.R. § 1926.20(b)(2) as follows:

> 29 CFR 1926.20(b)(2): The employer did not initiate and maintain a safety program which provides for frequent and regular inspections of jobsites, materials, and-equipment to be made by a competent person (i.e., a person who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has the authority to take prompt corrective measures to eliminate them):
>
> a) Keenan, Hopkins, Suder and Stowell Contractors Inc, dba KHS&S Contractors, at 13801 Grant Street, Thornton, CO: On 3/3/18, the employer did not maintain a safety program which provided for frequent and regular inspections of jobsites, materials, and equipment to be made by a competent person (i.e., a person who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has the authority to take prompt corrective measures to eliminate them). Employees were directed to perform framing and sheathing work on the towers upon flat steel decking roofs of buildings. The employer did not inspect the work areas to determine the presence of floor openings or other fall hazards prior to initiation of work. This condition exposed employees to approximate 15'9" fall hazards.

Citation at 6.

Section 1926.20(b)(1) requires employers to "initiate and maintain such programs as may be necessary to comply with [Part 1926 of the OSH Act]." Section 1926.20(b)(2), charged against Respondent here, provides "[s]uch programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers."

1. **The Standard Applies**

The parties do not dispute the cited standard applies to Respondent's construction activities. The Court finds the cited standard applies.

2. **The Standard Was Violated**

Complainant argues Respondent violated the standard because "[i]nspections performed in compliance with the standard would have detected the hazard of floor holes under the circumstances presented in this case." (Compl. Br. at 13). Respondent's main argument is as follows:

> [N]either the standard nor the Commission states that the standard requires inspections before work begins. If an employer fails to inspect an area before work begins, which exposes employees to a hazard, OSHA could theoretically cite the employer for exposing its employees to a hazard. If that hazard was electrical, OSHA could cite an electrical standard. But OSHA could only cite that employer for failing to inspect if it did not perform inspections or follow an inspection program. The hazard does not create an inspection violation.

(Resp't Br. at 12).

Respondent contends its inspection program, which provides for at least daily inspections by competent persons, was sufficient to comply with the standard. (Resp't Br. at 12-13). In the alternative, Respondent argues both Mr. Peraza and Mr. Payne were competent persons who had

inspected the worksite and their failure to recognize the existence of the hole was not tantamount to a violation of the standard because "[a]n unfortunate accident does not prove that an inspection was inadequate because the presence of a specific hazard does not, in and of itself, establish a failure to inspect." (Resp't Br. at 15).

Respondent's contention that "OSHA could only cite [an] employer for failing to inspect if it did not perform inspections or follow an inspection program" is untenable and not in accordance with Commission caselaw. In *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019 (No. 94-200, 1997), the Commission was faced with an alleged violation of 29 C.F.R. § 1926.20(b)(2). In that case, the crew for the employer, a maker of custom cabinets, was delivering cabinets for a master bathroom to a house under construction. *Id.* at *1. Prior to the delivery, the leadman for the crew was charged with "walking the house" to look for obstructions which could cause the delivery crew to trip or fall. *Id.* at *4. Because the "ticket" for the delivery did not indicate anything was to be delivered to the second floor, the leadman failed to investigate the second floor of the house and thus failed to recognize it was not guarded by any railing or other protection. *Id.* When the crew entered the house, they were instructed to deliver the cabinet to the master bathroom on the second floor. *Id*. at *1. When one of the employees reached the top of the stairs, he fell off the unguarded landing. *Id.*

In determining whether the leadman's inspection complied with 29 C.F.R. § 1926.20(b)(2), the Commission looked to the "totality of the evidence" around the inspection and agreed with the ALJ that "in view of his experience and the circumstances at the site it was unreasonable for [the leadman] to not check the upstairs...." *Id.* at *4. The Commission also noted the following bases for its conclusion: (1) the leadman "testified that most two-story homes have a bathroom upstairs"; (2) the delivery crew "ascertained that the master bathroom was on the second floor by simply

asking one of the other subcontractors"; and (3) there was "testimony that the bathroom on the first floor was 'clearly' not the master bathroom." *Id.* The Commission thus found a violation of 29 C.F.R. § 1926.20(b)(2). *Id.*

Superior Custom Cabinet makes clear any inspection by a competent person, even if made pursuant to a "program" of "frequent and regular" inspections, must adequately identify recognizable hazards associated with the worksite or otherwise the inspection is deficient. *Id.* (citing *DiGioia Bros. Excavating*, 17 BNA OSHC 1181, 1184 (No. 92–3024, 1995) (holding, under a similar inspection-by-a-competent-person regulation, where the "inspections were insufficient to identify [a] recognizable hazard" they violated the regulation)). Complainant has therefore properly focused on the adequacy of the actual inspection performed on the deck of Building 2, which failed to identify the hole through which [Redacted] fell. In this instance, the only designated "competent person" who inspected the deck the day of the accident was Mr. Peraza,[18] and thus only the adequacy of his inspection is at issue.[19]

[18] Complainant argues Mr. Peraza did not inspect the deck *at all* before commencing work. (Sec'y Br. at 17) ("Peraza did not inspect Building 2's deck on March 3, 2018 – even though he worked there for two or three hours before the accident." (citing Tr. 78)). The Court rejects this view of Mr. Peraza's testimony. Mr. Peraza testified no one from his crew was on the deck before him and he and Messrs. [Redacted] and Ruiz went up to the deck together. (*Id.*). This would not have precluded Mr. Peraza from inspecting the deck for hazards before commencing work, which he apparently did, given he directed Messrs. [Redacted] and Ruiz to remove the small pieces of plywood to avoid what he perceived as a trip hazard. (Tr. 112-114). Mr. Peraza also testified he filled out a PTP before having Messrs. [Redacted] and Ruiz install plywood on the deck, which would necessitate some sort of inspection. (Tr. 44, 69).

[19] The Court therefore rejects Respondent's arguments focusing on any inspections made by Mr. Payne or Mr. Mancera at the DPO worksite. Mr. Payne did not inspect the deck on which Respondent's crew was working the date of the accident, even though he visited other parts of the site at Building 2. (Tr. 413-15, 503, 686). Mr. Mancera inspected worksites at most once or twice a month and did not inspect the deck of Building 2 until after the accident. (Tr. 316-19, 390; Resp't Br. at 12).

The Court finds Mr. Peraza meets the definition of a "competent person," which is defined by 29 C.F.R. § 1926.32(f) as "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." Mr. Peraza had been designated as a "leadman" and a competent person by Respondent for purposes of conducting PTP inspections. (Tr. 40, 93-94, 251-52). He had worked in construction for 20 years. (Tr. 93-94). He was specifically assigned the duty of inspecting worksites and equipment prior to the start of work. (Tr. 44-45, 99-101, 629). He had been trained in identifying holes in the worksite and how to abate them. (Tr. 45-46, 96-97, 115, 324-25, 334-37; Ex. C-6; Ex. R-3). He demonstrated his knowledge regarding OSHA regulations for covering holes in the workplace. (Tr. 96-97). *See also* 29 C.F.R. §1926.501(a)(4) (requirement for all holes to be covered); § 1926.500(b) (defining "hole" as "a gap or void 2 inches (5.1 cm) or more in its least dimension, in a floor, roof, or other walking/working surface"). Finally, he had the authority to close worksites to eliminate safety hazards, including if he found an open hole. (Tr. 45, 100-01). The Court therefore finds Mr. Peraza met the definition of a "competent person" for the purposes of abating the hazard presented here, i.e., the unmarked hole in the deck. *See Superior Masonry Builders, Inc.*, 18 BNA OSHC 1182 at *8 (No. 96-1043, 2003) ("experience alone does not qualify [a] designated employee as a 'competent person'… [he must be] instructed about the specific hazards presented [by the worksite] …"); *Sw. Bell Telephone*, 19 BNA OSHC 1097 at *2 (No. 98-1748, 2000) (competent person is one who has "the authority to order the steps required to bring the physical conditions into compliance" and to "abate hazards").

The remaining issue, then, is whether Mr. Peraza's inspection of the deck of the tower of Building 2 on March 3, 2018, satisfied 29 C.F.R. § 1926.20(b)(2). This necessarily depends on

the state of the deck at the time he inspected it, which is the subject of conflicting assessments. The photographs and video taken by the CSHO are not representative of the deck's condition, because they were taken 13 days after the fact. Instead, the Court finds pages 8 and 9 of Complainant's Exhibit 1 to be the most accurate representation of the deck's surface on the date of the accident, including the piece of metal decking depicted on the left side of these photographs. (Ex. C-1 at 8 & 9). The CSHO's notes on page 8 indicate this photograph was "provided by Whiting-Turner" and depicted the "scene 2 h[ours] after [the] accident." (Tr. 553-54).[20] The photograph on page 9 contains a similar depiction, albeit without the added notes.

Respondent does not dispute the existence of the three boards depicted in these photographs (Resp't Br. at 13), and Respondent's own evidence depicts these three boards in similar if not identical positions. (Ex. R-13). Respondent argues, however, "the evidence does not support that the piece of decking [on the left side of the photographs] existed before the accident." (Resp't Br. at 13). The Court disagrees. While Messrs. Peraza and Payne could not recall having seen the decking (Tr. 50, 699), Mr. Mancera visited the worksite the date of the accident and recalled seeing the piece of metal decking depicted on the left side of this photograph upon his arrival and inspection of the deck. (Tr. 316-21). He later learned the piece of decking came from the opening of the hole through which [Redacted] fell. (Tr. 321). Other photographs of the deck only depict a portion of the deck depicted in Exhibit C-1, pages 8 and 9, and thus do not cast doubt on the accuracy of these photographs depicting it. (Ex. C-1 at 10-12; Ex. R-13). Although these photographs were taken some time after the accident, there is no evidence to suggest the piece of

[20] Respondent initially moved for the admission of this page including the CSHO's note (Tr. 554), and later affirmed the admission of the page with the CSHO's added note. (Tr. 729). Respondent has not disputed the notes' characterization of this photograph.

decking was moved onto the deck between the accident and the time the photographs were taken, which was approximately two hours later.

Based on the arrangement of the deck at the time he inspected it, the Court finds Mr. Peraza's inspection failed to detect a recognizable hazard and thereby violated 29 C.F.R. § 1926.20(b)(2). Mr. Mancera's investigation confirmed the piece of metal decking on the left side of the deck was the piece of decking cut to make the hole, thus making them approximately the same size. (Tr. 320-21). The Court finds the existence of this piece of decking should have caused Mr. Peraza, as a competent person inspecting the worksite for hazards, to further investigate the deck, including the smaller piece of plywood covering the hole. Mr. Mancera opined a person in Mr. Peraza's position on the roof could have walked up to plywood and picked up or moved it to see if it was covering a hole. (Tr. 321-22). Alternatively, the evidence establishes the area below the deck was readily accessible to Mr. Peraza. (Tr. 138-41, 426-27, 649-650; Ex. C-1 at 14-15, Ex. C-2 at 01:48-02:29). Thus, he could have gone below the deck to look up at the area covered by the plywood to see if it was covering a hole.[21] (Tr. 507-08). Following either of these courses would have likely led to Mr. Peraza to discover the existence of the hole before exposing workers to the hazard. Given the arrangement of the deck at the time Mr. Peraza inspected it, the "totality of the evidence … in view of [Mr. Peraza's] experience and the circumstances at the site" leads the Court to conclude Mr. Peraza's inspection failed to detect a "recognizable hazard" consistent with his obligations under 29 C.F.R. § 1926.20(b)(2). *See Superior Custom Cabinet Co.*, 18 BNA OSHC 1019 at *4; *DiGioia Bros. Excavating*, 17 BNA OSHC at 1184.

[21] Respondent argues "[e]ven if the wood was visible from below, the bottom of the wood did not show whether the top was correctly marked." (Resp't Br. at 14). While this may be true, it still would have revealed the existence of the hole. (Ex. C-1 at 14 & 15).

At the very least, the Court finds the arrangement of the deck should have put Mr. Peraza on notice to further inquire as to the origin of the piece of decking and the pieces of plywood on the deck when he arrived. Mr. Mancera testified a person in Mr. Peraza's position should have inquired as to the origins of the piece of decking. (Tr. 321). Such an inquiry would be consistent with the approach taken by the Commission in *Superior Custom Cabinet*, wherein the Commission relied not only on the leadman's "experience and circumstances at the site" but what information would be readily attainable to him through further inquiry. *See Superior Custom Cabinet Co.*, 18 BNA OSHC 1019 at *4 (noting, as one factor for its decision, the delivery crew "ascertained that the master bathroom was on the second floor by simply asking one of the other subcontractors").

Respondent argues the hole was not a "predictable" hazard because: (1) it was not properly marked by Complete; and (2) debris was common on the worksite, and there was no reason to suspect this piece of wood was covering a hole, especially because it resembled material KHS&S used itself. (Resp't Br. at 14). While it is undisputed Complete failed to properly mark the hole cover, it is also undisputed that, customarily, a hole cover would have been fastened into place in a fashion similar to the way the piece of plywood was. (Tr. at 323, 632-33; Resp't Br. at 14). Thus, Mr. Peraza was faced with at least one indication the plywood was covering a hole. (Tr. 323). The Court notes Respondent also put forth evidence regarding pieces of wood at the DPO worksite being fastened in place to prevent them from being swept away by wind. (Tr. 115-17, 692-94). However, Mr. Peraza, being confronted with a piece of wood of unknown origin,[22] could

[22] Although Mr. Peraza testified he believed the wood could have been placed there by his own crew (Tr. 81-82), this was not a reasonable belief in light of the circumstances under which he inspected the deck. Respondent had just finished its work on Building 1 and was preparing to start framing on Building 2. (Tr. 103-04, 574-75, 630). Mr. Peraza specifically testified no one from KHS&S had been on the deck of Building 2 before he, [Redacted], and Mr. Ruiz went up on the morning of March 3. (Tr. 78). Thus, there was no reason or opportunity for anyone from KHS&S to have fastened the board to the deck at the time Mr. Peraza inspected it.

not have known for what purpose it was fastened without further inspection. Therefore, he should have further investigated the purpose of the fasteners on the wood during his inspection. (Tr. 321-25).

Respondent also argues "the presence of a specific hazard does not, in and of itself, establish a failure to inspect." (Resp't Br. at 15). However, the relevant question is whether the inspection failed to uncover a *recognizable* hazard based on the totality of the evidence concerning the worksite and what information was known or ascertainable to the person performing the inspection. *See Superior Custom Cabinet Co.*, 18 BNA OSHC 1019 at *4; *DiGioia Bros. Excavating*, 17 BNA OSHC at 1184. In this instance, the Court finds the hazard was recognizable to Mr. Peraza, either by a more thorough inspection of the deck or by further inquiry into the origins of the wood on the deck when he arrived at the worksite. By failing to take either course, Mr. Peraza's inspection failed to fulfill Respondent's obligations under 29 C.F.R. § 1926.20(b)(2).

The Court therefore finds Respondent violated the standard.

3. **Employees Were Exposed to the Violative Condition**

Complainant argues Respondent's failure to properly inspect the work area exposed at least three employees – [Redacted], who actually fell through the hole, as well as Messrs. Peraza and Ruiz, who were working on the same deck – to the hazard. (Sec'y Br. at 19). Respondent has not contested Complainant's point. Access to a hazard is sufficient to establish employee exposure. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). Access to a hazard exists "if there is a 'reasonable predictability' that employees 'will be, are, or have been in' the 'zone of danger.'" *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869 at *1 (No. 92-2596, 1996). Additionally, an employee's actual exposure to the hazard proves access and therefore exposure. *See Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995).

Here, [Redacted] fell through the hole which Mr. Peraza's inspection failed to discover. (Tr. at 123-24). Thus, there was exposure to the hazard. *See Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079. Additionally, Mr. Ruiz, who was working with [Redacted] to remove the piece of plywood was in the "zone of danger," having been instructed to remove the plywood along with [Redacted]. (Tr. 69). Mr. Peraza was also in the "zone of danger" as he was working on the same deck approximately 10 to 12 feet from the metal decking made from cutting open the hole. (Tr. 60). Complainant has proven exposure.

4. Respondent Had Constructive Knowledge of the Violative Condition

To prove constructive knowledge, Complainant must show Respondent's failure to discover a violative condition was due to a lack of reasonable diligence. *See Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999). "In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring." *S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016). Whether an employer has exercised reasonable diligence is a question of fact that will "vary with the facts of each case." *Martin v. OSHRC*, 947 F.2d 1483, 1485 (11th Cir. 1991).

As detailed above in concluding Mr. Peraza violated the standard, the Court finds Mr. Peraza failed to take reasonable measures while conducting his inspection to detect the hazard and, therefore, failed to exercise reasonable diligence. The remaining question is whether Mr. Peraza's knowledge is imputable to Respondent. Under Commission precedent, Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its

supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). The supervisory status of an employee is based on a consideration of the "indicia of authority that the employer has empowered a foreman or other employee to exercise on its behalf." *Rawson Contractors, Inc.*, 20 BNA OSHC 1078 at *2 (No. 99-0018, 2003). The "key question is whether the individual in question was vested with some degree of authority over the other crew members assigned to carry out the specific job involved." *TNT Crane & Rigging, Inc.*, 2019 WL 4267108, at *13 (No. 17-1872, 2019) (ALJ), quoting *Iowa Southern Utils. Co.*, 5 BNA OSHC 1138 at *2 (No. 9295, 1977).

The evidence establishes Mr. Peraza was a supervisor for purposes of imputing knowledge to Respondent. Mr. Peraza was designated by Respondent as a "leadman" and a "competent person."[23] (Tr. 35-36, 56-57, 573-74, 687). In these capacities, he led a crew of six to ten other workers and had the authority to give them instructions on what tasks to perform and what equipment to use. (Tr. 40-42, 577-78). He could give verbal warnings to members of his crew and recommend suspension to Mr. Payne. (Tr. 40-41). Mr. Peraza had the responsibility to inspect worksites for hazards and the authority to close the worksite until any hazards were corrected. (Tr. 40, 45, 50-52, 99-100, 628-30). He further had the responsibility to inspect equipment and the authority to remove any malfunctioning equipment from service. (Tr. 42, 100-01). Based on these factors, the Court concludes Mr. Peraza was a supervisor for purposes of imputing his knowledge to Respondent. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078 at *2 (supervisory status found for employee who could "supervise the work activities of his crew, to take all necessary

[23] The CSHO testified, in his experience, leadmen are "non-management" and his conclusion was Mr. Peraza, as a leadman, was "an employee rather than a management person." (Tr. 435). However, the Commission has held that "job titles are not controlling," and it is the actual duties assigned to the employee which controls whether they are a supervisor for purposes of imputing knowledge. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078 at *2.

steps to complete job assignments, and to ensure that the work was done in a safe manner"); *Iowa Southern Utils. Co.*, 5 BNA OSHC 1138 at *2 (supervisory status found for employee whose "authority included the power to order that the necessary steps be taken in order to complete properly the job"); *Propellex Corp.*, 18 BNA OSHC 1677 at *3 (No. 96-0265, 1999) (ability to "write up" other crewmembers and report other behavior to supervisor indicative of supervisory status).

Under Commission precedent, Mr. Peraza's knowledge can be imputed to Respondent. *Dover Elevator Co.*, 16 BNA OSHC at 1286. However, because the inspection violation is based on Mr. Peraza's own conduct, Tenth Circuit law[24] requires Complainant to also demonstrate Mr. Peraza's conduct was foreseeable before his knowledge will be imputed to Respondent. *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980). This burden can be met through proof of "inadequacies in safety precautions, training of employees, or supervision." *Capital Elec. Line Builders of Kansas, Inc. v. Marshall*, 678 F.2d 128, 130 (10th Cir. 1982).

Complainant has established Mr. Peraza's conduct was foreseeable. There was no apparent work rule in place to detect possible holes in the surfaces on which Respondent's crew would be working so that flaw in itself is enough to establish foreseeability. No PTP forms were submitted at trial, but Mr. Peraza testified the forms did not include any explicit direction to look for holes in the working surface. (Tr. 45). Mr. Peraza testified he was trained to look for holes during his PTP inspections (*Id.*). However, the evidence demonstrated he did not act consistently with his training in inspecting potential holes. Mr. Mancera testified, per his training, Mr. Peraza should

[24] "Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has … applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, the violation occurred in Colorado, in the Tenth Circuit, and thus is most likely to be appealed there. *See* 29 U.S.C. § 660(b).

have gone up to the piece of plywood and inspected it further to determine if it was covering a hole. (Tr. 321-25). However, Mr. Peraza did not. There was also ample evidence presented to suggest going under the deck to look up and see whether a board was covering a hole was both reasonable and feasible. (Tr. 138-41, 426-27, 649-650; Ex. C-1 at 14-15, Ex. C-2 at 01:48-02:29). However, Mr. Peraza testified he had never gone under a deck to determine what an unknown board was covering on a deck. (Tr. 83-84).

The evidence further suggests there was little oversight of Mr. Peraza's inspections by any higher supervisor, Mr. Payne, Mr. Peraza's direct supervisor, testified he relied on Mr. Peraza and his crew to inspect worksites for safety issues. (Tr. 413-15, 503, 625-26, 686). On the date in question, Mr. Payne never visited the deck on which the crew would be working, instead relying entirely on Mr. Peraza's inspection before the crew began their work. (Tr. 413-15). He did so despite knowing the deck of Building 2 was an entirely new worksite. (Tr. 628-30). Finally, Respondent had no apparent protocol in place to warn its crews about specific dangers they might encounter on their worksites. As evidenced here, despite Mr. Payne knowing Complete intended to cut the openings in the deck of Building 2, and further knowing the schedule would overlap with Mr. Peraza's crew's work on the deck the next day,[25] he did not relay this information to Mr. Peraza or anyone else from KHS&S before Mr. Peraza's crew began their work. (Tr. 415, 640-41). This foreseeably led to Mr. Peraza conducting his PTP inspection differently than if he had known to look for a specific hazard, like the openings cut by Complete. (Tr. 86-87).

[25] Although Mr. Payne testified he did not know the exact schedule for Complete's work, he did know Complete intended to be done with all three buildings, Buildings 1, 2, and 3, by the end of the day Monday and further knew his crew intended to prepare the deck on Saturday to begin framing work on Monday. (Tr. 637-38).

Respondent emphasizes the qualifications and experience of its employees, including Mr. Peraza. (Resp't Br. at 15-16). However, "merely having experienced employees does not relieve an employer of the obligation to train its employees and to have work rules designed to prevent OSHA violations." *See Am. Wrecking Corp. & IDM Envtl. Corp.*, 2001 WL 1668964, at *9 (Nos. 96-1330 & 96-1331, 2001) (consolidated), citing *Hackney, Inc.*, 16 BNA OSHC 1806, 1811 (No. 91-2490, 1994) and *Loomis Cabinet Co*, 15 BNA OSHC 1635, 1640 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994). Indeed, Respondent does not directly address the issue of knowledge or foreseeability in its post-trial brief and "does not refer to any evidence that it took reasonable steps to discover safety violations committed by its supervisors, or that its safety policy was consistently enforced" to rebut the above findings. *Id.* at *11. The Court therefore finds Mr. Peraza's conduct in failing to detect the hole during his inspection was foreseeable and thus his knowledge is imputed to Respondent. *See id.* at *9-10 (finding supervisor's conduct foreseeable where employer did not have any work rules in place "designed to prevent the violation" at issue and where there was no specific guidance given to the supervisor concerning the condition); *L.E. Meyers Co.*, 16 BNA OSHC 1037, 1042 (No. 90-945, 1993) (adequate safety program requires monitoring of supervisors for adherence to safety rules); *Paul Betty*, 1981 WL 19281 at *4-5 (No. 76–4271, 1981) (ALJ) (finding that "minimal on-site supervision" increased the need to implement adequate safety measures). *Cf. Deer Park Roofing, Inc.*, 2010 WL 4318906, at *3 (No. 10-1135, 2010) (ALJ) (where employer had a work rule in place to prevent the violation and foreman had followed the work rule three times before the violation his misconduct was not foreseeable). The Court finds Respondent had constructive knowledge through Mr. Peraza and such knowledge may be imputed to Respondent.

5. **The Violation was Serious**

Complainant has classified the violation of 29 C.F.R. § 1926.20(b)(2) as serious. A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Complainant need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010).

Here, the hole Mr. Peraza failed to recognize with his deficient inspection was over 15 feet above a concrete surface. (Tr. 481). [Redacted] suffered traumatic brain injuries as a result of falling through the hole and was hospitalized for months. (Tr. 481-84, 708). The violation was properly classified as serious. Citiation 1, Item 1, will be AFFIRMED as a serious citation.

V. Penalty

When a citation is issued, it may include a penalty amount. *See* 29 U.S.C. § 659(a). OSHA has published a Field Operations Manual ("FOM") to, among other things, guide its employees in determining what penalty, if any, to propose for violations. FOM at 1-1, 6-1. FOM, Directive No. CPL-02-00-150, effective April 22, 2011, available at 4 Employment Safety and Health Guide, (CCH), ¶7965, at 12,133, 12,139 (2015). The penalty amounts proposed in a citation become 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). The Secretary's proposed penalties are not accorded the same deference the Commission gives his reasonable interpretations of an ambiguous standard. *See Hern Iron Works*, 16 BNA OSHC 1619,

1621 (No. 88-1962, 1994) (rejecting Secretary's contention that his penalty proposals are entitled to "substantial weight"); *Nacirema Operating Co*., 1 BNA OSHC 1001, 1003 (No. 4, 1972) (declining to agree with the result or methodology the Secretary used to calculate the penalty). It is the Secretary's burden to introduce evidence bearing on the factors and explain how he arrived at the penalty he proposed. *Orion Constr. Co., Inc.*, 18 BNA OSHC 1867, 1868 (No. 98-2014, 1999) (giving less weight to the history factor as the Secretary provided little specific information).

"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); *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished)). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (citation omitted). When applying the penalty assessment factors, the Commission need not accord each one equal weight. See e.g., *Astra Pharm. Prods., Inc.*, 10 BNA OSHC 2070, 2071 (No. 78-6247, 1982); *Orion*, 18 BNA OSHC at 1867 (giving less weight to the size and history factors). 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).

Complainant has proposed a penalty of $7,068 for Item 1 and $7,068 for Items 2a and 2b, which Complainant has grouped for the purposes of penalty. The CSHO calculated the proposed penalty employing calculation tables from the ("FOM"). (Tr. 486).

a. Gravity

"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). *See also Ernest F. Donley's Son, Inc.*, 1 BNA OSHC 1186 (No. 43, 1973) (viewing gravity as the probability of an accident's occurrence and the extent of exposure). "A lack of injuries is not a measure for determining gravity or any other penalty factor." *Altor Inc.*, 23 BNA OSHC 1458, 1468 (No. 99-0958, 2011), *aff'd* 498 F. Appx. 145 (3d Cir. 2012) (unpublished).

For Citation 1, Item 1, the CSHO determined the severity to be high because of [Redacted]' "fall of approximately 15 feet 9 inches on to a hard surface and especially considering that there was a traumatic brain injury …." (Tr. 483-84; Ex. C-27 at 1). He considered the probability to be "lesser" because of the duration of the exposure. (*Id*.). This resulted in the CSHO assessing the gravity of the violation as "moderate".[26] (Ex. C-27 at 1).

For Citation 1, Item 2a, the CSHO determined the severity to be high because a fall from a scaffold or aerial lift could lead to death or permanent disability. (Tr. 487-88; Ex. C-27 at 5). He determined the probability was lesser based on the "short" duration of the exposure. (Tr. 488; Ex. C-27 at 6). This resulted in the CSHO assessing the gravity of the violation as "moderate". (Ex. C-27.

b. Size

The gravity factor focuses on treating violations of similar quality and severity alike. In contrast, the other three factors—size, history, and good faith—require consideration of circumstances pertaining specifically to the cited employer. The Commission frequently relies on

[26] The CSHO clarified that using the tables in the FOM he inputs the "severity" and "probability" and the FOM determines the "gravity." (Tr. at 483).

the number of employees to evaluate the merits of altering a penalty for size. The Commission has viewed the size factor as "an attempt to avoid destructive penalties" that would unjustly ruin a small business. *Intercounty Constr. Corp.*, 1 BNA OSHC 1437, 1439 (No. 919, 1973), *aff'd,* 522 F.2d 777 (4th Cir. 1975). This concern for small businesses must be tempered with the need to achieve compliance with applicable safety standards. *Atlas Roofing Co. v. OSHRC,* 518 F.2d 990, 1001 (5th Cir.1975) (OSHA penalties are meant to "inflict pocket-book deterrence"), *aff'd*, 430 U.S. 442 (1977). Respondent received no reduction in the penalties for its size because it employs over 250 employees. (Tr. 486; C-27 at 1, 6, & 8).

c. History

The next statutory consideration, history, examines an employer's full prior citation history, not just prior citations of the same standard. *Orion*, 18 BNA OSHC at 1868; *Manganas Painting Co.*, 21 BNA OSHC 2043, 2055 (No. 95-0103, 2007) (Consol.) (history includes prior uncontested citations). For all violations, Respondent received a 10% reduction based on its citation history. (Tr. 485-86).

d. Good Faith

As to the final factor, good faith, this entails assessing an employer's health and safety program, its commitment to job safety and health, its cooperation with OSHA, and its efforts to minimize any harm from the violation. *Monroe Drywall Constr., Inc*., 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013); *Nacirema,* 1 BNA OSHC at 1002. For all violations, the CSHO applied a

15% good faith reduction because Respondent "had a safety and health management system in place" but there were "minor deficiencies." (Tr. 485).

For Citation1, Item 1, the Court agrees with Complainant's assessment for the proposed penalty. The record does not disclose exactly how many employees Respondent employs, but with at least 250 employees (Tr. 486), Respondent is a large employer and has not demonstrated any warranted reduction for size. Complainant has applied a reduction based on Respondent's good faith and history. As to gravity, the record shows Respondent had an inspection program in place, but it failed to uncover the opening through which [Redacted] fell, resulting in severe injuries. The gravity of the violation was thus accurately categorized as moderate. The Court therefore assesses the proposed penalty of $7,068 for Citation 1, Item 1.

Complainant grouped Citation 1, Items 2a and 2b for purposes of penalty. For Item 2a, the Court agrees with Complainant's assessment. The record shows Respondent provided scaffold training but, as the Court found, it was not provided by an individual qualified to provide it. This led to Respondent's employees being trained in the requisite subject matter, but deficiently so. The gravity of the violation was accurately categorized as moderate. The Court vacated Item 2b and found Respondent provided the required training to its employees. Thus, the Court finds some reduction in penalty is warranted. Based on the vacatur of Citation 1, Item 2b and the lesser probability and moderate gravity ratings assigned by OSHA to Citation 1, Item 2a, the Court finds a one-third reduction in the assessed penalty is warranted. Therefore, the Court will assess a penalty of $4,712 for Citation 1, Item 2a.

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, is it ORDERED that;

1. **Respondent's Motion to Strike Portion of Complainant's Post-Trial Brief is DENIED.**
2. **Citation 1, Item 1 is AFFIRMED as SERIOUS, and a penalty of $7,068 is ASSESSED.**
3. **Citation 1, Item 2a is AFFIRMED as SERIOUS, and a penalty of $4,712 is ASSESSED.**
4. **Citation 1, Item 2b is VACATED.**

SO ORDERED.

/s/Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: June 8, 2020
Denver, Colorado