Some personal identifiers have been redacted for privacy purposes

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. PRO-SPEC CORPORATION dba PRO-SPEC PAINTING, Respondent.	OSHRC Docket Nos. 16-1746 & 17-0125 CONSOLIDATED FOR HEARING

APPEARANCES:
Jennifer L. Gold, Esquire
U.S. Department of Labor, Philadelphia, Pennsylvania
For the Secretary

Ronald W. Yarbrough, pro se
Vineland, New Jersey
For the Respondent

BEFORE: Covette Rooney
Chief Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission" or "OSHRC") pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). Pro-Spec Corporation dba Pro-Spec Painting

("Respondent" or "Pro-Spec") was engaged in abrasive blasting and painting activities at worksites in Easton, Pennsylvania and Quakertown, Pennsylvania. In response to a hazard referral from a local municipality, the Occupational Safety and Health Administration ("OSHA") opened an investigation of Pro-Spec's Easton worksite on May 27, 2016.[1] In response to an anonymous complaint, OSHA opened an investigation of Pro-Spec's Quakertown worksite on August 31, 2016.[2]

The Easton investigation resulted in a Citation and Notification of Penalty ("Citation I") for serious and other-than-serious violations of the respiratory protection, scaffolds, fall protection, ladders, and recordkeeping standards issued to Respondent on September 21, 2016. Respondent timely filed a notice of contest, bringing the matter before the Commission. The Easton case was docketed as Docket No. 16-1746.

The Quakertown investigation resulted in a Citation and Notification of Penalty ("Citation II") for serious and other-than-serious violations of the respiratory protection, scaffolds, ladders, wiring, and confined spaces standards issued to Respondent on January 29, 2017. Respondent timely filed a notice of contest, bringing the matter before the Commission. The Quakertown case was docketed as Docket No. 17-0125.

The cases were consolidated for hearing. A two-day hearing was held in Philadelphia, Pennsylvania on November 16-17, 2017. (Tr. 10-11). Five witnesses testified at the hearing: [redacted], Pro-Spec employee; Timothy Zagra, Easton Suburban Water Authority (ESWA) employee; OSHA Compliance Officer ("CO") Richard Walters; OSHA CO Glenn Kerschner; and Ronald Yarbrough, president of Pro-Spec. The Secretary filed a post-hearing brief.

[1] The Easton worksite was cited under OSHA inspection number 1158271.

[2] The Quakertown worksite was cited under OSHA inspection number 1174404.

Respondent did not file a post-hearing brief.[3]

For the following reasons, all citation items are affirmed and a total penalty of $24,396 is assessed for Docket No. 16-1746 and all citation items are affirmed and a total penalty of $20,140 is assessed for Docket No. 17-0125.

Jurisdiction

Based upon the record, I find Pro-Spec, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of §§ 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5).[4] I find the Commission has jurisdiction over the parties and subject matter in this case.

Discovery Sanctions

Respondent did not cooperate during the discovery process, and in particular, did not comply with the Discovery Show Cause Order issued August 2, 2017. Sanctions, in accordance with Commission Rule 52, were imposed upon Respondent in an August 29, 2017 Order ("Sanctions Order").[5]

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[3] Hearing exhibits have the prefix of GXW for Docket No. 16-1746 (Easton), GXQ for Docket No. 17-0125 (Quakertown), and GXC for both dockets.

[4] Jurisdiction was stipulated to pursuant to a Sanctions Order that admitted Secretary's requests for admissions. (Tr. 19). The parties stipulated to jurisdiction and subject matter in the Amended Joint Pre-trial Statement. (Tr. 9-10).

[5] Commission Rule 52(f) states:

> (f) Failure to cooperate; Sanctions. A party may apply for an order compelling discovery when another party refuses or obstructs discovery . . . the Judge may make such orders with regard to the failure as are just . . . The orders may include any sanction stated in Federal Rule of Civil Procedure 37, including the following: (1) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order; (2) An order refusing to permit the disobedient party to support or to oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence; (3) An order striking out pleadings or parts

The Sanctions Order prohibited the Respondent from: introducing the evidence, witnesses or documentation sought in the Secretary's May 30, 2017 email; all affirmative defenses raised in Respondent's Answer were stricken; Respondent was prohibited from offering evidence for affirmative defenses at the hearing; and, finally, Secretary's June 7, 2017 request for admissions were deemed admitted.

The Secretary's May 30, 2017 email noted the following as deficient: the failure to provide any responses whatsoever to the Secretary's Requests for Admissions or Requests for Interrogatories; the failure to provide information or documents related to the names and contact information of all the individuals who worked on the projects at issue in these two cases; the failure to provide information or documents related to medical evaluations to determine employees' ability to use a respirator; the failure to provide information or documents related to qualitative and quantitative fit tests for all employees who worked on the projects at issue in these two cases; the failure to provide information or documents related to names and contact information of those who administered the respiratory fit tests of the individuals who worked on the projects at issue in these two cases; the failure to provide information or documents related to the specific types and brands of respirators used by employees on projects at issue in these two cases; the failure to provide information or documents related to the name and contact information of the individuals who were responsible for installing and maintaining the fall arrest system on the Wilden Acres Tank [Easton] Project; the failure to provide a complete set of Daily Field Reports (DFRs) for the two projects at issue in these two cases; and the failure to provide

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> thereof, or staying further proceedings until the order is obeyed; and (4) An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

29 C.F.R. § 2200.52(f).

any documentation of the financial statements of Pro-Spec. (Sanctions Order, 2).

Admissions[6]

Pursuant to the Sanctions Order, the following facts and issues of law from Secretary's June 7, 2017 request for admissions are deemed admitted.

Docket No. 16-1746

1. Pro-Spec Corporation, doing business as Pro-Spec Painting, is a corporation with a principal place of business at 1819 Cedar Avenue, Vineland, New Jersey 08360.

2. Pro-Spec Corporation, doing business as Pro-Spec Painting, has a web site at www.pro-spec.com.

3. During the relevant time period, particularly during May through September 2016 when the work site was inspected, President Ron Yarbrough, Superintendent Tommie Bell and Project Foreman [redacted] were management representatives of Pro-Spec Painting.

4. On or about May 25, 2016, an individual working at one of Respondent's work sites in New Jersey fell off a scaffold and was treated by medical professionals.

5. On or about July 21, 2016, Pro-Spec Corporation, doing business as Pro-Spec Painting, received a subpoena duces tecum, requesting various documents, including documentation of medical evaluations and fit tests regarding employees' ability to safely use respirators, at its Wilden Acres Tank [Easton] Project location.

6. The Occupational Safety and Health Administration has jurisdiction over this contest, pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 659(c), as amended.

7. Pro-Spec Corporation, doing business as Pro-Spec Painting, is an "employer" within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 652(5), as amended.

[6] Per Sanctions Order dated August 29, 2017, as read into the hearing record. (Tr. 19-20); *see also,* Secretary's Pre-Hearing Statement, 5.

8. During the relevant time period, particularly during August 2016 when the work site was inspected, President Ron Yarbrough and Project Foreman [redacted] were management representatives of Pro-Spec Painting.

9. On or about November 2, 2016, Pro-Spec Corporation, doing business as Pro-Spec Painting, received a subpoena duces tecum, requesting various documents, including documentation of medical evaluations and fit tests regarding employees' ability to safely use respirators, at its 1819 Cedar Avenue, Vineland, New Jersey 08360 location.

10. The Occupational Safety and Health Administration has jurisdiction over this contest, pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 659(c), as amended.

Findings of Fact

Ronald Yarbrough founded Pro-Spec 38 years ago. Pro-Spec is an industrial painting and blasting company. (Tr. 21, 353; Admis. ¶ 3). Pro-Spec is a certified SSPC Q1 and Q2 contractor. (Tr. 353). Pro-Spec has a 116-page Environmental, Health and Safety Manual ("Safety Manual"). (Ex. GXC-6). Mr. Yarbrough reviewed and approved the Safety Manual as "Principle & Environmental, Health, & Safety Officer" on October 8, 2015. (Ex. GXC-6). The Safety Manual included topics ranging from General Safety Rules, Abrasive Blasting, Confined Spaces, Fall Protection, and Scaffolds. (Ex. GXC-6).

OSHA inspected two Pro-Spec worksites—the Easton worksite and the Quakertown worksite. CO Richard Walters investigated the Easton worksite from May 27 to September 16, 2017. (Tr. 179, 181). CO Glenn Kerschner inspected the Quakertown worksite on August 31, 2017. (Tr. 262). Company president, Ronald Yarbrough was not present at either worksite when a CO was onsite. (Tr. 391).

Easton Worksite

On May 25, 2016, Pro-Spec employee, [redacted] was working from a two-point suspended scaffold hanging from the top of the Wilden Acres water tank. (Tr. 145). One of the

two suspension points failed, and the scaffold collapsed. (Tr. 42, 145). OSHA began its investigation of the Easton worksite after the Palmer Township Fire Department notified OSHA of the scaffold collapse. (Tr. 177).

The ESWA hired Pro-Spec to blast and paint the Wilden Acres water tank ("Easton project"). (Tr. 145). The Easton project was a complete drain down, blasting, and repainting of the tank. The tank was a circular, tower-like structure standing at just over 100 feet tall. (Tr. 26, 65, 145, 147). Timothy Zagra was a facilities technician and crew leader for ESWA. (Tr. 144). Mr. Zagra oversaw 17 sites for ESWA, including the Wilden Acres Tank in Easton. (Tr. 145). His duties included ongoing maintenance, tank inspections, and serving on ESWA's safety committee. (Tr. 144). Mr. Zagra visited the Easton worksite at least two times each day. (Tr. 145).

Tommie Bell was the superintendent (crew leader) for Pro-Spec employees at the Easton project on the day of the scaffold collapse. (Tr. 27). [redacted] was a journeyman painter at the Easton worksite.[7] (Tr. 26-27). [redacted] was Pro-Spec's project foreman at the Easton worksite. (Admis. ¶ 3).

Pro-Spec employees worked from a two-point suspended scaffold that hung near the top of the water tank. (Tr. 36, 38, 71; GXW-5, pp. 4-5). A fixed ladder on the side of the water tank extended to the top of the 100-foot tank. Employees climbed the fixed ladder to access the scaffold. (Tr. 36, 156; Ex. GXW-5, p. 14). Because the bottom rung of the tank's fixed ladder was several feet off the ground, a five-step, A-frame style, stepladder was placed just below the fixed ladder. The top of the stepladder was about 46 inches below the fixed ladder's bottom

[7] Mr. [redacted] was at the Easton worksite for most of the painting project; in particular, he was there on the day of the scaffold collapse and the two days thereafter. (Tr. 27-28).

rung. (Tr. 233). The stepladder was used in its unopened position, leaned up against the tank. An employee climbed the stepladder, stood on its top, grabbed a loop of rope attached to the bottom of the fixed ladder, placed a foot in the rope loop (like a stirrup), and then pulled himself up onto the fixed ladder's bottom rung. (Tr. 36, 71-73, 156, 158; Ex. GXW-5, p. 18, 24). Employees climbed the tank's fixed ladder every day.[8] (Tr. 71, 106).

On May 25, 2016, [redacted] climbed the water tank's fixed ladder to access the two-point suspended scaffold at the top of the tank. (Tr. 44, 170). The scaffold was 20 feet in length and about 1.5 to 2 feet wide. (Tr. 38). The scaffold was held by two outriggers. Each outrigger was attached to an eye-hook on the tank's roof. (Tr. 54, 58). The outriggers extended past the top edge of the tank providing two points to suspend the scaffold. (Tr. 58; GXW-5, p. 12).

The outriggers were fabricated in Pro-Spec's shop to accommodate the size and shape of the Easton tank. (Tr. 57). Mr. [redacted] was in Pro-Spec's fabrication shop when the outriggers used to support the Easton scaffold were made. (Tr. 56-57). He testified that no calculations were done to determine whether the outriggers could support four times the maximum intended load. (Tr. 56-57). Mr. Zagra stated the condition of the outrigger—the outrigger was twisted and bent out of shape after the accident—showed it could not withstand four times its maximum intended load. (Tr. 151-54; GXW-5, pp. 8-10).

While Mr. [redacted] was standing on the scaffold, the weld on one of the eye-hooks failed, resulting in a collapsed scaffold that dangled from the one remaining attachment point. (Tr. 151, 154-55). From his position on the ground, Mr. [redacted] heard a loud boom and then

[8] After the accident, Mr. [redacted] and Mr. Bell filled out a request form for a better ladder to use to access the tank's fixed ladder. (Tr. 74). However, Mr. [redacted] stated they did not receive another ladder to use, so they continued to use the A-frame ladder and rope to access the fixed ladder to the end of the project. (Tr. 70-72; GXW-5, p. 20).

heard Mr. [redacted] screaming. (Tr. 42, 46). Rather than falling off the scaffold, Mr. [redacted] managed to climb up the hanging scaffold structure, onto the outrigger still attached to the tank, and onto the tank's roof. He climbed down the tank's fixed ladder to the ground where he collapsed for about an hour. (Tr. 44, 48-49, 151).

Earlier on May 25, 2016, Mr. Zagra saw Mr. [redacted] on the scaffold. Based on Mr. [redacted]'s quick pace and unfettered movements, Mr. Zagra believed Mr. [redacted] had not attached his fall protection. (Tr. 38, 170-171). Further, Mr. Zagra saw no lifeline that could be attached to. (Tr. 170). Mr. Zagra also stated that at other times he had seen employees working from the scaffold without fall protection. (Tr. 149).

Mr. Zagra left the worksite and did not return until about 20 minutes after the scaffold collapse. (Tr. 170, 145). When he arrived, he saw Mr. [redacted], who was still very upset, on the ground near the fence-line. (Tr. 150). He saw that Mr. [redacted]'s injuries included bruises on his back and scrapes on his knees and elbows from contact with the scaffold and rigging. (Tr. 150). Mr. [redacted] chose to not seek medical treatment.[9] (Tr. 150-51).

On May 26, the day after the collapse, the fire department came to the site. (Tr. 146). The scaffold was still dangling by a single attachment point. (Tr. 147; Ex. GXW-5, pp. 5, 8).[10] The fire department cut away a large tarp that had become entangled in power lines near the tank. (Tr. 146). The tarp had been attached to the scaffold and consisted of three 50x75-foot sections. When the scaffold collapsed, the tarp partially detached and fell into the powerlines. (Tr. 32, 34, 112; Ex. GXW-5, p. 2).

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[9] Mr. [redacted] also stated that Mr. [redacted] did not seek medical treatment. (Tr. 49-50). Mr. [redacted]'s and Mr. Zagra's testimony that no medical treatment was sought is credited over the information at Admission no. 4.

[10] The fire department provided the May 26, 2017 photographs. (Tr. 215).

On May 27, 2016, CO Walters visited the Easton site to begin the OSHA investigation. (Tr. 181). At the site, the CO talked to Tommie Bell, [redacted], and Timothy Zagra. (Tr. 181-82). He spoke to Mr. Yarbrough by phone. (Tr. 182)

CO Walters visited the Easton worksite three times—May 27, 2016, June 20, 2016, and again in July 2016. (Tr. 179, 181). Mr. Yarbrough was not at the Easton worksite when the CO visited; Mr. Yarbrough could not recall whether he had visited the Easton worksite any time after the accident. (Tr. 390-91).

A row of metal flanges encircled the tank's top edge. Pro-Spec attached its fall protection lifeline at the top of the tank. (Tr. 60-61; GXW-5, pp. 12, 14-16). The lifeline extended from the tank's roof over the metal flange to hang down the side of the tank. Photographs show the lifeline had no abrasion protection where it came across the metal flange at the roof's edge. (Tr. 227; Ex. GXW-5, pp. 14-16). Mr. [redacted] confirmed the lifeline was not protected from abrasion. (Tr. 65-66; GXW-5, p.16). CO Walters saw no abrasion protection for the lifeline when he was at the worksite on May 27 nor on June 20. (Tr. 223-24).

Mr. [redacted] moved the tank's lifeline (red rope) the day after the collapse, at the request of Mr. [redacted] and Mr. Bell. (Tr. 42-48). At the time of the collapse the lifeline had been hanging on the other side of the tank, away from the scaffold. Mr. [redacted] moved the lifeline to an area adjacent to where the scaffold had been. (Tr. 46; GXW-5, pp. 7, 8). Mr. [redacted] had not seen whether Mr. [redacted] had attached his fall arrest system before the accident. (Tr. 109). However, after the accident Mr. [redacted] told Mr. [redacted] his fall arrest system had not been attached to a lifeline. (Tr. 42-43).

Initially, Tommie Bell and [redacted] told the CO that Mr. [redacted]'s fall arrest equipment had been attached to a lifeline. (Tr. 215-16). The CO examined Mr. [redacted]'s fall

arrest equipment. Because the lanyard had not deployed, the CO believed Mr. [redacted] had not been attached at the time of the accident. (Tr. 215-16). Further, in a May 26 photograph, [11] when the scaffold was still hanging broken on the tower, the CO could see the vertical lifeline appeared to be too far from the scaffold's location to have been used for attachment. (Tr. 215-16; GXW-5, p. 7). Later in the investigation, Foreman Bell admitted to CO Walters he had seen Mr. [redacted] had not been using fall protection. (Tr. 221).

Pro-Spec employees used respirators at the Easton worksite. For storage of the respirator, Mr. [redacted][12] was told to store it inside a sealed bag. (Tr. 77). Mr. [redacted] recalled that he had a respirator fit test but he could not recall the brand of the respirator. (Tr. 75-76; Ex. GXW-7). Documents show he was tested for a North brand 5500 respirator on September 3, 2015. (Tr. 76; Ex. GXW-7). Mr. [redacted] stated that he had not received a medical evaluation. (Tr. 76-78). Other worksite employees told CO Walters they also had not received a medical evaluation. (Tr. 197, 205-06).

Quakertown Worksite

Pro-Spec was hired to sandblast and paint the steel components inside a wastewater treatment tank in Quakertown, Pennsylvania ("Quakertown" worksite).[13] (Tr. 79). The tank was a wide, round, and roofless concrete structure. (Ex. GXQ-5, p. 1). It was about 30 feet in height and appeared to be about 60-90 feet in width. (Tr. 262-63; Ex. GXQ-5, p. 1).

[11] GXW-5, p. 1 is a photograph of the Easton worksite the day prior to the inspection, when the fire department was on the scene. (Tr. 194).

[12] [redacted] was the only Pro-Spec employee that testified at the hearing.

[13] The water tank at the Easton site was a tall, narrow, silo-like tank; by contrast, the wastewater tank in Quakertown was a wide, round tank – greater in width than in height. (Ex. GXQ-5, p. 1).

OSHA inspected the Quakertown worksite after receiving a complaint there was no guard rail next to a 30-foot-high metal walkway and that a ladder's non-slip fleet were missing. (Tr. 262-63; Ex. GXQ-2). CO Kerschner visited and photographed the Quakertown worksite on August 31, 2016. (Tr. 262). Of the four employees on site that day, CO Kerschner spoke with three, including [redacted], crew foreman. (Tr. 266). Because [redacted] was not onsite that day, the CO interviewed him later. (Tr. 266). [redacted] had worked at the Quakertown site for a few weeks at the beginning of the project. (Tr. 80). Company president, Mr. Yarbrough, was not at the worksite that day. (Tr. 380).

Pro-Spec's employees worked from the interior of the empty tank to sandblast and paint the tank's steel components. The components included large beams that spanned the tank from side-to-side and a large circular component in the center of the tank. (Tr. 79; GXQ-5, p. 6). The floor of the tank was sloped at a slight angle from the tank wall down to a center drainage point. (Tr. 309).

A portable scaffold set up inside the tank's interior was used as a work platform for employees to paint the steel components in the tank. (Tr. 298; Ex. GXQ-5, p. 10). Foreman [redacted] helped assemble the scaffold. (Tr. 297). Employees accessed the work platform of the scaffold by climbing the horizontal supports of the scaffold. (Tr. 84, 296).

The distance between each horizontal support was 19.5 inches. (Tr. 298-99). There was a large gap between the horizontal bars and the scaffold's work platform. (Tr. 296-98; Ex. GXQ-5, p. 10). It appeared a horizontal support had not been installed when the scaffold was assembled. (Tr. 298). The distance of the uppermost installed horizontal support to the work platform's point of access, was 38 to 40 inches. Employees worked from the scaffold every day. (Tr. 141).

CO Kerschner saw an extension ladder inside the tank that provided access from the top of the tank wall into the tank's interior. (Tr. 84, 331; Ex. GXQ-5, pp. 8, 11). The ladder had no non-slip feet and was leaning against the tank's wall at a 55-degree angle. (Tr. 308; Ex. GXQ-5, pp. 7, 8). There was no other ladder that provided access into and out of the tank's interior. (Tr. 310). Employees used the ladder every day. (Tr. 141).

During the initial week or so of the project, employees worked inside the tank under a tarp. (Tr. 81-82, 129). At that time, respirators were not available. Employees wore the supplied-air hood respirators while sandblasting. (Tr. 80-81). The supplied-air hoods were not worn while painting because employees believed they were not allowed to get paint on the hoods. (Tr. 81). Employees applied the paint with brush and roller at that time, instead of spraying. Nonetheless, fumes accumulated under the tarp and Mr. [redacted] felt a little "woozy." (Tr. 82, 129, 132-3).

After the first week or so, half and full-face respirators were available for employee use. (Tr. 81, 82). Additionally, the overhead tarp was removed so the tank was completely open-aired. (Tr. 82). The tank was in this uncovered condition when the CO conducted his onsite inspection. (Tr. 266).

Two employees wore respirators while CO Kerschner was onsite. (Tr. 273-74, 284-87; Ex. GXQ-5, p. 11). He photographed employee Jorge Orellano wearing a 3M respirator. (Tr. 277, 286; Ex. GXQ-5, p. 11). Employees told him they did not have any medical evaluations related to respirator use. (Tr. 275-76). Further, Respondent provided no documentation to OSHA of any medical evaluations. (Tr. 276).

Employees stated they had not received a fit test before using a respirator. (Tr. 278). When a respirator does not fit the face correctly, an employee is exposed to fumes and

particulates that enter around the mask. (Tr. 211). For example, CO Walters cannot wear a North respirator due to the shape of his nose. (Tr. 211).

CO Kerschner saw there was no legible date to show when the filter had last been replaced on the sorbent bed filter canister of the supplied air system. The sorbent bed filter canister device filtered the air for the employees' respirators. (Tr. 293, 295). Employees told the CO they had breathing problems at times because the lines had been incorrectly attached to the compressor. (Tr. 294-95). Condensation and hot air came into the hood making it difficult to breath. (Tr. 82). Employees discovered the lines to the tank had not been set up properly. (Tr. 83). The pressure gauge on the sorbent air filter canister appeared to be damaged and broken. Further, the system's gas monitoring, "wasn't really hooked up." (Tr. 83).

Additionally, the CO saw that a pinch point was created by a door closed on top of an extension cord. (Tr. 311; Ex. GXQ-5, p. 12). Another electrical cord was pinched and had no strain relief where outer insulation had pulled away where it was connected to another cord. (Tr. 312, 315; Ex. GXQ-5, p. 14). Foreman [redacted] was with the CO when he photographed the extension cords. (Tr. 311-12, 315; Ex. GXQ-5, p. 12, 14).

Employees also told CO Kerschner they had not received confined spaces training. (Tr. 318).

Secretary's Burden Of Proof

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd,* 681 F.2d 69 (1st Cir. 1982).

ANALYSIS

Citations – Easton Worksite (Docket No. 16-1746)

Applicability – all citation items (Docket No. 16-1746)

Respondent was cited for violations of respiratory protection, scaffolds, fall protection, ladder, and recordkeeping standards at its Easton worksite. Citation 1, Item 1a, Item 1b, and Item 1c are for three violations of the respiratory protection construction standard. Citation 1, Item 2a and Item 2b are for two violations of the scaffold construction standard. Citation 1, Item 3 is for one violation of the fall protection construction standard. Citation 1, Item 4a and Item 4b are for two violations of the ladders construction standard. Citation 2, Item 1 is for one violation of the recordkeeping standard.

"Construction work means work for construction, alteration, and/or repair, including painting and decorating." [14] 29 C.F.R. § 1926.32. The 100-foot water tank was being sandblasted and then repainted in its entirety. The work activity at the Easton worksite was construction work. Employees used respirators, a scaffold, fall protection equipment, and ladders to perform sandblasting and painting work. The standards cited are applicable to the Respondent's Easton worksite.

Employee Exposure – all citation items (Docket No. 16-1746)

During his three visits at the Easton worksite, CO Walters interviewed five Pro-Spec employees. (Tr. 200-201). The CO testified during the hearing that five employees at the site were exposed to the violative conditions set forth in Citation 1, Items 1a and 1b (respiratory protection); three employees were exposed to the violative conditions set forth in Citation 1,

[14] The introduction to the respiratory protection standards states that "[t]his section applies to General Industry (part 1910), Shipyards (part 1915), Marine Terminals (part 1917), Longshoring (part 1918), and Construction (part 1926)." 29 C.F.R. § 1910.134.

Items 1c, 4a, and 4b (respiratory protection and ladders); and, one employee was exposed to the violative conditions set forth in Citation 1, Items 2a, 2b, and 3 (scaffolds and fall protection). (Tr. 195, 202, 206, 216, 219, 222, 229, 231). Four employees were exposed to the violative conditions set forth in Citation 2, Item 1 (recordkeeping). (Tr. 235). These facts were unrebutted.

Employee exposure is established for each cited violative condition at the Easton worksite.

Knowledge – all citation items (Docket No. 16-1746)

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The employer's knowledge is focused on the physical condition that constitutes a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) *aff'd*, 79 F.3d 1146 (5th Cir. 1996). It is not necessary to show that the employer knew or understood the condition was hazardous. *Id.*

Reasonable diligence for constructive knowledge includes, among other factors, the "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence" of hazards. *Public Utils. Maint., Inc. v. Sec'y*, 417 F. App'x 58, 63 (2d Cir. 2011) (unpublished) (citing *North Landing Constr. Co.*, 19 BNA OSHC 1465, 1472 (No. 96-721, 2001)). Further, an employer has constructive knowledge of conditions that are "readily apparent." *See Hamilton Fixture,* 16 BNA OSHC 1073, 1091 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994).

Knowledge is imputed to the employer "through its supervisory employee." *Am. Eng'g & Dev. Corp.,* 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (*AEDC*) (citing *Access Equip.*

Sys., *Inc.,* 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999)). For imputation of knowledge, the formal title of an employee is not controlling. *Id.* The knowledge of crew leaders and foremen has been imputed. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000) (citing *Tampa Shipyards Inc.,* 15 BNA OSHC 1533, 1537-38 (No. 86-630, 1992); *Access Equip. Sys.*, *Inc.,* 18 BNA OSHC at 1726 ; *Mercer Well Serv.,* 5 BNA OSHC 1893, 1894 (No. 76-2337, 1977); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993); *Penn. Power & Light Co.*, 737 F.2d 350 (3d Cir. 1984)).

Pro-Spec specializes in industrial sandblasting and painting. Pro-Spec's president, Mr. Yarbrough, has 35 years of experience in the industry and testified to his knowledge of safety requirements for respiratory protection, fall protection, scaffold safety, and ladder use at the worksite. (Tr. 353, 363-64, 365-66, 375, 385-86; Ex. GXC-6). Further, Pro-Spec's Safety Manual included, among others, sections for respiratory protection, scaffolds, ladder, and abrasive blasting. (Ex. GXC-6, pp. 3-5).

Knowledge related to each citation item is discussed below. Respondent had knowledge of the cited hazardous conditions because the hazards were in plain view of an onsite supervisory employee. If Pro-Spec management had exercised reasonable diligence and inspected the worksite, it could have known of the violative conditions.

Citation 1, Item 1a (Docket No. 16-1746)

Citation 1, Item 1a, alleged a serious violation of 29 C.F.R. § 1910.134(c)(1), which sets forth, in pertinent part:

> (c) Respiratory protection program. This paragraph requires the employer to develop and *implement* a written respiratory protection program with required worksite-specific procedures and elements for required respirator use. . . .
> (1) In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with

> worksite-specific procedures. The program shall be updated as necessary to reflect those changes in workplace conditions that affect respirator use. The employer shall include in the program the following provisions of this section, as applicable:
> (i) Procedures for selecting respirators for use in the workplace;
> (ii) *Medical evaluations of employees required to use respirators*;
> (iii) *Fit testing procedures for tight-fitting respirators*;
> (iv) Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;
> (v) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;
> (vi) Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators;
> (vii) Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations;
> (viii) *Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance*; and
> (ix) Procedures for regularly evaluating the effectiveness of the program.

(emphasis added).

The Secretary asserted that Respondent had not established and implemented a written respiratory protection program that included the requirements of 29 CFR § 1910.134(c)(1)(i)-(ix). (S. Br. 13). Respondent asserted that it had a written respiratory program. (Tr. 361; Ex. GX-C6, C7).

Applicability, Employee Exposure, & Violation of the Cited Standard

As discussed above, the Secretary established the elements of applicability and employee exposure.

The cited standard requires an employer to implement a written respiratory program with worksite-specific procedures. Among the required program elements are conducting employee medical evaluations, conducting proper fit testing, and training employees on the proper maintenance and storage of respirators.

Respondent's Safety Manual included a five page section for its respiratory protection policy. However, it did not provide employees with procedures or schedules or other means to

implement the cleaning, storage, and maintenance of respirators as required by the cited standard. (Ex. GXC-6, p. 67). Mr. [redacted] was simply instructed to keep his respirator in a sealed bag. (Tr. 77). Pro-Spec provided no other instruction to its employees for the necessary care and maintenance of respirators. Further, Pro-Spec's respirator fit testing was incomplete. (Tr. 76; Ex. GXW-7, W-8, W-9). *See Citation 1, Item 1c, below.* Pro-Spec also did not provide the required medical evaluations to its employees. *See Citation 1, Item 1b, below.* When questioned by the CO, employees stated they had not received medical evaluations or training. (Tr. 76-78, 197).

The Respondent did not implement a written respiratory protection program that included the requirements of 29 C.F.R. § 1910.134(c)(1), therefore, the standard was violated.

Knowledge

Pro-Spec had actual knowledge of the requirement to implement the procedures and elements of a written respiratory protection program. Mr. Yarbrough reviewed and approved the Safety Manual on October 8, 2015. (Ex. GXC-6). Pro-Spec's Safety Manual included a requirement to train employees on the proper care and use of respirators. (Ex. GXC-6, p. 67). As a principle of the company, Mr. Yarbrough's knowledge is imputed to Pro-Spec. Pro-Spec had actual knowledge that it was required to implement a written respiratory protection program.

Pro-Spec also had constructive knowledge of the hazardous condition. Reasonable diligence would have revealed it had not implemented a written respiratory protection program. With an inspection of the worksite or review of its documents or inquiry of its employees, Pro-Spec could have known that it had not implemented the requirements of a respiratory protection program.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 1, Item 1a is affirmed.

Citation 1, Item 1b (Docket No. 16-1746)

Citation 1, Item 1b, alleges a serious violation of 29 C.F.R. § 1910.134(e)(1), which sets forth:

> (e) Medical evaluation. Using a respirator may place a physiological burden on employees that varies with the type of respirator worn, the job and workplace conditions in which the respirator is used, and the medical status of the employee. Accordingly, this paragraph specifies the minimum requirements for medical evaluation that employers must implement to determine the employee's ability to use a respirator.
> (1) General. *The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace.* The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

(emphasis added).

The Secretary asserted that Respondent did not provide a medical evaluation to determine each employee's ability to use a respirator. (S. Br. 19). The Respondent asserted employees had medical evaluations. (Tr. 363-64).

Applicability, Employee Exposure, & Violation of the Cited Standard

As discussed above, the Secretary established the elements of applicability and employee exposure.

The cited standard requires Pro-Spec to medically evaluate employees prior to use of respirators. Mr. [redacted] stated that he had not been medically evaluated prior to using a respirator. (Tr. 76-78). Other employees at the worksite told CO Walters they had not received a medical evaluation. (Tr. 205-06).

Mr. Yarbrough asserted that employees were evaluated through a questionnaire. The questionnaire results determined whether an employee had a medical condition that could affect

respirator use. If the employee had such a condition, a medical professional would then be consulted. (Tr. 363, 365).

However, Pro-Spec provided no evidence of a medical questionnaire—either blank or completed by an employee.[15] (Tr. 205, 364; S. Br. 20). Pro-Spec was in a position to provide evidence of its own medical evaluation process. Mr. Yarbrough's testimony that each employee was medically evaluated is not supported. As president of Pro-Spec, Mr. Yarbrough has a vested interest in the outcome of this case. Because Pro-Spec provided no documentary evidence to support its position, I credit Mr. [redacted]'s and the CO's testimony that employees were not medically evaluated over Mr. Yarbrough's unsupported assertion.

Respondent did not provide a medical evaluation for its employees using respirators and therefore violated the standard's requirement.

Knowledge

Pro-Spec had actual knowledge that a medical evaluation was required prior to an employee's use of a respirator. Mr. Yarbrough acknowledged that an employee with a serious medical issue, such as asthma, cannot wear a respirator until they are evaluated by a medical professional. (Tr. 363-64). Further, Pro-Spec's Safety Manual included the requirement to evaluate employees with certain medical conditions before they were assigned respirator work. (Ex. GXC-6, pp. 64-68). Mr. Yarbrough knew medical evaluations were required and had not been provided to each employee. Actual knowledge is imputed to the Pro-Spec through Mr. Yarbrough.

[15] CO Walters testified that after the citation was issued he received portions of a safety and health program from Respondent; however, Respondent did not provide documentation related to medical evaluations. (Tr. 205).

Pro-Spec also had constructive knowledge of the hazardous condition. Mr. Yarbrough and the onsite supervisors knew employees used respirators at the worksite. With reasonable diligence, Pro-Spec could have known that it had not provided medical evaluations for employees using respirators. A review of Pro-Spec's records would have revealed the lack of medical evaluations. Further, management could have asked employees and found they had not been medically evaluated. Respondent had both actual and constructive knowledge employees had not been medically evaluated.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 1, Item 1b is affirmed.

Citation 1, Item 1c (Docket No. 16-1746)

Citation 1, Item 1c, alleges a serious violation of 29 C.F.R. § 1910.134(m)(2)(i), which sets forth:

> (m) Recordkeeping. This section requires the employer to establish and retain written information regarding medical evaluations, fit testing, and the respirator program. This information will facilitate employee involvement in the respirator program, assist the employer in auditing the adequacy of the program, and provide a record for compliance determinations by OSHA . . . .
> (2) Fit testing. (i) The employer shall establish a record of the qualitative and quantitative fit tests administered to an employee including:
> (A) The name or identification of the employee tested;
> (B) Type of fit test performed;
> (C) Specific make, model, style, and size of respirator tested;
> (D) Date of test; and
> (E) The pass/fail results for QLFTs or the fit factor and strip chart recording or other recording of the test results for QNFTs.

The Secretary asserted Respondent did not establish a record of the qualitative and quantitative fit tests administered to employees. (S. Br. 22). Respondent asserted that every employee at the worksite had been fit tested and the records were kept at the job site. (Tr. 363).

Applicability, Employee Exposure, & Violation of the Cited Standard

As discussed above, the Secretary has established the elements of applicability and employee exposure.

The cited standard requires Pro-Spec to keep detailed records of specific information for each employee's fit test. Pro-Spec's fit test documents for Tommie Bell, [redacted], and [redacted][16] were incomplete. (Ex. GXW-7, W-8, W-9). The forms did not include the required information about the respirator's size and style, the pass/fail results for QLFTs, the fit test factor, and the strip chart or other recording of the test results for QNFTs.

Respondent did not retain the required written information for its employees' fit tests. Pro-Spec violated the cited standard.

Knowledge

Pro-Spec had actual knowledge that a record of qualitative and quantitative fit testing was required. Pro-Spec's Safety Manual required qualitative and quantitative fit tests for respirators.[17] Mr. Yarbrough reviewed and approved Pro-Spec's Safety Manual. Actual knowledge is imputed through Mr. Yarbrough. Pro-Spec also had constructive knowledge of the

[16] The dates of the fit tests were September 3, 2015, for [redacted] and [redacted] and December 16, 2015, for Tommie Bell. (Ex. GXW-7, W-8, W-9). Each document recorded the employee's name, job title, the date of the fit test, a fitting checklist, and the brand and model number of the respirator. *Id.* Each employee was tested on a North 5500 brand respirator. *Id.* These documents were not submitted to OSHA during its investigation; instead, they were provided to the Secretary only after the citation was issued.

[17] The Safety Manual states:

> A respirator fit test will be performed annually to determine the model and size respirator that will be assigned to a worker. 29 CFR 1910.134 presents the procedure that will be used. A qualitative fit test procedure is used for half-mask respirators while a quantitative fit test procedure is used for full-face respirators. (Ex. GXC-6, p. 66).

violative condition. With reasonable diligence, Pro-Spec could have known that its fit test records were incomplete by reviewing its records. Respondent had both constructive and actual knowledge of this violative condition.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 1, Item 1c is affirmed.

Citation 1, Item 2a (Docket No. 16-1746)

Citation 1, Item 2a, alleges a serious violation of 29 C.F.R. § 1926.451(g)(1)(ii), which sets forth:

> (g) Fall protection.
> (1) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1) (i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.
> Note to paragraph (g)(1): The fall protection requirements for employees installing suspension scaffold support systems on floors, roofs, and other elevated surfaces are set forth in subpart M of this part. . . .
> (ii) Each employee on a single-point or two-point adjustable suspension scaffold shall be protected by both a personal fall arrest system and guardrail system;

The Secretary asserted that Respondent did not ensure that an employee on a two-point adjustable suspension scaffold was protected from falling by a personal fall arrest system. (S. Br. 25). Respondent asserted that company policy was to terminate any employee that did not use fall protection and that Mr. Yarbrough had never witnessed an employee work without fall protection. (Tr. 365-66).

Applicability, Employee Exposure, & Violation of the Cited Standard

As discussed above, the Secretary has established the elements of applicability and employee exposure.

The cited standard requires the use of a personal fall arrest system when an employee is on a scaffold. The credible evidence shows that Mr. [redacted]'s personal fall arrest equipment was not attached to a vertical lifeline while he was on the scaffold.

Mr. [redacted] stated that Mr. [redacted] had told him just minutes after the accident that he had not been tied off. (Tr. 43-44). Further, the day after the accident, at the request of both Mr. [redacted] and Mr. Bell, Mr. [redacted] moved the vertical lifeline over to the area next to where the scaffold had been so it would appear the lifeline had been available for use when Mr. [redacted] was on the scaffold. (Tr. 42-48). During his hearing testimony, Mr. [redacted] confirmed the lifeline had been on the other side of the tank and not by the scaffold when it collapsed. (Tr. 43-47).

Mr. [redacted]'s testimony is supported by Mr. Zagra, ESWA's technician. Mr. Zagra stated that when he was at the site at other times, he had seen employees working from the scaffold without fall protection. (Tr. 149). On the day of the accident, Mr. Zagra saw Mr. [redacted] working from the scaffold just before he left the worksite that morning. Because Mr. [redacted] was freely moving about on the scaffold, it appeared to Mr. Zagra that he was not attached to a fall arrest lifeline. (Tr. 170-71). Further, he did not see a lifeline for tie-off near the scaffold. (Tr. 170-71).

The CO testified that even though Tommie Bell and [redacted] had initially told him that Mr. [redacted] had been tied off at the time of the accident, that later Foreman Bell admitted that he had seen Mr. [redacted] not using his fall protection equipment. (Tr. 215-16, 221). CO Walter's inspection of Mr. [redacted]'s fall arrest equipment led him to believe it had not been in use at the time of the collapse. (Tr. 215-16).

Pro-Spec attempts to refute the Secretary's position by contending that an employee is terminated if he does not use fall protection. Mr. Yarbrough stated that he had never seen an employee work without fall protection. (Tr. 365-66). However, Mr. Yarbrough admitted he was not at the Easton worksite on the day of the accident nor could he recall ever being at the worksite after the accident. (Tr. 391). Pro-Spec offered no evidence of any employee that had ever been disciplined or terminated for fall protection violations. Pro-Spec's assertion that Mr. [redacted] must have been wearing fall protection because of its termination policy, is rejected.

The credible evidence shows Mr. [redacted] was not using fall protection when he was on the scaffold. The cited standard was violated.

Knowledge

Pro-Spec had actual knowledge that Mr. [redacted] was not using fall protection on the scaffold. Foreman Bell told the CO that he had seen that Mr. [redacted] was not using fall protection. (Tr. 221). Mr. [redacted] moved the lifeline at the request of Mr. [redacted] and Foreman Bell. Knowledge is imputed to Pro-Spec through its foreman, Tommie Bell.

Further, Pro-Spec had constructive knowledge of the hazardous condition. Respondent made no effort to inspect the worksite or determine if its employees routinely used fall protection, or whether its onsite supervisors enforced the use of fall protection. Further, the lack of a vertical lifeline by the scaffold was in plain view. With reasonable diligence, Respondent could have known that Mr. [redacted] would not be using fall protection while working from the scaffold.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 1, Item 2a is affirmed.

Citation 1, Item 2b (Docket No. 16-1746)

Citation 1, Item 2b, alleges a serious violation of 29 C.F.R. § 1926.451(a)(1), which sets forth:

> (a) Capacity. (1) Except as provided in paragraphs (a)(2), (a)(3), (a)(4), (a)(5) and (g) of this section, each scaffold and scaffold component shall be capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it.

The Secretary asserted that Pro-Spec fabricated outriggers without calculating whether they were capable of supporting four times the maximum intended load. (S. Br. 30). Respondent asserted its shop-made outriggers were not the cause of the scaffold collapse. (Tr. 368)

Applicability, Employee Exposure, & Violation of the Cited Standard

As discussed above, the Secretary has established the elements of applicability and employee exposure.

The cited standard requires that every component of a scaffold must withstand four times the maximum intended load. Mr. [redacted] was at the workshop when Pro-Spec fabricated the outriggers. (Tr. 56-57). Mr. [redacted] knew of no calculations that had been done to determine the maximum load the outriggers would support. (Tr. 56-57). Mr. Zagra stated the post-accident condition of the outrigger indicated it could not have supported four times the maximum intended load. Finally, Pro-Spec provided no evidence the outriggers were designed to support four times the maximum intended load. (Tr. 219-22).

Respondent's assertion that the outrigger did not cause the scaffold collapse is not pertinent to whether a violation of the standard occurred. Evidence shows the outrigger was not designed to withstand four times the maximum intended load. Respondent fabricated the

outriggers without ensuring they could support four times the maximum intended load. The cited standard was violated.

Knowledge

Pro-Spec had constructive knowledge the outriggers were not fabricated to support four times the maximum intended load. Pro-Spec fabricated the outriggers in its workshop to fit the Easton tank's dimensions. Pro-Spec's president, job superintendent, or project foreman could have determined the maximum load the outriggers had been fabricated to support. Pro-Spec management could have directed its workshop to fabricate outriggers that could support four times the maximum intended load. There is no evidence that Pro-Spec made an effort to ensure the outriggers were fabricated to meet the standard's requirements. With reasonable diligence, Pro-Spec could have known the outriggers had not been fabricated to withstand four times the maximum intended load. Pro-Spec had constructive knowledge of the violative condition.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 1, Item 2b is affirmed.

Citation 1, Item 3 (Docket No. 16-1746)

Citation 1, Item 3, alleges a serious violation of 29 C.F.R. § 1926.502(d)(11), which sets forth:

> (d) Personal fall arrest systems. Personal fall arrest systems and their use shall comply with the provisions set forth below. Effective January 1, 1998, body belts are not acceptable as part of a personal fall arrest system. Note: The use of a body belt in a positioning device system is acceptable and is regulated under paragraph (e) of this section . . . .
>
> (11) Lifelines shall be protected against being cut or abraded.

The Secretary asserted that vertical lifelines were not protected from abrasion at the tank roof's edge. (S. Br. 34). The Respondent asserted the roof had no edge that could abrade the lifelines. (Tr. 369).

Applicability, Employee Exposure, & Violation of the Cited Standard

As discussed above, the Secretary has established the elements of applicability and employee exposure.

Photographs show the lifeline extended across the roof metal's edge with no protection from abrasion. (Ex. GXW-5, pp. 12, 14-16). Pro-Spec's assertion there was no edge the tank that could abrade the lifeline is rejected. There was no abrasion protection for the lifeline, thus, the standard was violated.

Knowledge

Pro-Spec had constructive knowledge of the lack of abrasion protection through its onsite foremen. The lack of abrasion protection for the lifeline was in plain view at the top of the tank. CO Walters saw the condition during two of his visits at the Easton worksite. (Tr. 223-24). With reasonable diligence, the onsite foreman could have found the hazardous condition and added protection from abrasion. I find Pro-Spec had constructive knowledge.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 1, Item 3 is affirmed.

Citation 1, Item 4a (Docket No. 16-1746)

Citation 1, Item 4a, alleges a serious violation of 29 C.F.R. § 1926.1053(b)(4), which sets forth:

> (b) Use. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:

. . .

(4) Ladders shall be used only for the purpose for which they were designed.

The Secretary asserted that an A-frame ladder (stepladder), designed for use in the open position, was used in its unopened position. (S. Br. 36). Pro-Spec agreed this was not a proper use of the stepladder. (Tr. 369, 372).

Applicability, Exposure, Violation of the Cited Standard & Knowledge

As discussed above, the Secretary has established the elements of applicability and employee exposure. Photographs show the A-frame stepladder, designed to be used in an open fashion, was instead leaning against the water tank in its closed position. (Tr. 31-36, 70-73). Mr. [redacted] confirmed the ladder was used by employees every day. (Tr. 71, 106). Respondent agreed this was an improper use of this stepladder. The ladder was not used for the purpose it was designed. The cited standard was violated.

Pro-Spec had constructive knowledge of the violative condition. The ladder was in plain view beneath the fixed ladder and it was obvious that it was being used in a closed position. Mr. [redacted] stated that he and other employees at the site routinely used the ladder in this position to access the fixed ladder. (Tr. 71). Pro-Spec's onsite foreman, with reasonable diligence, could have determined the ladder was being used improperly. Pro-Spec had constructive knowledge of the ladder's condition and use.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 1, Item 4a is affirmed.

Citation 1, Item 4b (Docket No. 16-1746)

Citation 1, Item 4(b), alleges a serious violation of 29 C.F.R. § 1926.1053(b)(13), which sets forth:

> (b) Use. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:
> . . .
> (13) The top or top step of a stepladder shall not be used as a step.

The Secretary asserted that the top of a stepladder was used as a step to access the tank's permanent ladder. (S. Br. 39). The Respondent asserted he was surprised the top of the ladder was used and agreed it was not a proper use of the ladder. (Tr. 369, 372).

Applicability, Exposure, Violation of the Cited Standard & Knowledge

As discussed above, the Secretary has established the elements of applicability and employee exposure.

In addition to being improperly used in its closely position, the top of the A-frame stepladder was used as a step. (Tr. 31-36, 63-64, 66-69, 70-74; Ex. GXW-5, pp. 1, 2, 18-21, 23-25). Employees stood on the top of the stepladder in order to access the fixed ladder's bottom step, which was roughly 46 inches above the top of the stepladder. (Tr. 71, 195, 233). The top of the stepladder was used as a step; thus, the cited standard was violated.

As with Citation 1, Item 4a above, Pro-Spec had constructive knowledge of the ladder's condition and use. The ladder was in plain view at the base of the fixed ladder and its top was used daily to access the fixed ladder. (Tr. 71). With reasonable diligence, Pro-Spec's onsite foreman could have determined the ladder was being used improperly.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 1, Item 4b is affirmed.

Citation 2, Item 1 (Docket No. 16-1746)

Citation 2, Item 1, alleges an other-than-serious violation of 29 C.F.R. § 1904.40(a), which sets forth:

> (a) Basic requirement. When an authorized government representative asks for the records you keep under part 1904, you must provide copies of the records within *four (4) business hours*.

(emphasis added).

The Secretary asserted that Respondent failed to provide copies of OSHA Form 300 for calendars years 2013, 2014, 2015, and 2016 to date, within four business hours of the CO's request. (S. Br. 42). The Respondent asserted there was no intent to delay; he sent the reports to the wrong OSHA office. (Tr. 372-73).

Applicability, Exposure, Violation of the Cited Standard & Knowledge

As discussed above, the Secretary has established the elements of applicability and employee exposure.

CO Walters requested the OSHA 300 forms from Pro-Spec's onsite foremen when he visited the Easton worksite on May 27, 2016, and on June 20, 2016. (Tr. 235-36). The CO again requested the 300 forms during a phone call with Mr. Yarbrough the last week of June. (Tr. 236). CO Walters received the OSHA 300 forms in December 2016 in response to a subpoena. (Tr. 236). Pro-Spec provided the requested OSHA 300 forms months after they were requested. Mr. Yarbrough presented no evidence to support his assertion that he sent the requested records to the wrong OSHA address.

I find Respondent did not provide the OSHA 300 forms within four business hours of OSHA's request and thus violated the cited standard. Pro-Spec had knowledge of the request for the OSHA 300 forms through both its worksite foremen and Mr. Yarbrough.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 2, Item 1 is affirmed.

Characterization (Docket No. 16-1746)

Citations 1, Items 1 through 4 are classified as serious violations. Under section 17(k) of the Act a violation is serious if "there is a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666 (k). Commission precedent requires a finding that "a serious injury is the likely result should an accident occur." *Pete Miller, Inc.,* 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000). The Secretary has proved the violations in Citation 1, Items 1 through 4 are serious in nature. Employees were subjected to death or serious injury from exposure to particulates and fumes from improper respirator use, from use of a respirator without a medical evaluation, from falls, and from scaffold collapse. (Tr. 193-94, 213, 219, 222-23, 229, 231).

Citation 2, Item 1 is classified as other-than-serious. The Commission has stated an other-than-serious violation "is one in which there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm." *Crescent Wharf & Warehouse Co*., 1 BNA OSHC 1219, 1222 (No. 1, 1973); *see, Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2185 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001) (affirming non-willful recordkeeping items as other-than-serious).

Pro-Spec's delay in providing its records did not have a relationship to injury or serious physical harm. The Secretary has proved the violation is other-than-serious in nature.

Penalty (Docket No. No. 16-1746)

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the

violation is generally accorded greater weight. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The maximum statutory penalty for serious and other-than-serious citations is $12,471.[18] A 30 percent reduction to the maximum penalty was applied due Respondent's size. A combined penalty of $7,482 was proposed for Citation 1, Items 1a through 1c based on an assessed medium severity, greater probability, moderate gravity for Items 1a to 1b (Tr. 193-96, 202-04) and an assessment of medium severity, lesser probability, moderate gravity for Item 1c. (Tr. 193-94, 206). A combined penalty of $6,236 was proposed for Citation 1, Items 2a to 2b based on an assessment of high severity, lesser probability, and moderate gravity. (Tr. 193-94, 213-14, 219). A penalty of $6,236 was proposed for Citation 1, Item 3 based on an assessment of high severity, lesser probability, and moderate gravity. (Tr. 193-94, 222-23). A combined penalty of $3,742 was proposed for Citation 1, Items 4a to 4b, based on an assessment of low severity, lesser probability, and low gravity. (Tr. 193-94, 229, 231-32). A 30% size reduction was applied to OSHA's typical recordkeeping penalty of $1,000 for a proposed penalty of $700 for Citation 2, Item 1. (Tr. 235).

I find the Secretary has given due consideration to all the necessary criteria established by the Act; the penalties are appropriate and are assessed as proposed.

Citations – Quakertown worksite (Docket No. 17-0125)

Applicability – all citation items (Docket No. 17-0125)

[18] OSHA's statutory maximum penalties were increased pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). OSHA established new penalties for violations that occurred after November 2, 2015. 81 Fed. Reg. 43430 (July 1, 2016). The violation in the instant case occurred after November 2, 2015, and was assessed between August 1, 2016 and January 13, 2017, thus the statutory maximum of $12,471 applies.

Respondent was cited for violations of the respiratory protection, scaffolds, ladder, electrical wiring, and confined spaces training standards at its Quakertown worksite. Citation 1, Item 1a, Item 1b, and Item 2 are for three violations of the respiratory protection construction standard. Citation 1, Item 3 is for one violation of the scaffold construction standard. Citation 1, Item 4a and Item 4b are for two violations of the ladders construction standard. Citation 2, Item 1a and 1b are for two violations of the electrical construction standard. Citation 2, Item 2 is for a violation of the confined spaces training construction standard.

At Quakertown, employees were sandblasting and painting the steel components of a large, wastewater treatment tank. (Tr. 79). Employees used respirators, a scaffold, electrical equipment, and ladders to perform the sandblasting and painting work. As with the Easton worksite, the cited standards are applicable to Respondent's Quakertown worksite.

Employee Exposure – all citation items (Docket No. 17-0125)

CO Kerschner testified during the hearing that four employees at the worksite were exposed to the violative conditions set forth in Citation 1, Item 1a (lack of medical evaluation); one employee was exposed to the violative conditions set forth in Citation 1, Item 1b and Citation 2, Item 1a and Item 1b (fit testing, electrical wiring); two employees were exposed to the violative conditions set forth in Citation 1, Item 2 and Item 3 (respiratory protection, scaffolds); three employees were exposed to the violative conditions set forth in Citation 1, Item 4a and Item 4b (ladders); and, five employees were exposed to the violative conditions set forth in Citation 2, Item 2 (confined spaces training). (Tr. 273, 277, 291, 296, 301, 308, 311, 314, 316). These facts were unrebutted.

Employee exposure is established for the cited violative conditions at the Quakertown worksite.

Knowledge – all citation items (Docket No. 17-0125)

To prove the element of knowledge, the Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Revoli,* 19 BNA OSHC at 1684. It is not necessary to prove the employer knew the condition was hazardous; instead, knowledge is directed to the physical conditions that constitute a violation. *Phoenix*, 17 BNA OSHC at 1079-80. Knowledge can be imputed through an employer's supervisory employees, regardless of job title. *AEDC,* 23 BNA OSHC at 2095.

Knowledge related to each citation item is discussed below. Respondent's knowledge is based on the violative conditions being in plain view of an onsite supervisor. With reasonable diligence Respondent could have known of the violative conditions at the Quakertown worksite.

Citation 1, Item 1a (Docket No. 17-0125)

Citation 1, Item 1a, alleges a serious violation of 29 C.F.R. § 1910.134(e)(1), which sets forth:

> (e) Medical evaluation. Using a respirator may place a physiological burden on employees that varies with the type of respirator worn, the job and workplace conditions in which the respirator is used, and the medical status of the employee. Accordingly, this paragraph specifies the minimum requirements for medical evaluation that employers must implement to determine the employee's ability to use a respirator.
> (1) General. *The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace*. The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

(emphasis added).

The Secretary asserted that Respondent did not provide a medical evaluation to employees. (S. Br. 44). The Respondent asserted employees had medical evaluations. (Tr. 363-64).

Applicability, Employee Exposure, & Violation of the Cited Standard

As discussed above, the Secretary has established the elements of applicability and employee exposure.

The cited standard requires Pro-Spec to medically evaluate employees prior to the use of respirators. Employees told CO Kerschner they had not received a medical evaluation for respirator use. (Tr. 273-75). Mr. [redacted] had no medical evaluation prior to his use of a respirator. (Tr. 76-78). Employee medical evaluation documents were not provided to CO Kerschner. (Tr. 275-76). Further, the Secretary states medical evaluation documents were subpoenaed but not received from Pro-Spec. (Tr. 275-76; Admis. ¶ 9).

Nonetheless, Mr. Yarbrough asserted each employee was evaluated through a medical questionnaire. (Tr. 363, 365). Pro-Spec provided no documents to support the existence of a medical questionnaire. Mr. Yarbrough's testimony that each employee was medically evaluated is not credited.

Respondent did not provide a medical evaluation to each employee using respirators and therefore violated the cited standard.

Knowledge

Pro-Spec had actual knowledge that a medical evaluation was required prior to an employee's use of a respirator. Mr. Yarbrough acknowledged that an employee with a serious medical issue, such as asthma, cannot wear a respirator until they are evaluated by a medical professional. (Tr. 363-64). Further, Pro-Spec's Safety Manual included the requirement to evaluate employees with certain medical conditions before they are assigned work that required respiratory protection work. (Ex. GXC-6, pp. 64-68). Actual knowledge is imputed to the Pro-Spec through Mr. Yarbrough. Mr. Yarbrough knew medical evaluations were required and had not been provided to each employee.

Pro-Spec also had constructive knowledge of the hazardous condition. Mr. Yarbrough and the onsite foremen knew employees used respirators. With reasonable diligence, Pro-Spec could have known that it had not provided medical evaluations for all employees. A review of Pro-Spec's records would have revealed the missing medical evaluations. Further, a survey of its employees would have revealed they had not been medically evaluated. Respondent had both actual and constructive knowledge of employees had not been medically evaluated.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 1, Item 1a is affirmed.

Citation 1, Item 1b (Docket No. 17-0125)

Citation 1, Item 1b, alleges a serious violation of 29 C.F.R. § 1910.134(f)(1), which sets forth:

> (f) Fit testing. This paragraph requires that, before an employee may be required to use any respirator with a negative or positive pressure tight-fitting facepiece, the employee must be fit tested *with the same make, model, style, and size* of respirator that will be used. This paragraph specifies the kinds of fit tests allowed, the procedures for conducting them, and how the results of the fit tests must be used. (1) The employer shall ensure that employees using a tight-fitting facepiece respirator pass an appropriate qualitative fit test (QLFT) or quantitative fit test (QNFT) as stated in this paragraph.

(emphasis added).

The Secretary asserted the respirators used at the Quakertown worksite did not match the respirator make and model fit tested. (S. Br. 49.) The Respondent asserted that it was possible an employee might wear a brand of mask that he was not fit tested for; however, it was company policy that an employee should be fit tested for each brand of respirator worn by an employee. (Tr. 375)

Applicability, Exposure, & Violation of the Cited Standard

As discussed above, the Secretary has established the elements of applicability and employee exposure.

The cited standard requires Pro-Spec to provide fit testing for the make, model, style, and size of respirator used at the worksite. The fit of a respirator varies by model and brand. (Tr. 290). If the respirator does not fit the face correctly, an employee is exposed to fumes and particulates that can enter past the mask. (Tr. 211).

Jorge Orellano was photographed wearing a 3M brand respirator. (Tr. 277, 286; Ex. GXQ-5, p. 11). Mr. Orellano was fit tested for a North brand respirator. (Tr. 288; Ex. GXQ-11). Pro-Spec does not dispute Mr. Orellano had not been fit tested for the mask he used at the Quakertown worksite. Respondent did not provide a fit test for make and model of respirators used at the Quakertown worksite, therefore, the standard was violated.

Knowledge

Pro-Spec had actual knowledge that Mr. Orellano was wearing a 3M brand mask and that he had been fit tested for a North brand mask. (Tr. 287). Pro-Spec also had constructive knowledge of the violative condition. The brand of respirator was written on the exterior of the mask, was plainly visible, and photographed by the CO. (Tr. 284-87; Ex. GXQ-5, p. 11). Further, a review of its records would have shown the masks used at the site did not match the brand that had been fit tested. Pro-Spec had both actual and constructive knowledge of the violative condition.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 1, 1b is affirmed.

Citation 1, Item 2 (Docket No. 17-0125)

Citation 1, Item 2, alleges a serious violation of 29 C.F.R. § 1910.134(i)(5)(iv), which sets forth:

> (i) Breathing air quality and use. This paragraph requires the employer to provide employees using atmosphere-supplying respirators (supplied-air and SCBA) with breathing gases of high purity. . . .
> (5) The employer shall ensure that compressors used to supply breathing air to respirators are constructed and situated so as to:
> (i) Prevent entry of contaminated air into the air-supply system;
> (ii) Minimize moisture content so that the dew point at 1 atmosphere pressure is 10 degrees F (5.56 °C) below the ambient temperature;
> (iii) Have suitable in-line air-purifying sorbent beds and filters to further ensure breathing air quality. Sorbent beds and filters shall be maintained and replaced or refurbished periodically following the manufacturer's instructions.
> (iv) *Have a tag containing the most recent change date and the signature of the person authorized by the employer to perform the change. The tag shall be maintained at the compressor.*

(emphasis added).

The Secretary asserted that Respondent did not document sorbent bed and filter changes with a legible tag that indicated the signature and date maintenance changes were performed. (S. Br. 52). The Respondent asserted the tag was located inside the filter. (Tr. 376).

Applicability, Exposure, & Violation of the Cited Standard

As discussed above, the Secretary has established the elements of applicability and employee exposure.

The cited standard requires a tag at the compressor to show the change date and the signature of the person that replaced the sorbent beds and filter. At the Quakertown worksite, a tag was attached to the compressor, but there was no information to show when sorbent beds and filters had been changed or who performed the maintenance. (Tr. 293-95; Ex. GXQ-5, pp. 22-23).

Mr. Yarbrough asserted that every filter was changed before it was sent to a worksite and the tag was placed inside the filter. (Tr. 376-77). However, Mr. Yarbrough admitted he was not

present for this compressor's filter change. (Tr. 377-78). Pro-Spec provided no evidence the necessary information had been on a tag at the compressor.

Pro-Spec violated the cited standard in that it there was no tag on the compressor that contained the recent change date and signature of person that changed the sorbent beds and filters.

Knowledge

Pro-Spec had actual knowledge there was no tag with the required information at the compressor. Foreman [redacted] set up the air lines to the compressor. (Tr. 292-93). The tag was plainly visible and photographed by the CO. The tag did not show a name or the change date for the sorbent bed and filter. (Tr. 293-95; Ex. GXQ-5, pp. 22-23). Pro-Spec also had constructive knowledge of the violative condition. With reasonable diligence, it could have known the required information was not on the tag. There is no evidence any steps were taken to ensure the tag had the required information. Pro-Spec had both actual and constructive knowledge of the violative condition.

The Secretary has proved applicability, a violation of the standard, employee exposure, and employer knowledge of the hazard. Citation 1, Item 2 is affirmed.

Citation 1, Item 3 (Docket No. 17-0125)

Citation 1, Item 3, alleges a serious violation of 29 C.F.R. § 1926.451(e)(1), which sets forth:

> (e) Access. This paragraph applies to scaffold access for all employees. Access requirements for employees erecting or dismantling supported scaffolds are specifically addressed in paragraph (e)(9) of this section.
> (1) When scaffold platforms are *more than 2 feet (0.6 m) above or below a point of access*, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another

> scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

(emphasis added).

The Secretary asserted the scaffold platform was more than two feet above the nearest horizontal support. (S. Br. 56). Respondent asserted that employees were accessing the scaffold from the trough that went around the top of the tank and not from the scaffold's horizontal members. (Tr. 380).

Applicability, Employee Exposure, & Violation of the Cited Standard

As discussed above, the Secretary has established the elements of applicability and employee exposure.

The standard requires a means of access when the distance between the point of access to the scaffold's work platform is greater than two feet. Employees climbed the scaffold's horizontal supports to get to the work platform. (Tr. 84, 296). The distance from work platform to the nearest horizontal support was 38-40 inches. (Tr. 298-99; Ex. GXQ-5, p. 10). No ladder or other means was provided to access the scaffold platform.

Mr. Yarbrough stated that when he visited the Quakertown worksite he saw employees enter the scaffold from a trough that ran around the top of the tank. Mr. Yarbrough did not state whether he saw this before or after the CO's onsite inspection. (Tr. 380). Mr. Yarbrough was not at the Quakertown worksite the day of the OSHA inspection. (Tr. 380). Thus, his testimony about how employees accessed the scaffold is not credited.

Pro-Spec did not provide a means of access for the gap of more than two feet at the access point to the scaffold platform; therefore, the cited standard was violated.

Knowledge

Pro-Spec had actual knowledge there was a gap of more than two feet between the work platform and the nearest horizontal support. Foreman [redacted] was onsite and helped assemble the scaffold. (Tr. 297). Knowledge is imputed through Foreman [redacted]. Pro-Spec also had constructive knowledge of the violative condition. The condition was clearly visible and photographed by the CO. (Tr. 297; Ex. GXQ-5, p. 10). With reasonable diligence, Pro-Spec could have known there was a gap of more than two feet from the access point to the scaffold platform. Pro-Spec had both actual and constructive knowledge of the violative condition.

The Secretary has proved applicability, violation of the standard, employee exposure and employer knowledge of the violative condition. Citation 1, Item 3 is affirmed.

Citation 1, Item 4a (Docket No. 17-0125)

Citation 1, Item 4a, alleges a serious violation of 29 C.F.R. § 1926.1053(b)(5)(i), which sets forth:

> (b) Use. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:
> . . . .
> (5)(i) Non-self-supporting ladders shall be used at an angle such that the horizontal distance from the top support to the foot of the ladder is approximately one-quarter of the working length of the ladder (the distance along the ladder between the foot and the top support).

The Secretary asserted the portable aluminum ladder was used at an angle greater than one-quarter of the working length of the ladder. (S. Br. 59). Respondent asserted the ladder was not in use. (Tr. 381).

Applicability, Exposure, & Violation of the Cited Standard

As discussed above, the Secretary has established the elements of applicability and employee exposure.

The ladder was used by employees to access the tank's interior. (Tr. 84). The standard requires the ladder to be used at an angle that is approximately one-quarter of the working length of the ladder. A 72-degree angle would have been approximately one-quarter of this ladder's working length. (Tr. 303-04). CO Kerschner calculated the ladder was at a 55-degree angle.[19] (Tr. 303-04; Ex. GXQ-13).

Mr. Yarbrough asserted the ladder was not used in this position, it was being stored. (Tr. 380, 81). However, Mr. Yarbrough was not at the worksite that day and no evidence was provided to support this assertion. Further, the ladder was the sole means to access the tank's interior where work was performed.

The ladder's angle did not comply with the standard's requirements. The standard was violated.

Knowledge

Pro-Spec had actual knowledge employees used the ladder at a noncompliant angle. Foreman [redacted] was photographed standing next to the ladder. (Tr. 302-03, 310; Ex. GXQ-5, p. 8). Knowledge is imputed through Foreman [redacted]. Pro-Spec also had constructive knowledge of the violative condition. The ladder's improper angle was clearly visible and photographed by the CO. (Tr. 307-07; Ex. GXQ-5, p. 10). With reasonable diligence, Pro-Spec could have known the ladder was not at the correct angle. Pro-Spec had both actual and constructive knowledge of the violative condition.

The Secretary has proved applicability, violation of the standard, employee exposure and employer knowledge of the violative condition. Citation 1, Item 4a is affirmed.

[19] The angle of the ladder affects its load-bearing capacity. (Tr. 302).

Citation 1, Item 4b (Docket No. 17-0125)

Citation 1, Item 4(b), alleges a serious violation of 29 C.F.R. § 1926.1053(b)(16), which sets forth:

> (b) Use. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:
> . . . .
> (16) Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

The Secretary asserted the portable aluminum ladder was being used without shoes, cleats, or other anti-slip devices at its base to prevent inadvertent movement. (S. Br. 62). Respondent asserted the ladder was not in use and no anti-slip device at the base was needed. (Tr. 383).

Applicability, Exposure, & Violation of the Cited Standard

As discussed above, the Secretary has established the elements of applicability and employee exposure.

The cited standard requires a ladder with a structural defect to be withdrawn from use until it is repaired. Photographs show there were no slip-resistant feet at the base of the ladder.[20] (Tr. 307-11; GXQ-5, pp. 7, 8). The Respondent asserted anti-slip feet were not necessary. (Tr. 383). Nonetheless, CO Kerschner stated slip-resistant feet were needed due to the slippery

[20] The standard reads:

> (7) Ladders shall not be used on slippery surfaces unless secured or provided with slip-resistant feet to prevent accidental displacement. Slip-resistant feet shall not be used as a substitute for care in placing, lashing, or holding a ladder that is used upon slippery surfaces including, but not limited to, flat metal or concrete surfaces that are constructed so they cannot be prevented from becoming slippery. 29 C.F.R. § 1926.1053(b)(7).

nature of the tank's floor. (Tr. 309). The material blasted off the tank's surface created a gravel-like surface on the concrete floor. (Tr. 309). This material, in combination with the angled floor of the tank, created a surface the ladder could slip on. (Tr. 309).

Mr. Yarbrough stated the ladder was not in use because it was not tied-off. (Tr. 383). Mr. Yarbrough is incorrect. The CO testified the ladder was tied-off and a photograph shows the ladder tied-off to a bracket at the side of the tank. (Tr. 402-03; Ex. GXQ-5, p. 5). The credible evidence refutes Mr. Yarbrough's assertion the ladder was not in use.

The ladder did not have slip-resistant feet and did not comply with the cited standard.

Knowledge

Pro-Spec had actual knowledge the ladder had no slip-resistant feet. Foreman [redacted] was photographed standing near the ladder. (Tr. 302-03, 310; Ex. GXQ-5, p. 8). Knowledge is imputed through Foreman [redacted]. Pro-Spec also had constructive knowledge of the violative condition. The condition was in plain view. (Ex. GXQ-5, p. 10). With reasonable diligence, Pro-Spec could have known the ladder had no slip-resistant feet. Pro-Spec had both actual and constructive knowledge of the violative condition.

The Secretary has proved applicability, violation of the standard, employee exposure and employer knowledge of the violative condition. Citation 1, Item 4b is affirmed.

Citation 2, Item 1a (Docket No. 17-0125)

Citation 2, Item 1a, alleges an other-than-serious violation of 29 C.F.R. § 1926.405(a)(2)(ii)(I), which sets forth:

> (a) Wiring methods. The provisions of this paragraph do not apply to conductors which form an integral part of equipment such as motors, controllers, motor control centers and like equipment.
> . . . .
> (2) Temporary wiring—
> . . . .

> (I) Flexible cords and cables shall be protected from damage. Sharp corners and projections shall be avoided. Flexible cords and cables may pass through doorways or other pinch points, if protection is provided to avoid damage.

The Secretary asserted a flexible extension cord was not protected from damage where it through a doorway to the blower room. (S. Br. 66). The Respondent agreed this was an improper use of the extension cord. (Tr. 384).

Applicability, Exposure, Violation of the Cited Standard, & Knowledge

As discussed above, the Secretary has established the elements of applicability and employee exposure. A photograph shows an extension cord going through a doorway with the door shut on it. There was no protection from the weight of the door. (Tr. 311-13; GXQ-5, p. 12). Mr. Yarbrough agreed the extension cord was not protected from damage. (Tr. 384). The cited standard was violated.

Pro-Spec had both actual and constructive knowledge of the violative condition. Foreman [redacted] was present when the CO photographed the extension cord, which was in plain view. (Tr. 311-12). With reasonable diligence, the foreman could have determined there was no protection against damage from the door. Mr. [redacted]'s knowledge is imputed to Respondent.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 2, Item 1a is affirmed.

Citation 2, Items 1b (Docket No. 17-0125)

Citation 2, Item 1b, alleges an other-than-serious violation of 29 C.F.R. § 1926.405(g)(2)(iv), which sets forth:

> (g) Flexible cords and cables—
> . . . .
> (2) Identification, splices, and terminations—
> . . . .

> (iv) Strain relief. Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

The Secretary asserted that strain relief was not provided for the female connection of a flexible extension cord to prevent pull from being directly transmitted to joints or terminal screws. (S. Br. 68). The Respondent agreed the extension cord was damaged and should have been removed from use. (Tr. 384).

Applicability, Exposure, Violation of the Cited Standard & Knowledge

As discussed above, the Secretary has established the elements of applicability and employee exposure. Pro-Spec did not provide strain relief to prevent the pull from the terminal screws. A photograph shows the extension cord with the insulation pulled away. (Tr. 313-16; GXQ-5, p. 14). Mr. Yarbrough agreed the extension cord was damaged and should not have been in use. (Tr. 384). The cited standard was violated.

Pro-Spec had both actual and constructive knowledge of the violative condition. Foreman [redacted] was present when the CO photographed the extension cord, which was in plain view. (Tr. 311-12). With reasonable diligence, he could have determined the cord had no strain relief. Mr. [redacted]'s knowledge is imputed to Respondent.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 2, Item 1b is affirmed.

Citation 2, Item 2 (Docket No. 17-0125)

Citation 2, Item 2, alleges an other-than-serious violation of 29 C.F.R. § 1926.1207(d), which sets forth: [21]

[21] The scope statement of this standard states:

> (d) The employer must maintain training records to show that the training required by paragraphs (a) through (c) of this section has been accomplished. The training records must contain each employee's name, the name of the trainers, and the dates of training. The documentation must be available for inspection by employees and their authorized representatives, for the period of time the employee is employed by that employer.

The Secretary asserted the employer did not maintain training records to show it had trained employees on the hazards of working in confined spaces and the methods used protect employees from these hazards. (S. Br. 71). Respondent asserted its safety manual included a confined spaces program. (Tr. 385-86).

Applicability, Exposure, Violation of the Cited Standard & Knowledge

A confined space "means a space that: (1) Is large enough and so configured that an employee can bodily enter it; (2) Has limited or restricted means for entry and exit; and (3) Is not designed for continuous employee occupancy." 29 C.F.R. § 1926.1202. Employees worked in the tank's interior, there was a single access point for entry/exit, and it was not a space designed for continuous occupancy. (Ex. GXQ-5, p. 20). The tank at the Quakertown worksite meets the definition of a confined space. The elements of applicability and employee exposure have been established.

> Scope (a) This standard sets forth requirements for practices and procedures to protect employees engaged in construction activities at a worksite with one or more confined spaces, subject to the exceptions in paragraph (b) of this section.
>
> Note to paragraph (a). Examples of locations where confined spaces may occur include, but are not limited to, the following: Bins; boilers; pits (such as elevator, escalator, pump, valve or other equipment); manholes (such as sewer, storm drain, electrical, communication, or other utility); tanks (such as fuel, chemical, water, or other liquid, solid or gas); incinerators; scrubbers; concrete pier columns; sewers; transformer vaults; heating, ventilation, and air-conditioning (HVAC) ducts; storm drains; water mains; precast concrete and other pre-formed manhole units; drilled shafts; enclosed beams; vessels; digesters; lift stations; cesspools; silos; air receivers; sludge gates; air preheaters; step up transformers; turbines; chillers; bag houses; and/or mixers/reactors. 29 C.F.R. § 1926.1201.

Respondent asserted its safety manual included a section on confined spaces. However, Respondent did not provide training records that showed it had provided confined spaces training. (Tr. 316-18). Further, employees told CO Kerschner that Pro-Spec had not provided any confined spaces training. (Tr. 318). Respondent violated the cited standard.

Pro-Spec had actual and constructive knowledge of the violative condition. As confirmed by Mr. Yarbrough, Pro-Spec's safety manual included a section with requirements and hazards for confined spaces. (Ex. GXC-6, pp. 69-76). The Safety Manual included a requirement to train all entrants, attendants, and supervisors in confined space procedures. (Ex. GXC-6, p. 70). With reasonable diligence, Pro-Spec could have determined it had not maintained the required training records. Knowledge is imputed through its president, Mr. Yarbrough.

The Secretary has proved applicability, violation of the standard, employee exposure, and employer knowledge of the violative condition. Citation 2, Item 2 is affirmed.

Characterization (Docket No. 17-0125)

Citation 1, Items 1 through 4 of Docket No. 17-0125 are classified as serious violations. Under section 17(k) of the Act a violation is serious if "there is substantial probability that death or serious physical harm could result." Commission precedent requires a finding that "a serious injury is the likely result should an accident occur." *Pete Miller, Inc.,* 19 BNA OSHC at 1258. The Secretary has proved these citation items are serious in nature. Employees were subjected to death or serious injury from exposure to particulates and fumes due to improper respirator use and lack of medical evaluations, and from falls from scaffold platforms and ladders. (Tr. 273-75, 277, 291-92, 296, 308).

Citation 2, Items 1 and 2 of Docket No. 17-0125 are classified as other-than-serious. The Secretary has proved the lack of training and extension cord violations did not present a risk of

serious harm at the worksite and are other-than-serious in nature. *See, Kaspar*, 18 BNA OSHC at 2185; *Crescent*, 1 BNA OSHC at 1222.

Penalty (Docket No. 17-0125)

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Compass Envtl., Inc.*, 23 BNA OSHC at 1137. The gravity of the violation is generally accorded greater weight. *See J. A. Jones Constr. Co.*, 15 BNA OSHC at 2214.

The maximum statutory penalty for serious and other-than-serious citations is $12,471.[22] A thirty percent reduction to the maximum penalty was applied due to the Respondent's size and a fifteen percent discount for good faith. (Tr. 266). A combined penalty of $6,360 was proposed for Citation 1, Items 1a and 1b, based on an assessment of medium severity, greater probability, and moderate gravity. (Tr. 273-77). A penalty of $6,360 was proposed for Citation 1, Item 2, based on an assessment of medium severity, greater probability, and moderate gravity. (Tr. 291-92). A penalty of $3,180 was proposed for Citation 1, Item 3, based on an assessment of high severity, lesser probability, and moderate gravity. (Tr. 296). A combined penalty of $4,240 was proposed for Citation 1, Items 4a and 4b, based on an assessment of medium severity, lesser

[22] OSHA's statutory maximum penalties were increased pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015) as updated at 81 Fed. Reg. 43430 (July 1, 2016). The violation in the instant case occurred after November 2, 2015, and was assessed between August 1, 2016 and January 13, 2017, thus the statutory maximum of $12,471 applies.

probability, and moderate gravity (Tr. 300-01, 308). No penalty was proposed for Citation 2, Items 1a, 1b, and 2. (Tr. 312, 314, 317).

I find the Secretary has given due consideration to all the necessary criteria established by the Act; the penalties are appropriate and are assessed as proposed.

Findings of Fact and Conclusions of Law

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

ORDER

Docket No. 16-1746 (Inspection #1158271)

1. Citation 1, Item 1a, alleging a serious violation of 29 C.F.R. § 1910.134(c)(1), Citation 1, Item 1b, alleging a serious violation of 29 C.F.R. § 1910.134(e)(1), and Citation 1, Item 1c, alleging a serious violation of 29 C.F.R. § 1910.134(m)(2)(i) are AFFIRMED, and a penalty of $7,482 is assessed.

2. Citation 1, Item 2a, alleging a serious violation of 29 C.F.R. § 1926.451(g)(1)(ii), and Citation 1, Item 2b, alleging a serious violation of 29 C.F.R. § 1926.451(a)(1) are AFFIRMED, and a penalty of $6,236 is assessed.

3. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1926.502(d)(11), is AFFIRMED,[23] and a penalty of $6,236 is assessed.

4. Citation 1, Item 4a, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(4), and Citation 1, Item 4b, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(13) are AFFIRMED, and a penalty of $3,742 is assessed.

5. Citation 2, Item 1, alleging an other-than-serious violation of 29 C.F.R. § 1904.40(a), is AFFIRMED, and a penalty of $700 is assessed.

Docket No. 17-0125 (Inspection # 1174404)

6. Citation 1, Item 1a, alleging a serious violation of 29 C.F.R. § 1910.134(e)(1), and Citation 1, Item 1b, alleging a serious violation of 29 C.F.R. § 1910.134(f)(1), and are AFFIRMED, and a penalty of $6,360 is assessed.

7. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1910.134(i)(5)(iv) is AFFIRMED, and a penalty of $6,360 is assessed.

8. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1926.451(e)(1), is AFFIRMED, and a penalty of $3,180 is assessed.

9. Citation 1, Item 4a, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(5)(i), and Citation 1, Item 4b, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(16) are AFFIRMED, and a penalty of $4,240 is assessed.

10. Citation 2, Item 1a, alleging an other-than-serious violation of 29 C.F.R. § 1926.405(a)(2)(ii)(I), and Citation 2, Item 1b, alleging an other-than-serious violation of 29 C.F.R. § 1926.405(g)(2)(iv) are AFFIRMED, and no penalty is assessed.

11. Citation 2, Item 2, alleging an other-than-serious violation of 29 C.F.R. § 1926.1207(d), is AFFIRMED, and no penalty is assessed.

Some personal identifiers have been redacted for privacy purposes

/s/Covette Rooney
The Honorable Covette Rooney
Chief Administrative Law Judge

Dated: August 22, 2018
Washington, D.C.